Court File No. CV-16-11369-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

1299746 ONTARIO INC. o/a COMPUQUEST2000 and
2252709 ONTARIO INC.

Respondent

BRIEF OF AUTHORITIES OF GRANT THORNTON LIMITED,

(in its capacity as Receiver and Trustee)
(Hearing June 13, 2017)

June 12, 2017

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TAB 1

Date: 20040218
Docket: CI 00-01-16509
Indexed as: Kripp v. Standard Life Assurance Company et al
Cited as: 2004 MBQB 51
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

NESTOR ALEXANDER KRIPP, plaintiff,	)	Appearances: GAVIN WOOD for Mr. Kripp
- and -	)	
STANDARD LIFE ASSURANCE COMPANY, THE MANITOBA SECURITIES COMMISSION, and LINDA A. VINCENT, defendants.	)	BRIAN JONES for the defendants, The Manitoba Securities Commission and Linda A. Vincent
	)	ROBIN KERSEY and LYNDEE BOTHE for the defendant, Standard Life Assurance Company
	)	JUDGMENT DELIVERED: FEBRUARY 18, 2004

DUVAL, J.

[1] This case raises the issue: what is the effect of a pardon granted by the National Parole Board? Mr. Kripp claims damages against the Manitoba Securities Commission ("the Securities Commission") and its employee, Ms Linda

Vincent ("Ms Vincent"), based on negligence. He also alleges a breach of ***The Securities Act***, R.S.M. 1988, c. S50, by providing disclosure of his criminal record to his employer and sponsor, at all, and before providing it to him. Against the Standard Life Assurance Company ("Standard Life"), Mr. Kripp claims damages based on inducement of a breach of his employment contract with Midland, Walwyn Financial Services Inc. ("Midland Walwyn"). Against all of the defendants he alleges breach of the statutorily imposed duties pursuant to the following Acts:

- the ***Criminal Records Act***, R.S.C. 1985, c. C-47, ss. 5(a)(ii) and 5(b);
- ***The Freedom of Information and Protection of Privacy Act***, S.M. 1997, c.50; and
- the ***Canadian Human Rights Act***, S.C. 1976-77, c. 33, ss. 1-4;

by disclosing his prior criminal record despite the grant of a pardon. Mr. Kripp withdrew any allegations of negligent misrepresentation during final submissions.

[2] The Securities Commission and Ms Vincent advance the following position:

(i) pre-hearing disclosure is required to be made to the parties based on fundamental principles of fairness and natural justice required of tribunals and based on the dicta of the Supreme Court of Canada in ***R. v. Stinchcombe*** (1991), 8 C.R. (4^{th}) 277;

(ii) pre-hearing disclosure in this case did not violate the provisions of the ***Criminal Records Act***, ***The Freedom of Information Act***, S.M. 1985-86, c. 6 (the statute in force at the relevant time), the ***Canadian Human Rights Act*** or ***The Securities Act***;

(iii) s. 142(1) of ***The Securities Act*** provided immunity from personal liability to employees employed under the Securities Commission to conduct any investigation or inquiry for anything done by the Securities Commission or that employee under the authority of the Act;

(iv) in the alternative, if a breach of ***The Freedom of Information Act*** or of the ***Criminal Records Act*** occurred, these Acts do not create a cause of action permitting a remedy in damages;

(v) if any liability is established against the defendants, the measure of damages is nominal.

[3] Standard Life advances the following position:

(i) it does not have a **common law** duty of care to keep private the contents of published newspaper articles;

(ii) there is no **statutory** duty of non-disclosure pursuant to the statutes relied upon by Mr. Kripp respecting published newspaper articles relating to conviction and/or sentence;

(iii) Mr. Kripp has not established the following elements of the claim of inducing breach of contract on a balance of probabilities:

(a) intention to induce a breach of Mr. Kripp's employment contract with Midland Walwyn, or

(b) actual breach of its contract with Mr. Kripp by Midland Walwyn, or

(c) knowledge of the terms of the contract by Standard Life;

(iv) if Standard Life is found liable for its conduct in this matter, the measure of damages is nominal.

ISSUES

[4] The issues are as follows:

1) Are the Securities Commission and/or Ms Vincent liable in negligence (common law or statutory) for disclosing Mr. Kripp's criminal record to Standard Life at any time, or prior to providing the disclosure documents to Mr. Kripp?

2) Are the Securities Commission and/or Ms Vincent liable in negligence (common law or statutory) for failing to disclose to Standard Life that Mr. Kripp had been pardoned?

3) Is Standard Life liable in negligence for statutory breaches or at common law by disclosing published newspaper articles to Midland Walwyn?

4) Did the actions of Standard Life induce a breach of the employment contract between Mr. Kripp and Midland Walwyn?

5) If liability is established, what is the measure of damages?

DISPUTED DATES

[5] For the most part, the facts are not in dispute, except for the dates of two telephone conversations between Mr. Kripp and Ms Vincent. Did Mr. Kripp speak to Ms Vincent for the first time on February 4, 1998 (as her handwritten file note suggests) or on February 5, 1998? Ms Vincent's file notes lead me to conclude that the first telephone conversation took place on February 4, 1998 at 1:15 p.m. (Ex. 1, Tab 25). Although this note indicates a time of 1:15 p.m., it is undated. It appeared in Ms Vincent's file immediately after a handwritten note dated February 4th at 10:55 a.m., wherein she documented leaving a voicemail message for Mr. Kripp. The 1:15 p.m. note indicates that Mr. Kripp acknowledged that Ms Vincent had called him earlier "today". Ms Vincent states that she does not always place the date on a note when the telephone conversation or other occurrence takes place on the same day as a prior time – documented note. Also, these notes are placed in the file chronologically. Mr. Kripp relies solely on his memory to suggest that the conversation took place on February 5, 1998.

[6] Mr. Kripp also took issue with Ms Vincent's February 5, 1998 handwritten note of their telephone conversation. He believes that the conversation took place on February 10, 1998 following his receipt of disclosure documents upon which the Securities Commission staff intended to rely. Mr. Kripp relies solely on his memory, and he candidly admits that he is not sure.

[7] Ms Vincent had sent a letter by courier to Mr. Kripp on February 4, 1998. The letter stated that staff of the Securities Commission were opposing his application for registration. Her note of February 5th contains the following reference to Mr. Kripp's observations: " letter was delivered ... this is different ... he is being opposed". I accept Ms Vincent's statement that when she places a date on a note, it is the actual date of the event and that she has never backdated a file note. On a balance of probabilities, and considering the lapse of a significant period of time between the events and the date of Mr. Kripp's examination for discovery when he first stated that the conversation reflected in the note took place on February 10th, I conclude that the conversation reflected by the note (Ex. 1, Tab 32) actually took place on February 5th as noted by Ms Vincent.

FACTS

[8] The majority of the facts are not in issue, and my findings follow. Mr. Kripp was admitted to the Bar as a barrister and solicitor entitled to practise law in Manitoba in 1961. Thereafter, he practiced primarily as a solicitor. In the early 1980s he misappropriated trust funds entrusted to him by his clients. He was subsequently adjudged bankrupt. A receiving order was granted in the Court of Queen's Bench on April 19, 1984. He was discharged from bankruptcy on August 23, 1988.

[9] Mr. Kripp was convicted of 12 counts of criminal breach of trust on December 30, 1986. A sentence of four years' imprisonment was imposed on

December 31, 1986. In his reasons for decision, the sentencing judge referred to Mr. Kripp's suspension from the practise of law in March 1983 and his formal disbarment in May 1984. Newspaper articles relating to the convictions and the sentence hearing appeared in the Winnipeg Free Press on December 30, 1986 and on January 2, 1987.

[10] On July 10, 1996 Mr. Kripp was granted a pardon from the Government of Canada, through the National Parole Board. The pardon states:

> AND this pardon is evidence of the fact that the Board, after making proper inquiries, was satisfied that the said
>
> NESTOR ALEXANDER KRIPP
>
> has remained free of any conviction since completing the sentence and was of good conduct and that the conviction should no longer reflect adversely on his character and, unless it ceases to exist or is subsequently revoked, this pardon vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which
>
> NESTOR ALEXANDER KRIPP
>
> is, by reason of the conviction, subject by virtue of any Act of Parliament or a regulation made thereunder.

[11] Mr. Kripp submits that as a result of the pardon, his criminal record was vacated, sealed, and was not to be disclosed to any person.

[12] Mr. Kripp confirms that when the Law Society began its investigation in early 1983, he was suspended from the practise of law. He decided to surrender his practicing certificate to the Law Society, as he expected to be disbarred in future at the discipline hearing. On January 30, 1984, he surrendered his practicing certificate to the Law Society Director, stating that he was "resigning

or quitting". He did not appear at the discipline hearing of the Law Society. Thereafter, he did not receive a written notice of disbarment. He states that although he "knew it", he did not receive an official notice from the Law Society. He was present in the courtroom when the sentencing judge referred to the date of his disbarment by the Law Society.

[13] In late 1983, Mr. Kripp began a second career as an insurance salesman, which continued until his incarceration and which resumed upon his release in the fall of 1987. While employed in the insurance field, Mr. Kripp pursued continuing education and obtained certificates of high achievement in the Canadian Investment Funds course and other courses offered by the Investment Funds Institute of Canada. In 1990 he was hired by an insurance company as a sales manager. In August 1993 he was hired by Standard Life in that capacity. He continued in that position until June 2, 1997 when he was relieved of these responsibilities. However, he remained with the company as a sales representative. The reason given by Standard Life for Mr. Kripp's demotion was "low production of your unit".

[14] When Mr. Kripp was hired in 1988 by an insurance company, he disclosed his criminal record. His immediate supervisor was aware of the circumstances. This person also became his supervisor at Standard Life. During an after-work social gathering, this supervisor revealed Mr. Kripp's criminal history to other employees of Standard Life. Although I have concluded that some personnel in the Winnipeg office of Standard Life were aware of Mr. Kripp's criminal history,

the evidence suggests that personnel in the Standard Life Head Office in Montreal were not aware of it, until it came to their attention in 1998.

[15] In the fall of 1997, with the endorsement of Standard Life, Mr. Kripp decided to seek approval from the Securities Commission for registration as a mutual funds salesperson. On November 12, 1997, Mr. Kripp completed a Uniform Application of Registration/Approval to the Securities Commission ("1-U-85"), which was jointly signed by Mr. Kripp and an authorized officer of the Standard Life Mutual Funds Department. In the application Mr. Kripp disclosed:

> … my licence was suspended in March, 1983 pending an investigation, and I surrendered my licence in January, 1984 prior to a disciplinary hearing.

He did not disclose that he had been disbarred by the Law Society of Manitoba. As a result of the disclosure, the Securities Commission's registration officer wrote to the Law Society of Manitoba requesting further information and received a reply by letter of December 15, 1997, which included the following information:

> … Our records do not indicate that the interim suspension imposed upon Mr. Kripiakevich on March 30, 1983 was ever rescinded prior to his disbarment on May 8, 1984. Our records also do not indicate that Mr. Kripiakevich surrendered or attempted to surrender his licence in January, 1984, prior to a Discipline Hearing.

[16] The 1-U-85 form also required answers to questions respecting "offences under the law", but instructed that the individual was ***not*** required to disclose any offence for which an unrevoked pardon had been granted under the ***Criminal Records Act***. In these circumstances, the form instructed that the

appropriate response to any questions respecting criminal convictions was "no". Therefore, Mr. Kripp replied "no" to these questions.

[17] The Securities Commission's in-house file respecting Mr. Kripp contained four documents. They were:

(i) a synopsis of offences initially alleged against Mr. Kripp which provided detailed information relating to criminal breach of trust, forgery, and other offences. This synopsis was not limited to the offences which resulted in the 12 convictions. Its source remains undisclosed and unknown;

(ii) copies of two newspaper articles published by the Winnipeg Free Press on December 30, 1986 and January 2, 1987;

(iii) the reasons for decision delivered by the presiding sentencing judge on December 31, 1986.

The file did not contain any information that Mr. Kripp had subsequently received a pardon. Ms Vincent and the Securities Commission became aware of it on February 4, 1998 when Mr. Kripp told Ms Vincent that he had been granted a pardon.

[18] On January 30, 1998, Mr. R. B. Bouchard, Deputy Director of Corporate Finance for the Securities Commission, issued a memorandum directing a hearing of the application. He expressed the following reasons for his decision:

(a) he (Mr. Kripp) was convicted of 12 counts of criminal breach of trust under the ***Criminal Code of Canada*** in 1986 and was sentenced to a term of four years of imprisonment;

(b) he was initially suspended from the practice of law in 1983 by the Law Society of Manitoba and was subsequently disbarred in 1984;

(c) he failed to disclose the criminal conviction and the disbarment referred to above on his application for registration as a salesman under ***The Securities Act***.

[19] Ms Vincent was assigned the conduct of the matter in her capacity of assistant counsel to the Securities Commission. She received the file after January 30, 1998 with instructions to proceed to hearing.

[20] She was a clear, articulate, and candidly honest witness, at times admitting that she had no memory of a conversation. On other occasions she stated that her memory had been refreshed by her notes or letters contained in the office file.

[21] She stated that, typically, individuals seeking to become registered in some capacity with the Securities Commission require a sponsoring firm. The firm is registered with the Securities Commission and is responsible to enforce the statutory requirements, *vis-à-vis* the individual salesperson. Although in theory, an individual could be registered with the Securities Commission without a sponsoring firm, in practise it is very difficult for an individual to meet the required standards. By jointly applying for registration with the individual, the

sponsoring firm assumes responsibility for the enforcement of regulatory requirements respecting the individual's activities.

[22] Ms Vincent stated that the Securities Commission had adopted a policy of providing "Stinchcombe level disclosure". This is a reference to the judgment of the Supreme Court of Canada in ***R. v. Stinchcombe***, *supra*, a case involving criminal charges. In summary, the general principle enunciated by the decision is that all relevant information in the possession of the prosecution must be disclosed to the defence, whether the Crown intends to introduce it in evidence or not, and whether it is inculpatory or exculpatory. The prosecution must provide to the defence any information in its possession which may assist the accused. The Crown is required to provide this disclosure before an accused person enters a plea or elects his/her mode of trial, i.e. in the early stages of the proceeding.

[23] Ms Vincent stated that the Ontario Securities Commission had adopted this criminal law standard of disclosure in respect of its hearings, where an individual's reputation or livelihood might be affected. The Manitoba Securities Commission implemented the same standard. Ms Vincent considered that Standard Life, as a sponsoring firm, was a joint applicant with Mr. Kripp. Both applicants were entitled to disclosure of relevant evidence upon which staff of the Securities Commission intended to rely within a reasonable time prior to the hearing.

[24] On February 4, 1998 at 10:55 a.m., Ms Vincent left a voicemail message for Mr. Kripp advising him of the date of her call, of the "case he will have to meet", and requesting that he call her. She then prepared and sent a letter by courier in the afternoon to Mr. Kripp in which she advised that the application would be opposed and which stated: "I am assembling the documentation that staff will use at the hearing and will provide you with copies as soon as possible." She further advised that "Standard will also be notified of the hearing and provided with copies of all documentation".

[25] At 1:15 p.m. Mr. Kripp returned Ms Vincent's call and advised:

- that he had been granted a pardon;
- that his licence to practise law had been suspended in 1983;
- that a Law Society hearing had been scheduled for January of 1984;
- that he pleaded "no contest" and surrendered his two practicing certificates;
- that the Law Society was incorrect when it suggested that he had not surrendered his certificates;
- that the Law Society proceeded and made a finding in any event;
- that he had never received notification of disbarment from the Law Society.

From Mr. Kripp's remarks, it is reasonable to infer that he was aware of the issues raised by the Securities Commission, i.e. the criminal record and disbarment. Ms Vincent advised Mr. Kripp of the nature of the hearing and

Mr. Kripp stated that he intended to be present. She advised him that he could retain legal counsel and that subpoenas for witnesses could be issued. An undated note (Ex. 1, Tab 28) reflects another telephone conversation at 11:05 a.m. between Mr. Kripp and Ms Vincent, which I conclude occurred on February 5, 1998. Ms Vincent advised of the date of hearing and Mr. Kripp requested that any documents be sent to his home. He provided his residential address to Ms Vincent.

[26] At 1:00 p.m. on February 4th, Ms Vincent had left a voicemail message for Mr. Michael Airey, who was registered with the Securities Commission as Standard Life's chief compliance officer. His office was located in Calgary, Alberta. He returned her call later in the day, and Ms Vincent advised him "about the past matter" (i.e. Mr. Kripp's criminal record and disbarment), of which he had no knowledge. Ms Vincent undertook to send him a package of materials upon which the Securities Commission staff intended to rely at the hearing.

[27] After her conversation with Mr. Airey, Ms Vincent prepared and sent him a letter, enclosing copies of the synopsis, the two newspaper articles, and the reasons for decision of the sentencing judge. She confirmed a hearing date of February 19, 1998. However, the letter was directed in error to Standard Life's Head Office in Montreal, Quebec.

[28] On February 5th at 10:00 a.m., Mr. Kripp called Ms Vincent confirming that her letter had been delivered and noted that his application was "being

opposed". During their conversation Ms Vincent provided some information respecting the documents upon which staff of the Securities Commission would be relying.

[29] Mr. Kripp asked her to wait until the next day before sending a letter or documentation to the branch manager of Standard Life's Winnipeg office. He was concerned that he might lose his employment and was considering withdrawing the application. Ms Vincent told him that a letter and documents had already been forwarded to Mr. Airey, but she agreed to refrain from sending a letter to the Winnipeg branch immediately.

[30] By February 9, 1998, personnel of Standard Life's Head Office were reconsidering their sponsorship of Mr. Kripp's application.

[31] On February 10, 1998, Ms Vincent sent copies of the documentation to Mr. Kripp at his residence and to his branch manager in Winnipeg. At this time, Mr. Kripp had decided to proceed with the application and to argue that his criminal record should not be considered at the hearing as it had been vacated by the granting of a pardon. He did not provide a copy of the pardon to Mr. Airey or to the Securities Commission.

[32] By letter dated February 10, 1998 (received by the Securities Commission on February 16th), Mr. Airey withdrew Standard Life's sponsorship of Mr. Kripp's application. On February 11, 1998, Mr. Airey telephoned Ms Vincent and Mr. Kripp to advise of Standard Life's position. Mr. Kripp called Ms Vincent on the same day to advise that he was withdrawing his application due to Standard

Life's decision to withdraw its sponsorship. The hearing before the Securities Commission was cancelled.

[33] On January 20, 1998, Standard Life and Midland Walwyn entered into an agreement whereby Midland Walwyn was appointed a selling agent of Standard Life's insurance contracts. On April 24, 1998, Mr. Kripp was hired by Midland Walwyn as an estate planning advisor, commencing May 1, 1998. He completed an application for that employment, but the document was not produced in these proceedings. Mr. Kripp cannot now recall the answers he gave to the questions listed on the employment application form, but says he probably provided answers similar to those he provided on the 1-U-85 application. Some of the questions included in Midland Walwyn's standard form of application were:

- Have you ever been a party to litigation arising from your work?
- Have you ever been convicted of a criminal offence for which a pardon has not been granted?
- Have you ever personally gone bankrupt ...?
- Have you been known by any name other than the name on this application form?

A declaration at the end of the application states:

> I hereby acknowledge that any material misrepresentation or intentional omission in my application for employment or on any attachments shall be considered sufficient cause for my immediate termination.

[34] New employees of Midland Walwyn were required to complete pages 2 and 4 of a New Hire Package, which includes the following clause:

> I acknowledge and agree that any falsification by me of information contained herein, or on my resume, whether innocent or willful and whether or not related to the performance of any jobs with Midland Walwyn Capital Inc. will constitute grounds for immediate discharge from employment from Midland Walwyn Capital Inc.

[35] In May 1998, Mr. George Kamphorst of Midland Walwyn told Mr. Claude Martineau, Standard Life's Director of National Accounts, that they had recently hired an ex-employee of Standard Life, Mr. Kripp. A few weeks later, Mr. Martineau mentioned the fact to his supervisor, Mr. Mark McClosky. Mr. McClosky recalled that Mr. Kripp's name was linked to a criminal history. He asked Mr. Martineau to review this ex-employee's file. Mr. Martineau found copies of two newspaper clippings from the Winnipeg Free Press publications of December 30, 1986 and January 2, 1987. He was concerned that a failure to disclose this information respecting their ex-employee to Midland Walwyn might affect their relationship if Midland Walwyn discovered it in future. Because Standard Life was beginning a new business relationship with Midland Walwyn and because of the nature of Mr. Kripp's criminal convictions and the fact that employees of Midland Walwyn would be managing clients' finances, he was concerned. After consulting Standard Life's legal counsel, and on instructions from Mr. McClosky, Mr. Martineau contacted Mr. Kamphorst and advised him of the information contained in the newspaper articles. At Mr. Kamphorst's request, he mailed copies of these two newspaper articles to him.

[36] Mr. Martineau did not suggest that any particular course of action should be taken by Midland Walwyn. He thought that Mr. Kripp's employment with

Midland Walwyn might benefit Standard Life, as Mr. Kripp was familiar with their insurance products. He had no knowledge of the particulars of the contractual arrangement between Mr. Kripp and Midland Walwyn. Mr. Martineau was not personally aware that Mr. Kripp had received a pardon. However, there is some documentation directed to Mr. McClosky on which a handwritten note suggests that Mr. Kripp "may" have obtained a pardon. There is no direct evidence that any personnel of the Standard Life Head Office actually had knowledge that a pardon had been granted. Mr. Kripp had not advise them of its existence.

[37] On June 16, 1998, Mr. Kripp states that the senior vice president of Midland Walwyn advised that they were very pleased with his work.

[38] On June 17, 1998, Mr. Kripp was called into the Winnipeg office of Midland Walwyn and questioned about his criminal record and period of incarceration. He acknowledged same, and indicated that he had been granted a pardon. The manager stated that he would be consulting with his superiors and would contact Mr. Kripp the next day. Mr. Kripp was asked to leave the office, and he did so.

[39] On June 18, 1998, Mr. Kripp was terminated from his employment with Midland Walwyn. The letter of termination states:

> The reason for the termination is a result of our discovering a material fact with respect to your background that was not disclosed in the employment interview and registration process with respect to your joining the firm.

[40] The nature of the undisclosed material fact is not specified in the letter. A representative of Midland Walwyn was not called to testify. Mr. Kripp says that as a result of discussions with the Human Rights Commission, to whom he made a complaint, he believed that his termination was due to his failure to disclose that he was a defendant in a pending civil suit alleging fraud. Mr. Kripp did not initiate a civil proceeding against Midland Walwyn, although he believes that he was fired without just cause.

[41] Mr. Kripp stated that he probably completed the Midland Walwyn employment application form "in the same manner" as his completion of the 1-U-85 application. In answer to a question in the 1-U-85 about any "pending civil proceedings", Mr. Kripp answered that "a civil action was commenced against me and my former business associates in or about 1989, which was defended, and the action never proceeded to trial". Mr. Kripp did not disclose that the case was active, was being pre-tried, that a motion for summary judgment had been brought in the spring of 1997, and that Mr. Kripp's affidavit had been filed with the court on May 1, 1997. He admitted that in 1997 he was aware the civil proceeding was active.

[42] Further, in answer to another question on the 1-U-85 respecting whether he had ever been the subject of disciplinary action, he advised that his licence to practice law had been suspended and that he had subsequently surrendered it prior to a disciplinary hearing, but he did not disclose his disbarment. Mr. Kripp admitted that in his recent annual applications for licencing, he had consistently

answered "no" with respect to questions pertaining to a pending civil suit. If Mr. Kripp completed the application for employment with Midland Walwyn in the "same manner", it is reasonable to infer that his answers were evasive and misleading and failed to disclose material information that he was a "party to pending litigation arising from his work".

[43] The compensation arrangement between Mr. Kripp and Midland Walwyn included a base salary of $50,000.00 to be paid at the rate of $5,000.00 per month for the first three months and $2,500.00 per month for the next 14 months, plus a share of commissions and bonuses credited to Mr. Kripp based on an Estate Planning Advisor grid schedule.

[44] As a result of the termination of his employment with Midland Walwyn, Mr. Kripp states that he was unable to obtain employment which provided equivalent financial remuneration. His licence to sell insurance was reinstated in December 1998 through the sponsorship of Imperial Life Financial Company. Mr. Kripp admits that he did not make serious efforts to sell life insurance, as he was more interested in obtaining a position as a sales manager or estate planning advisor. In April 1999 he suffered a stroke. He had just commenced an Estate Planning Advisor training program. Despite his condition, he completed the course. However, he suffers lingering effects of the stroke.

[45] Mr. Kripp claims damages based on projected commission income from his employment with Midland Walwyn for 1998 and 1999, totalling $47,809.93 and $122,217.00, respectively. He admits that these estimates of earned commission

are speculative projections of sales and that between December 1998 and October 2000, when he was licenced to sell life insurance, he did not earn income from such sales. Mr. Kripp says that he would have continued to work until retirement, whenever that occurred.

CLAIM OF NEGLIGENCE AGAINST SECURITIES COMMISSION AND MS VINCENT

[46] In order to establish negligence, Mr. Kripp must prove:

(a) a duty of care owed to him;

(b) a breach of that duty of care;

(c) that the breach of the duty of care caused, or contributed to, the damages which he suffered.

[47] Mr. Kripp submits that the Securities Commission and its employee breached their duty of care to him by:

(i) disclosing documentation not required to be provided by s. 5(1) of ***The Securities Act***;

(ii) revealing his prior criminal record in breach of the ***Criminal Records Act***;

(iii) failing to disclose the pardon when providing other disclosure;

(iv) disclosing personal information in breach of ***The Freedom of Information and Protection of Privacy Act***, ss. 17, 25, 33, and 38 which provide that:

(a) the head of a public body shall refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure is prohibited under an enactment of Canada;

(b) the head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy;

(c) when the head of a public body is considering giving access to a record, the disclosure of which might result in an unreasonable invasion of a third party's privacy or affect a third party's interests, then he shall give written notice to the third party as soon as practicable and shall take reasonable steps to ensure that the information is accurate and complete.

[48] Further, Mr. Kripp submits that the disclosure of a criminal record for which a pardon has been granted constitutes a discriminatory practice in breach of the ***Canadian Human Rights Act***.

[49] With respect to the issue of disclosure, counsel for the Securities Commission and Ms Vincent relied on the references at pp. 35 to 44 of Sara Blake's text, ***Administrative Law in Canada***, (3rd ed., 2001, Butterworths Canada Ltd.). The author states at p. 35:

> Fairness requires that a party to be affected by a decision have an opportunity to make representations. To do so, the party must first be

> informed of the case to be met. Without knowledge of the matters in issue one cannot effectively exercise one's right to be heard. Disclosure of the facts upon which the decision will be based enables a party to review the facts, to prepare to challenge them, to obtain evidence that rebuts them or reduces their impact and to prepare submissions concerning them.

And at pp. 36-37:

> The parameters of disclosure are defined by relevance. Information that is relevant to the issues to be decided must be disclosed. ...
>
> . . .
>
> Disclosure should be made to each party directly, not to just some parties with a hope that the information will be passed along by them to other parties.

[See: ***Lewis v. Canada (Employment & Immigration Commission)*** (1985), 60 N.R. 14 at 21-22 (F.C.A.), leave to appeal to Supreme Court of Canada refused (1985), 63 N.R. 317 n. (S.C.C.)]

[50] At pp. 39-43, the author notes:

> ... The general rule is that any information that will be taken into account in making the decision should be disclosed in advance. To be safe, disclosure should be made of any information that will be put before the decision maker. ...
>
> . . .
>
> Criminal law rules of disclosure do not apply because the stakes are not as high. [See: *Blencoe v. B.C. (Human Rights Commission)*, (2000) 190 D.L.R. (4^{th}) 513 at 553-556 (S.C.C.)] ... Administrative proceedings are more like civil proceedings than criminal proceedings. However, even in civil proceedings full disclosure is required. ... As there is no right to remain silent in administrative proceedings, there is a trend towards reciprocal disclosure even in discipline proceedings. ...
>
> Even in proceedings where the disclosure requirements are lower, if the tribunal intends to consider documentary evidence, parties should have an opportunity to review the documents before the hearing.

. . .

> Not only the evidence, but also the essential issues to be considered should be revealed. ...

. . .

> Disclosure should be timely. There should be sufficient time after disclosure to permit the party to review the information and to prepare to meet the newly disclosed information. ...

[51] Section 5(1)(a) of ***The Securities Act*** provides that notice in writing of the "time, place and purpose of the hearing shall be given to any person or company that, in the opinion of the commission is substantially affected by the hearing". I agree with counsel for the Securities Commission and Ms Vincent that s. 5 of ***The Securities Act*** does not preclude the application of principles of fundamental justice and fairness at common law and the disclosure of information in addition to time, place and purpose.

[52] Ms Vincent acted in good faith and in a responsible manner by providing full disclosure at the earliest possible date prior to the scheduled hearing. The delay in forwarding the documents to Mr. Kripp resulted in part from his request and did not result in any proven damages. Section 142 of ***The Securities Act***, which provided immunity from personal liability in respect of Ms Vincent as an employee of the Securities Commission acting under its authority, is applicable. The sections of ***The Freedom of Information and Protection of Privacy Act*** relied upon by Mr. Kripp, although in force at the time of Standard Life's disclosure to Midland Walwyn, relate to an application for information made to

the head of the public body. They are not applicable to the circumstances of this case.

[53] I also agree with the submission of counsel for the Securities Commission and Ms Vincent that Mr. Kripp had a lesser expectation of privacy when he applied to be registered as a mutual funds salesman pursuant to ***The Securities Act***, due to the nature of the legislation. Counsel relies on the judgment of the Supreme Court of Canada in ***British Columbia Securities Commission v. Branch***, [1995] 2 S.C.R. 3, which states at para. 57:

> ... Persons who carry on the business of trading in securities realize that the industry is heavily regulated and for good reason. It is a crucial part of our economy that is at stake. In *Pezim*, *supra*, [[1994] 2 S.C.R. 557] at pp. 592-93, this Court relied on the following position articulated by Fauteux J. in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, at p. 588:
>
>> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

and at paragraph 58:

> In our opinion, persons involved in the business of trading securities do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. It is widely known and accepted that the industry is well regulated. Similarly, it is well known why the industry is so regulated. ...

[54] I have concluded that the principles of fundamental justice and fairness require that the parties to an application such as this be provided with all relevant information where the application is being opposed.

[55] Standard Life sponsored Mr. Kripp's application to be registered as a mutual fund salesperson. The 1-U-85 application was signed by Mr. Kripp and an authorized officer of Standard Life, who both certified that the statements contained therein were true and correct to the best of their knowledge, information, and belief. The form of application cautioned that the filing of any false information or failure to disclose full information required by, or on, the application might result in its rejection or in disciplinary action being taken against the applicant and/or the sponsoring firm. Standard Life, as the sponsoring firm, was entitled to receive the same disclosure as Mr. Kripp. The disclosure by Ms Vincent to Mr. Kripp and Standard Life was reasonable and appropriate. Further, she acted in good faith and pursuant to the instructions and reasonable policy directives of the Director of the Securities Commission respecting disclosure. It would have been preferable to send the disclosure to Mr. Kripp and to his sponsor at the same time. The delay in forwarding the documents to Mr. Kripp resulted in part from his request to delay sending them to the Winnipeg branch office of Standard Life. As Ms Vincent had discussed the information which she intended to rely upon with Mr. Kripp and he was aware of it, she elected to forward both packages of material (to Mr. Kripp and to the Winnipeg office of Standard Life) on the same date, i.e. February 10, 1998. Why they were not sent on February 6th or 7th was not explained, except that Ms Vincent was very busy.

[56] Mr. Kripp argues that all of the defendants breached ***The Freedom of Information and Protection of Privacy Act***, S.M. 1997, c. 50 – Cap. F175. This Act came into force with some exceptions on May 4, 1998 (assented to on June 28, 1997). It was not in force in February 1998 when disclosure was made by Ms Vincent. The protection of privacy provisions in Part III of ***The Freedom of Information and Protection of Privacy Act*** relied upon by Mr. Kripp were not in effect at the time of the disclosure by Ms Vincent and the Securities Commission. The Act in effect at that time was ***The Freedom of Information Act***, S.M. 1985-86, c. 6, which provided for a right of access to any record in the custody or under the control of a department, upon application by any person. Its provisions do not assist Mr. Kripp's claim against Ms Vincent and the Securities Commission.

BREACH OF THE *CRIMINAL RECORDS ACT*

[57] Mr. Kripp submits that all of the defendants breached a duty of care to him by disclosing his criminal record to others in breach of the ***Criminal Records Act***. The ***Criminal Records Act***, R.S.C. 1985, c. c-47, in effect at the relevant time, provided, in s. 5 (amended S.C. 1992, c. 22, s. 5; S.C. 1995, c. 39, s. 167; S.C. 1995, c. 42, s. 78), as follows:

> 5. The pardon
>
> (a) is evidence of the fact
>
> > (i) that, in the case of a pardon for an offence referred to in paragraph 4(a), the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and

(ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character; and

(b) unless the pardon is subsequently revoked or ceases to have effect, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament, other than section 100, 161 or 259 of the *Criminal Code*, or of a regulation made under an Act of Parliament.

[58] Section 6 of the ***Criminal Records Act*** provided that:

(a) the Minister may, by order in writing to persons having custody or control of judicial records of convictions, require that person to deliver the record into the custody of the Commissioner;

(b) any record of conviction in respect of which a pardon has been granted that is in the custody of the Commissioner or of any department or agency of the Government in Canada shall be kept separate and apart from other criminal records;

(c) no such records shall be disclosed to any person, nor shall the existence of the record or the fact of the conviction be disclosed to any person, without the prior approval of the Minister.

[59] The 1-U-85 form of application provided specific instructions for the section entitled: "Offences Under the Law", as follows:

You are not required to disclose any offence for which a pardon has been granted under the *Criminal Records Act* (Canada) and such pardon has not been revoked. Under such circumstances, the appropriate response would be: "No".

Based on these instructions, Mr. Kripp properly answered "No" to any questions respecting past offences. One of the reasons stated by the Securities Commission's Deputy Director for holding a hearing in the matter of Mr. Kripp's application was his failure to disclose his criminal convictions. This non-disclosure, which complied with the instructions on the Securities Commission form, could not constitute a proper basis for requiring a hearing. However, the other stated reason, i.e. the failure to disclose the disbarment, might constitute a basis for requiring a hearing.

[60] Mr. Kripp submits that the criminal record and sentence could not be considered at a Securities Commission hearing, as the pardon vacates the convictions, and that the disclosure of the criminal record and sentence by Ms Vincent to Standard Life violated the ***Criminal Records Act***. A breach of statutorily imposed duties can constitute negligence where the breach caused or contributed to damages suffered by a party.

[61] The effect of a pardon granted under the ***Criminal Records Act***, R.S.C. 1985, c. C-47, ss. 5(a), was considered by the Federal Court of Canada, Trial Division, in ***Smith v. Canada (Minister of Citizenship and Immigration)***, [1998] 3 F.C. 144. MacKay J. stated at para. 12:

> ... A pardon under that Act is not the same, in legal effect, as the setting aside by an appeal court of a conviction found at trial, or a conditional discharge substituted by a court of appeal for a trial sentence. The effect of a pardon granted under the Act in question is not the same as if the conviction were quashed on appeal; its effect depends on the Act.

And at para. 15:

> ... In this case if the Act were intended to vacate the conviction in the sense that the conviction is deemed never to have existed, there would be no need for reference to specific effects of pardoned convictions, for all potential effects would be precluded if the conviction were erased from the historic record by a pardon. There would then be no logical basis for revocation of a pardon and restoration of the record of conviction.

And at para. 20:

> I conclude from these authorities that the Act cannot be said to erase the conviction in the sense that the conviction is deemed not to have existed. While the purpose of the Criminal Records Act is to bar any further disadvantage imposed by Parliament that arises from a pardoned conviction, by cleansing the individual of the stain caused by the conviction and limiting the uses to which the fact of the conviction can be put, the conviction cannot be said not to have existed by virtue of the pardon.

[62] The effect of a pardon was also considered by the Supreme Court of Canada in ***Therrien (Re)***, [2001] S.C.J. No. 36. However, the circumstances of that case differed from those of the case at bar. In ***Therrien*** the application form queried whether the applicant had ever been "in trouble with the law". The court held that the applicant could not deny his criminal record. In ***Therrien*** the applicant argued, as has Mr. Kripp, that the pardon retroactively wiped out his conviction. In considering ss. 5 and 6(2) of the Act, Gonthier J., for the court, declared that these provisions did not operate to retroactively wipe out the conviction. Rather, they were an expression of the fact that it still exists, combined with a desire to minimize its future consequences. At para. 116 he states:

> Sections 5 and 6(2) C.R.A. set out the effects of granting a pardon: (1) it is evidence that the National Parole Board, after making the inquiries specified in the Act, was satisfied that the applicant was of good conduct and that the conviction in respect of which it is granted should no longer reflect adversely on his character; (2) it vacates the conviction and removes any disqualification to which the person is subject by virtue of any federal Act or regulation made thereunder; and (3) it results in any record of the conviction being kept separate and apart: in other words, the criminal record is expunged. In and of themselves, these provisions do not persuade me that the pardon can operate to retroactively wipe out the conviction. Rather, they are an expression of the fact that it still exists, combined with a desire to minimize its future consequences. ... the effects of the pardon are limited to the legal disqualifications created by federal statutes or the regulations thereunder and therefore exclude all the post-sentence consequences provided in provincial legislation, which also suggests that the pardon has only limited effect. Third, the information contained in the criminal record is not destroyed but is kept separate and apart, whence it may re-emerge should the pardoned person subsequently be no longer of good conduct.

[63] For the reasons expressed by the Supreme Court of Canada in its judgment in ***British Columbia Securities Commission v. Branch***, *supra*, consideration of the criminal record of an applicant, who seeks to be registered by a provincial securities commission to sell securities, may be a relevant consideration for a hearing, whether or not a pardon has been granted. That issue need not be decided in these proceedings. Nevertheless, it is inconsistent for the Manitoba Securities Commission to utilize a Form 1-U-85 (apparently drafted for use by the Canadian Securities Commission), which specifically advises the applicant that he is not required to disclose his criminal record if he has obtained a pardon (unrevoked) and yet to raise the applicant's failure to disclose the record as a basis for opposing his application. If prior convictions for offences suggestive of dishonesty are relevant considerations for the Manitoba Securities Commission when deciding whether to approve registration

of a candidate to sell mutual funds, then their disclosure should be required on the application form. The reasons of the Director of the Securities Commission include not only the failure to disclose a criminal record, but the fact of the convictions. Whether Mr. Kripp's prior convictions could be a relevant consideration is a matter which could have been argued at the hearing if it had proceeded. Although the Canadian Securities Commission is subject to the ***Criminal Records Act***, the Manitoba Securities Commission is not. And although s. 5 of the ***Criminal Records Act*** removes any disqualification resulting from conviction, by virtue of federal legislation, it does not extend to provincial legislation. On a balance of probabilities, Mr. Kripp has not established a breach of the ***Criminal Records Act*** by the defendants.

[64] With respect to a claim in negligence against Ms Vincent and the Securities Commission, Mr. Kripp has also failed to establish that a breach of the ***Criminal Records Act*** caused him damage. The sole consequence of the Securities Commission's disclosure was Standard Life's withdrawal of its sponsorship. Although Mr. Kripp complains that Ms Vincent should have advised Standard Life of the existence of the pardon, she did not have a copy of it, nor did he provide her with one. There is no evidence that Mr. Kripp personally advised Standard Life that he had received a pardon. Although Mr. Kripp was concerned that he might lose his employment with Standard Life as a result of the disclosure, he continued to be employed by Standard Life until he voluntarily retired in June of 1998.

[65] Any potential damages relate to Mr. Kripp's subsequent loss of his employment with Midland Walwyn. The Securities Commission and its employee made no disclosure to Midland Walwyn. There was an intervening act on the part of Standard Life which disclosed the newspaper articles. Mr. Kripp has not established that his loss of income is a direct result of the pre-hearing disclosure by Ms Vincent to Standard Life.

[66] Counsel for Standard Life submits that the information disclosed by Standard Life to Midland Walwyn was a matter of public record and not subject to the restrictions of the ***Criminal Records Act*** or ***The Freedom of Information Act***. Section 5 of the ***Criminal Records Act*** refers to the removal of any disqualification to which the convicted person would be subject by virtue of the provisions of any Act of Parliament, subject to certain qualifications. I agree with counsel for Standard Life that s. 5 does not purport to restrict disclosure of a criminal record by individuals or provincial departments, provincial government agencies or any other bodies, save and except for federal bodies and agencies. Section 6 of the ***Act*** requires that the record which is in the custody of the Commissioner or any department or agency of the Government of Canada shall be kept separate and apart from other criminal records and not disclosed without the prior approval of the Minister. However, it does not purport to restrict disclosure where the information is in the custody or possession of a member of the public. It does not apply to information already in the public domain. Once information has been made public, it is not in the

custody of a federal government department and is not subject to the controls specified in the ***Criminal Records Act***

[67] The claim in negligence against Standard Life by Mr. Kripp, based on a breach of the ***Criminal Records Act***, for the reasons previously set out herein, is also dismissed.

BREACH OF THE *CANADIAN HUMAN RIGHTS ACT*

[68] Mr. Kripp alleges, against all of the defendants, a breach of ss. 1 to 4 of the ***Canadian Human Rights Act***.

[69] Section 3(1) states that for all purposes of the Act, a prohibited ground of discrimination is "conviction for which a pardon has been granted". Section 7 provides that it is a discriminatory practice, directly or indirectly

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination. Part III of the Act provides for the filing and investigation of a complaint with the Canadian Human Rights Commission and for an inquiry before the Canadian Human Rights Tribunal. Section 53 of the Act specifies the remedies which may be granted by the Tribunal if the complaint is substantiated, including:

- an order that the person found to have engaged in a discriminatory practice compensate the victim for any and all of the wages that the victim was deprived of and for any expenses incurred as a result thereof; and

- an order that such person compensate the victim, by an amount not exceeding $20,000, for any pain and suffering that the victim experienced as a result of the discriminatory practice;
- a "special compensation" order not exceeding $20,000 to the victim if the person was found to have engaged in the discriminatory practice wilfully or recklessly;
- an order that the person make available to the victim the rights, opportunities or privileges that were denied.

Any such order may be filed in, and become an order of, the Federal Court for the purpose of enforcement.

[70] Section 2 of the ***Canadian Human Rights Act*** states its purpose:

> … to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on … or conviction for an offence for which a pardon has been granted. [underlining supplied]

[71] Mr. Kripp made a complaint to the Canadian Human Rights Commission against Midland Walwyn, his employer. The Act creates a particular scheme to deal with complaints of discriminatory practices. It provides for a specialized tribunal to adjudicate these matters and for specific remedies. The scheme of

the Act does not provide for the commencement and/or the determination of a complaint alleging a breach of the Act by a provincial superior court, nor for the granting of a remedy in damages for breach of a statutory duty of care.

[72] The claim based on negligence, whether alleged at common law or as statutory breaches of ***The Securities Act***, of ***The Freedom of Information Act***, of the ***Criminal Records Act*** or of the ***Canadian Human Rights Act***, has not been established on a balance of probabilities against any and all of the defendants.

INDUCEMENT OF BREACH OF EMPLOYMENT CONTRACT

[73] Counsel for Mr. Kripp submits that Standard Life induced a breach of his employment contract with Midland Walwyn. He submits that Mr. Kripp was dismissed by Midland Walwyn due to his failure to disclose his criminal record or because of his previous convictions, which information was provided to his employer by Mr. Martineau of Standard Life, through telephone conversation and the providing of copies of newspaper articles.

[74] The test for inducing breach of contract was considered by Pitt J. in ***Schmidt v. Bell Canada***, [1999] O.J. No. 3176 at para. 39. It consists of five elements which must be established. They are:

1) the defendant's knowledge of the contract and its terms;

2) the intention to procure a breach of the contract;

3) conduct by which the defendant directly persuades or induces a third party to break a contract with the plaintiff;

4) a breach of contract; and

5) damages.

[75] Mr. Martineau of Standard Life was aware that a contractual relationship existed between Midland Walwyn and Mr. Kripp. He was not aware of the exact terms of the contract, but he was aware that the information which he provided with respect to the criminal record could result in a decision by Midland Walwyn to terminate its contract with Mr. Kripp. Knowledge of the precise terms of the contract need not be known, but the defendant must be aware that his conduct will result in the breach of a contractual relationship. I am not satisfied that the evidence establishes on a balance of probabilities that Mr. Martineau had an intention to encourage, persuade, cajole, or convince Mr. Kamphorst to breach Mr. Kripp's contract. Mr. Martineau would have preferred that Mr. Kripp remain in the employ of Midland Walwyn as there was a possibility of an indirect benefit to Standard Life. I am not satisfied that Mr. Martineau had an intention, actual or constructive, to secure a breach of the contract.

[76] Nor is there sufficient evidence to establish that Midland Walwyn breached its contract with Mr. Kripp. The nature of the "undisclosed material fact", the stated basis for the termination of June 18, 1998, remains unknown. No

evidence was called from Midland Walwyn. Mr. Kripp's application for employment with Midland Walwyn was not produced. Because of information which he received from the Human Rights Commission, Mr. Kripp suggested that his termination might have been based on a reason other than his criminal record, i.e. his failure to disclose a pending civil fraud action. The standard form application for employment with Midland Walwyn included a declaration by the applicant that any material misrepresentation or intentional omission would be considered sufficient cause for immediate termination.

[77] Midland Walwyn's standard form of application for employment only required disclosure of convictions for criminal offences for which a pardon had not been granted. A failure to disclose a criminal record would not have constituted a "material fact with respect to your background that was not disclosed in the employment interview and registration process". If Mr. Kripp failed to disclose that he was a party to litigation or that he had been adjudged a bankrupt or that he had previously been known by another name, these material undisclosed facts could have constituted a basis for Mr. Kripp's termination. In the absence of clear evidence as to the reason for termination, I am unable to conclude that Midland Walwyn breached its employment contract with Mr. Kripp.

[78] I have, therefore, concluded that Mr. Kripp has failed to establish on a balance of probabilities that Standard Life induced a breach of his employment contract with Midland Walwyn.

[79] If they are unable to agree, counsel may arrange an appearance to speak to the issue of costs.

______________________________J.

TAB 2

In the Provincial Court of Alberta

Citation: R. v. Martin, 2014 ABPC 283

Date: 20141205
Docket: 130022528P1
Registry: Edmonton

Between:

Her Majesty The Queen

- and -

James Samuel Martin

Accused

Reasons for Sentence of The Honourable Assistant Chief Judge L.G. Anderson

Introduction and Overview

[1] This sentencing involves a unique set of circumstances in which a unique sentence is sought.

[2] Between December of 2010 and May of 2011, the accused defrauded his employer, the Canadian government of $684.84 by buying helmets for his step-children and later trying to pass the purchases off as a legitimate employment expense. He was an R.C.M.P. officer at the time.

[3] The Defence seeks a conditional discharge, which would be highly unique for any theft from employer. Such offences usually attract jail.

Background Circumstances

[4] At the time of this offence, Mr. Martin was a member of the RCMP, stationed in Spruce Grove, Alberta.

[5] This offence has ended his career after 25 years of service. He has always been a high performer. This is in part because of obsessive personality traits that have served him well as an investigator but have also dogged him since suffering post-traumatic stress in 2005 when four officers under his charge were shot to death. This event shocked the nation but the trauma to Mr. Martin was much more acute. He went through therapy in 2005 for Post-Traumatic Stress and learned to cope but treatment of a brain injury does not involve a cure; it involves learning how to manage the condition.

[6] Mr. Martin was transferred to the Spruce Grove detachment and continued to work. However, the disorder resurfaced again in 2010 as his marriage deteriorated, his financial position worsened and the public inquiry into the Mayerthorpe incident approached.

[7] Just before Christmas of 2010, Mr. Martin, who had access to a credit card to be used for RCMP business only, used the credit card to buy helmets for his girlfriend's children. Later, when confronted, he tried to pass off the purchases as legitimate policing expenditures despite the fact that the helmets were brightly coloured and unmistakably kids' helmets.

[8] The Crown has proceeded by way of summary conviction and full restitution has been made. Further, a forensic psychiatric assessment has been entered, which describes Mr. Martin's psychiatric condition at the time of the offence and its connection to the offence before the Court. The finding of Dr. Woods is that Mr. Martin's risk to re-offend is "very low, if not inconsequential".

Position of the Parties

[9] Crown counsel submits that the Court should impose either a fine or probation. The Crown resists a form of discharge primarily because the actions of the accused constituted a breach of trust, not only in relation to his employer but to society at large. The public looks to police to set a high standard of integrity as part of promoting respect for the rule of law.

[10] The Defence submits that in the unique circumstances of this case, particularly in light of the accused's psychiatric condition at the time, a conditional discharge would not be contrary to the public interest.

What Is a Discharge?

[11] A discharge is a special category of sentence that was created by statute in 1972. A discharge presupposes a finding of guilt and it constitutes a 'criminal record' governed by the *Criminal Records Act* ("*CRA*") but it deems that the person is not 'convicted'. In other words, it is a disposition that is deemed to be something between a finding of guilt and a conviction. It can be absolute or conditional. If conditional, the offender must comply with conditions in a probation order. If the person reoffends during the period of probation, or otherwise breaches the order, the discharge can be revoked and any sentence that could otherwise have been imposed at the time of sentencing can then be imposed (s.730 (4)).

[12] When a discharge is conditional, the period of probation can be for a duration of up to three years, the same as any other probation order; the conditions that can be included in a probation order attached to a discharge are no more or less restricted than those that can be included in any probation order.

[13] Any sentence imposed by a court for a criminal offence has two primary consequences: (a) since the abolishment of corporal punishment, it will punish the person financially or will affect the person's liberty interests or both and (b) it will create a record that will stigmatize the person for a longer period of time, in some cases for life.

[14] The discharge provisions were enacted two years after statutory 'pardons' were created, which are also governed by the *Criminal Records Act*. A pardon, now called a 'record suspension', is like a discharge in that it reflects the societal value that the stigmatization flowing from having committed a criminal act need not last forever in all cases. There is a point at which

the public interest no longer requires that past wrongdoings necessarily reflect adversely on the character of someone who has committed a criminal offence in the past.

[15] In the case of any conviction, the offender can apply to be relieved of the institutional stigmatization of a criminal record after specified periods of time, now five years from the conclusion of any sentence for summary offences and ten years for indictable offences. Before 2012, the periods were three years and five years respectively. The Parole Board determines whether the conviction "should no longer reflect adversely on the applicant's character" (s. 2.3 *CRA*). The Board's discretion will be based on both the circumstances of the offence(s) and the person's post-offence conduct.

[16] In the case of a discharge, the determination as to how long the record should adversely reflect on the person's character is moved forward to the sentencing stage. The judge determines the duration by determining whether to grant a discharge. The offender determines whether the discharge will endure through his or her conduct while the record remains on the CPIC system. If the person does not reoffend, the discharge will be purged from the CPIC system after one year in the case of an absolute discharge or three years in the case of a conditional discharge.

[17] Apart from being automatically purged from the CPIC system after a fixed period of time rather than upon application, a 'discharge' also differs from a 'conviction' in respect of the message that is communicated by the criminal record for the period of time that it is part of the CPIC database. It is a 'record of discharge' rather than a 'record of conviction'. The significance of this distinction of course depends upon what the person or body looking at the record chooses to make of it.

[18] A discharge is not a panacea. A foreign jurisdiction with access to CPIC such as Homeland Security in the U.S. is neither bound nor likely to draw a distinction between a 'discharge' and a 'conviction' when determining whether or not to grant entry into their country. A prospective employer or bonding agency may or may not be moved to draw a distinction. Further, the *CRA* governs the removal of records from CPIC and other federal agencies but it does not purport to govern the purging of records not in the hands of the federal government.

[19] In the modern era, particularly in a criminal case that attracts any media attention and is thus likely to find its way onto the web, neither a discharge nor a record suspension is likely to result in a complete burial of information about the past event. However, what a discharge does denote is that the judge who imposed the sentence found something exceptional about the circumstances to which the finding of guilt was attached and found that it was not contrary to the public interest that this finding of exceptional circumstances be flagged. The public benefit served by a discharge is not a suppression of a past truth; it is a means of more aptly characterizing it.

[20] To put the significance of a discharge into the context of this case, the primary issue is not that of the effect on Mr. Martin's liberty, as the Crown is not seeking a sentence greater than probation. The real issue is how long the brand of criminality should endure and what it should look like while it does. The *Criminal Code* requires that when considering this issue, the Court must consider both the interests of the accused and the public interest.

Case Law Concerning Discharges

[21] For almost as long as the discharge provisions have been in existence, courts have consistently said that discharges should be the exception, not the norm. If they were otherwise, they could not serve the intended purpose. In Alberta, the leading authority on discharges has always been *R. v. MacFarlane* (1976), 55 AR 222 (Alta CA). *MacFarlane* sets out a list of factors that should be taken into account when considering the propriety of a discharge. Factors include the nature of the offence, its prevalence, one's motive, the extent of planning, in the case of a property crime, the value of the property and the public interest in there being a public record. The Court observed, "Theft from an employer would, in most cases, involving as it does a breach of trust, not warrant a discharge, as it may be thought that prospective employers should have the means of knowing something about the character of the prospective employee. Even here, there may be exceptional circumstances ...".

[22] The concern on behalf of future employers is considered part of the public interest on the assumption that a record of prior criminal behaviour denotes a greater risk to the public and particularly future employers by reason of the prior criminal conduct.

[23] The Court will note at this point that the *assumption* of greater risk is specifically displaced in this case by the *evidence* of risk. The uncontradicted evidence is that the likelihood of recidivism in this case is close to zero.

Proportionality and the Objectives of Sentencing

[24] The over-arching sentencing principle in all sentencing cases is proportionality – the sanction must be proportionate to the gravity of the offence and the offender's degree of responsibility. This is codified in s. 718.1 of the *Criminal Code*.

[25] In the relatively recent sentencing decision of *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada expanded on this principle as follows, at paragraphs 36 – 37:

> The *Criminal Code* goes on to list a number of principles to guide sentencing judges. The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. As this Court has previously indicated, this principle was not borne out of the 1996 amendments to the *Code* but, instead, has long been a central tenet of the sentencing process (see, e.g., *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.), and, more recently, *R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 40-42). It also has a constitutional dimension, in that s. 12 of the *Canadian Charter of Rights and Freedoms* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. In a similar vein, proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*.
>
> The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various

> objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533:
>
>> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.
>
>> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[26] In the context of a discharge application, the principle of proportionality remains the governing principle. The focus of the inquiry simply shifts somewhat to the impact of a 'criminal record' (coupled with the other impact of the sentence) in relation to the gravity of the offence and the responsibility of the offender.

[27] When crafting a sentence, the Court must also consider the aggravating and mitigating factors of the case in the context of the objectives that are set out in the *Criminal Code*. These include the objectives of denunciation and deterrence, rehabilitation, reparation and the need to instill a sense of responsibility. (s. 718 CC).

[28] When considering the need for denunciation and deterrence and when considering the degree of responsibility of the offender, the presence of a psychiatric condition that is not self-induced and that has caused or contributed to the offence, can be a significant factor, sometimes a very significant factor. Examples of this can be found in many authorities including *R. v. Belcourt*, 2010 ABCA 319, *R. v. Resler*, 2011 ABCA 167, *R. v. Ayorech*, 2012 ABCA 82, *R. v. Newby* (1991), 120 AR 68 (ABCA), *R. v. Fraser*, 2007 SKCA 113, *R. v. Tremblay*, 2006 ABCA 252, *R. v. Edmunds*, 2012 NLCA 26 and more recently, *R. v. Legg*, 2014 ABPC 238.

[29] In the Report filed in this matter, a report requested by the Court, Dr. Woods described Mr. Martin's diagnosis of Post-Traumatic Stress Disorder, a well-recognized psychiatric disorder, and made the following observations regarding its relevance to the offence before the Court:

> In 2005, Mr. Martin developed PTSD, which has likely intermittently and substantively impacted his mental health stability and functional capacity in an

> untoward way since that time. It is evident that Mr. Martin encountered a recurrence of PTSD-anchored clinical phenomena in 2010 due to myriad exogenous stressors, with said symptomatic decline described earlier in this report. Mr. Martin's obsessional personality structure and concordant psychological defence mechanisms were eventually overwhelmed by existing and enduring biological and psychosocial disturbances, leading to a discernable degree of functional impairment and disability. It is a testament to Mr. Martin's resilience, commitment, and intelligence that he was able to remain at work during this time of active illness (noting also that Mr. Martin has utilized work as a mechanism to cope with emotional distress for some time now). The index criminal offence ostensibly was entirely out-of-character for Mr. Martin and not part or indicative of a pattern of similar conduct and concomitant underlying narcissistic or antisocial characterological deficits. Mr. Martin's relationship with his employer has soured to some extent over the years (particularly since 2005), yet he has maintained a sincere fidelity to furnishing exemplary service. Nonetheless, lingering resentments may have played a role in the offence, though latent disenchantment and irritation would unlikely be expressed overtly (whether directly or indirectly) in the case of Mr. Martin without weakened internal self-regulation (such as when acutely unwell from a psychiatric perspective). Therefore, it seems reasonable to conclude that this man's singular error of judgment was tangibly affected by and linked to a conspicuous decompensation of his mental state.

Aggravating and Mitigating Factors

[30] There are two aggravating factors in this case. First, the fraud involves a breach of trust, not only of the employer but of the public at large. Second, when confronted, Mr. Martin compounded the fraudulent purchase by attempting initially to justify it.

[31] On the other side of the ledger, Mr. Martin has entered a guilty plea and has accepted responsibility. This is always a mitigating factor because it relieves the state of the burden to prove the wrong and it mitigates the objective of seeking to instill a sense of responsibility through the sentencing process. It is also a reflection of remorse.

[32] The Court is also satisfied that Mr. Martin's remorse is deeper than that which is reflected in the guilty plea. The word 'remorse', according to the Oxford dictionary has its roots in the concepts of repetition ("re") and eating or biting ("mordere"). The Court is left with no doubt regarding the extent to which the actions in question have eaten away at Mr. Martin's pro-social conscience.

[33] The Court further accepts that this fraud is closely tied to the disordered thinking beneath his psychiatric disorder, a condition that perhaps ironically came about in the course of his service to the public good.

[34] The Court considers the fact that full restitution has been made to be a mitigating factor.

[35] Mr. Martin's loss of employment as a result of this offence is a further consideration that mitigates. While it can be said that there will often, if not always be negative consequences flowing from an offence such as this, apart from those imposed by the Court, some individuals'

fall from grace is farther than others. The extra-judicial consequences of this offence for Mr. Martin have been very significant.

[36] It has also not been lost on the Court that while Mr. Martin may have derived some indirect satisfaction from giving the helmets in question to the children who received them, this was not a fraud motivated by profit.

Conclusion

[37] Having considered the purpose of sentencing, the objectives of sentencing, the aggravating and mitigating factors and the factors specifically relevant to discharges as outlined in the authorities, the Court is satisfied that it is in the best interests of the accused and not contrary to the public interest to discharge the accused, subject to conditions in a probation order that will be in effect for two years and will include conditions that will be spelled out after consultation with counsel. The conditions will include, at a minimum, a reporting requirement, at least 100 hours of community service work and counselling as directed.

Heard on the 31st day of October, 2014.

Dated at the City of Edmonton, Alberta this 5th day of December, 2014.

L.G. Anderson
A Judge of the Provincial Court of Alberta

Appearances:

Rod Gregory
for the Accused

Photini Papadatou
for the Crown

TAB 3

Information No. 10957/14

CITATION: *R. v. R.Z.*, 2016 ONCJ 438

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

- and -

R.Z.

****

BEFORE THE HONOURABLE JUSTICE G. WAKEFIELD,
AT THE COURTHOUSE, 150 BOND ST. E., OSHAWA, ONTARIO,
ON WEDNESDAY, JUNE 1, 2016.

****

RULING ON CROWN APPLICATION AND SENTENCE

PUBLICATION BAN

PURSUANT TO THE ORDER OF WAKEFIELD J. - JUNE 1, 2016

These reasons, if printed, electronically reproduced or audio copied, shall have the personal identifiers of the offender removed and replaced with his initials. The Crown material attached to these reasons has been amended to replace the offender's name with initials.

APPEARANCES:

K. Saliwonchyk — Counsel for the Crown.

R.Z. — in Person.

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Legend:

[sic] Indicates preceding word has been reproduced *verbatim* and is not a typographical error, but is a spoken error

(ph) Indicates preceding word has been spelled phonetically *as pronounced* and is not a typographical error, or indicates a deficiency in the annotations made by the in-court reporter, or due to the quality of the audio recording, and does not represent typographical errors.

WEDNESDAY, JUNE 1, 2016

RULING ON CROWN APPLICATION

WAKEFIELD J. **(Orally)**

R.Z. entered a plea of guilty to over 80 on his trial date of December 15, 2015 as a self-represented defendant. The Crown elected to proceed summarily and further elected not to file any Notice of Increased Penalty.

However, on sentencing, the Crown alleged the defendant had a prior cognate record, a record containing three separate prior convictions for drinking and driving and a possession for the purpose of trafficking. All but the earliest conviction had been previously pardoned.

While the records have not been proven pursuant to s. 667 of the *Code*, I have been provided with a Ministry of Transportation record of convictions which reflects three prior drinking and driving offences from 1982, 1989 and 1996, together with a letter from the RCMP confirming authorization by the Minister of Public Safety and Emergency Preparedness releasing, presumably for the purposes of this hearing only, a copy of the defendant's record suspension printout in which are a 1989 over 80, a 1990 possession for the purpose of trafficking and a 1996 impaired, together with the National Parole Board confirmatory letter of a pardon being granted for the same three offences in the record suspension printout. Neither document mentions the 1982 conviction for over 80 reflected in the Ministry of Transportation Record, assuming that matter is a legitimate conviction. The Crown has quite generously taken the position that for the purposes of this application, I should treat the 1982 conviction as an administrative oversight on the part of the National Parole Board and that the defendant's pardon includes that earlier conviction as well.

The issue before me is whether the then-pardoned, now record suspended convictions, with the appropriate Ministry's permission to disclose, can be used on sentencing or whether the effect of the pardon is to exclude the prior convictions as a sentencing consideration. While the Crown is only seeking a modest increase over the minimum sentence for this defendant, their application is to obtain a ruling as to the use of such records in future sentencings of other like offenders.

The applicable sections of the *Criminal Records Act* are set out in the attached Crown submissions. Of specific application here is s. 2.3 which reads as follows:

Effect of record suspension

2.3 A record suspension

(a) is evidence of the fact that

(i) the Board, after making inquiries, was satisfied that the applicant was of good

conduct, and

(ii) the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant's character; and

(b) unless the record suspension is subsequently revoked or ceases to have effect, requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament — other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the Criminal Code, subsection 147.1(1) or section 227.01 or 227.06 of the National Defence Act or section 36.1 of the International Transfer of Offenders Act.

As well, s. 4.1 of the same Act sets out that:

4.1 (1) The Board may order that an applicant's record in respect of an offence be suspended if the Board is satisfied that

(a) the applicant, during the applicable period referred to in subsection 4(1), has been of good conduct and has not been convicted of an offence under an Act of Parliament;

Finally, s. 7 of the same Act:

Revocation of record suspension

7 A record suspension may be revoked by the Board

(a) if the person to whom it relates is subsequently convicted of an offence referred to in paragraph 4(1)(b), other than an offence referred to in subparagraph 7.2(a)(ii);

(b) on evidence establishing to the satisfaction of the Board that the person to whom it relates is no longer of good conduct; or

(c) on evidence establishing to the satisfaction of the Board that the person to whom it relates knowingly made a false or deceptive statement in relation to the application for the record suspension, or knowingly concealed some material particular in relation to that application.

Additionally, in 7.2,

Cessation of effect of record suspension

7.2 A record suspension ceases to have effect if

(a) the person to whom it relates is subsequently convicted of

(i) an offence referred to in paragraph 4(1)(a), or

(ii) any other offence under the Criminal Code, except subsection 255(1), or under the Controlled Drugs and

Substances Act, *the* *Firearms Act*, *Part III or IV of the* *Food and Drugs Act* *or the* *Narcotic Control Act*, *chapter N-1 of the Revised Statutes of Canada, 1985, that is punishable either on conviction on indictment or on summary conviction; or*

(b) the Board is convinced by new information that the person was not eligible for the record suspension when it was ordered.

Unlike any other offence in the *Criminal Code*, a post-pardon or post record suspension summarily elected conviction under s. 255(1) will not automatically revoke or cause the cessation of the record suspension as it is explicitly excluded pursuant to s. 7.2(a)(ii). If I understand *Criminal Records Act* s. 7(a) correctly, a subsequent *Criminal Code* s. 255(1) conviction would not be an offence which permits opening an application to the Parole Board to revoke the record suspension, given the same exclusionary wording, and any such application to the Board would need to be grounded on a s. 7(b) with evidence of the person "is no longer of good character".

The assistant Crown, Mr. Malleson, confirms that there is not any case law directly on point since 1977. He also recognizes that the defendant is self-represented and, as such, has made submissions in support of the defendant's position that this prior pardoned offences are not admissible on sentencing. I direct that any transcript of these reasons include, as an appendix, a copy of Mr. Malleson's written submissions. I also note that Mr. Malleson has devoted substantial time, and no doubt personal time, given the limited Crown resources in this region, in preparation of these materials.

The language used in the *Criminal Records Act* has evolved since the 1977 Ontario court of Appeal case of *R. v. Spring [1977] O.J. No. 463*. Pardons have become record suspensions and the actual convictions, which at one time were "vacated", transitioned into a direction that the "judicial record of the conviction be kept separate and apart from other criminal records". The version of the Act in effect at the time of granting the defendant's pardon was amended yet again in 2014 when the word "pardon" was replaced by the phrase "record suspension". The issue of what impact, if any, the 2014 statutory amendment and change in wording of what was being granted might have on this application was not argued, including such as whether the subsequent amendments were retrospective or retroactive.

In the *Spring* case, the court, without citing any specific language in the act, states in para 5 that:

> *The appellant had previously been pardoned, and the question arose as to whether or not he should be treated as a first offender. We*

> *treat him as such because we think the statute gives us this direction in these circumstances.*

Has the subsequent changes in the wording of the Act, prior to this defendant's pardon being issued, resulted in a different statutory direction?

By referencing the word "statute" as opposed to any particular word, I understand that court to be referring to the intent of the statute as a whole or to use the wording of s. 5 of that Act, that upon a pardon being granted, the prior record "should no longer reflect adversely on the applicant's character". This wording has survived each of the Act's several amendments, whether in s. 5 or now s. 2.3.

The subsection (b) wording of either s. 5 or s. 2.3, in my view, is more consistent wording and sets out the effect of a revocation or additionally, after 2006, "revoke or ceases to have effect". The earlier wording of a pardon vacating the conviction unless revoked might be considered an oxymoron given the *Black's Law Dictionary*, 5th edition meaning of:

> *to annul; to set aside, to cancel or rescind. To render an act void; as to vacate an entry of record, or a judgement. As applied to a judgement or a decree it is not synonymous with 'suspend' which means to stay enforcement*

of judgment or decree.

However, a common power through the various wording changes in the Act as been the ability to revoke the pardon, which is more than to "un-annul". In my view, "to be kept separate and part from other criminal records" is wording more consistent with the residual power of Parliament to revoke outright or enable a regime in which the benefit of a pardon "ceases to have effect", as opposed to inferring a greater degree of permanence to a pardon by the use of the word "vacate".

The *Oxford English Dictionary* (2d ed. 1989) Vol. XIX at p. 385 defines "vacate" as "to make void in law, to deprive of legal authority, validity, force, efficacy or value to render inoperative or to annul or cancel"; "which does not necessarily involve retroactive effects" (referred to in *R. v. Therrien* [2001] 2 S.C.R. 3).

Indeed, the *Criminal Records Act* in effect at the time of *R. v. Spring*, supra, set out that the privilege of a pardon and the "vacated" record of conviction could be revoked, meaning that the vacated record was no inviolably permanent as it was subject to revocation and had not simply disappeared.

I appreciate an argument could be made that the use of the phrase "kept separate and apart" could infer a more accessible record than one vacated, but that would ignore the context of the section which now includes exceptions to the disqualification removals for such privileges as possessing firearms, as well as ignoring the underlying policy direction to remove the adverse reflection on the offender's character.

It would also ignore the conclusion of the Supreme Court of Canada in ***Re: Therrien*** that there would be no need for the various provisions to revoke or reveal the pardoned offences if those "convictions were deemed never to have existed" (***Therrien***, para 120) and infer the further conclusion that the various amendments to the wording in both official languages "embody the meaning that Parliament has always intended the Act to have" (***Therrien***, para 119) equally expands to include the pre-2000 version of the Act.

If the meaning Parliament has always intended includes the wording in effect at the time of the ***Spring*** decision, then I agree with the conclusions of Justice Wein in ***R. v. Gyles*** [2003] O.J. No. 1924 that pardons granted under previous *Criminal Records Act* wording should not be given greater weight. Leaving aside the limited use in cross-examination of a prior record acknowledged by the witness before trespassing into propensity reasoning, I view this decision as being of limited value to the issue before me, especially given Justice Wein's observations as to how rarely counsel would be aware of a witness' prior pardoned record. In the case at bar, the Crown would always be aware of any prior drinking and driving record, which is recorded in either provincial or municipal record printouts if requested by the Crown. Counsel are often aware of a prior record by stint of research into social media or just common knowledge within the community.

Of course, whether "vacated" or "kept separate and apart", the restrictions on the use of a prior record are limited to federal matters and not provincial or municipal matters. (*R. v. Therrien*, para. 116). The Parole Board letter to the defendant confirming the granting of the pardon also states that the pardon only applies federally. That limitation is reflected in the Ontario *Highway Traffic Act*, s. 1(6), setting out that a pardoned federal record is still admissible against a defendant on sentencing pursuant to that provincial legislation.

In ***Re Therrien***, [2001] 2 S.C.R. 3, the Supreme Court reviewed the obligation of a judicial candidate to disclose a prior pardoned record. Commencing at paragraphs 113 and following, the Court set out the 'Meaning and Effect of a Pardon' and a brief contextual history of the types of pardon. For my purposes, the *Criminal Records Act* sets out the procedure for administrative pardons and the court, in *Therrien*, concluded that a pardon does not retroactively wipe out the conviction but instead minimizes the future consequences of that record. As previously noted, the court, in reviewing the changes in wording, concluded that those changes "embody the meaning that Parliament has always intended the Act to have" (para 119), which I take to mean that the use of the word "vacate" in the previous versions of the Act does not mean that the effect of an administrative pardon was any stronger in previous decades.

The Crown submits that policy considerations favour admission of the pardoned records and that the *Criminal Records Act* lacks any language preventing a court from considering pardoned convictions on a subsequent sentencing. I must disagree.

Ultimately, prior convictions are aggravating factors on sentencing partly due to those convictions being a commentary on the character of the offender. Often a sentencing justice will comment on how the offender's history is the best predictor of that offender's future. The unpardoned prior convictions are the clearest commentary of the type of person the offender is or, in other words, the type of character the offender possesses. However, the *Criminal Records Act* clearly sets out that once the offender's character has been assessed by the Board and the prior offences pardoned by the Board, the pardoned convictions "should no longer reflect adversely on the applicant's character".

In my view, this is a clear direction from Parliament to sentencing justices to disabuse oneself of any knowledge of pardoned offences not revoked or by procedure resulting in cessation of effect of pardon. This would be my understanding of the rationale in ***R. v. Paterson*** (1998) 122 C.C.C.(3d)254, B.C.C.A., cited in ***Gyles***, where that appellate court refused cross-examination on a pardoned record which would otherwise permit attacking the character of a witness despite the *Criminal Records Act* explicitly stating that the subject charges are no longer to reflect adversely on the witness' character.

An additional issue is the Ministerial consent to disclose the pardoned offences to this court, though the consent form is silent as to whether the disclosure is being permitted for sentencing purposes or for the Crown application for a ruling as to the admissibility of the pardoned record on sentencing. If the former, the record is silent as to whether any opportunity was provided to the defendant for submissions to the Minister, nor do I have any submissions as to what standing the defendant might have, if any. Given the delays in completion of this sentence, I did not intend to delay matters further by embarking on additional proceedings by providing the defendant with an opportunity for a review of the Minister's order. My ruling in this application would, in any event, make such a proceeding moot.

I infer the Ministerial consent was for the purposes of the application only as opposed to exerting any decision making process which would predetermine the Crown application. While the Crown application asserts the Ministerial consent was for sentencing, I note the covering letter from the RCMP advises that the record disclosure "be restricted for use only in connection with the pending charges and that its existence be made only to those directly involved in the investigation and court proceedings" (Crown Material for Sentencing, Tab 2). The actual consent form itself sets out a Ministerial finding that "disclosure is desirable in the interests of the administration of justice", same reference, which is much broader than any stated reason pertaining to sentencing, and I also infer the Ministerial release of records leaves to my discretion what use is to be made of the records and specifically whether admission of pardoned records is desirable in the interests of justice, which would arise from the wording of the *Criminal Records* Act.

The Crown asserts that the clear policy of the *Criminal Records Act* is the rehabilitation of offenders. I lack any *Hansard* excerpts and approach the legislation policy interests from the four corners of the Act itself. I would certainly agree that a pardon, or now record suspension, is the recognition of an offender's successful rehabilitation. Where the Crown and I part company is his assertion that the exclusion of s. 255 convictions within the Criminal Records Act is a justifiable policy consideration as it only means to protect "low end" drunk driving offences in order to prevent adverse and disproportionate impact on rehabilitation. Apart from the possible influence from an outmoded societal acceptance of drinking and driving, I am bereft of any understanding why Parliament would choose to protect those drunk drivers lucky enough to miss killing or maiming innocent victims over any other criminal offence in the Code. Indeed, the Crown's suggestion that exposing the defendant's prior pardoned conviction for possession for the purpose of trafficking would garner greater societal challenges, such as employment or travel, which would depend very much on the substance involved. As for travel, the record before me is silent as to whether pardoned offences are sealed from other countries such as the United States given the post 9/11 broadening of record sharing between our two countries.

The reality of the s. 255 exclusion in the *Criminal Records Act* is that Parliament has enhanced the protection of the pardon from a drunk driving charge prosecuted on summary conviction. That is the policy conclusion I draw from the clear wording of the Act. The Crown's "*in terrorem*" assertion that excluding this record from the sentencing consideration would "incentivize" the Crown to apply to the National Parole Board for pardon revocation on all future similar cases does not address my concern that all other offences in the *Criminal Code*, including the shoplifting of a chocolate bar or a mischief or other similar offence lack a protection which Parliament has reserved for s. 255 offences. Should that mean in the future, whether this or similar defendants, the choice to drive drunk results in the exposure of other cognate and non-cognate prior offences is a simple consequence of choosing to drink and drive. The conviction on any hybrid offence in which the Crown elected by way of indictment automatically suspends the pardon: ***R. v. Gamble*** [2011] O.J. No. 4469 and ***R. v. Kanagarajah et al*** [2013] O.J. No. 258.

I certainly agree with the Crown's submission of unfairness that a re-offending pardoned offender whose cognate record is not revoked would receive a lesser penalty, probably the minimum, and escape jail than someone who has a prior cognate record of drinking driving offences who would face mandatory incarceration. The Crown suggests that this would be a totally absurd result. It is not in my purview to comment on Parliament's balancing of competing societal interests. I do note that such a result is not unprecedented. Under the *Juvenile Delinquents Act*, a youth might accumulate dozens of offences each year until turning 16, and then immediately be treated as a first offender, receiving an equivalent sentence as any other adult who, up to that point, had led an unblemished life. A similar example is referenced in ***Therrien*** where the court points out that under the *Young Offenders Act*, s. 36(1), after the applicable periods of time, the dispositions and terms imposed on young offenders are deemed never to have existed (para 121).

I do agree with the Crown's submission regarding the impact of pardoned offences under the *Highway Traffic Act*. The *Criminal Records Act* clearly sets out its mandate is for federal matters only and does not prevent provincial and municipal record keepers from utilizing the pardoned offences. That restriction is the reason why the Ministry of Transportation record is able to retain the prior drinking/driving offences of R.Z. in their provincial records.

In sentencing R.Z., I have the jurisdiction to increase his licence suspension as opposed to a *Criminal Code* driving prohibition, as does the Ministry of Transportation in their mandate to review the defendant's privilege of driving. The *Highway Traffic Act*, s. 41(4) empowers me to increase the length of the suspension and s. 1(6) directs that pardoned and non-pardoned convictions are treated the same and certainly my jurisdiction as a Provincial Offences Court is set out in the *Courts of Justice Act* permitting my utilization of the *Highway Traffic Act* principles.

In closing, I would remiss in not commenting on an issue which has completely flummoxed me in completing these reasons. A post-pardon indictable conviction automatically results in losing the benefit of that pardon. Choosing the mode of election is solely with the purview of the Crown office. Given the undisputed carnage created by drinking drivers, the most efficient community response to a defendant who has previously been entrusted with the privilege of a pardon, who is then charged with a drinking/driving offence, would be an indictable election to ensure upon any eventual conviction that the offender's entire prior court record is made available to the sentencing justice, as well as deprive that offender of the pardon. The Crown will be on notice of the likelihood of a prior pardon by reviewing the Ministry of Transportation record and comparing it to the CPIC printout.

Alternatively, Parliament might consider removing the exception in s. 7.2(a)(ii) of the *Criminal Records Act* exempting s. 255(1) convictions from cessation of Effect. I am again completely flummoxed in finding any policy justification in protecting drunk drivers who have chosen to put the community at risk by drinking and driving, should be protected from the consequences of their actions, especially should that prior record include cognate offences which would mandate mandatory incarceration.

SENTENCING

WAKEFIELD J. (Orally)

Today I have this defendant before me to be sentenced as the law is today. As such, R.Z., I would ask you to stand up at this point.

With respect to the sole criminal charge before me of over 80 and being treated as a first offender who has taken responsibility for his actions, thereby demonstrating remorse by a contextually early guilty plea, I sentence you to the minimum fine of $1000, to which is added the victim surcharge of $300.

If the fine is not paid, there is an estimated time in default of 15 days' incarceration.

R.Z.: I'm sorry, say that again?

THE COURT: 15 days' incarceration if you don't pay the fine is the anticipated time in jail. There is a process involved which has to be followed should that occur but what I am leading up to - this is why I asked you earlier about your income. I am going to grant you one year in which to pay the fine. If you are not able to pay it within that one year, speak to duty counsel about the process by which you apply for an extension of time to pay the fine. That comes to me. I look to see how fastidiously you are whittling down the fine and if I see that you are taking responsibility and making regular payments, then I will certainly look at granting you additional time, but I want to see you make the effort first.

Secondly, I hope you did not drive here today?

R.Z.: Say what?

THE COURT: You did not drive here today?

R.Z.: I did not.

THE COURT: "Did not", good. Have you got your driver's licence back?

R.Z.: Yes, I do.

THE COURT: Did you bring that with you today?

R.Z.: Yes, I did.

THE COURT: Would you pass that to Mr. Clerk, please? Is the address on the driver's licence your current address?

R.Z.: It is, Your Honour.

THE COURT: As such, pursuant to the *Criminal Code*, you are now prohibited from operating a motor vehicle on any street, road, highway or other place for a period of 12 months, commencing on today's date.

You have to understand, sir, that if you are found driving, more to the point, convicted of breaching this order, the Crown by an indictable election would open up the possibility of five years in a penitentiary. So it is essential that you don't drive again until you are legitimately entitled to do so.

However, I do have concurrent jurisdiction under the *Highway Traffic Act* and, within that jurisdiction, have the capacity to review the pardoned drinking and driving offences set out in the Ministry of Transportation record, which more than justifies an increased suspension as "being desirable for the protection of the public using the highways" (s. 41(4) of the *Highway Traffic Act)*. As such, there will be a licence suspension of a concurrent - so a licence suspension of two years duration concurrent to the *Criminal Code* prohibition; however, subject to inclusion in the Interlock Program. I understand the *Highway Traffic Act*, s. 41(4.1) permits the Interlock privileges to the licence suspension as well as the driving prohibition and that understanding is the basis of my additional suspension.

I should also acknowledge in this judgment that the delay in sentencing is partly due to the Crown application to the Ministry and the subsequent preparation of material and illness delays caused by myself before releasing this judgment.

I am declining to impose the additional

sentencing component submitted by the Crown of a probationary period for counselling. The public will be protected for the next two years and the defendant now realizes the consequences to him should he re-offend, thereby permitting the Crown to elect by way of indictment. It is very much in the defendant's best interests to independently follow up with counselling.

The one outstanding issue is the consequence of revealing the offender's prior pardons, as permitted by the Ministerial consent, in open court on the record. The Ministerial documents, I understand, are required to be returned to the Ministry. However, to permit publication of the offender's name, together with the publication of the prior pardons, would defeat the core intent of the *Criminal Records Act*. To put the press on notice, and I acknowledge that should be, in the ordinary course, the next step, would also defeat the core intent of the Act.

I note that the Canadian Judicial Counsel protocol on personal information, at paragraph 19 states that:

> *However, even in cases where no publication ban is in place, it may still be appropriate for a judge when drafting reasons to omit certain personal information from a judgment in the interest of protecting the privacy of the litigants or other participants in the proceedings. The protocol establishes some*

basic types of cases where individual identities or factual information needs to be protected and suggests what types of information should be removed. There are four objectives which must be taken into account when determining what information should be included or omitted from reasons for judgment:

1) ensuring full compliance with the law;

which I believe to be in full compliance with the Criminal Records Act.

2) fostering an open and accountable judicial system;

This, again, would be served by maintaining the privacy of the offender.

3) protecting the privacy of justice system participants where appropriate; and

4) maintaining the readability of reasons for judgment.

That is the Judges' Technology Advisory Committee, Use of Personal Information in Judgments and Recommended Protocol, approved by the Canadian Judicial Counsel in March 2005.

As such, I hereby order that these Reasons, if printed, electronically reproduced or audio copy, have the personal identifiers of the offender removed and replaced with his initials. The Crown material attached to these reasons will be similarly amended to replace the offender’s name with initials.

The Crown material will be sealed to be opened only by a court of competent jurisdiction.

Obviously, the conviction at bar is part of the public record and the offender’s name can be set out in full with respect to this conviction only.

That is my ruling and sentencing in this matter. There will be documents for you to sign before you leave the building. As I said, I have given you time to pay on the fine and you will check in to how you extend the time, should you need that, but you have to justify it in that application.

R.Z.: Yes, Your Honour.

THE COURT: Anything further from the Crown with respect to this matter?

MR. SALIWONCHYK: No, thanks.

THE COURT: Any questions, sir?

... DISCUSSION BETWEEN R.Z. AND THE COURT ABOUT WHEN THE TRANSCRIPT OF THIS JUDGMENT WILL BE AVAILABLE

THE COURT: Mr. Saliwonchyk, while I have put it into the judgment, it would be remiss of me not to thank Mr. Malleson for submissions that covered both the defence aspect and the Crown aspect in the best traditions.

FORM 2

Certificate of Transcript

***Evidence Act,* subsection 5(2)**

I, Maxine Newell, certify that this document is a true and accurate transcript of the recordings of Maxine Newell in *R. v. R.Z.* in the Ontario Court of Justice held at 150 Bond St. E., Oshawa, Ontario, taken from Recording number 2811-106-20160601-085124-10-WAKEFIG, which has been certified in Form 1.

20 June, 2016 ________________________________

Maxine Newell, C.C.R.

**Transcript ordered: June 1, 2016

**Transcript completed: June 20, 2016

**Transcript Released: July 14, 2016

ONTARIO COURT OF JUSTICE
(Central East Region)

B E T W E E N:

HER MAJESTY THE QUEEN

-and- R.Z.

CROWN WRITTEN SUBMISSIONS ON SENTENCE & IMPACT OF "PARDONED" CONVICTIONS

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The Facts

1. Mr. Z. plead guilty to over 80 on his trial day of December 15, 2015. The case was adjourned for sentencing to March 15, 2016. The Crown seeks to tender proof of three separate prior convictions for drunk driving, which are contained on Mr. Z.'s certified Ontario Ministry of Transportation record. For clarity, the Crown in this case is exercising its discretion **not** to file the "notice of increased penalty" (pursuant to s. 727 of the *Criminal Code)* due to the dated nature of the convictions.

2. The Crown acknowledges that Mr. Z. received a pardon in November 2006 – he has provided to the Crown as proof a letter written by the National Parole Board which the Crown acknowledges is accurate.[1]

   Book of Crown Materials, Tab 1: Letter from the National Parole Board to Mr. Z.

3. On December 30, 2015, the Crown sought permission of the Federal Minister of Public Safety & Emergency Preparedness to authorize disclosure of the federal record of the convictions to this court for the purposes of sentencing, pursuant to s. 6(2) and s. 6(3) of the *Criminal Records Act* (herein the "*CRA*"). The federal Minister considered this request, and on January 27, 2016, decided to grant such permission.

   Book of Crown Materials, Tab 2: Letter from the Minister of Public Safety & Emergency Preparedness

1. Although the National Parole Board letter only mentions pardons for two drunk driving convictions (rather than three), the Crown does not seek to take advantage of what may simply be an administrative oversight at the time.

4. To be clear, the Crown has received permission to ***disclose*** the record to this sentencing court pursuant to s. 6(2) and s. 6(3) of the *CRA*. This is different than ***revoking*** the pardon altogether, the statutory framework for which falls under s. 7 of the *CRA*. The Crown does not seek revocation of the pardon in this case. This is very much to the benefit of Mr. Z.. If a potential employer or volunteer agency were to conduct a federal criminal record check today, his pardon would still prevent disclosure of those records in those circumstances.

5. The Crown position is that Your Honour can and ought to weigh these three prior drunk driving convictions in order to craft a fit sentence. The Crown submits the sentence sought is a modest one in the circumstances: $1100 fine, 6 months probation, with a term requiring alcohol counselling, and a three year driving prohibition, during which the Crown is ***not*** asking Your Honour to prohibit Mr. Z. from benefiting from the Interlock program. In light of Mr. Z.'s history endangering the public by drunk driving – a pattern with convictions spanning three separate decades – the Crown submits the sentence sought is proportionate and would better protect the public and assist Mr. Z. in his rehabilitation.

Book of Crown Materials, Tab 3: Ministry of Transportation Record Showing Three Prior Drunk Driving Convictions

6. The Crown understands Mr. Z.'s position to be that none of the three drunk driving convictions are admissible due to the pardon, and that Mr. Z. should be treated by this sentencing court as though he had never even once before been found guilty of drunk driving.

The Position of the Crown

General Rule – Absent an Exclusionary Rule, All Relevant Evidence is Admissible

7. The general rule is that all relevant credible or trustworthy evidence is admissible at sentencing unless it is subject to an exclusionary rule. This general rule is well established in Canadian law. Notably, the Supreme Court of Canada once invoked this rule with respect to the common law admissibility of a certified Ministry of Transportation record to prove a non-pardoned criminal drunk driving conviction in a criminal sentencing hearing for drunk driving:

> ….The [Ministry of Transportation] certificate is admissible at common law because, irrespective of the hearsay rule, all credible and trustworthy evidence is admissible at a sentencing hearing…
>
> *R. v. Albright*, [1987] 2 S.C.R. 383 at para. 14

8. The key question at issue in this case is thus as follows: "Does any caselaw or statute create an exclusionary rule that bars admission or consideration of a *pardoned* conviction at a sentencing hearing?" The Crown submits the answer is no.

9. Since the accused is self-represented, and there is no reported case that I can locate that is directly on point, the Crown will review caselaw and several sections of the *CRA* that might arguably create such an exclusionary rule. However, the Crown ultimately submits that no case or statute, when properly appreciated in context, creates such an exclusionary rule – and thus the pardoned convictions are admissible and ought to be weighed by Your Honour.

In Light of Legislative Changes, *R. v. Spring* Does not Create an Exclusionary Rule

10. In 1977, the Ontario Court of Appeal held that the *CRA* statute required sentencing courts to treat those with pardons, who were subsequently convicted, as first offenders. It is important to note that this decision was based on interpreting the statute ***as it was then***, in 1977. Only one paragraph in *R. v. Spring* addresses the issue, and it is as follows:

> A matter of importance was pointed out to us in argument. The appellant had previously been pardoned, and the question arose as to whether or not he should be treated as a first offender. We treat him as such because we think the statute gives us this direction in these circumstances.
>
> ***R. v. Spring*, [1977] O.J. No. 463 at para. 5 (C.A.) [Emphasis added]. (Tab 1, BOA)**

11. However, since *R. v. Spring,* there has been a significant change in the law and, in particular, the *CRA* – and thus, the Crown submits, the opposite conclusion is the legally correct one today.

12. In 1977, when *R. v. Spring* was decided, the *CRA* stated that a pardon "vacates the conviction." That phrase has since been completely deleted. That phrase has been ***replaced*** by the requirement, instead, that pardoned convictions be "kept separate and apart from other criminal records".

13. The chart on the following page outlines the relevant portion of the *CRA* during three time periods: 1) the *CRA* when *R. v. Spring* was decided; 2) the *CRA* when Mr. Z. received his pardon in November 2006; and 3) the *CRA* in effect today. Please note in particular the yellow highlighted portions:

***CRA* (as it was in 1977, when *R. v. Spring*, *supra* was decided).**	***CRA* (as amended on August 1, 2000, and was in effect on November 2006, when Mr. Z. received his pardon).**	***CRA* (as of today, which came into force on December 6, 2014).**
EFFECT OF GRANT OF PARDON 5. The grant of pardon (a) is evidence of the fact that the Board, after making proper inquiries, was satisfied that an applicant was of good behavior and that the conviction in respect of which the pardon is granted should no longer reflect adversely on his character; and (b) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of such conviction, subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder.	EFFECT OF PARDON 5. The pardon (*a*) is evidence of the fact (i) that, in the case of a pardon for an offence referred to in paragraph 4(*a*), the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and (ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character; and (*b*) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament, other than section 109, 110, 161, 259, 490.012 or 490.019 of the *Criminal Code* or subsection 147.1(1) of the *National Defence Act*, or of a regulation made under an Act of Parliament.	EFFECT OF RECORD SUSPENSION 2.3 A record suspension (*a*) is evidence of the fact that (i) the Board, after making inquiries, was satisfied that the applicant was of good conduct, and (ii) the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant's character; and (*b*) unless the record suspension is subsequently revoked or ceases to have effect, requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament — other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the *Criminal Code*, subsection 147.1(1) or section 227.01 or 227.06 of the *National Defence Act* or section 36.1 of the *International Transfer of Offenders Act*.

14. Whether or not the conviction is "vacated" by the pardon – such that it is judicially deemed to *no longer exist* -- is important to the issue currently facing this court. If the conviction is deemed to be vacated and to essentially no longer exist, then the Crown agrees *R. v. Spring*, *supra* dictates the result, and Mr. Z. should be treated as a first offender (unless and until the pardon is revoked by the National Parole Board). However changes to the wording of the *CRA*, outlined above, make clear that a pardon no longer deems a conviction to be "vacated". Notably, these changes to the law took effect well *before* November 2006 when Mr. Z. received his pardon.

15. Indeed the French version of the law deleted the phrase "annule la condamnation" (i.e. vacates the conviction) in 1985, and did the same for the English version on August 1, 2000. For a discussion of the legislative changes in English and French with respect to "annule la condamnation"/"vacates the conviction", see:

> *R. v. Gyles*, [2003] O.J. No. 1924 at para.10&11 (S.C.J.) (Tab 2, BOA)
>
> *Re Therrien*, [2001] 2 S.C.R. 3 at para. 117 (Tab 3, BOA)

16. Even more importantly, the Supreme Court of Canada considered the *CRA* in *Therrien*, and interpreted the statute and explicitly *rejected* the notion that a pardon means that a conviction is deemed to not exist

> *Re Therrien*, [2001] 2 S.C.R. 3 at para. 117 - 123

17. The significance of the deletion of the words "vacates the conviction" from the *CRA* was commented on by Justice Wein of the Ontario Superior Court of Justice in *R. v. Gyles.* In that case, defence sought to cross examine a Crown witness on his pardoned conviction. At that time, the main authority on point was *R v. Paterson* (1998), 122 C.C.C. (3d) 254 (B.C. C.A.), which prohibited such cross-examination. Justice Wein reviewed changes to the *CRA*, including the deletion of the phrase "vacates the conviction," as well as the *Re Therrien* Supreme Court of Canada case, and concluded: "I therefore do ***not*** find that *Paterson* remains authoritative, even if it was correctly decided." Justice Wein thus allowed cross examination of the witness on his pardoned conviction – holding that the existence of the pardon goes to the weight of the evidence – not its admissibility.

R. v. Gyles, [2003] O.J. No. 1924 at paras. 3-11 and paras. 15-19

18. It is also noteworthy that the form letter the National Parole Board sent to Mr. Z., when granting him the pardon, warned: "… a pardon does not erase the fact that an individual was convicted of an offence(s) and has a criminal record…"

Book of Crown Materials, Tab 1: Letter from the National Parole Board to Mr. Z.

Section 2.3 of the *CRA* Does Not Create an Exclusionary Rule

19. The "effects" of an administrative pardon and/or "record suspension" are explicitly prescribed by the *CRA.* The Crown submits a careful reading of this

section reveals that none of these "effects" create an exclusionary rule at a subsequent sentencing hearing.

> <u>Effect of Record Suspension</u>
>
> 2.3 A record suspension
>
> (*a*) is evidence of the fact that
>
> (i) the [National Parole] Board, after making inquiries, was satisfied that the applicant was of good conduct, and
>
> (ii) the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant's character; and
>
> (*b*) unless the record suspension is subsequently revoked or ceases to have effect, requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament — other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the *Criminal Code*, subsection 147.1(1) or section 227.01 or 227.06 of the *National Defence Act* or section 36.1 of the *International Transfer of Offenders Act*.

20. The Crown will divide submissions here into the following three parts:

    i. Section 2.3(a)(i) does not create an exclusionary rule.

    ii. Section 2.3(a)(ii) does not create an exclusionary rule.

    iii. Section 2.3(b) does not create an exclusionary rule.

<u>i. Section 2.3(a)(i) does not create an exclusionary rule.</u>

21. With respect to s. 2.3(a)(i), the Crown submits that the phrase "good conduct" does ***<u>not</u>*** mean the offender is now deemed to have been of "good conduct" with respect to the subject matter of the criminal conviction which was pardoned, but rather is evidence that the offender was of "good conduct"

during a prescribed period ***after*** the offence for which he has been pardoned. This interpretation is especially clear when reading the whole of the *CRA* harmoniously, with a focus on the criteria for granting a record suspension in the first place, found in s. 4.1, which includes the specific phrase "good conduct" during the "applicable period" after the conviction:

> 4.1 (1) The Board may order that an applicant's record in respect of an offence be suspended if the Board is satisfied that
>
> (*a*) the applicant, during the applicable period referred to in subsection 4(1), has been of good conduct and has not been convicted of an offence under an Act of Parliament; and [Emphasis added].

…

22. In other words, the "good conduct" phrase in the *CRA*, refers to the person's conduct during the mandated "waiting period," in between one's last conviction and becoming eligible for a pardon. The statute in no way purports to transform what was previously considered "criminal conduct" into deemed "good conduct". Therefore, this subsection does not create an exclusionary rule preventing pardoned convictions from being considered at sentencing.

ii. Section 2.3(a)(ii) does not create an exclusionary rule.

23. This subsection states that the record suspension is "evidence of the fact that… the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant's character". The Crown submits this too does not create as an exclusionary rule at a subsequent sentencing hearing. The Crown is ***not*** seeking the Court to impose a different sentence on Mr. Z. because his (now pardoned) convictions reflect poorly on his

"character." Rather, the Crown is seeking a fit sentence that takes into consideration that Mr. Z. has been convicted of three prior drunk driving offences, and thus poses a heightened concern to both public safety and himself. The Crown submits this concern is distinct from Mr. Z.'s "character," and thus s. 2.3(a)(ii) does not create an exclusionary rule at sentencing.

<u>iii. Section 2.3(b) does not create an exclusionary rule.</u>

24. This subsection requires that records be "kept separate and apart from other criminal records". The Crown submits nothing in this section creates an exclusionary rule at sentencing, especially now that the federal Minister has granted permission to disclose the record, pursuant to s. 6(2) and 6(3) of the *CRA*, to this Court for the purposes of sentencing.

<u>Section 7.2 of the *CRA* Does Not Create an Exclusionary Rule</u>

25. Section 7.2 of the *CRA* states that if an accused is convicted of a *Criminal Code* offence that is prosecutable by indictment, that any pardon is automatically and immediately *revoked*; however, the *CRA* exempts offences under s. 255 of the *Criminal Code* – i.e. drunk driving offences where there has been no injury or death – from triggering this automatic revocation. The Crown acknowledges Mr. Z. benefits from this exemption, in that his pardon is not automatically revoked. For example, if Mr. Z. were to apply for employment and be subject to a criminal record check, his previous

convictions would remain sealed and would not be disclosed. However, the Crown submits that nothing in this section prevents the Crown from seeking and obtaining permission from the federal Minister to disclose the pardoned record, and submit it to the court to consider during sentencing.

26. The Crown acknowledges there are a number of cases in which an accused was found guilty of an indictable offence, other than drunk driving, and his pardons were deemed by the court to be automatically and immediately revoked under s. 7.2(a), and the sentencing judge, over the objection of the defence, then took the pardoned convictions into consideration at sentencing on that basis – i.e. that the pardon had been revoked.

R. v. Poupart, 2010 QCCA 1956
R. v. Gamble, 2011 ONCJ 513 at paras. 8-11 (De Filippis J.) (Tab 5, Crown's BOA)
R. v. Kanagarajah, 2013 ONCJ 16 at para. 41 (De Filippis J.)

27. In this above line of cases, there was no need to seek permission of the federal Minister to disclose the record, as the Crown has done in this case, because the pardon was deemed to no longer exist as it had been revoked.

28. The Crown submits that these three cases do **not** stand for the *converse* principle – i.e. if the conviction does *not* by virtue of s. 7.2 revoke the pardon, the pardoned convictions are *in*admissible. The Crown submits nothing in s. 7.2, or in this line of three cases noted above, suggest that s. 7.2 of the *CRA* creates an exclusionary rule at sentencing.

Policy Considerations Also Favour Admission of the Pardoned Convictions

29. The Crown submits the language of the current *CRA* makes clear that nothing in that Act prevents a court from considering pardoned convictions at sentencing, especially after the federal Minister has provided permission to the Crown to disclose the pardoned convictions to the sentencing judge under s. 6(2) and 6(3) of the *CRA*.

30. However, in the event Your Honour disagrees with the Crown, and concludes that the wording of the *CRA* is not sufficiently clear to on its own resolve the issue, rules of statutory interpretation require this court to consider policy considerations:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> *R. v. Bell Expressvu*, [2002] 2 SCR 559 at para. 26

31. The Crown submits it is clear that the object of the *CRA* is the rehabilitation of offenders. In this light, the Crown submits Parliament prevented s. 255 drunk driving offences from automatically revoking a pardoned criminal record, because of a concern that relatively "low end" drunk driving offences, would have an adverse and disproportionate impact on rehabilitation, including employment and travel, and <u>***not***</u> because of a concern that drunk drivers, who

committed another drunk driving offence after receiving a pardon, would receive an unfairly strict sanction.

32. Mr. Z. is a good example of this policy concern. Your Honour will note that one of Mr. Z.'s pardoned convictions, which the federal Minister has given permission to disclose to the Court, is for possession of drugs for the purpose of trafficking, for which Mr. Z. received a sentence in September 1990 of two years (less one day) jail. It is reasonable to infer that such a conviction on a criminal record would adversely impact opportunities in Mr. Z.'s life, including those that might assist rehabilitation, such as travel, volunteerism and employment. No doubt, many employers or volunteer agencies, which might be willing to overlook drunk driving convictions, might decline to hire someone if their criminal record included such an indictable offence that carried such a long jail sentence. Certainly, if employment or volunteerism involved travel to another country, a drug trafficking related-conviction would be far more problematic than a drunk driving conviction.

33. The Crown submits it is clear s. 7.2(a)(ii) of the *CRA*, which prevents a drunk driving *simpliciter* conviction from automatically revoking a pardon, was crafted with this concern in mind. However, this issue is totally different from whether a court should be allowed to *weigh* a pardoned conviction at sentencing – which the Crown submits is entirely appropriate and consistent with the objectives of the *CRA*.

34. The position forwarded by the defence could actually deter the rehabilitative objective of the *CRA*. If the *CRA* were interpreted so that the ***only way*** a Court could consider pardoned convictions of a repeat drunk driver at a sentencing hearing is if the pardon were revoked, then the Crown, in the future, would be incentivized to invite the National Parole Board to use its discretion under s. 7(b) the *CRA* to revoke the pardon (which would necessarily mean all convictions which had been pardoned). For a person such as Mr. Z., this would necessarily mean that, if the Crown were successful, a future employer or volunteer agency would, during a federal criminal record check, learn of his drug trafficking conviction. (For clarity, the Crown wishes to emphasize again here it is not seeking, and will not seek, the revocation of Mr. Z.'s pardon in this case). In contrast, the legal interpretation put forth by the Crown better promotes rehabilitation, because it allows a court to consider an offender's past pardoned convictions in crafting a fit sentence, while simultaneously maintaining the pardon for the totally unrelated drug trafficking conviction.

The Interpretation Proposed by the Defence Would Have Unfair Results

35. Moreover, interpreting the law in such a way that creates an exclusionary rule at sentencing would create highly arbitrary and unfair results. Consider a hypothetical example of two persons: "Person A" and "Person B", each of whom are convicted of a similar drunk driving offence on January 11, 2016, and each now face sentencing.

Person A	Person B
• Convicted of impaired driving previously **six** times: 1. January 10, 1987, 2. January 10, 1988, 3. January 10, 1999, 4. January 10, 2000, 5. February 10, 2010, 6. January 10th, 2011. • Applies for and receives a pardon/“record suspension” on January 10, 2016 (so long as the Crown proceeded summarily on prior occasions, by statute “Person A” is entitled to the record suspension.) • Crown files notice of higher penalty	• Convicted of impaired driving previously **once**: 1. January 10, 2011. • Does not seek or receive a pardon/“record suspension”. • Crown files notice of higher penalty.

36. Surely, “Person A” is a greater threat to public safety and warrants a more significant sanction than “Person B”. However, the interpretation that pardoned convictions are inadmissible would lead to a totally absurd result: “Person A” would be eligible for (and likely receive) the minimum $1000 fine, while “Person B” would face a minimum sentence of 30 days incarceration. This would be totally unfair and arbitrary, and at odds with *Criminal Code* sentencing principles.

37. In short, consistent with the rehabilitative objective of the *CRA*, a person who receives a pardon should feel secure that their pardoned conviction will not adversely affect their employment, international travel, or volunteerism.

However, there is no sound public policy rationale for interpreting the *CRA* so that a pardoned person can rest assured that if he commits the offence of drunk driving again, in the *future*, he will be protected from his numerous past drunk driving convictions being considered at sentencing in crafting a fit sentence.

<u>The Ontario *Highway Traffic Act*</u>

38. There is yet another basis upon which the Crown submits this Court ought to weigh the pardoned convictions. A judge presiding over a criminal drunk driving sentencing hearing in Ontario wears two hats – one under the federal *Criminal Code* and the other under the Ontario *Highway Traffic Act*. With respect to the latter, the *Highway Traffic Act* grants this court the discretion to make an additional driving suspension under s. 41(4) of the *Highway Traffic Act:*

> 41 (4) Where the court or judge, as the case may be, making the conviction referred to in subsection (1) considers it to be desirable for the protection of the public using the highways, the court or judge may make an order extending the suspension of the licence,
>
> > (a) for any period in addition to the period specified in subsection (1) that the court or judge considers proper, if the person is liable to imprisonment for life in respect of the offence; or
> >
> > (b) for any period in addition to the period specified in subsection (1) that the court or judge considers proper but not exceeding three years, if the person is not liable to imprisonment for life in respect of the offence. R.S.O. 1990, c. H.8, s. 41 (4).

39. It is noteworthy that s. 1(6) of the Ontario *Highway Traffic Act*, explicitly states that, for its purposes, a conviction that has been pardoned by the federal government is treated no differently than a non-pardoned conviction:

> 1(6) This Act and the regulations apply to a person who has been granted a pardon under the *Criminal Records Act* (Canada) in the same manner as if the person had not been granted the pardon. R.S.O. 1990, c. H.8, s. 41 (4).

40. Even in British Columbia, where, unlike in Ontario, the analogous provincial highway safety legislation was completely silent on the issue, the Supreme Court of British Columbia ruled that the B.C. Superintendent of Motor Vehicles could treat a pardoned drunk driving conviction as it would a non-pardoned drunk driving conviction.

> *Gutteridge v. British Columbia* (Superintendent of Motor Vehicles), 2001 BCSC 620 (Tab 7 of the Crown's BOA).

41. It is noteworthy that even the letter written by the National Parole Board to Mr. Z. in November 2006, granting him the pardon, warned him that the *CRA* only applies federally, and does not apply to provincial law:

> A pardon does not ensure that either municipal or provincial agencies or private citizens will not disclose a criminal record, because the CRA applies only records kept at the federal level. However, many provincial and municipal agencies, when notified of the award of a pardon under the CRA, choose to cooperate by restricting the disclosure of their records even though they are not required by law to do so.

> *Book of Crown Materials, Tab 1: Letter from National Parole Board to Mr. Z., page 2*

42. The Crown submits the Ontario *Highway Traffic Act* is yet another basis upon which Your Honour ought to receive and consider Mr. Z.'s pardoned drunk driving convictions in this sentencing hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

M. Malleson

Michael Malleson
Assistant Crown Attorney
Date: March 3, 2016
Durham Crown Attorney's Office

TAB 4

2007 SCC 43
Supreme Court of Canada

Application to proceed in camera, Re

2007 CarswellBC 2418, 2007 CarswellBC 2419, 2007 SCC 43, [2007] 3 S.C.R. 253, [2007] B.C.W.L.D. 5717, [2007] B.C.W.L.D. 5725, [2007] B.C.W.L.D. 5769, [2007] B.C.W.L.D. 5846, [2007] S.C.J. No. 43, [2008] 1 W.W.R. 223, 162 C.R.R. (2d) 104, 224 C.C.C. (3d) 1, 247 B.C.A.C. 1, 285 D.L.R. (4th) 193, 368 N.R. 112, 409 W.A.C. 1, 51 C.R. (6th) 262, 73 B.C.L.R. (4th) 34, 75 W.C.B. (2d) 103, J.E. 2007-1909

Named Person and Attorney General of Canada on behalf of the Requesting State (Appellants) v. The Vancouver Sun, The Province, BCTV, Canadian Broadcasting Corporation, CKNW, CityTv and CTV, a Division of Bell Globemedia Inc. (Respondents) and Attorney General of Ontario and Law Society of British Columbia (Interveners)

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

Heard: April 24, 2007
Judgment: October 11, 2007*
Docket: 30963

Proceedings: reversing *Application to proceed in camera, Re* (2006), 2006 BCSC 1805, 2006 CarswellBC 2957 (B.C. S.C.)

Counsel: Ian Donaldson, Q.C. for Appellant, Named Person
Bernard Laprade, Cheryl D. Mitchell for Appellant, Attorney General of Canada
Robert S. Anderson, Ludmila B. Herbst for Respondents, The Vancouver Sun, The Province and BCTV
Daniel W. Burnett, Heather E. Maconachie for Respondent, Canadian Broadcasting Corporation
Michael A. Skene, Angus M. Gunn, Jr. for Respondent, CTV, a Division of Bell Globemedia Inc.
No one for Respondents, CKNW and CityTv
Christopher Webb for Intervener, Attorney General of Ontario
Leonard T. Doust, Q.C., Michael A. Feder for Intervener, Law Society of British Columbia

Subject: Constitutional; Criminal; Civil Practice and Procedure; Evidence; Human Rights

Related Abridgment Classifications

Constitutional law

XI Charter of Rights and Freedoms
  XI.3 Nature of rights and freedoms
    XI.3.b Freedom of expression
      XI.3.b.iv Provisions requiring disclosure of information

Criminal law

IV Charter of Rights and Freedoms
  IV.12 Life, liberty and security of person [s. 7]
    IV.12.g Miscellaneous

Evidence

XVII Privilege
XVII.6 Miscellaneous

Judges and courts

XVII Jurisdiction
XVII.2 Superior courts
XVII.2.j Miscellaneous

Headnote

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Provisions requiring disclosure of information

During extradition hearing, appellant named person successfully applied for order that proceedings continue in camera with consent of appellant Attorney General of Canada, acting on behalf of requesting state — When both appellants submitted that proceedings should remain in camera because named person was confidential police informer, at recommendation of amicus curiae he appointed, extradition judge invited certain media counsel to in camera proceeding, conditional on counsel filing undertakings of confidentiality and non-disclosure to their clients — Series of hearings included arguments to disclose evidence to respondent media outlets — Extradition judge allowed respondents' application to be permitted to review documents, conditional upon filing undertakings of non-disclosure — Named person and Attorney General appealed — Appeal allowed — Extradition judge's order set aside — Principle of informer privilege provides almost absolute bar against revealing information that may identify confidential informer, while open court principle provides that information before court ought to be public — Trial judge has no discretion not to apply informer privilege rule, but in order to ensure that open court principle retains its maximum effect, informer privilege should only cover information that would in fact tend to reveal informer's identity — Procedure set out to reconcile principle of informer privilege and open court principle includes protection of confidentiality, such as restricting standing in initial hearing, but also emphasizes judge's duty to ensure minimal intrusion — Once existence of informer privilege is established, judge may allow submissions from third parties — Protection of open court principle demands that all information necessary to ensure meaningful submissions that can be disclosed without breaching privilege be so disclosed.

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person — Right to fair trial

During extradition hearing, appellant named person successfully applied for order that proceedings continue in camera with consent of appellant Attorney General of Canada, acting on behalf of requesting state — When both appellants submitted that proceedings should remain in camera because named person was confidential police informer, extradition judge invited certain media counsel to in camera proceeding, conditional upon them filing undertakings of confidentiality and non-disclosure to their clients — Series of hearings included arguments to disclose evidence to respondent media outlets — Extradition judge allowed respondents' application to be permitted to review documents, conditional upon filing undertakings of non-disclosure — Named person and Attorney General appealed — Appeal allowed — Extradition judge's order set aside — Extradition judge erroneously found that common law rule requiring publication ban was discretionary — Neither media nor their counsel should have been granted access to any privileged material — Principle of informer privilege is mandatory and provides almost absolute bar against revealing information that may identify confidential informer — Informer privilege rule may be abridged only when necessary in order to establish innocence in criminal trial — Innocence at stake exception only applies if informer's identification is only way to establish innocence — Common law informer privilege does not offend Canadian Charter of Rights and Freedoms because rule always affirmed importance of not condemning innocent accused by permitting exception to privilege where innocence is at stake — Procedure set out to reconcile principle of informer privilege and open court principle — Procedure includes assuming that informer privilege exists when first raised, maintaining confidentiality during in camera proceedings and only restricting potentially identifying information.

Judges and courts --- Jurisdiction — Superior courts — Miscellaneous

During extradition hearing, appellant named person successfully applied for order that proceedings continue in camera with consent of appellant Attorney General of Canada, acting on behalf of requesting state — When both appellants submitted that proceedings should remain in camera because named person was confidential police informer, at recommendation of amicus curiae he appointed, extradition judge invited certain media counsel to in camera proceeding, conditional upon them filing undertakings of confidentiality and non-disclosure to their clients — Series of hearings included arguments to disclose evidence to respondent media outlets — Extradition judge allowed respondents' application to be permitted to review documents, conditional upon filing undertakings of non-disclosure — Named person and Attorney General appealed — Appeal allowed — Extradition judge's order set aside — Extradition judge erroneously found that common law rule requiring publication ban was discretionary — Informer privilege rule provides all informers with general protection so important that it is beyond judge's discretion — Permitting judicial discretion would undermine rule's underlying rationale of encouraging would-be informers to come forward secure in their safety, as there would be significant disincentive to do so if judges had power to decide on ad hoc basis whether to protect informer privilege — Appointment of amicus curiae was unwarranted because determination of proper legal test to be applied was responsibility of extradition judge — Procedure set out to reconcile principle of informer privilege and open court principle emphasized mandatory nature of informer privilege rule.

Evidence --- Privilege — Miscellaneous

During extradition hearing, appellant named person successfully applied for order that proceedings continue in camera with consent of appellant Attorney General of Canada, acting on behalf of requesting state — When both appellants submitted that proceedings should remain in camera because named person was confidential police informer, extradition judge invited certain media counsel to in camera proceeding, conditional upon them filing undertakings of confidentiality and non-disclosure to their clients — Series of hearings included arguments to disclose evidence to respondent media outlets — Extradition judge allowed respondents' application to be permitted to review documents, conditional upon filing undertakings of non-disclosure — Named person and Attorney General appealed — Appeal allowed — Extradition judge's order set aside — Extradition judge erred in finding that named person compromised privilege by revealing his status — Present case was exceptional because informer is not usually party to proceedings and because named person came forward for very purpose of enforcing confidential informer agreement — Procedure set out to reconcile principle of informer privilege and open court principle emphasized mandatory nature of informer privilege rule — When individual wishes to claim informer privilege, proceedings should continue in camera with only individual and Attorney General granted standing and access — Once established to judge's satisfaction that individual is confidential informer, then privilege applies — While media groups may subsequently make submissions on proper procedure in given case, judge must be extremely careful in determining what material to give to media — Material must be limited to non-identifying information that can provide general basis from which media can argue to what extent proceedings should be heard in open court.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Liberté d'expression — Dispositions exigeant la divulgation de renseignements

Dans le cadre d'une audience d'extradition, la personne désignée, appelante, a demandé au tribunal d'ordonner le huis clos pour la poursuite de l'instance avec le consentement du procureur général du Canada, représentant l'État requérant — Lorsque les deux appelants ont fait valoir que la suite des procédures devrait se dérouler à huis clos parce que la personne désignée était un indicateur confidentiel de la police, le juge d'extradition, à la suggestion de l'amicus curiae qu'il avait nommé, a invité certains avocats des médias à assister à l'audience à huis clos à la condition que ces derniers remplissent un engagement de confidentialité et de non-communication à leurs clients — Plusieurs arguments ont été plaidés au cours des audiences en faveur de la communication de la preuve aux médias intimés — Juge d'extradition a accueilli la requête des intimés les autorisant à passer en revue les documents, après le dépôt de leurs engagements de non-communication — Personne désignée et le procureur général ont formé un pourvoi — Pourvoi accueilli — Ordonnance du juge d'extradition a été annulée — Bien que le principe de la publicité des débats judiciaires prévoit que toute information présentée au tribunal doit être rendue publique, la règle du privilège relatif aux indicateurs de police assure une interdiction quasi absolue de révéler toute information pouvant permettre d'identifier un indicateur confidentiel — Juge du procès n'a aucune discrétion relativement à la règle du privilège relatif aux indicateurs de police et se doit de l'appliquer; toutefois, pour faire en sorte que le principe de la publicité des débats judiciaires reçoive pleinement effet, le privilège relatif aux indicateurs de police ne devrait se limiter qu'aux informations qui risqueraient de révéler l'identité de l'indicateur — Procédure applicable afin de

(B.C. S.C.), granting respondent media outlets' application for access to information related to in camera proceeding.

POURVOI à l'encontre d'un jugement publié à *Application to proceed in camera, Re* (2006), 2006 BCSC 1805, 2006 CarswellBC 2957 (B.C. S.C.), ayant accueilli la requête des médias intimés visant à obtenir une autorisation leur permettant d'accéder à l'information concernant des procédures tenues à huis clos.

***Bastarache J.*:**

I. Introduction

1 Information is at the heart of any legal system. Police investigate crimes and act on the information they acquire; lawyers and witnesses present information to courts; juries and judges make decisions based on that information; and those decisions, reported by the popular and legal press, make up the basis of the law in future cases. In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public. However, from time to time, the safety or privacy interests of individuals or groups and the preservation of the legal system as a whole require that some information be kept secret.

2 This case is about a conflict between two principles, each vital to Canadian law, which pull in fundamentally opposite directions *vis-à-vis* the treatment of information in our legal system. On the one hand is the open court principle, which, as has been repeatedly recognized by this Court, provides that court proceedings should presumptively be a matter of public record. On the other hand lies informer privilege, an age-old privilege according to which the identity of a confidential informer cannot be exposed under any but the narrowest of exceptions.

3 In this case, the appellant, whose name cannot be disclosed, informed the Extradition Judge (who, along with the Named Person, is referred to in the masculine), during an *in camera* portion of the extradition proceedings, that he was a confidential police informer, and on that basis requested some disclosure from the appellant Attorney General of Canada, who was acting in the extradition proceeding on behalf of the state requesting the Named Person's extradition. Upon learning of the existence of these extradition proceedings, the respondents claimed a right to publicize details of the proceedings and to have access to information alleged to be protected by informer privilege.

4 The question posed to this Court is how to satisfy the interests which underlie the Named Person's privilege in light of the interests which underlie the open court principle on the basis of which the respondents claim a right to publish details of the proceedings. In my view, informer privilege must remain absolute. Information which might tend to identify a confidential informant cannot be revealed, except where the innocence of a criminal accused is at stake. Open courts are undoubtedly a vital part of our legal system and of our society, but their openness cannot be allowed to fundamentally compromise the criminal justice system. The appeal should therefore be allowed.

II. Judicial History

5 This appeal is from an order made in the course of an extradition hearing before a judge of the Supreme Court of British Columbia, sitting as an extradition judge (the "Extradition Judge"). (The facts are taken, except where noted otherwise, from the Statement of Non-Identifying Facts, found in the public file at AR, pp. 105-9.) The appellant Named Person was the subject of the extradition hearing, having been charged with an offence in the requesting state. The appellant Attorney General of Canada was a party to the extradition hearing, acting on behalf of the requesting state.

6 At some point during the hearing, the Named Person applied for an order that the proceedings continue *in camera*. The Attorney General consented and the Extradition Judge allowed the application.

7 While the proceedings were taking place *in camera*, the Named Person made it known that he wished to apply for a stay of his extradition on the grounds that his rights under the *Canadian Charter of Rights and Freedoms* had been breached. In support of the application for a stay, the Named Person disclosed to the Extradition Judge that he was a confidential police

privilege. Thus the protection is not limited simply to the informer's name, but extends to any information that might lead to identification.

27 The informer privilege rule admits but one exception: it can be abridged if necessary to establish innocence in a criminal trial (there are no exceptions to the rule in civil proceedings). According to the innocence at stake exception, "there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused": *Leipert*, at para. 21. It stands to be emphasized that the exception will apply only if there is an evidentiary basis for the conclusion; mere speculation will not suffice: Sopinka, Lederman and Bryant, at p. 884. The exception applies only where disclosure of the informer's identity is the *only* way that the accused can establish innocence: *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32 (S.C.C.), at para. 4.

28 In this Court's decision in *Leipert*, it was clearly established that innocence at stake is the *only* exception to the informer privilege rule. The rule does not allow an exception for the right to make full answer and defence. Nor does the rule allow an exception for disclosure under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). Indeed, the Court's decision in *Leipert* suggests, at para. 24, that an absolute informer privilege rule, subject only to the innocence at stake exception, is consistent with the *Charter*'s provisions dealing with trial rights:

> To the extent that rules and privileges stand in the way of an innocent person establishing his or her innocence, they must yield to the *Charter* guarantee of a fair trial. The common law rule of informer privilege, however, does not offend this principle. From its earliest days, the rule has affirmed the priority of the policy of the law "that an innocent man is not to be condemned when his innocence can be proved" by permitting an exception to the privilege where innocence is at stake: *Marks v. Beyfus* [(1980), 25 Q.B.D. 494 (C.A.)]. It is therefore not surprising that this Court has repeatedly referred to informer privilege as an example of the policy of the law that the innocent should not be convicted, rather than as a deviation from it.

29 For the sake of clarity, it is useful to pause here to explain the law regarding what were argued before us as some "other" exceptions to the informer privilege rule. As already noted, the only real exception to the informer privilege rule is the innocence at stake exception: *Leipert*. All other purported exceptions to the rule are either applications of the innocence at stake exception or else examples of situations in which the privilege does not actually apply. For example, situations in which the informer is a material witness to a crime fall within the innocence at stake exception: *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 996. The privilege does not apply to an individual whose role extends beyond that of an informer to being an *agent provocateur*: *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.); Hubbard, Magotiaux and Duncan, at p. 2-28. Similarly, situations in which s. 8 of the *Charter* is invoked to argue that a search was not undertaken on reasonable grounds may fall within the innocence at stake exception: *Scott*. Thus, as I noted, the only time that the privilege, once found, can be breached, is in the case of an accused raising the innocence at stake exception. All other so-called exceptions are simply applications of this one true exception: *Scott*, at p. 996; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (4th ed. 2005), at p. 254.

30 In conclusion, the general rationale for the informer privilege rule requires a privilege which is extremely broad and powerful. Once a trial judge is satisfied that the privilege exists, a complete and total bar on any disclosure of the informer's identity applies. Outside the innocence at stake exception, the rule's protection is absolute. No case-by-case weighing of the justification for the privilege is permitted. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time.

B. The Open Court Principle

31 The "open court principle" is a "hallmark of a democratic society", as this Court said in *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43 (S.C.C.), at para. 23. This principle, as the Court noted in that case, "has long been recognized as a cornerstone of the common law" (para. 24), and has been recognized as part of the law since as far back as *Scott v. Scott*, [1913] A.C. 417 (U.K. H.L.), and *Trinidad & Tobago (Attorney General) v. Ambard*, [1936] A.C. 322 (Trinidad & Tobago P.C.), where Lord Atkin wrote, at p. 335: "Justice is not a cloistered virtue". "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity" (J. H. Burton, ed., *Benthamiana: Or, Select Extracts*

from the Works of Jeremy Bentham (1843), p. 115).

32 Open courts have several distinct benefits. Public access to the courts allows anyone who cares to know the opportunity to see "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) ("*CBC*"), at para. 22. An open court is more likely to be an independent and impartial court. Justice seen to be done is in that way justice more likely to be done. The openness of our courts is a "principal component" of their legitimacy: *Vancouver Sun*, at para. 25.

33 In addition to its longstanding role as a common law rule required by the rule of law, the open court principle gains importance from its clear association with free expression protected by s. 2(*b*) of the *Charter*. In the context of this appeal, it is important to note that s. 2(*b*) provides that the state must not interfere with an individual's ability to "inspect and copy public records and documents, including judicial records and documents" (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.), at p. 1338, citing *Nixon v. Warner Communications Inc.*, 435 U.S. 589 (U.S.S.C. 1978), at p. 597). La Forest J. adds at para. 24 of *CBC*: "[e]ssential to the freedom of the press to provide information to the public is the ability of the press to *have access to this information*" (emphasis added). Section 2(*b*) also protects the ability of the press to have access to court proceedings (*CBC*, at para. 23; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 (S.C.C.), at para. 53).

34 Returning to our examination of the open court principle, I note that it is clearly a broad principle of general application to all judicial proceedings. The principle has gained some jurisprudential purchase through this Court's decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.). In those decisions, the Court developed a test — colloquially known as the *Dagenais/Mentuck* test — "to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test": *Vancouver Sun*, at para. 28. The test has two parts, which mirror the minimal impairment and proportionality steps in the s. 1 analysis set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). The test was set out at para. 23 of *Mentuck*.

35 However, we need not delve into a detailed analysis of the *Daigenais/Mentuck* test. As the Court made clear in *Dagenais*, at pp. 874-75, the test was intended to apply only to exercises of discretionary power by a trial judge. This understanding of the test was reaffirmed in *Vancouver Sun* at para. 31, where Iacobucci and Arbour JJ. expanded the application of the test beyond discretionary publication bans (which were at issue in the *Dagenais* and *Mentuck* decisions) to "all *discretionary* actions by a trial judge to limit freedom of expression by the press during judicial proceedings" (emphasis added).

36 The *Daigenais/Mentuck* test has a wide area of application, but we must take caution not to widen it beyond its proper scope. The test was never intended to apply to all actions limiting freedom of expression in a court. The limitation to discretionary action was clear from the test's first incarnation in *Dagenais*, where Lamer C.J. wrote at pp. 874-75:

> Challenges to publication bands may be framed in several different ways, depending on the nature of the objection to the ban. If legislation <u>requires</u> a judge to order a publication ban, then any objection to that ban should be framed as a *Charter* challenge to the legislation itself. Similarly, if a common law rule <u>requires</u> a judge to order a publication ban or authorizes a judge to order a publication ban that infringes *Charter* rights in a manner not reasonably and demonstrably justified in a free and democratic society, then any objection to that ban should be framed as a *Charter* challenge to the common law rule.
>
> [Emphasis in original.]

37 As should now be clear from the examination of the informer privilege rule, it is this last situation which faces the Court in this case. *Daigenais/Mentuck,* insofar as that line of cases now represents a "test" for the application of the open court principle in discretionary action by courts, does not apply to the privilege in this case. The informer privilege rule does *not* provide a trial judge with a discretionary power to order a publication ban. Quite the contrary. When a trial judge finds that an informer privilege exists, then, as the Court stated in *Bisaillon c. Keable*, at p. 93, "[i]ts application does not depend on the judge's discretion, as it is a legal rule of public order by which the judge is bound".

A. Open Court Principle

(1) The Principle and the Rationale for It

81 The open court principle is now well established in Canadian law. This Court has on numerous occasions confirmed the fundamental importance and constitutional nature of this principle (see *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41 (S.C.C.); *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43 (S.C.C.); *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 (S.C.C.); *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.); *R. v. E. (O.N.)*, [2001] 3 S.C.R. 478, 2001 SCC 77 (S.C.C.); *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.); *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.); *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 (S.C.C.)). In general terms, the open court principle implies that justice must be done in public. Accordingly, legal proceedings are generally open to the public. The hearing rooms where the parties present their arguments to the court must be open to the public, which must have access to pleadings, evidence and court decisions. Furthermore, as a rule, no one appears in court, whether as a party or as a witness, under a pseudonym.

82 For centuries, the importance of the open court principle has been recognized at common law. Various justifications have been given for it. The oldest of these is probably the connection made between openness and the pursuit of truth. For example, Blackstone made the following comment in his *Commentaries on the Laws of England* (1768), vol. III, chap. 23, at p. 373:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk ....

In a similar vein, Wigmore made the following comment on the effect openness has on the quality of testimony:

> Its operation in tending to *improve the quality of testimony* is two-fold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.

> *Wigmore on Evidence*, vol. 6 (Chadbourn rev. 1976), — 1834, at pp. 435-36 (emphasis in original).)

83 Another frequently proposed justification for the principle is that openness fosters the integrity of judicial proceedings (see in particular *Edmonton Journal*, at p. 1360 (*per* Wilson J.)). Thus, it has been argued that all participants in judicial proceedings will be further induced to conduct themselves properly if they know that they are under the watchful eye of the public. This is what led Bentham to state that "[p]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity" (J. H. Burton, ed., *Benthamiana: or Select Extracts from the Works of Jeremy Bentham* (1843), at p. 115).

84 Openness ensures both that justice is done and that it is seen to be done. For justice to be seen to be done is necessary to preserve public confidence in the administration of justice. Bentham is often quoted in support of this argument, too:

> The effects of publicity are at their *maximum* of importance, when considered in relation to the judges; whether as insuring their integrity, or as producing public confidence in their judgments.

> (J. Bentham, *Treatise on Judicial Evidence* (1825), at p. 69 (emphasis in original).)

This Court adopted a similar argument in *Vancouver Sun*:

> Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts. [para. 25]

85 More recently, stress has been laid on the relationship between open courts and the promotion of democracy. (In my view, this is the justification that is most relevant in the case at bar.) The courts play a key role in a democracy, not only because they are where disputes between citizens can be resolved peacefully, but also — and perhaps most importantly — because they are where citizens' disputes with the state are decided. Furthermore, there is no denying that the importance of the courts' role is accentuated by the constantly increasing complexity of contemporary societies. It is therefore essential that what the courts do be open to public scrutiny in order both to improve the operation of the courts and to maintain public confidence in them (see *Edmonton Journal*, at p. 1337 (*per* Cory J.)).

86 Similarly, the "educational" aspect of an open court process has been noted in, for example, the following passage from the reasons of Wilson J. in *Edmonton Journal*:

> It provides an opportunity for the members of the community to acquire an understanding of how the courts work and how what goes on there affects them. Bentham recognized the importance of publicity in fostering public discussion of judicial matters, *Treatise on Judicial Evidence*, op. cit., at p. 68, and Wigmore pointed out in *Evidence*, op. cit., §1834, at p. 438, that "[t]he educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy". [pp. 1360-61]

87 Openness also ensures that matters considered in court are not debated only in the courts. It fosters the extension of such debates to other areas of society. In my view, this consideration played an important part in this Court's decision in *Mentuck* to uphold the trial judge's refusal to order a publication ban on the methods used by the police in investigating the accused. This Court found that the deleterious effects of such an order would be substantial, particularly because the freedom of the press to report information regarding a subject of great importance to any free and democratic society would be curtailed. I will reproduce the relevant passage insofar as the extradition judge appears to have had similar concerns in the case at bar:

> The deleterious effects, however, would be quite substantial. In the first place, the freedom of the press would be seriously curtailed in respect of an issue that may merit widespread public debate. A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state. The tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourage the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed critics of what may be controversial police actions.
>
> As this Court recognized in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976, "participation in social and political decision-making is to be fostered and encouraged", a principle fundamental to a free and democratic society. See *Switzman v. Elbling*, [1957] S.C.R. 285; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. Such participation is an empty exercise without the information the press can provide about the practices of government, including the police. In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the

> fabric of Canadian society and democracy. [paras. 50-51]

88 The open court principle, which was accepted long before the adoption of the *Charter*, is now enshrined in it. This is due to the fact that the principle is associated with the right to freedom of expression guaranteed by s. 2(*b*) of the *Charter*. It is clear that members of the public must have access to the courts in order to freely express their views on the operation of the courts and on the matters argued before them. The right to freedom of expression protects not only the right to express oneself on an issue, but also the right to gather the information needed to engage in expressive activity (see *Canadian Broadcasting Corp. v. New Brunswick*, at para. 27).

(2) Role of the Press

89 Of course, few citizens have the time to attend court proceedings. The scope of the open court principle would therefore be quite limited were it not for the corollary right of the press to have access to the courts and publish information on their operation. As Cory J. wrote in *Edmonton Journal*:

> That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings — the nature of the evidence that was called, the arguments presented, the comments made by the trial judge — in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media. [pp. 1339-40]

90 Thus, the right of the press to have access to the courts and report on what takes place in them is also guaranteed by s. 2(*b*) of the *Charter*, as was expressly recognized by this Court in *Canadian Broadcasting Corp. v. New Brunswick* (see the comments of La Forest J., at para. 26).

(3) Limits on the Open Court Principle

91 The open court principle is not absolute, however. A court generally has the power, in appropriate circumstances, to limit the openness of its proceedings by ordering publication bans, sealing documents, or holding hearings *in camera*. It can also authorize an individual to make submissions or appear in court under a pseudonym should this be necessary in the circumstances. In some cases, courts may be required by statute to order such measures. In others, they are merely authorized to do so, whether under legislation granting them this power or — where superior courts are concerned — pursuant to their inherent power to control their own processes. There are common law rules that also apply in such cases, and informer privilege establishes one of them. However, careful consideration must be given to the scope of the privilege and, where applicable, to whether the limits it places on the openness of court proceedings are necessary or how they are to be implemented.

92 As Lamer C.J. acknowledged in *Dagenais*, the wide range of possible situations means that the form of a challenge to an order limiting the openness of court proceedings will vary depending on the nature of the objection to the ban (at pp. 874 *et seq*.). Thus, if legislation or a common law rule *requires* a judge to make such an order, any objection to the order must be framed as a *Charter* challenge to that legislation or common law rule. If, however, the legislation or the common law rule merely grants the trial judge the discretion to make such an order, any *Charter* review must concern the exercise of this discretion in the specific case before the court. Discretionary powers must be exercised in a manner consistent with the *Charter*. For a judge to exceed the limits placed by the *Charter* on the exercise of such powers would be an error of law that

would justify setting the order aside.

93 To determine whether a legal rule compelling a trial judge to limit the openness of court proceedings is constitutional, it will be necessary to conduct the analysis adopted in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). Since such a rule eliminates the court's discretion to review the specific circumstances of the case before it, there is always a possibility that the rule's impairment of freedom of expression will not be minimal. Motivated by a desire to preserve the public nature of justice in Canada to the greatest extent possible, this Court has acted with reserve and circumspection in accepting such limits (see *Canadian Newspapers*).

94 In *Dagenais*, this Court developed, for the purpose of reviewing the constitutionality of the exercise of a discretion to limit the openness of court proceedings, an approach that incorporates the gist of the *Oakes* test, but is tailored to the specific context of the exercise of such a discretion. This approach was subsequently reformulated as follows in *Mentuck*:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para.32]

95 It is interesting to note that the Law Reform Commission of Canada had, in a working paper on public and media access to the criminal process, recommended that all automatic publication bans be eliminated from the *Criminal Code*, R.S.C. 1985, c. C-46. The Commission expressed the view that "there should always be room for a judge or justice to refuse to make an order limiting openness where there is no demonstrable need for it" (Working Paper 56, *Public and Media Access to the Criminal Process* (1987), at p. 45). It is indeed inconceivable that an order limiting openness could be justified if the need for it was not demonstrated. Recognizing that the trial judge has the discretion to make such an order eliminates this potential pitfall. It is thus up to the judge to weigh the interests at stake. In this context, a number of means are available to the judge to deal with the situation in a way that impairs freedom of expression as minimally as possible in the specific circumstances of a given case. These means range from a partial or temporary publication ban to a temporary or permanent sealing order regarding certain pieces of evidence to an order that proceedings be held entirely *in camera*.

(4) Distinction Between the Right of Access to the Courts and the Right to Inform the Public on Matters Before Them

96 It will now be necessary to turn to a problem relating to the definition of the rights flowing from the open court principle. The recognition of the right of the press to inform the public on court proceedings as a corollary to the public's right to open courts tends to lead to the view that these two rights are one and the same. However, a conceptual distinction must be maintained between them in order to deal with the difficulties that the application of this principle gives rise to in the relationships between these rights and other rights without taking the relevant values into consideration. For example, in certain situations, a judge might consider it appropriate — or might be required by legislation — to order a publication ban but not to order that the proceedings be held *in camera*. Such an order would restrict the right of the press to report on what happens in court. However, it would not infringe the more general right to open courts. In this sense, an order that proceedings be held *in camera* is more drastic because, in practice, it constitutes a publication ban, whereas the converse is not true.

97 The difference between the two types of orders can be seen in *Canadian Newspapers*, in which this Court ruled on the constitutionality of a statutory provision compelling the trial judge to order a publication ban in certain circumstances in sexual assault cases. On that occasion, the Court agreed that such a provision limits the right to freedom of expression guaranteed by s. 2(*b*) of the *Charter*. It nevertheless held that the provision was justified under s. 1 of the *Charter* because, *inter alia*, it did not require the trial judge to proceed *in camera* but, on the contrary, allowed the media to be present at the

TAB 5

2010 ONCA 726
Ontario Court of Appeal

Canadian Broadcasting Corp. v. R.

2010 CarswellOnt 8225, 2010 ONCA 726, [2010] O.J. No. 4615, 102 O.R. (3d) 673, 221 C.R.R. (2d) 242, 262 C.C.C. (3d) 455, 271 O.A.C. 7, 327 D.L.R. (4th) 470, 91 W.C.B. (2d) 175

Canadian Broadcasting Corporation (Applicant / Appellant in Appeal / Respondent in Cross-Appeal) and Her Majesty the Queen (Respondent / Respondent in Appeal) and Valentino Burnett, Karen Eves, Blaine Phibbs and Travis MacDonald (Respondents / Respondents in Appeal) and Waterloo Regional Police Service and The Office of the Chief Coroner (Respondents / Respondents in Appeal)and Correctional Service of Canada (Respondent / Respondent in Appeal / Appellant in Cross-Appeal)

Gloria Epstein J.A., John Laskin J.A., and Robert J. Sharpe J.A.

Heard: September 15, 2010
Judgment: November 1, 2010
Docket: CA C51613, C51617

Proceedings: reversing in part *Canadian Broadcasting Corp. v. R.* (2010), (sub nom. *R. v. Canadian Broadcasting Corp.)* 251 C.C.C. (3d) 414, 2010 CarswellOnt 707, 2010 ONSC 86 (Ont. S.C.J.)

Counsel: Patricia M. Latimer for Canadian Broadcasting Corporation
Joel Robichaud, Nancy Noble for Correctional Service of Canada
Lorenzo D. Policelli for Office of the Chief Coroner
Gary Melanson for Waterloo Regional Police Service

Subject: Criminal; Constitutional; Human Rights

Related Abridgment Classifications

Criminal law

IV Charter of Rights and Freedoms
IV.8 Freedom of expression [s. 2(b)]

Criminal law

VII Pre-trial procedure
VII.21 Public or publication ban order
VII.21.a General principles

Headnote

Criminal law --- Pre-trial procedure — Public or publication ban order — General principles

Release of exhibits to media where proceedings and publication ban ended — Inmate died at correctional facility — Officers were charged and preliminary inquiry was conducted — All officers were discharged upon preliminary inquiry, and publication ban expired — Media outlet brought unsuccessful application for access to all preliminary inquiry exhibits, including videotaped exhibits, for purpose of producing television documentary — Media outlet brought application for certiorari quashing decision of applications judge and ordering access to exhibits — Application was granted — Test for access to videotaped exhibits is in Supreme Court of Canada judgments, Dagenais and Mentuck — Media outlet was only entitled to view and copy portions of video evidence that were played at preliminary inquiry, and it was entitled to view but not copy portion of video that showed inmate's death — Media outlet appealed limitations; Correctional Service of Canada ("CSC") cross-appealed — Appeal allowed; cross-appeal dismissed — Principles enunciated in Dagenais and Mentuck were fully applicable to media outlet's requests — Case law has affirmed that right to access exhibits includes right to make copies — Most of decisions cited by CSC were distinguishable; debate over cameras in courtroom raised very different issues that did not concern case at bar — Application judge erred by limiting media outlet's right of access to only those exhibits that were played in open court — When exhibit is introduced as evidence to be used without restriction in judicial proceeding, entire exhibit becomes part of record — Further, application judge's perception that image of person dying was not something that needed to be broadcast was not based upon finding of potential harm to recognized legal interest.

Criminal law --- Charter of Rights and Freedoms — Freedom of expression [s. 2(b)]

Media's right to gather information.

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

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CTV Television v. Ontario Superior Court of Justice (2002), (sub nom. *CTV Television Inc. v. Toronto Police Service)* 157 O.A.C. 238, (sub nom. *CTV Television v. Toronto Police Service)* 163 C.C.C. (3d) 321, 17 C.P.C. (5th) 252, 59 O.R. (3d) 18, 5 C.R. (6th) 189, 2002 CarswellOnt 955 (Ont. C.A.) — considered

CTV Television Inc. v. R. (2006), 208 Man. R. (2d) 244, 383 W.A.C. 244, (sub nom. *R. v. Hogg)* 214 C.C.C. (3d) 70, (sub nom. *R. v. Hogg (re CTV Television Inc.))* 148 C.R.R. (2d) 249, 2006 CarswellMan 372, 2006 MBCA 132, [2006] 12 W.W.R. 200 (Man. C.A.) — considered

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R. v. Stark (1995), 1995 CarswellBC 1749 (B.C. S.C.) — referred to

R. v. Van Seters (1996), 1996 CarswellOnt 5489, 31 O.R. (3d) 19 (Ont. Gen. Div.) — referred to

Société Radio-Canada c. Québec (Procureur général) (2008), 62 C.R. (6th) 99, [2008] R.J.Q. 2303, 2008 CarswellQue 9893, 2008 CarswellQue 14639, 2008 QCCA 1910 (C.A. Que.) — referred to

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Generally — referred to

s. 2(b) — considered

s. 24(1) — considered

Coroners Act, R.S.O. 1990, c. C.37

s. 31 — considered

Criminal Code, R.S.C. 1985, c. C-46

s. 539 — referred to

s. 539(1)(c) — referred to

APPEAL from judgment, reported at *Canadian Broadcasting Corp. v. R.* (2010), (sub nom. *R. v. Canadian Broadcasting Corp.)* 251 C.C.C. (3d) 414, 2010 CarswellOnt 707, 2010 ONSC 86 (Ont. S.C.J.), allowing media outlet to view and copy portions of evidence that were played at preliminary inquiry.

***Robert J. Sharpe J.A.*:**

1 This appeal involves consideration of the media's right to access and copy exhibits filed at a preliminary inquiry. In October 2007, Ashley Smith died in custody at the Grand Valley Institution for Women. Four correctional officers were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry where certain exhibits were introduced into evidence. The exhibits included video recordings, one of which captured the actual circumstances of Ashley Smith's death. Part way through the preliminary inquiry, the Crown decided not to proceed with the charges and the four correctional officers were discharged. A coroner's warrant was subsequently issued for the seizure of all documents related to Ashley Smith's death including the preliminary inquiry exhibits.

2 The appellant Canadian Broadcasting Corporation ("CBC") decided to produce an investigative documentary on Ashley Smith's tragic life. CBC sought access to and copies of the preliminary inquiry exhibits. The preliminary inquiry judge refused CBC's request on the ground that he should not interfere with the process of the coroner's inquest. The application judge granted certiorari to review that order and held that CBC was entitled to access the exhibits, but he limited CBC's rights in certain respects. In particular, he held that CBC was entitled to view and copy only those portions of the video evidence that were actually played at the preliminary inquiry, and that CBC was entitled to view but not copy the portion of the video that was played showing Ashley Smith's death.

3 CBC appeals the limitations imposed on its right to access and copy the exhibits. The Correctional Service of Canada ("CSC") cross-appeals arguing that the application judge erred by applying the *Dagenais/Mentuck* test and granting CBC any right to copy the exhibits.

Facts

4 Ashley Smith, a 19-year-old from Moncton, New Brunswick, was serving a six-year sentence at the Grand Valley Institution for Women in Kitchener. On October 19, 2007, while under observation in an isolation cell, she strangled herself with a strip of cloth. Four correctional officers employed by CSC were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry in November 2008. A publication ban was imposed pursuant to s. 539 of the *Criminal Code*. The exhibits entered into evidence included photographs, documents and audio and video recordings relating to CSC's management of Ashley Smith. Although these recordings were marked as exhibits in their entirety, only portions were actually played in open court. The portion of one of the video recordings showing the actual circumstances of Ashley Smith's death was played in open court.

5 Several days into the preliminary inquiry, the Crown determined that there was no reasonable prospect of any of the accused being convicted and decided not to proceed with the charges. All four accused were discharged. As the preliminary inquiry had concluded, the publication ban expired pursuant to s. 539(1)(c) of the *Criminal Code*. The exhibits were returned to the investigating police force, the Waterloo Region Police Service ("WRPS"), and then given to the Office of the Chief Coroner ("OCC") pursuant to a coroner's warrant for the purpose of a coroner's inquest into Ashley Smith's death.

6 Several CSC employees were disciplined and grievances were filed. The estate and members of Ashley Smith's family commenced a civil action against CSC.

Proceedings in the Ontario Court of Justice and Superior Court of Justice

7 In July 2009, some seven months after the conclusion of the preliminary inquiry, CBC applied to the Ontario Court of Justice for access to the preliminary inquiry exhibits. CBC wanted copies of the exhibits to use in a proposed documentary on Ashley Smith's life for the series *the fifth estate*. The preliminary inquiry judge held that he retained jurisdiction over the exhibits but he refused to deal with CBC's request on the ground that he should not interfere with the process of the coroner's inquest.

8 CBC sought certiorari in the Superior Court of Justice to quash the decision of the preliminary inquiry judge and an order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* granting it access to and the right to copy the exhibits. The application judge found that the preliminary inquiry judge erred by refusing to deal with CBC's application on the merits, and then turned to CBC's application for a s. 24(1) *Charter* remedy.

9 The application judge held that the principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442 (S.C.C.), generally know as the "*Dagenais*/*Mentuck*" test, applied to CBC's request. The *Dagenais*/*Mentuck* test requires the party opposing media access to demonstrate that the order is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties and the public.

10 The application judge concluded that the respondents could not satisfy that onus and that CBC was entitled to access the preliminary inquiry exhibits subject to a number of exceptions and limitations. CBC takes no issue with the following exceptions and limitations imposed by the application judge:

• the faces of any CSC officer or any other individual who did not consent to their faces being shown was to be digitally obscured;

• the audio recordings were to be edited to remove the names of any corrections officers or other person who did not consent to their name being broadcast;

• the copying and editing of the video and audio recordings was to be done so as to maintain the integrity of the original recordings;

• the exhibits are to be used solely for use in a documentary by *the fifth estate*;

• no copies are to be made of the exhibits other than for that use;

• copies of the exhibits are not to be posted on any internet site except as part of a documentary by *the fifth estate*.

11 CBC appeals the following exceptions and limitations imposed by the application judge, namely, that it:

• is entitled to access and copy only the portions of the video recordings that were played in open court;

• is entitled to view but not copy the portion of the video showing Ashley Smith's death that was played in open court;

• is entitled to view but not to copy the portion of one video recording showing four correctional officers entering the segregation unit;

• where it is uncertain what portion of an exhibit was actually played in open court CBC was denied any access to that exhibit.

12 The application judge denied the OCC's request for an order delaying release of the exhibits until completion of the coroner's inquest.

13 On January 8, 2010, CBC aired *the fifth estate* documentary on the life of Ashley Smith which incorporated some video footage from the exhibits copied in accordance with the application judge's order.

Issues

14 CBC appeals the restrictions imposed by the application judge on its right to access and copy the exhibits that I have identified in para. 11 of these reasons. The respondent CSC cross-appeals the order granting CBC the right to access and copy the exhibits. The respondent OCC takes the position that the application judge should have deferred CBC's request to the coroner presiding at the coroner's inquest into Ashley Smith's death. The respondent WRPS essentially supports the order of the application judge.

15 As the cross-appeal raises the fundamental issue of whether CBC was entitled to any access to the exhibits, I will deal with that issue first. I will then turn to the issues raised by CBC's appeal as to the limitations imposed on its right to access and copy the exhibits.

16 The issues may be summarized as follows:

1. Did the application judge err by applying the *Dagenais*/*Mentuck* test to CBC's request?

2. Did the application judge err by limiting CBC's right to access and copy the exhibits?

3. Did the application judge err by failing to give adequate consideration to the coordinate jurisdiction of the OCC?

Analysis

1. Did the Application Judge Err by Applying the Dagenais/Mentuck Test to CBC's Request?

17 CSC submits that the application judge erred by applying the *Dagenais*/*Mentuck* test to CBC's request to access and obtain copies of exhibits. CSC argues that *Vickery v. Nova Scotia (Prothonotary, Supreme Court)*, [1991] 1 S.C.R. 671 (S.C.C.), governs such requests and required that CBC satisfy the onus of demonstrating why it was entitled to copies of the exhibits. CSC argues that the open court principle allows the public and the media to attend court and to listen to and observe the evidence as it is given, but does not stand for the proposition that the media is entitled to obtain copies of the exhibits and

to publish or broadcast the copies.

18 *Vickery* involved a media request for access to an accused's alleged confession that had been excluded at a murder trial. The accused was acquitted and a journalist sought access to the alleged confession. By a 6-3 majority, the Supreme Court denied access, essentially on the ground that the acquitted accused's privacy interest and the need to protect the innocent outweighed the public's right of access.

19 *Vickery* preceded *Dagenais* and *Mentuck*. In *Vickery*, the Supreme Court of Canada expressly refused to consider the *Charter* as the journalist seeking access had not raised the *Charter* at first instance. As *Dagenais* and *Mentuck* make clear, the *Charter* has fundamentally altered the legal landscape in relation to court orders limiting freedom of the press in relation to court proceedings. *Vickery* plainly did not take into account that fundamental legal change. And, as the application judge rightly observed at para.14, *Vickery* did not purport "to formulate a general rule for regulating access to audio and video recordings which were made court exhibits."

20 For the Supreme Court's post-*Charter* test that applies to all discretionary decisions limiting freedom of the press in relation to court proceedings, it is to *Dagenais* and *Mentuck* that one must turn. The *Dagenais*/*Mentuck* test, as restated in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 (S.C.C.) at para. 26, reflects the importance of the open court principle and the rights of freedom of expression and freedom of the press in relation to judicial proceedings. Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the restriction outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

21 While the *Dagenais*/*Mentuck* test was developed in the context of publication bans, the Supreme Court has stated that it applies any time s. 2(b) freedom of expression and freedom of the press rights are engaged in relation to judicial proceedings: "[T]he *Dagenais*/*Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings": *Toronto Star* at para. 7 (emphasis in original). See also *Vancouver Sun, Re*, [2004] 2 S.C.R. 332 (S.C.C.) at paras. 30-31.

22 The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the *Charter*: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.) at p. 184. As Dickson J. stated at pp. 186-187: "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance."

23 Now recognized as a fundamental aspect of the rights guaranteed by s. 2(b) of the *Charter*, the open court principle has taken on added force as "one of the hallmarks of a democratic society" that deserves constitutional protection: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) at para. 22.

24 The open court principle and the rights conferred by s. 2(b) of the *Charter* embrace not only the media's right to publish or broadcast information about court proceedings, but also the media's right to gather that information, and the rights of listeners to receive the information. "[T]he press must be guaranteed access to the courts in order to gather information" and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.": *CBC v. New Brunswick* at paras. 23-26. In *Vancouver Sun (Re)* at para. 25, the Supreme Court of Canada described the openness of the courts and judicial processes as being "necessary to maintain the independence and

impartiality of courts", "integral to public confidence in the justice system" and "a principal component of the legitimacy of the judicial process".

25 I am unable to accept CSC's submission that the *Dagenais*/*Mentuck* test does not apply to media requests for access to exhibits. That argument has been properly and firmly rejected by two provincial appellate courts. In *R. v. Fry* (2010), 254 C.C.C. (3d) 394 (B.C. C.A.) at para. 65, a majority of the British Columbia Court of Appeal held that "the principles enunciated by the Supreme Court of Canada" in *Dagenais* and *Mentuck* "are fully applicable" to a media request for access to and the right to copy an exhibit after the conclusion of a trial. *CTV Television Inc. v. R.* (2006), 208 Man. R. (2d) 244 (Man. C.A.) [hereinafter R. v. Hogg] is to the same effect. The Manitoba Court of Appeal applied the *Dagenais*/*Mentuck* test to assess the media's right to access a video recording of a statement made by an accused person that had been entered as an exhibit at a preliminary inquiry.

26 To paraphrase Fish J. in *Toronto Star* at para 30, CSC's argument that the *Dagenais*/*Mentuck* test does not apply to CBC's right to access and copy exhibits "is doomed to failure by more than two decades of unwavering decisions" from the Supreme Court and from provincial courts of appeal.

27 In my view, the authority of *Vickery*, post *Dagenais* and *Mentuck*, is limited. The case still stands as authority for the proposition that concern for the protection of the privacy and reputation of innocent persons are among the factors to be considered and weighed by the judge applying the *Dagenais*/*Mentuck* test, although under *Dagenais*/*Mentuck*, privacy interests and the protection of the innocent no longer automatically trump the public's right to access: *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry Commissioner* (2007), 278 D.L.R. (4th) 550 (Ont. C.A.) at para. 42.

(i) Are the media's rights limited to attending court and observing and reporting on what transpires in the courtroom?

28 I do not agree with CSC's submission that the open court principle and the media's s. 2(b) *Charter* rights are limited to attending court and observing and reporting on what actually transpires in the courtroom. Even before the *Charter*, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognized aspect of the open court principle: *MacIntyre*. That approach was endorsed in *Vancouver Sun* at para. 27:

> [T]he principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage....[In *MacIntyre*,] Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy".

29 Likewise, in *Toronto Star*, the Supreme Court applied the *Dagenais*/*Mentuck* test to a Crown application to seal search warrant materials, thereby underlining that *Dagenais*/*Mentuck* applies to ensure the "openness of the judicial process", not only what actually transpires in open court. CSC's argument was implicitly rejected by this court in *CTV Television v. Ontario Superior Court of Justice* (2002), 59 O.R. (3d) 18 (Ont. C.A.), where the court held that the jurisdiction to order access to exhibits does not vanish simply because the exhibits were filed in open court.

30 In *Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc.*, [2001] 2 S.C.R. 743 (S.C.C.) at para. 72, the Supreme Court defined the media's right to access to court records and exhibits very broadly and in terms that are inconsistent with notion of a bare right to report on what actually transpires in open court:

> [O]nce the trial begins, and except for the limited number of cases held *in camera* or subject to a publication ban, *the media will have broad access to the court records, exhibits and documents filed by the parties, as well as to the court sittings*. They have a *firm guarantee of access*, to protect the public's right to information about the civil or criminal justice systems and freedom of the press and freedom of expression.

[Emphasis added.]

(ii) Does the right to access exhibits include the right to make copies?

31 In my view, absent the proof of some countervailing interest sufficient to satisfy the *Dagenais*/*Mentuck* test, the right to access exhibits includes the right to make copies.

32 While the Supreme Court of Canada appears not to have directly ruled on this point, there are *dicta* in at least two Supreme Court decisions supporting the proposition that the right to access exhibits includes the right to make copies.

33 In *Application to proceed in camera, Re*, [2007] 3 S.C.R. 253 (S.C.C.) at para 33, the court reaffirmed the holding in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.) at p. 1338, that the right to access exhibits includes the right to make copies as "s. 2(b) provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents, including judicial records and documents'."

34 We were referred to a long list of first instance decisions dealing with the right to make copies. While those decisions are not entirely consistent, the clear preponderance of authority applies the *Dagenais*/*Mentuck* test to such requests and allows for copies to be made.

35 Most, if not all, of the decisions cited by CSC in support of the argument that there is no right to copy exhibits are readily distinguishable. *R. v. Pilarinos* (2001), 158 C.C.C. (3d) 1 (B.C. S.C.), dealt with the British Columbia Supreme Court's policy banning cameras from the courtroom. Likewise, *Société Radio-Canada c. Québec (Procureur général)*, 2008 QCCA 1910 (C.A. Que.), dealt with restrictions on holding interviews and recording images within the courthouse and the prohibition of broadcasts of court hearings. The debate over cameras in the courtroom and the right to broadcast court proceedings raises very different issues that do not concern us in this appeal.

36 Three cases cited by CSC dealt with the impact of allowing access on fair trial rights in ongoing criminal trials. In *Canadian Broadcasting Corp. v. R.* (2007), 222 C.C.C. (3d) 106 (Ont. S.C.J.), the trial judge refused to allow a media request to copy an exhibit, but he did so because he was satisfied (at para. 86) that "to permit dissemination to occur...would pose a real and substantial risk to [the accused's] right to a fair trial." *R. v. Cairn-Duff* (2008), 237 C.C.C. (3d) 181 (Alta. Q.B.), also dealt with a mid-trial request to copy an exhibit. While there are certainly some statements in that case that could be taken to support CSC's position, the trial judge also referred to the need to protect the accused's right to a fair trial and the failure of the media to give notice to all persons who might be affected by allowing copies to be made.

37 *R. c. Dufour*, 2008 CarswellQue 14365 (C.S. Que.), leave to appeal granted, [2009] S.C.C.A. No. 84 (S.C.C.), also dealt with a mid-trial application for access to a video recording of a statement made by the accused. The trial judge denied that request on the ground that Rules of Practice of the Superior Court prohibit the broadcast of the proceedings of the court.

38 In my view, the cases cited by CSC do not establish anything approaching a general rule or practice that the media are not entitled to copies of exhibits filed in judicial proceedings. In the present case, there is no fair trial interest to protect, as all four accused were discharged at the preliminary inquiry, and no suggestion that the ban on cameras in the courtroom applies.

39 On the other side of the ledger, there is a very long line of cases that permit the media to make copies of exhibits. In *R. v. Hogg*, the media sought access to a video recording of an accused that had been introduced at a preliminary inquiry. The accused pleaded guilty at trial and received a conditional sentence. The Crown successfully appealed the sentence and a custodial term was imposed. At that point, the media sought access to the video recording of the statement and the right to make a copy for purposes of broadcast. The Manitoba Court of Appeal held at para. 47 that the media were "entitled to have access to and copy the videotape subject to any condition the court officers may impose to preserve the integrity of the exhibit." For other cases allowing the right to access and copy exhibits, see e.g.: *R. v. Fry*; *Canadian Broadcasting Corp. v. R.* (2008), 232 C.C.C. (3d) 445 (Ont. S.C.J.); *CanWest MediaWorks Inc. v. R.* (2007), 213 Man. R. (2d) 233 (Man. Q.B.); *R. v. Hilderman* (2006), 395 A.R. 218 (Alta. Q.B.); *R. v. Black*, 2006 BCSC 2040 (B.C. S.C.); *R. v. Arenburg* (1997), 38 O.T.C. 91 (Ont. Gen. Div.); *R. v. Van Seters* (1996), 31 O.R. (3d) 19 (Ont. Gen. Div.); *R. v. Stark*, [1995] B.C.J. No. 3064 (B.C. S.C.).

(iii) Conclusion: application of the Dagenais/Mentuck test.

40 I conclude that the trial judge was correct in applying the *Dagenais*/*Mentuck* test to CBC's request for access to and copies of the exhibits at issue in this case. If CBC is to be denied access, or to have its access limited, it is for the party seeking to assert or uphold that denial to demonstrate through convincing evidence that the two-part *Dagenais*/*Mentuck* test has been satisfied.

41 Accordingly, I would dismiss the cross-appeal.

2. Did the Application Judge Err by Limiting CBCs Right to Access and Copy the Exhibits?

(a) Is access and the right to copy limited to only those portions of the videos played in open court?

42 In my view, the application judge erred by limiting CBC's right of access to only those portions of the exhibits that were played in open court. While this result follows from much of what I have already said about the application of the *Dagenais*/*Mentuck* test, I add the following considerations.

43 When an exhibit is introduced as evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes a part of the record in the case. While a party may choose to read or play only portions of the exhibit in open court, the trier of fact, whether judge or jury, is not limited to considering only those portions when deciding the case. A party who introduces an exhibit without restriction cannot limit the attention of the trier of fact to only portions of the exhibit that favour that party and that the party chooses to read out or play in open court.

44 As the entire exhibit is evidence to be used in deciding the case, I can see no principled reason to restrict access to only those portions played or read out in open court. When Dickson J. articulated and applied the open court principle to accord a journalist access to an affidavit filed in support of a search warrant application in *MacIntrye*, he was plainly confronted with material that had not been read out in open court. Yet he did not hesitate to order access. Absent some countervailing consideration sufficient to satisfy the *Dagenais*/*Mentuck* test, the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record, subject to any specific order to the contrary.

45 Accordingly, it is my view that the application judge erred by limiting CBC's access to only those portions of the exhibits that were played in open court.

(b) Did the Application Judge Err by Refusing CBC the Right to Copy the Portion of the Video Exhibit Showing the Actual Circumstances of the Death of Ashley Smith?

46 The application judge did not give extensive reasons for refusing CBC the right to copy the portion of the video showing the circumstances of the death of Ashley Smith. He stated at para. 49:

> I have decided that the CBC should be entitled to access to the video recording of Ashley Smith's death but not to have a copy of the recording. The gruesome image of a person dying is not something that I feel needs to be broadcast to the general public. By allowing the CBC access to the recording, will permit a verbal description to be broadcast, which in my view is sufficient.

47 We have viewed the contested portion of the video and it is certainly disturbing. However, I am not persuaded that there is anything in the record before us that can be invoked to justify the limitation imposed by the application judge, whether under the *Dagenais*/*Mentuck* test or under any other legal rule or principle.

48 The circumstances of this case are distinguishable from *R. v. Bernardo*, [1995] O.J. No. 1472 (Ont. Gen. Div.), leave to appeal refused, [1995] S.C.C.A. No. 250 (S.C.C.), further appeal dismissed for lack of jurisdiction, (1998), 122 C.C.C. (3d) 475 (Ont. C.A.), where the trial judge made an order relating to the treatment at trial of video tape evidence depicting in explicit detail the sexual assaults and rapes of four young girls, three of who were murder victims. LeSage A.C.J.O.C. applied the *Dagenais* test and, after a careful review of the evidence and the competing *Charter* arguments, concluded that the case for restricting access had been made out. He ruled that when the evidence was played, it should be visible only to the judge, the jury, counsel, the accused and to the extent necessary, court staff. No limit was imposed on the access to the audio portion of the exhibit. LeSage A.C.J.O.C. stated at para. 121 that the evidence established that "the harm that flows from the public display of this videotape evidence far exceeds any benefit that will flow from the public exposure of sexual assault and child pornography." LeSage A.C.J.O.C. found, again at para. 121, that the families of the victims would

> ...suffer tremendous psychological, emotional and mental injury if the evidence, as the Crown has described it in the opening statement, that is rape; anal and vaginal, the forced fellatio, cunnilingus, anilingus, forcing of the neck of a wine bottle in both the vagina and anus of one of these young women, is publicly displayed.

49 There are no comparable findings in this case. The application judge's perception that "[t]he gruesome image of a person dying is not something that I feel needs to be broadcast to the general public" is not based upon a finding of potential harm or injury to a recognized legal interest. Ashley Smith's mother, willing to have the circumstances of her daughter's death publicly considered, asserts no claim to privacy and agrees that CBC should have access and no other member of Ashley Smith's family has objected.

50 With respect, absent any finding of potential harm or injury to a legally protected interest, there is nothing in the law that permits a judge to impose his or her opinion about what does not need to be broadcast to the general public. That would be inconsistent with the constitutional protection our legal order accords freedom of expression and freedom of the press. In this case, there is no finding of harm or injury capable of overriding a constitutional guarantee, and I would set aside that part of the application judge's order.

(c) Other limitations

51 CBC also raises the issue of the propriety of the restriction the application judge imposed on copying a portion of exhibit 41 because it "is something about which the Correction Service of Canada has security concerns". The evidence in support of that contention is limited to a bald assertion and, having viewed the exhibit, it is very difficult to discern what the security concern would be. In my view, the evidence led to support this restriction on access falls well short of the "convincing evidence" required to satisfy the *Dagenais*/*Mentuck* test. Accordingly, I would set aside that part of the application judge's order.

3. Did the Application Judge Err by Failing to Give Adequate Consideration to the Coordinate Jurisdiction of the OCC?

52 The OCC takes the position that the presiding coroner is in the best position to decide the impact of publication or broadcast of exhibits on a pending inquest and that the application judge failed to take that into account. The OCC submits that the issue of the right to access and copy the exhibits should be left to the coroner presiding at the inquest into the death of Ashley Smith.

53 I am unable to accept that submission. As specified by s. 31 of the *Coroners Act*, R.S.O. 1990, c. C. 37, the coroner's jury will be prohibited from making any findings of legal responsibility in relation to Ashley Smith's death, but will be asked to make recommendations "directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest." There is nothing in this record to show that the order sought by CBC would interfere with the successful accomplishment of that mandate. In my view, the application judge quite properly concluded that there was no risk to the administration of justice arising from the pending coroner's inquest that would justify restricting CBC's access to the exhibits.

54 Nor, in the context of this case, does any possessory interest of the CSC, OCC or WRPS constitute a factor capable of precluding the court from exercising its jurisdiction over the exhibits and making an order in favour of CBC: see *CTV Television Inc.* at paras. 24-27.

Disposition

55 For these reasons, I would allow CBC's appeal and dismiss CSC's cross-appeal. The order of the application judge should be amended in accordance with these reasons.

***John Laskin J.A.*:**
I agree.

***Gloria Epstein J.A.*:**
I agree.

Appeal allowed; cross-appeal dismissed.

End of Document

TAB 6

Judge Richard Therrien, Q.C.J. *Appellant*

v.

The Minister of Justice *Respondent*

and

The Attorney General of Quebec *Respondent*

and

The Attorney General for Ontario, the Attorney General for New Brunswick, Office des droits des détenus and Association des services de réhabilitation sociale du Québec *Interveners*

INDEXED AS: THERRIEN (RE)

Neutral citation: 2001 SCC 35.

File No.: 27004.

2000: October 2; 2001: June 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Appeal — Supreme Court of Canada — Jurisdiction — Report of inquiry panel of Quebec Court of Appeal — Judicial ethics — Report of Court of Appeal recommending removal of Judge of Court of Québec — Whether Supreme Court has jurisdiction to hear appeal from report of Court of Appeal — Whether report a "judgment" within meaning of Supreme Court Act — Supreme Court Act, R.S.C. 1985, c. S-26, ss. 2(1), 40(1) — Courts of Justice Act, R.S.Q., c. T-16, s. 95.

Courts — Jurisdiction — Quebec Court of Appeal — Superior Court — Legal ethics — Court of Appeal hearing request by Minister of Justice concerning removal of Judge of Court of Québec — Judge concerned applying to Superior Court to have report of committee of inquiry

Le juge Richard Therrien, j.c.q. *Appelant*

c.

La ministre de la Justice *Intimée*

et

La procureure générale du Québec *Intimée*

et

Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, l'Office des droits des détenus et l'Association des services de réhabilitation sociale du Québec *Intervenants*

RÉPERTORIÉ : THERRIEN (RE)

Référence neutre : 2001 CSC 35.

N° du greffe : 27004.

2000 : 2 octobre; 2001 : 7 juin.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Appel — Cour suprême du Canada — Compétence — Rapport de la formation d'enquête de la Cour d'appel du Québec — Déontologie judiciaire — Rapport de la Cour d'appel recommandant la destitution d'un juge de la Cour du Québec — La Cour suprême a-t-elle compétence pour se saisir de l'appel du rapport de la Cour d'appel? — Ce rapport constitue-t-il un « jugement » au sens de la Loi sur la Cour suprême? — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 2(1), 40(1) — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Tribunaux — Compétence — Cour d'appel du Québec — Cour supérieure — Déontologie judiciaire — Cour d'appel saisie d'une requête du ministre de la Justice concernant la destitution d'un juge de la Cour du Québec — Juge concerné présentant en Cour supérieure *of Conseil de la magistrature quashed and challenge constitutionality of provision of provincial statute — Whether Superior Court has jurisdiction to hear application and motion — Whether Court of Appeal has exclusive jurisdiction to decide questions of law and jurisdiction in course of inquiry — Courts of Justice Act, R.S.Q., c. T-16, s. 95.*

Courts — Judges — Legal ethics — Conseil de la magistrature — Jurisdiction — Whether Conseil de la magistrature may examine conduct of judge even if breach of ethics occurred prior to appointment.

Constitutional law — Independence of judiciary — Security of tenure of judges — Provincial statute providing for removal of judge of provincial court without address of legislature — Whether provincial statute satisfies requirements of judicial independence — Constitution Act, 1867, preamble — Courts of Justice Act, R.S.Q., c. T-16, s. 95.

Constitutional law — Independence of judiciary — Security of tenure of judges — Provincial statute providing that government may remove judge only on report of Court of Appeal at request of Minister of Justice — Whether judicial office is secure against discretionary interference by Executive — Courts of Justice Act, R.S.Q., c. T-16, s. 95.

Administrative law — Natural justice — Duty to act fairly — Right to be heard — Complaint made to Conseil de la magistrature against Judge of Court of Québec — Committee of inquiry of Conseil recommending judge be removed — Whether judge had sufficient notice of findings that might be made by committee of inquiry — Whether judge had right to separate hearing on question of sanctions.

Administrative law — Natural justice — Duty to act fairly — Right to impartial hearing — Complaint made to Conseil de la magistrature against Judge of Court of Québec — Conseil bound to follow recommendations of committee of inquiry — Committee of inquiry recommending judge be removed — Whether decision-making structure of Conseil and committee of inquiry violates maxim delegatus non potest delegare — Whether presence of persons not members of judiciary at preliminary stage of disciplinary process violates institutional dimension of structural principle of judicial independence — Whether functioning of committee of inquiry,

des requêtes pour faire annuler le rapport du comité d'enquête du Conseil de la magistrature et contester la constitutionnalité d'une disposition d'une loi provinciale — La Cour supérieure a-t-elle compétence pour entendre ces requêtes? — La Cour d'appel a-t-elle compétence exclusive pour décider de questions de droit et de compétence dans le cadre de l'enquête? — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Tribunaux — Juges — Déontologie judiciaire — Conseil de la magistrature — Compétence — Le Conseil de la magistrature peut-il examiner la conduite d'un juge même si le manquement déontologique est antérieur à sa nomination?

Droit constitutionnel – Indépendance judiciaire — Inamovibilité des juges — Loi provinciale prévoyant la destitution d'un juge d'une cour provinciale sans adresse parlementaire — La loi provinciale est-elle conforme aux exigences de l'indépendance judiciaire? — Loi constitutionnelle de 1867, préambule — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Droit constitutionnel — Indépendance judiciaire — Inamovibilité des juges — Loi provinciale prévoyant que le gouvernement ne peut démettre un juge que sur un rapport de la Cour d'appel à la suite d'une requête du ministre de la Justice — La fonction judiciaire est-elle à l'abri de toute intervention discrétionnaire de la part de l'exécutif? — Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16, art. 95.

Droit administratif — Justice naturelle — Obligation d'agir équitablement — Droit d'être entendu — Dépôt d'une plainte contre un juge de la Cour du Québec auprès du Conseil de la magistrature — Comité d'enquête du Conseil recommandant la destitution du juge — Le juge a-t-il bénéficié d'un préavis suffisant quant aux conclusions susceptibles d'être tirées par le comité d'enquête? — Le juge avait-il droit à une audition distincte sur la question des sanctions?

Droit administratif — Justice naturelle — Obligation d'agir équitablement — Droit à une audition impartiale — Dépôt d'une plainte contre un juge de la Cour du Québec auprès du Conseil de la magistrature — Conseil contraint de suivre les recommandations de son comité d'enquête — Comité d'enquête recommandant la destitution du juge — La structure décisionnelle du Conseil et de son comité d'enquête viole-t-elle la maxime delegatus non potest delegare? — La présence de personnes non membres de la magistrature au stade préliminaire du processus disciplinaire porte-t-elle atteinte à la dimension institutionnelle du principe structurel de *in particular role of committee counsel, raises reasonable fear of institutional bias.*

Civil rights — Equality rights — Information relating to employment — Criminal record — Candidate for judicial office — Whether selection committee may question candidate regarding criminal record — Whether question infringes Charter of Human Rights and Freedoms — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 10, 18.1, 18.2, 20.

Constitutional law — Equality rights — Information relating to employment — Criminal record — Candidate for judicial office — Whether procedure initiated against judge concerned infringes equality rights guaranteed by Canadian Charter — Canadian Charter of Rights and Freedoms, s. 15.

Courts — Judges — Judicial ethics — Sanctions — Removal of judge of provincial court — Failure by judge to disclose criminal record when candidate for office of judge — Report of Court of Appeal recommending revocation of commission of judge — Whether sanction appropriate.

Criminal law — Effect of granting pardon — Meaning and effect of pardon granted under Criminal Records Act — Whether pardon expunges conviction retroactively — Criminal Records Act, R.S.C. 1970 (1st Supp.), c. 12, s. 5.

In 1970, the appellant was sentenced to imprisonment for one year for unlawfully giving assistance to four members of the Front de libération du Québec. After serving his sentence, he continued his legal studies. From 1976 to 1996, the appellant practised law, and in 1987, on his application, the Governor in Council granted him a pardon under s. 5(*b*) of the *Criminal Records Act*. Between 1989 and 1996, the appellant submitted his candidacy in five selection procedures for judicial appointments. In 1991 and 1993, he revealed his previous convictions and stated that he had been pardoned and his candidacy was rejected because of his criminal record. In the last selection procedures, he did not disclose his criminal record, or even that he had been pardoned. In September 1996, as a result of the favourable recommendation of the selection committee, the Minister of Justice recommended that he be appointed as a Judge of the Court of Québec. In late October, the Associate Chief Judge of the Court of

l'indépendance judiciaire? — Le fonctionnement du comité d'enquête, en particulier le rôle de son procureur, soulève-t-il une crainte raisonnable de partialité institutionnelle?

Libertés publiques — Droits à l'égalité — Renseignements relatifs à l'emploi — Antécédents judiciaires — Candidat à la magistrature — Le comité de sélection peut-il questionner un candidat sur ses antécédents judiciaires? — Cette question porte-t-elle atteinte aux dispositions de la Charte des droits et libertés de la personne? — Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 10, 18.1, 18.2, 20.

Droit constitutionnel — Droits à l'égalité — Renseignements relatifs à l'emploi — Antécédents judiciaires — Candidat à la magistrature — La procédure intentée contre le juge concerné porte-t-elle atteinte aux droits à l'égalité garantis par la Charte canadienne? — Charte canadienne des droits et libertés, art. 15.

Tribunaux — Juges — Déontologie judiciaire — Sanctions — Destitution d'un juge d'une cour provinciale — Omission d'un juge de révéler ses antécédents judiciaires alors qu'il était candidat au poste de juge — Rapport de la Cour d'appel recommandant la révocation de la commission d'un juge — Cette sanction est-elle appropriée?

Droit criminel — Effet de l'octroi d'un pardon — Sens et portée du pardon obtenu en vertu de la Loi sur le casier judiciaire — Un pardon anéantit-il rétroactivement une condamnation? — Loi sur le casier judiciaire, S.R.C. 1970 (1er suppl.), ch. 12, art. 5.

En 1970, l'appelant est condamné à un an d'emprisonnement pour avoir illégalement fourni une aide quelconque à quatre membres du Front de libération du Québec. Après avoir purgé sa peine, il poursuit ses études de droit. De 1976 à 1996, l'appelant pratique le droit et, en 1987, à sa demande, le gouverneur général en conseil lui accorde un pardon en vertu de l'al. 5*b*) de la *Loi sur le casier judiciaire*. Entre 1989 et 1996, l'appelant soumet sa candidature à cinq concours pour l'obtention d'un poste de juge. En 1991 et 1993, il révèle ses condamnations antérieures et mentionne qu'il a fait l'objet d'un pardon et sa candidature n'est pas retenue à cause de ses antécédents judiciaires. Lors du dernier concours, il ne révèle pas ses antécédents judiciaires ni même l'existence d'un pardon. En septembre 1996, suivant la recommandation favorable du comité de sélection, le ministre de la Justice recommande la nomination de l'appelant comme juge à la Cour du Québec. À la fin d'octobre, le juge en chef adjoint de la Cour du Québec

Québec and chairman of the selection committee which had recommended the appellant's candidacy learned that he had been in trouble with the law. She advised the Minister of Justice of the situation and stated that the appellant had failed to disclose this information to the committee. The Minister lodged a complaint with the Quebec Conseil de la magistrature. A committee of inquiry of the Conseil found that the complaint was justified and recommended that removal procedures be initiated. The Conseil then recommended that the Minister of Justice initiate the process to remove the appellant by making a request to the Court of Appeal in accordance with s. 95 of the *Courts of Justice Act* ("*C.J.A.*").

Concurrently with that proceeding, the appellant challenged the removal process and filed an application for judicial review in the Superior Court seeking to have the committee's inquiry report, the recommendation and the order of the Conseil de la magistrature suspending him declared void and of no effect, and seeking to have the request to the Court of Appeal dismissed. At the same time, he filed a motion for declaratory judgment challenging the constitutionality of s. 95. In response to the application and motion, the Minister of Justice filed two motions to dismiss in which he claimed that the Court of Appeal had jurisdiction to dispose of the issues in conducting the inquiry referred to it pursuant to s. 95. The Superior Court dismissed the motions to dismiss. The Minister appealed the decisions. The Court of Appeal allowed the two appeals and dismissed the application for judicial review and motion for declaratory judgment filed by the appellant. In 1998, five judges of the Court of Appeal submitted a report to the Minister of Justice following their inquiry, in which they recommended that the Government revoke the appellant's commission.

Held: The appeal should be dismissed.

(1) *Jurisdictional Questions*

Because the requirements of s. 40(1) of the *Supreme Court Act* ("*S.C.A.*") have been met, the appellant can appeal to this Court from a report of the inquiry panel of the Court of Appeal made pursuant to s. 95 *C.J.A.*, recommending to the government that he be removed. Specifically, the report of the Court of Appeal is a final or other judgment within the meaning of ss. 2(1) and 40(1) *S.C.A.* The expressions "judgment" and "final judgment" in s. 2(1) both contrast the concept of a decision with the concept of mere opinion or advice. The jurisdiction of this Court under that provision is therefore

et présidente du comité de sélection ayant recommandé la candidature de l'appelant apprend que celui-ci a eu des démêlés avec la justice. Elle informe le ministre de la Justice de la situation et indique que l'appelant a omis de révéler ces informations au comité. Le ministre dépose une plainte auprès du Conseil de la magistrature du Québec. Un comité d'enquête du Conseil conclut au bien-fondé de la plainte et recommande d'engager des procédures de destitution. Le Conseil recommande alors au ministre de la Justice d'engager des procédures de destitution à l'endroit de l'appelant en présentant une requête en ce sens à la Cour d'appel, conformément à l'art. 95 de la *Loi sur les tribunaux judiciaires* (« *L.T.J.* »).

Parallèlement, l'appelant conteste la procédure de destitution et présente en Cour supérieure une requête en révision judiciaire demandant de déclarer nuls et sans effet le rapport d'enquête du comité, la recommandation et l'ordonnance de suspension prononcées par le Conseil de la magistrature et demandant de déclarer irrecevable la requête présentée à la Cour d'appel. À la même occasion, il dépose une requête en jugement déclaratoire contestant la constitutionnalité de l'art. 95. Le ministre de la Justice présente à l'encontre de ces deux requêtes des requêtes en irrecevabilité alléguant que la Cour d'appel est compétente pour trancher ces questions dans le cadre de l'enquête dont elle est saisie en vertu de l'art. 95. La Cour supérieure rejette les requêtes en irrecevabilité. Le ministre en appelle des décisions. La Cour d'appel accueille les deux pourvois et déclare irrecevables les requêtes en révision judiciaire et en jugement déclaratoire présentées par l'appelant. En 1998, cinq juges de la Cour d'appel remettent un rapport fait après enquête au ministre de la Justice dans lequel ils recommandent au gouvernement de révoquer la commission de l'appelant.

Arrêt : Le pourvoi est rejeté.

(1) *Les questions de compétence*

Puisque les conditions prévues au par. 40(1) de la *Loi sur la Cour suprême* (« *L.C.S.* ») sont remplies, l'appelant peut interjeter appel devant notre Cour d'un rapport de la formation d'enquête de la Cour d'appel, fait en vertu de l'art. 95 *L.T.J.*, qui recommande au gouvernement sa destitution. En particulier, le rapport de la Cour d'appel constitue un jugement, définitif ou autre, au sens des par. 2(1) et 40(1) *L.C.S.* Les termes « jugement » et « jugement définitif » au par. 2(1) opposent tous deux la notion de décision à celle de la simple opinion ou consultation. La compétence de notre Cour en connected to the fact that the subject matter of the appeal is in the nature of a decision. In these circumstances, it depends on the nature and effect of the jurisdiction exercised by the Court of Appeal in respect of judicial ethics when it conducts the proceeding set out in s. 95 *C.J.A.* A careful study of the law and its context and purpose leads to the conclusion that the report of the Court of Appeal is in the nature of a decision. Section 95 does not require that the Court of Appeal make a report of an inquiry, but a report made after inquiry. The report is a judicial report and, moreover, one made by the highest court in the province. Its purpose is not simply to assist the Minister in making a decision; rather, it is an essential condition of the proceeding that may lead to the removal of a provincially appointed judge. The aim of the report is legally to determine a situation, and the wording of s. 95 does not restrict the Court of Appeal to making recommendations. The fact that the report is judicial and in the nature of a decision is fundamental to the constitutionality of the proceeding as a whole. Having regard to the fact that the report of the Court of Appeal is substantially in the nature of a decision, this is sufficient to satisfy the definitions of "judgment" or "final judgment" in s. 40(1) *S.C.A.* and to enable this Court to review it.

The Superior Court did not have jurisdiction to consider the application for judicial review and motion for declaratory judgment made by the appellant. Under art. 31 of the *Code of Civil Procedure*, the Superior Court hears in first instance every suit not assigned to another court by a specific provision of law. Where a request is properly made to the Court of Appeal under s. 95 *C.J.A.*, it is precisely the intent of the legislature that it determine the matter to the exclusion of any other court. This interpretation is consistent with the legislature's intention of complying with the constitutional requirements regarding tenure of provincial court judges by assigning responsibility to the Court of Appeal, exclusively and in the first instance, for conducting an inquiry and making a report on the conduct of a judge. Any other conclusion would be inimical to the proper administration of justice, since it would encourage a multiplicity of proceedings before various tribunals. In the case at bar, because the Court of Appeal had before it the request made by the Minister under s. 95 *C.J.A.* before the appellant filed his application and motion in the Superior Court, the appellant's case had been properly referred to the Court of Appeal to the exclusion of any other court. The Superior Court therefore had no jurisdiction to act in the circumstances.

vertu de cette disposition est donc liée au caractère décisionnel de ce qui fait l'objet de l'appel. Dans le présent contexte, elle dépend de la nature et de la portée de la compétence exercée par la Cour d'appel en matière de déontologie judiciaire dans le cadre de la procédure prévue à l'art. 95 *L.T.J.* Une étude attentive de la loi, du cadre dans lequel elle s'inscrit et de la finalité qu'elle poursuit amène à la conclusion que le rapport de la Cour d'appel a un caractère décisionnel. L'article 95 n'exige pas que la Cour d'appel remette un rapport d'enquête, mais un rapport fait après enquête. Le rapport relève du domaine judiciaire, et de surcroît, du plus haut tribunal de la province. Il n'existe pas simplement pour assister le ministre dans sa prise de décision, mais constitue une condition essentielle de la procédure pouvant mener à la destitution d'un juge de nomination provinciale. Le rapport vise la détermination juridique d'une situation et le texte de l'art. 95 ne restreint pas la Cour d'appel à la formulation de recommandations. Le caractère décisionnel et judiciaire du rapport est un élément fondamental de la constitutionnalité de l'ensemble de la procédure. Vu le caractère décisionnel important du rapport de la Cour d'appel, cela suffit pour répondre aux définitions de « jugement » ou de « jugement définitif » prévues au par. 40(1) *L.C.S.* et pour permettre à notre Cour de siéger en révision.

La Cour supérieure n'avait pas compétence pour examiner les requêtes en révision judiciaire et en jugement déclaratoire présentées par l'appelant. En vertu de l'art. 31 du *Code de procédure civile*, la Cour supérieure connaît en première instance de toute demande qu'une disposition formelle de la loi n'a pas attribuée exclusivement à un autre tribunal. Or, lorsque la Cour d'appel est régulièrement saisie d'une requête en vertu de l'art. 95 *L.T.J.*, il est précisément de l'intention du législateur qu'elle le soit à l'exclusion de tout autre tribunal. Cette interprétation est conforme à la volonté du législateur de respecter les exigences constitutionnelles en matière d'inamovibilité des juges de cours provinciales en confiant à la Cour d'appel, exclusivement et en première instance, la responsabilité de faire enquête et d'émettre un rapport sur la conduite d'un juge. Conclure autrement irait à l'encontre d'une saine administration de la justice, puisque cela favoriserait la multiplication des recours devant différentes instances. En l'espèce, puisque la Cour d'appel a été saisie de la requête déposée par le ministre conformément à l'art. 95 *L.T.J.* avant que l'appelant ne dépose ses deux requêtes en Cour supérieure, la Cour d'appel était régulièrement saisie du dossier de l'appelant à l'exclusion de tout autre tribunal. La Cour supérieure était donc incompétente pour agir dans ces circonstances.

The Conseil de la magistrature had jurisdiction to review the appellant's conduct even though the ethical breach occurred before he was appointed. The Conseil had jurisdiction over the person who was the subject of the complaint and over the subject matter of the complaint. Whether or not the appellant's actions were prior to his appointment is not relevant under the *C.J.A.* In the interests of judicial independence, it is also important that discipline be dealt with in the first place by peers. The committee of inquiry of the Conseil is responsible for preserving the integrity of the whole of the judiciary. Accordingly, it must be able to examine the past conduct of a judge if, as in this case, it is relevant to the assessment of his candidacy, having regard to his capacity to carry out his judicial functions, and to determine, based on that, whether it may reasonably undermine public confidence in the incumbent of the office. In conclusion on this point, the process of selecting persons for appointment as judges is so closely related to the exercise of the judicial function that it cannot be dissociated from it.

(2) *Constitutional Questions*

Section 95 *C.J.A.* is constitutional. The removal of a judge of a provincial court without an address of the legislature is not contrary to the principle of judicial independence embodied in the preamble to the *Constitution Act, 1867*. Regarding security of tenure, it does not afford greater protection to judges of the Provincial Court than s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* in criminal matters. The functions of the judge are essentially the same whether or not the judge is hearing criminal matters. Requiring that the removal of a provincial court judge follow the procedure of an address of the legislature, as provided by s. 99 of the *Constitution Act, 1867* for superior court judges, may indeed be an ideal, but that procedure is not necessary in order to comply with the Constitution. Furthermore, the jurisdiction of provincial legislatures over provincial courts derives expressly from s. 92(14) and (4) of the *Constitution Act, 1867*. In exercising their jurisdiction, and within the limitations of the constitutional requirements, provincial legislatures are authorized to establish separate rules for the functioning of the various judicial councils they establish. Lastly, although the government makes the final decision regarding removal, it "may remove a judge only upon a report of the Court of Appeal" (s. 95 *C.J.A.*). The use of that wording indicates a real intention on the part of the legislature that the Executive be bound by a finding of the Court of Appeal exonerating a judge. Because the Executive is bound by a finding exonerating a judge, the judges of

Le Conseil de la magistrature avait compétence pour examiner la conduite de l'appelant même si le manquement déontologique est survenu avant sa nomination. Le Conseil avait compétence sur la personne visée par la plainte et sur l'objet de la plainte. Que les gestes de l'appelant soient antérieurs à sa nomination n'est pas un critère pertinent au sens de la *L.T.J.* Au nom de l'indépendance judiciaire, il importe aussi que la discipline relève au premier chef des pairs. Le comité d'enquête du Conseil a la responsabilité de veiller à l'intégrité de l'ensemble de la magistrature. En ce sens, il doit pouvoir examiner la conduite passée d'un juge si, comme en l'espèce, celle-ci est pertinente à l'appréciation de sa candidature eu égard à sa capacité d'exercer ses fonctions judiciaires et pour décider si, en conséquence, elle peut raisonnablement porter atteinte à la confiance du public envers le titulaire de la charge. Enfin, le processus de sélection des personnes aptes à être nommées juges est si intimement lié à l'exercice même de la fonction judiciaire qu'il ne saurait en être dissocié.

(2) *Les questions constitutionnelles*

L'article 95 *L.T.J.* est constitutionnel. La destitution d'un juge d'une cour provinciale sans adresse parlementaire n'est pas contraire au principe de l'indépendance judiciaire enchâssé dans le préambule de la *Loi constitutionnelle de 1867*. En matière d'inamovibilité dans un contexte autre que pénal, le préambule n'offre pas une protection supérieure aux juges de la Cour provinciale que l'al. 11*d*) de la *Charte canadienne des droits et libertés* en matière pénale. Les fonctions du juge sont essentiellement les mêmes qu'il siège en matière pénale ou non. L'assujettissement de la destitution d'un juge d'une cour provinciale à la procédure d'une adresse parlementaire, comme le prévoit l'art. 99 de la *Loi constitutionnelle de 1867* pour les juges des cours supérieures, peut certes constituer un idéal, mais cette procédure n'est pas nécessaire pour se conformer à la Constitution. Par ailleurs, la compétence des législatures provinciales sur les cours provinciales découle expressément des par. 92(14) et (4) de la *Loi constitutionnelle de 1867*. Dans l'exercice de leurs compétences et dans les limites des exigences constitutionnelles, les législatures provinciales sont autorisées à établir des règles de fonctionnement distinctes pour les différents conseils de la magistrature qu'elles mettent sur pied. Enfin, bien que le gouvernement soit le titulaire de la décision finale en matière de destitution, il « ne peut démettre un juge que sur un rapport de la Cour d'appel » (art. 95 *L.T.J.*). L'emploi d'une telle formulation indique une volonté réelle du législateur que le pouvoir exécutif soit lié par the Provincial Court are secure against any discretionary interference by the Executive. Section 95 is consistent with the requirements of judicial independence.

une conclusion d'exonération prononcée par la Cour d'appel. Puisque le pouvoir exécutif est lié par une conclusion d'exonération, les juges de la Cour provinciale sont à l'abri de toute intervention discrétionnaire de la part de l'exécutif. L'article 95 est conforme aux exigences de l'indépendance judiciaire.

(3) *Substantive Issues*

The Conseil de la magistrature and its committee of inquiry are subject to the rules of procedural fairness. Essentially, the duty to act fairly has two components: the right to be heard and the right to an impartial hearing. The nature and extent of the duty may vary with the specific context and the various fact situations dealt with by the administrative body, as well as the nature of the disputes it must resolve. In this case, the right to be heard was respected. First, the appellant had sufficient notice. The committee of inquiry of the Conseil de la magistrature did not hold a general inquiry; it examined a specific complaint made against a particular judge. That judge was therefore a party to the proceedings from the outset and was informed of the allegations made against him. In this case, the appellant received a copy of the complaint in accordance with s. 266 *C.J.A.* and the respondents filed a further pleading in which they detailed the subject matter of the complaint. In the circumstances, the appellant was well aware of all of the findings of misconduct that might be made against him in the final report. Second, having regard to s. 275 *C.J.A.*, which authorizes the committee of inquiry of the Conseil de la magistrature to make rules of procedure or practice that are necessary for the carrying out of its duties, the committee was fully justified, out of concern for efficiency, in refusing to hold a separate hearing on the question of sanctions. The committee made a genuine effort to allow the appellant to make representations by twice giving him an opportunity to be heard on the question of the various applicable sanctions.

The right to an impartial hearing was also respected. Although the Conseil de la magistrature does not exercise its decision-making authority itself since it is bound by the conclusions drawn by the committee, decision-making structures of the Conseil and its committee do not violate the maxim *delegatus non potest delegare*. The terms used in the *C.J.A.* are mandatory and reflect a clear intent on the part of the legislature to authorize delegation of the powers of inquiry and decision regarding the justification for a complaint to a committee consisting of five persons chosen from among the members

(3) *Les questions de fond*

Le Conseil de la magistrature et son comité d'enquête sont assujettis aux règles de l'équité procédurale. L'obligation d'agir équitablement comporte essentiellement deux volets, soit le droit d'être entendu et le droit à une audition impartiale. La nature et la portée de cette obligation peuvent varier en fonction du contexte particulier et des différentes réalités auxquelles l'organisme administratif est confronté, ainsi que de la nature des litiges qu'il est appelé à trancher. En l'espèce, le droit d'être entendu a été respecté. Premièrement, l'appelant a bénéficié d'un préavis suffisant. Le comité d'enquête du Conseil de la magistrature ne tient pas une enquête en général, mais il étudie une plainte précise portée à l'encontre d'un juge en particulier. Ce juge est donc partie prenante dès le début des procédures et est informé de ce qui lui est reproché. Dans la présente affaire, l'appelant a reçu une copie de la plainte conformément à l'art. 266 *L.T.J.* et les intimées ont déposé une procédure supplémentaire qui en précisait l'objet. Dans ce contexte, l'appelant connaissait très bien l'ensemble des conclusions d'inconduite susceptibles d'être tirées contre lui dans le rapport final. Deuxièmement, vu l'art. 275 *L.T.J.*, qui permet au comité d'enquête du Conseil de la magistrature d'adopter les règles de procédure ou de pratique qu'il juge convenir aux circonstances de son enquête, le comité était pleinement justifié, dans un souci d'efficacité, de refuser la tenue d'une audience supplémentaire et distincte pour les sanctions. Le comité a fait un effort réel pour permettre à l'appelant de présenter son point de vue en lui fournissant, et ce, à deux reprises, l'occasion de se faire entendre sur les différentes sanctions applicables.

Le droit à une audition impartiale a également été respecté. Bien que le Conseil de la magistrature n'exerce pas lui-même son pouvoir décisionnel puisqu'il est lié par les conclusions tirées par le comité, la structure décisionnelle du Conseil et de son comité ne viole pas la maxime *delegatus non potest delegare*. Les termes utilisés par la *L.T.J.* sont impératifs et reflètent une intention claire du législateur d'autoriser la délégation des pouvoirs d'enquête et de décision sur le bien-fondé d'une plainte à un comité formé de cinq personnes choisies parmi les membres du Conseil (art. 268, 278 et 279).

of the Conseil (ss. 268, 278 and 279). Even though 4 of the 15 members of the Conseil de la magistrature are not judges, the presence of persons who are not members of the judiciary at a preliminary stage of the disciplinary process does not violate the collective or institutional dimension of the structural principle of judicial independence in that only a body composed of judges may recommend the removal of a judge. The report and recommendations made by a committee of inquiry of the Conseil are merely the first stage of the process put in place by the *C.J.A.* The final recommendation to remove a provincial court judge is within the exclusive jurisdiction of the highest court in the province. In these circumstances, the composition of the committee of inquiry of the Conseil de la magistrature complies with the structural principle of judicial independence and the rules of procedural fairness. Lastly, the functioning of the committee of inquiry does not raise a reasonable apprehension of institutional bias. Counsel for the committee does not play the role of judge and party. The committee's purpose is to gather the facts and evidence in order, ultimately, to make a recommendation to the Conseil de la magistrature. When he examined and cross-examined witnesses, counsel was not acting as a prosecutor, but rather was providing the committee with assistance in carrying out the mandate assigned to it by the statute. Where there are no judge or parties, counsel for the committee cannot be in a conflict of interest. Because the committee's recommendation is not final with respect to the outcome of the disciplinary process, the role played by the independent counsel neither violates procedural fairness nor raises a reasonable apprehension of bias in a large number of cases in the mind of an informed person viewing the matter realistically and practically and having thought the matter through.

The pardon granted to the appellant under the *Criminal Records Act* did not mean that he could deny his criminal record and answer "no" to the question regarding his "trouble with the law", which the selection committee asks people qualified for appointment as judges. An objective analysis of the Act does not support the argument that the pardon retroactively wipes out his conviction. While a pardon does not make the past go away, it expunges consequences for the future. The integrity of the pardoned person is restored and he or she need not suffer the effects associated with the conviction in an arbitrary or discriminatory manner. Even if the opinion subjectively formed by the appellant had to be considered, the Court of Appeal held that the appellant's record contained sufficient evidence tending to

Même si 4 des 15 membres du Conseil de la magistrature ne sont pas des juges, la présence de personnes non membres de la magistrature au stade préliminaire du processus disciplinaire ne porte pas atteinte à la dimension collective ou institutionnelle du principe structurel de l'indépendance judiciaire en ce que seul un organisme composé de juges peut recommander la révocation d'un juge. Le rapport ainsi que les recommandations formulées par le comité d'enquête du Conseil ne constituent que la première étape du processus mis en place par la *L.T.J.* La recommandation définitive de destitution d'un juge d'une cour provinciale est exclusivement réservée au plus haut tribunal de la province. Dans ce contexte, la composition du comité d'enquête du Conseil de la magistrature est conforme au principe structurel de l'indépendance judiciaire et aux règles de l'équité procédurale. Enfin, le fonctionnement du comité d'enquête ne soulève pas une crainte raisonnable de partialité institutionnelle. Le procureur du comité ne joue pas le rôle de juge et partie. Le but recherché par le comité est de recueillir les faits et les éléments de preuve afin de formuler ultimement une recommandation au Conseil de la magistrature. En interrogeant et contre-interrogeant les témoins, le procureur n'agit pas comme un poursuivant, mais fournit une aide au comité dans l'accomplissement du mandat qui lui est confié par la loi. En l'absence de juge et de parties, le procureur du comité ne peut être en conflit d'intérêts. Puisque la recommandation du comité n'est pas définitive quant à l'issue du processus disciplinaire, le rôle joué par le procureur indépendant ne saurait porter atteinte à l'équité procédurale, ni soulever une crainte raisonnable de partialité dans un grand nombre de cas chez une personne bien renseignée qui étudierait la question en profondeur de façon réaliste et pratique.

Le pardon obtenu par l'appelant conformément à la *Loi sur le casier judiciaire* ne l'autorisait pas à nier son dossier judiciaire et à répondre négativement à la question portant sur ses « démêlés avec la justice » posée par le comité de sélection des personnes aptes à être nommées juges. Une analyse objective de cette loi ne permet pas de soutenir que le pardon anéantit rétroactivement sa condamnation. Sans faire disparaître le passé, le pardon en efface les conséquences pour l'avenir. L'intégrité de la personne réhabilitée est rétablie et elle ne doit pas subir les effets liés à sa condamnation de façon arbitraire ou discriminatoire. Même si l'on devait considérer l'opinion que s'est subjectivement formée l'appelant, la Cour d'appel a jugé que le dossier de l'appelant contenait suffisamment d'éléments de preuve tendant à démontrer establish that he was aware of the meaning and effect of the Act and that he deliberately subjectively ignored them.

qu'il connaissait le sens et la portée de la loi et qu'il les a subjectivement ignorés.

The decision by the Minister of Justice to lodge an ethics complaint against the appellant was based primarily, perhaps exclusively, on the appellant's failure to disclose to the members of the selection committee that he had been in trouble with the law. Even though that decision was based in part on the existence of a criminal record, it did not infringe the appellant's equality rights under s. 15(1) of the *Canadian Charter*. Although there was differential treatment between the appellant and others who did not have a criminal history, and assuming, but without deciding the issue, that a criminal record is an analogous ground of discrimination for the purposes of s. 15(1), the Minister's decision cannot be regarded as discriminatory when we consider the relevant contextual factors. The Minister took into account the appellant's situation as a whole, as well as the situation of people who come before the court and are entitled to the highest degree of integrity, impartiality and independence on the part of the members of the judiciary in whom they place their confidence.

La décision du ministre de la Justice de déposer une plainte déontologique contre l'appelant repose principalement, voire exclusivement, sur son omission de révéler l'existence de ses démêlés avec la justice aux membres du comité de sélection. Même si cette décision était fondée en partie sur la présence d'antécédents judiciaires, elle ne porterait pas atteinte au droit à l'égalité de l'appelant garanti par le par. 15(1) de la *Charte canadienne*. Bien qu'il ait subi une différence de traitement par rapport à d'autres personnes qui n'ont pas de passé pénal, et en tenant pour acquis, sans toutefois en décider, que les antécédents judiciaires constituent un motif de discrimination analogue au sens du par. 15(1), la décision du ministre ne peut être considérée discriminatoire à la lumière des facteurs contextuels pertinents. Le ministre a pris en considération l'ensemble de la situation de l'appelant ainsi que celle des justiciables qui sont en droit d'obtenir la plus grande intégrité, impartialité et indépendance de la part des membres de la magistrature envers lesquels ils accordent leur confiance.

The appellant could have been asked the question about being in trouble with the law by the members of the selection committee without infringing the provisions of the *Quebec Charter*. Section 18.1 provides that no one may, in an employment interview, require a person to give information regarding any ground mentioned in s. 10 unless the information is useful for the application of s. 20. It is uncertain whether judicial office is included in the expression "employment" in s. 18.1 and a criminal record, even one for which a pardon has been granted, is not included in the grounds listed in s. 10. Even if the information related to one of the grounds listed in s. 10, the question would still be permitted in the selection process for persons qualified for appointment as judges since the distinction is based on the aptitudes or qualifications required for judicial office, which is deemed non-discriminatory by s. 20 of the *Quebec Charter*. The existence of a police file containing information relating to the appellant's criminal record is a supplementary source of information, but it cannot replace the selection committee and did not justify the appellant in not answering the question asked by the committee.

La question des démêlés avec la justice pouvait être posée à l'appelant par les membres du comité de sélection et ce, sans porter atteinte aux dispositions de la *Charte québécoise*. L'article 18.1 prévoit que nul ne peut, lors d'une entrevue relative à un emploi, requérir d'une personne des renseignements sur les motifs visés dans l'art. 10, sauf si ces renseignements sont utiles à l'application de l'art. 20. Il n'est pas certain que la fonction judiciaire soit visée par le terme « emploi » prévu à l'art. 18.1 et les antécédents judiciaires, même pardonnés, ne font pas partie des motifs énumérés à l'art. 10. Même si l'information portait sur l'un des motifs prévus à l'art. 10, la question serait toujours permise dans le cadre d'un processus de sélection des personnes aptes à être nommées juges puisqu'il s'agit d'une distinction fondée sur les aptitudes ou les qualités requises par la fonction judiciaire laquelle est réputée non discriminatoire en vertu de l'art. 20 de la *Charte québécoise*. L'existence d'un dossier des forces policières contenant des renseignements relatifs aux antécédents judiciaires de l'appelant constitue un moyen d'information complémentaire, mais il ne saurait remplacer le comité de sélection et ne permettait pas à l'appelant de ne pas répondre à la question posée par le comité.

Section 18.2 of the *Quebec Charter*, which provides that no one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence, cannot prevent the appellant from being removed. A careful examination of the conditions that must be met if that section is to apply clearly indicates that this provision does not apply to members of the judiciary. Judicial office is not an employment within the meaning of s. 18.2, by reason of the history of the judiciary and the nature, characteristics and requirements of the office. As well, the recommendations made by the Conseil de la magistrature and the Court of Appeal were not made owing to the mere fact that the appellant had been convicted of a criminal offence; rather, they were made solely because he had failed to disclose his criminal record to the selection committee. Lastly, the legislature, which was concerned about preserving the independence, impartiality and integrity of the judiciary, cannot have intended to deprive the government of its discretion to refuse to vest judicial authority in candidates whose past would be likely to undermine public confidence in its justice system.

Quant à l'art. 18.2 de la *Charte québécoise* qui prévoit que nul ne peut congédier, refuser d'embaucher ou autrement pénaliser dans le cadre de son emploi une personne du seul fait qu'elle a été déclarée coupable d'une infraction pénale ou criminelle, si cette infraction n'a aucun lien avec l'emploi ou si cette personne en a obtenu le pardon, il ne peut empêcher la révocation de l'appelant. Un examen attentif des conditions d'application de cet article indique clairement que cette disposition est inapplicable aux membres de la magistrature. La fonction de juge ne constitue pas un emploi au sens de l'art. 18.2 et ce, en raison de l'histoire de la magistrature, la nature, les caractéristiques et les exigences de la fonction. De plus, les recommandations formulées par le Conseil de la magistrature et la Cour d'appel ne l'ont pas été du seul fait que l'appelant a été déclaré coupable d'une infraction criminelle, mais exclusivement parce que celui-ci a omis de révéler ses antécédents judiciaires au comité de sélection. Enfin, le législateur, ayant le souci de préserver l'indépendance, l'impartialité et l'intégrité des membres de la magistrature, ne peut avoir voulu priver le gouvernement du pouvoir discrétionnaire de refuser de confier des pouvoirs judiciaires à certains candidats dont le passé serait susceptible d'ébranler la confiance que porte le public dans son système de justice.

Revocation of the appellant's commission is the appropriate sanction. The public's confidence in its justice system, which every judge must strive to preserve, is at the very heart of this case. The Court of Appeal made a thorough study and a balanced assessment of the appellant's situation and focused its decision on upholding the integrity of the judicial office. In the circumstances, and since it is the judicial forum appointed by the legislature to make determinations concerning the conduct of a judge, and a recommendation for removal in this case would not amount to arbitrary interference by the Executive in the exercise of the judicial function, the sanction that the Court of Appeal chose to impose should not be reviewed. The appellant's failure to be candid and to disclose relevant information when he was a candidate for the office of judge sufficiently undermined public confidence that he was incapable of performing the duties of his office.

La révocation de la commission de l'appelant est la sanction appropriée. La confiance que porte le public envers son système de justice et que chaque juge doit s'efforcer de préserver est au cœur du présent litige. La Cour d'appel a fait une étude approfondie et une appréciation nuancée de la situation de l'appelant et elle a centré sa décision sur le maintien de l'intégrité de la fonction judiciaire. Dans ces circonstances, et eu égard aux faits qu'elle constitue le forum judiciaire désigné par le législateur pour se prononcer sur la conduite d'un juge et qu'une recommandation de destitution ne saurait équivaloir à une intervention arbitraire de l'exécutif dans l'exercice de la fonction judiciaire, il n'y a pas lieu de revenir sur le choix de la sanction imposée par la Cour d'appel. Le manque de transparence et l'omission de l'appelant à révéler des informations pertinentes alors qu'il était candidat au poste de juge a suffisamment ébranlé la confiance de la population pour le rendre incapable de s'acquitter des fonctions de sa charge.

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APPEAL from a report of the inquiry panel of the Quebec Court of Appeal, [1998] R.J.Q. 2956, 21 C.R. (5th) 296, [1998] Q.J. No. 3105 (QL), recommending the removal of a judge of the Court of Québec, and from a decision of the Quebec Court of Appeal, [1998] R.J.Q. 1392, [1998] Q.J. No. 1666 (QL), setting aside judgments of the Superior Court, [1998] Q.J. No. 180 (QL), J.E. 98-433, dismissing motions to dismiss applications for judicial review and for declaratory judgment. Appeal dismissed.

POURVOI contre un rapport de la formation d'enquête de la Cour d'appel du Québec, [1998] R.J.Q. 2956, 21 C.R. (5th) 296, [1998] A.Q. n^{o} 3105 (QL), recommandant la révocation de la commission d'un juge de la Cour du Québec, et contre un arrêt de la Cour d'appel du Québec, [1998] R.J.Q. 1392, [1998] A.Q. n^{o} 1666 (QL), infirmant les jugements de la Cour supérieure, [1998] A.Q. n^{o} 180 (QL), J.E. 98-433, qui ont rejeté des requêtes en irrecevabilité à l'encontre de requêtes en révision judiciaire et en jugement déclaratoire. Pourvoi rejeté.

Jean-Claude Hébert, *Sophie Bourque* and *Christian Brunelle*, for the appellant.

Benoît Belleau, *Robert Mongeon* and *Monique Rousseau*, for the respondents.

Lori Sterling and *Sean Hanley*, for the intervener the Attorney General for Ontario.

Cedric L. Haines, Q.C., for the intervener the Attorney General for New Brunswick.

Julius H. Grey and *Elisabeth Goodwin*, for the interveners the Office des droits des détenus and the Association des services de réhabilitation sociale du Québec.

Jean-Claude Hébert, *Sophie Bourque* et *Christian Brunelle*, pour l'appelant.

Benoît Belleau, *Robert Mongeon* et *Monique Rousseau*, pour les intimées.

Lori Sterling et *Sean Hanley*, pour l'intervenant le procureur général de l'Ontario.

Cedric L. Haines, *c.r.*, pour l'intervenant le procureur général du Nouveau-Brunswick.

Julius H. Grey et *Elisabeth Goodwin*, pour les intervenants l'Office des droits des détenus et l'Association des services de réhabilitation sociale du Québec.

English version of the judgment of the Court delivered by

GONTHIER J. —

I. Introduction

This appeal raises very important and for the most part novel questions. They are essentially of three types. First, it addresses questions concerning the jurisdiction of this Court and the courts below in relation to the disciplinary procedure for provincially appointed judges put in place by the *Courts of Justice Act*, R.S.Q., c. T-16 ("*C.J.A.*"). Second, it challenges the constitutionality of s. 95 *C.J.A.* as regards the principle of the independence of the judiciary. Finally, it raises three sets of allegations relating to compliance with the rules of procedural fairness by the Conseil de la magistrature of Quebec and its committee of inquiry, the application of certain provisions of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") and the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*") that protect a person who has been pardoned, and the fitness of the sanction imposed on the appellant in the present proceedings.

II. Facts

In October 1970, Quebec was shaken by a serious political crisis. Richard Therrien was then a minor and a first-year law student in the Université de Montréal law faculty. He lived close to the faculty in his sister Colette's apartment on Queen Mary Road. Neither the brother nor the sister was at that time formally a member of the Front de libération du Québec ("F.L.Q."), an association declared to be unlawful by s. 3 of the *Public Order Regulations, 1970,* SOR/70-444, enacted under the *War Measures Act*, R.S.C. 1952, c. 288. Richard Therrien's sister was, however, a friend of Jacques Rose. From October 17 to November 6, 1970, Paul Rose, Jacques Rose, Francis Simard and Bernard Lortie, the four F.L.Q. members associated with the kidnapping of the minister Pierre Laporte, hid in that apartment. Richard Therrien's involvement

Le jugement de la Cour a été rendu par

LE JUGE GONTHIER —

I. Introduction

1 Le présent pourvoi soulève des questions fort importantes et, pour la plupart, inédites. Elles sont essentiellement de trois ordres. D'abord, il pose des questions de compétence de notre Cour et des cours inférieures dans le cadre de la procédure disciplinaire des juges de nomination provinciale, mise en place par la *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16 (« *L.T.J.* »). Ensuite, il met à l'épreuve la constitutionnalité de l'art. 95 *L.T.J.* en regard du principe de l'indépendance de la magistrature. Finalement, il soulève trois séries de moyens d'appel concernant le respect des règles de l'équité procédurale par le Conseil de la magistrature du Québec et son comité d'enquête, l'application de certaines dispositions de la *Charte canadienne des droits et libertés* (« *Charte canadienne* ») et de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12 (« *Charte québécoise* ») conférant une protection à une personne ayant fait l'objet d'un pardon, et le caractère approprié de la sanction imposée à l'appelant dans le cadre des présentes procédures.

II. Les faits

2 Octobre 1970, le Québec est secoué par une importante crise politique. À cette époque, Richard Therrien est mineur et étudiant en première année de droit à la Faculté de droit de l'Université de Montréal. Il réside à proximité de la Faculté dans l'appartement de sa sœur Colette, rue Queen Mary. Ni l'un ni l'autre n'est alors membre en règle du Front de libération du Québec (« F.L.Q. »), une association déclarée illégale par l'art. 3 du *Règlement de 1970 concernant l'ordre public*, DORS/70-444, adopté sous l'empire de la *Loi sur les mesures de guerre*, S.R.C. 1952, ch. 288. La sœur de Richard Therrien est toutefois une amie de Jacques Rose. Entre le 17 octobre et le 6 novembre 1970, Paul Rose, Jacques Rose, Francis Simard et Bernard Lortie, les quatre membres du F.L.Q. associés à l'enlèvement du ministre Pierre Laporte,

in these events was quite minor: he stayed in the apartment with them for only a few nights, preferring to keep his distance. At one point, he went to get materials so that they could build a hideout, and at another time he mailed three letters at the request of one of these persons.

se réfugient dans cet appartement. La participation de Richard Therrien à ces événements n'est que bien secondaire : il demeure seulement quelques nuits avec eux dans le logement préférant se tenir à l'écart. À un moment, il va chercher des matériaux pour leur permettre de se construire une cachette et, à un autre moment, il met trois lettres à la poste à la demande de l'un d'entre eux.

3 On November 26, 1970, Richard Therrien was charged with illegally and unlawfully giving assistance to these four individuals with intent thereby to prevent, hinder and interfere with their apprehension, trial or punishment, knowing or having reasonable cause to believe that they were members of the unlawful association, contrary to s. 5 of the *Public Order Regulations, 1970*. He was also charged with communicating statements on behalf of the said association, contrary to s. 4(*c*) of the Regulations. On April 14, 1971, he pleaded guilty and on the following day Judge Antonio Lamer, then of the Superior Court (Criminal Division), sentenced him to imprisonment for one year.

Le 26 novembre 1970, Richard Therrien est accusé d'avoir illégalement et sans droit fourni une aide quelconque à ces quatre individus dans l'intention d'empêcher leur arrestation, leur jugement ou leur châtiment, sachant ou ayant des motifs raisonnables de croire que ces personnes étaient membres de l'association illégale, le tout contrairement à l'art. 5 du *Règlement de 1970 concernant l'ordre public*. Il est également accusé d'avoir communiqué des déclarations pour le compte de ladite association contrairement à l'al. 4*c*) du même règlement. Le 14 avril 1971, il plaide coupable et le lendemain, le juge Antonio Lamer, alors juge à la Cour supérieure (chambre criminelle), le condamne à une peine d'emprisonnement d'un an.

4 After serving his sentence, Richard Therrien continued his legal studies and received his licence. In the spring of 1974, the examining committee of the Barreau du Québec, which was established to consider the appellant's candidacy in view of the fact that he had a criminal record, recommended that he be admitted to the professional school of the Barreau. His name was first entered on the Roll of the order on January 26, 1976. From 1976 to 1996, he practised law in various provincial legal aid offices in a competent and dignified manner, thus winning the respect of his colleagues and members of the bench.

Après avoir purgé sa peine, Richard Therrien poursuit ses études de droit et obtient sa licence. Au printemps 1974, le comité de vérification du Barreau du Québec, institué pour étudier la candidature de l'appelant eu égard au fait qu'il avait eu des antécédents judiciaires, recommande son admission à l'École professionnelle du Barreau. Il est inscrit au Tableau de l'Ordre pour la première fois le 26 janvier 1976. De 1976 à 1996, il pratique le droit dans différents bureaux d'aide juridique de la province avec compétence et dignité et gagne ainsi le respect de ses collègues et des membres de la magistrature.

5 On August 20, 1987, on the appellant's application, the Governor in Council granted him a pardon pursuant to s. 5(*b*) of the *Criminal Records Act*, R.S.C. 1970, c. 12 (1st Supp.). The document he received stated that it is evidence that he was of good behaviour and that the conviction in respect of which it is granted should no longer reflect adversely on his character. It also stated that the pardon granted vacates the conviction and removes any disqualification to which the person so con-

Le 20 août 1987, à la demande de l'appelant, le gouverneur général en conseil lui accorde un pardon en vertu de l'al. 5*b*) de la *Loi sur le casier judiciaire*, S.R.C. 1970, ch. 12 (1[er] suppl.). Le document qu'il reçoit précise qu'il constitue une preuve de bonne conduite et du fait que la condamnation à l'égard de laquelle il est accordé ne devrait plus nuire à sa réputation. Il indique aussi que le pardon obtenu annule cette condamnation et élimine toute déchéance que celle-ci entraîne pour victed is subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder.

la personne en vertu de toute loi du Parlement du Canada ou d'un règlement établi sous son régime.

Between 1989 and 1996, Mr. Therrien submitted his candidacy in five selection procedures for judicial appointments. He was interviewed on four occasions by the committee for the selection of persons qualified for appointment as judges, and on each occasion committee members raised the issue of trouble with the law. In 1991 and 1993, he revealed his previous conviction and stated that he had been pardoned. His candidacy for the first two appointments was unsuccessful, and it appears clearly from the evidence of persons who were selection committee members at that time that his criminal record was a determining factor in the decision to reject his candidacy. It is not clear whether the issue was directly addressed at the third interview, but there is no doubt that during the last selection process he did not disclose his criminal record or the fact that he had been pardoned, when he was asked the following series of questions: [TRANSLATION] "Have you ever been in trouble with the law or with the Barreau? Has any disciplinary action ever been taken against you? Are there any outstanding complaints against you?" Judge Therrien testified to the committee of inquiry of the Conseil de la magistrature that he felt he was justified in answering "no" to these questions for two reasons. First, he understood, at the time, that the pardon had vacated his conviction and that this was precisely what the law meant. Second, his answer meant that he would be assessed on his personal qualities and merits, although he was convinced that the Minister of Justice would be informed about his record.

Entre 1989 et 1996, Me Therrien soumet sa candidature à cinq concours pour l'obtention d'un poste de juge. Il est reçu en entrevue par le comité de sélection des personnes aptes à être nommées juges à quatre occasions et les membres de ce comité abordent la question des démêlés avec la justice lors de chacune de ces rencontres. En 1991 et 1993, il révèle sa condamnation et mentionne qu'il a fait l'objet d'un pardon. Sa candidature n'est pas retenue pour les deux premiers postes et il ressort clairement des témoignages de membres du comité de sélection de l'époque que l'existence d'antécédents judiciaires est déterminante dans la décision de rejeter sa candidature. Il n'est pas clair que la question ait été directement abordée lors de la troisième entrevue, mais il est certain que lors du dernier concours, il ne révèle pas ses antécédents judiciaires ni même l'existence d'un pardon, alors qu'on lui pose, en un bloc, la série de questions suivantes : « Est-ce que vous avez déjà eu des démêlés avec la justice ou avec le Barreau? Est-ce que vous avez déjà fait l'objet de sanctions disciplinaires? Est-ce que vous avez des plaintes disciplinaires pendantes? » Devant le comité d'enquête du Conseil de la magistrature, le juge Therrien témoigne s'être senti justifié de répondre « non » à ces questions pour deux raisons. D'abord, il comprend alors que le pardon obtenu a annulé sa condamnation et que l'esprit de la loi est justement à cet effet-là. Ensuite, une telle réponse lui permettait d'être jugé sur ses qualités et mérites personnels tout en étant, par ailleurs, convaincu que le ministre de la Justice serait informé de ses antécédents. 6

On September 18, 1996, as a result of the favourable recommendation of the committee for the selection of persons qualified for appointment as judges, and after running checks with the Barreau du Québec and the Sûreté du Québec and confirming that his record was clear, the Minister of Justice recommended that Richard Therrien be appointed as a Judge of the Court of Québec. In late October 1996, the Associate Chief Judge of the Court of Québec and chairman of the selection

Le 18 septembre 1996, suivant la recommandation favorable du comité de sélection des personnes aptes à être nommées juges et après vérifications auprès du Barreau du Québec et de la Sûreté du Québec témoignant d'un dossier sans tache, le ministre de la Justice recommande la nomination de Richard Therrien comme juge à la Cour du Québec. À la fin d'octobre 1996, la juge en chef adjointe de la Cour du Québec et présidente du comité de sélection ayant recommandé la 7 committee which had recommended Judge Therrien for appointment, Louise Provost, learned that he had been in trouble with the law in the early 1970s. She advised the Minister of the situation and stated that the appellant had failed to disclose this information to the committee. On November 11, 1996, the Minister lodged a complaint with the Quebec Conseil de la magistrature pursuant to s. 263 *C.J.A.*, requesting that the Conseil [TRANSLATION] "determine whether Judge Richard Therrien is capable, in the circumstances, of fulfilling his role with dignity, honour and impartiality". He also lodged a complaint with the Barreau du Québec; however, that complaint was stayed pending a decision by the Conseil.

candidature du juge Therrien, Louise Provost, apprend que celui-ci a eu des démêlés avec la justice au début des années 1970. Elle informe le ministre de la situation et indique que l'appelant a omis de révéler ces informations au comité. Le 11 novembre 1996, le ministre dépose une plainte auprès du Conseil de la magistrature du Québec en vertu de l'art. 263 *L.T.J.* demandant à ce dernier de « déterminer si monsieur le juge Richard Therrien peut, dans les circonstances, accomplir son rôle avec dignité, honneur et impartialité ». Il dépose aussi une plainte auprès du Barreau du Québec qui sera toutefois suspendue dans l'attente de la décision du Conseil.

8 In accordance with ss. 268 and 269 *C.J.A.*, the Conseil de la magistrature established a committee of inquiry to consider the matter, and the committee submitted its report on July 11, 1997. A majority of the committee, Judge Rivet dissenting, found that the complaint was justified and recommended that procedures for the removal of Judge Therrien be initiated in accordance with ss. 279(*b*) and 95 *C.J.A.*

Conformément aux art. 268 et 269 *L.T.J.*, le Conseil de la magistrature nomme un comité d'enquête pour étudier la question lequel dépose son rapport le 11 juillet 1997. Le comité conclut, à la majorité, au bien-fondé de la plainte et recommande d'engager des procédures de destitution à l'encontre du juge Therrien conformément à l'al. 279*b*) et à l'art. 95 *L.T.J.*; la juge Rivet est dissidente.

9 On July 22, 1997, pursuant to the majority recommendation of the committee of inquiry, the Conseil de la magistrature recommended to the Minister of Justice that he initiate the process to remove Judge Therrien by making a request to the Court of Appeal in accordance with s. 95 *C.J.A.* The request was made on August 11, 1997. Concurrently with that proceeding, on October 2, 1997, Judge Therrien filed an application for judicial review in the Superior Court, seeking to have the committee's inquiry report and the recommendation and the order of the Conseil de la magistrature suspending him declared void and of no effect, and seeking to have the request to the Court of Appeal dismissed. At the same time, he filed a motion for declaratory judgment challenging the constitutionality of s. 95 *C.J.A.* In response to the application and motion, the Minister of Justice filed two motions to dismiss in which he claimed that the Court of Appeal had jurisdiction to dispose of the issues in conducting the inquiry referred to it pursuant to s. 95 *C.J.A.* On January 26, 1998,

Le 22 juillet 1997, suivant la recommandation majoritaire du comité d'enquête, le Conseil de la magistrature recommande au ministre de la Justice d'engager des procédures de destitution à l'endroit du juge Therrien en présentant une requête à la Cour d'appel conformément à l'art. 95 *L.T.J.*, laquelle est déposée le 11 août 1997. Parallèlement, le 2 octobre 1997, le juge Therrien présente en Cour supérieure une requête en révision judiciaire demandant de déclarer nuls et sans effet le rapport d'enquête du comité ainsi que la recommandation et l'ordonnance de suspension prononcées par le Conseil de la magistrature et demandant de déclarer irrecevable la requête présentée à la Cour d'appel. À la même occasion, il dépose une requête en jugement déclaratoire contestant la constitutionnalité de l'art. 95 *L.T.J.* Le ministre de la Justice présente à l'encontre de ces deux requêtes des requêtes en irrecevabilité alléguant que la Cour d'appel est compétente pour trancher ces questions dans le cadre de l'enquête dont elle est saisie en vertu de l'art. 95 *L.T.J.* Le 26 janvier

Cliche J. of the Quebec Superior Court dismissed the motions to dismiss.

The Minister of Justice appealed the decisions of the Superior Court to the Court of Appeal. On May 14, 1998, a majority of that Court, Beauregard J.A. dissenting, allowed the first appeal and dismissed the application for judicial review filed by Judge Therrien. The Court of Appeal unanimously allowed the second appeal, and dismissed the motion for declaratory judgment filed by Judge Therrien.

On October 28, 1998, the five judges of the Court of Appeal submitted a report to the Minister of Justice following their inquiry, in which they recommended that the Government revoke Judge Therrien's commission.

III. Judgments Below

A. *Committee of Inquiry of the Conseil de la magistrature*

1. Preliminary Question

At the outset, the appellant challenged the jurisdiction of the Conseil and its committee to investigate his conduct, since the complaint was based on facts prior to his appointment as a judge. On this preliminary question, the committee of inquiry unanimously found that it had jurisdiction to review a judge's past conduct where that conduct could affect his capacity to perform his judicial functions, and to determine whether it undermines public confidence in the incumbent of the office.

2. Judges Lachapelle, Lalande, and Quesnel and Mr. Michel Caron (majority)

The four majority members took the view that while the pardon granted to the appellant restored his reputation, it did not erase the past and did not mean that he could deny his criminal record and answer "no" to the question asked by the selection committee regarding his convictions. In addition,

1998, le juge Cliche de la Cour supérieure du Québec rejette les requêtes en irrecevabilité.

Le ministre de la Justice appelle des décisions de la Cour supérieure devant la Cour d'appel. Le 14 mai 1998, cette dernière accueille à la majorité le premier pourvoi et déclare irrecevable la requête en révision judiciaire présentée par le juge Therrien; le juge Beauregard est dissident. La Cour d'appel accueille également le deuxième pourvoi, cette fois à l'unanimité, et déclare irrecevable la requête en jugement déclaratoire présentée par le juge Therrien. 10

Le 28 octobre 1998, les cinq juges de la Cour d'appel remettent au ministre de la Justice un rapport fait après enquête dans lequel ils recommandent au gouvernement de révoquer la commission du juge Therrien. 11

III. Les décisions dont appel

A. *Le comité d'enquête du Conseil de la magistrature*

1. Question préliminaire

Dès le début de l'enquête, l'appelant conteste la compétence du Conseil et de son comité pour enquêter sur sa conduite puisque la plainte repose sur des faits antérieurs à sa nomination en tant que juge. Sur cette question préliminaire, le comité d'enquête conclut, à l'unanimité, qu'il est compétent pour examiner la conduite passée d'un juge lorsque celle-ci risque d'avoir des effets sur sa capacité à exercer ses fonctions judiciaires et pour décider si elle porte atteinte à la confiance du public envers le titulaire de la charge. 12

2. Les juges Lachapelle, Lalande et Quesnel et Me Michel Caron (majoritaires)

Les quatre membres majoritaires estiment que le pardon obtenu par l'appelant, bien qu'il réhabilite sa réputation, n'efface pas le passé et ne l'autorisait pas à nier son dossier judiciaire et à répondre négativement à la question posée par le comité de sélection sur ses condamnations. De plus, même en 13 even if it were assumed that having a criminal record may be regarded as an analogous ground for the purposes of s. 15 of the *Canadian Charter*, it is in the best interests of justice and justified in a free and democratic society for candidates for judicial office to be questioned regarding their criminal past. Nor can Judge Therrien rely on ss. 18.1 and 18.2 of the *Quebec Charter*. Although three of the four majority members were of the view that the office of judge is an employment within the meaning of s. 18.2, they all agreed this provision did not prohibit questioning of a candidate regarding his criminal record. In addition, he was not justified in denying that he had a record, and in so doing he undermined public confidence in his integrity, rectitude and honesty and in the justice system.

prenant pour acquis que le motif des antécédents judiciaires peut être considéré comme un motif analogue aux fins de l'art. 15 de la *Charte canadienne*, il est dans l'intérêt supérieur de la justice et justifié dans une société libre et démocratique de questionner les candidats aspirants à un poste de juge sur leur passé judiciaire. Le juge Therrien ne peut pas non plus s'appuyer sur les art. 18.1 et 18.2 de la *Charte québécoise*. Bien que trois des quatre juges majoritaires considèrent que la fonction de juge constitue un emploi au sens de l'art. 18.2, ils sont tous d'avis que cette disposition n'interdit pas de questionner un candidat sur ses antécédents judiciaires. De plus, il n'était pas justifié de nier l'existence de son dossier et, ce faisant, il a miné la confiance de la population en son intégrité, sa droiture et son honnêteté, et envers le système de justice.

14 Finally, the four majority members made a decision regarding Judge Therrien's conduct. The applicable criterion in that regard was related to the confidence of a reasonably informed person appearing before the court, and of the general public, in his honesty, integrity and impartiality. Since the pardon did not erase the past, an impartial observer would have some doubt as to whether a person sentenced to a year of imprisonment could fulfil his role in accordance with all the provisions of the Code of Ethics. The public would also have some doubt as to whether he had the capacity to be a judge. It was therefore important that as a candidate, Judge Therrien act completely transparently and answer "yes" to the questions asked by the committee. The Committee had the mandate to inform the Minister, and Judge Therrien could not assume that the Minister of Justice alone could find out about his record. Instead, he opted to construe the law in his own interest, and failed to disclose information of which the committee ought to have been informed, substituting his judgment for theirs. The entire judicial system depends on truth. In their view, therefore, a reprimand was not an appropriate sanction; it could not restore public confidence in the judge in question and in the judi-

Les quatre membres majoritaires se prononcent finalement sur la conduite du juge Therrien. Le critère applicable à cet égard est lié à la confiance de la personne raisonnablement informée qui se présente devant le tribunal et du public en général en son honnêteté, son intégrité et son impartialité. Puisque le pardon n'efface pas le passé, un observateur impartial pourrait douter qu'une personne condamnée à une année d'incarcération puisse remplir son rôle selon toutes les prescriptions du Code de déontologie. Le public pourrait également douter de sa capacité à être juge. D'où l'importance pour le candidat Therrien d'agir en toute transparence et de répondre affirmativement aux questions posées par le comité. Celui-ci avait le mandat d'éclairer le ministre et le juge Therrien ne pouvait présumer que seul le ministre de la Justice pouvait prendre connaissance de son dossier. Il a plutôt choisi d'interpréter la loi à ses fins et a omis de dévoiler un renseignement dont le comité devait être informé en substituant son jugement au leur. Or, tout le système judiciaire repose sur la vérité. Ils estiment donc qu'une réprimande n'est pas une sanction appropriée; elle ne saurait rétablir la confiance du public à l'endroit du juge concerné et de la magistrature. En raison de la gravité du manqueciary. Given the gravity and the continuing nature of the offence, a recommendation for removal was appropriate.

3. Judge Rivet (dissenting)

Judge Rivet, the President of the Human Rights Tribunal, would have dismissed the complaint. In her view, the effect of the pardon granted under s. 5(*b*) of the *Criminal Records Act* was to vacate the conviction in question, which then became part of the sphere of privacy protected by the charters. In this regard, Judge Therrien must be given the protection of s. 18.2 of the *Quebec Charter*, the purpose of which is to combat potential prejudice and discrimination against persons with a criminal past. The office of judge is an employment within the meaning of that section. In addition, the complaint lodged by the Minister would "otherwise penalize" the judge "owing to the mere fact" of his criminal record. It is necessary to look beyond the failure to disclose and to consider instead what he had failed to disclose and who was being discriminated against. She added that Judge Therrien also enjoyed the protection of s. 15 of the *Canadian Charter*, since the status of pardoned person is an analogous ground to those set out in s. 15, and an infringement of this nature cannot be justified under s. 1, which requires that the limit in question be prescribed by law.

In conclusion, she stated that she could not criticize him for how he answered the selection committee, since he did so with the goal of having his candidacy judged in a manner that was consistent with his rights, without discrimination. In doing so, he had not lied. The fact that he had a criminal record, even though he had been granted a pardon, had been a major factor in the rejection of his candidacy in previous selection processes and Judge Therrien, being aware of this situation, was justified in withholding the information and requiring that his candidacy be considered on its true merits. Thus, an informed person viewing the matter realistically and practically, and having thought the matter through, would not lose confidence in the impartiality or integrity of the judicial system and of Judge Therrien, but rather would consider him to be an example of rehabilitation.

ment et des effets qu'il continue d'avoir, il y a lieu de recommander sa destitution.

3. La juge Rivet (dissidente)

La juge Rivet, présidente du Tribunal des droits 15
de la personne, est d'avis de rejeter la plainte. Elle estime que le pardon obtenu en vertu de l'al. 5*b*) de la *Loi sur le casier judiciaire* a pour effet d'annuler la condamnation visée, laquelle entre alors dans la sphère de vie privée protégée par les chartes. En ce sens, le juge Therrien doit bénéficier de la protection de l'art. 18.2 de la *Charte québécoise* dont l'objectif est de lutter contre les préjugés et la discrimination à l'endroit des personnes ayant un passé criminel. La fonction de juge constitue un emploi au sens de cet article. De plus, la plainte déposée par le ministre va « autrement pénaliser » le juge « du seul fait » de l'existence de son casier judiciaire. Il s'agit d'aller au-delà de l'omission de révéler et de considérer plutôt ce qu'il a omis de révéler et qui fut l'objet de discrimination. Elle ajoute que le juge Therrien bénéficie aussi de la protection de l'art. 15 de la *Charte canadienne* puisque l'état de personne pardonnée constitue un motif analogue à ceux énumérés à l'art. 15 et qu'une telle violation ne saurait être justifiée par l'article premier qui exige l'existence d'une règle de droit.

En conclusion, elle affirme qu'elle ne peut lui 16
reprocher sa façon de répondre au comité de sélection, car il l'a fait dans le but de faire juger sa candidature dans le respect de ses droits, sans discrimination. Ce faisant, il n'a pas menti. La présence d'antécédents judiciaires, même pardonnés, avait eu un impact majeur sur le rejet de sa candidature lors des concours précédents et, conscient de cette situation, le juge Therrien était justifié de retenir ces informations et d'exiger que sa candidature soit considérée sur son mérite réel. Ainsi, une personne bien renseignée qui étudierait la question en profondeur et de façon réaliste et pratique ne perdrait pas confiance dans l'impartialité ou l'intégrité du système de justice et du juge Therrien, mais considérerait plutôt qu'il est un exemple de réhabilitation.

B. *Quebec Superior Court*, [1998] Q.J. No. 180 (QL)

17 Assuming the veracity of all the allegations in the application for judicial review and the motion for declaratory judgment, and without ruling as to the merits, Cliche J. took the view that the application and motion contained sufficient grounds to be referred to a judge of the Superior Court. A refusal to allow judicial review of the decision by the Conseil de la magistrature would deprive the appellant of his right to review and his right of appeal such as could be exercised by any other person. There were therefore no grounds to decline to exercise his discretion.

C. *Quebec Court of Appeal*

1. Motions to Dismiss, [1998] R.J.Q. 1392

(a) *LeBel J.A. (majority)*

18 LeBel J.A. was of the view that the jurisdiction assigned to the Court of Appeal in s. 95 *C.J.A.* precluded the exercise of the ordinary jurisdiction of the Superior Court in respect of judicial review and consideration of motions for declaratory judgment. The Superior Court should have declined to exercise its discretion, and dismissed the application and motion. In his opinion, the Court of Appeal had the required jurisdiction to consider all issues of fact and law in connection with the request by the Minister of Justice for an inquiry. This was the case because, among other things, there is a close and necessary connection among the various steps in the process of removing a judge, which involves review by the Court of Appeal of the validity of the initial step. In addition, this is a matter involving the public interest where diligence is essential, the review of which is assigned entirely to the Court of Appeal.

(b) *Beauregard J.A. (dissenting in part)*

19 Beauregard J.A. would have allowed the Minister's appeal on the question of the dismissal of the motion for declaratory judgment, on the ground that it was not up to the Superior Court to state an opinion as to whether the Court of Appeal should

B. *La Cour supérieure du Québec*, [1998] A.Q. nº 180 (QL)

Tenant pour avérées toutes les allégations des requêtes en révision judiciaire et en jugement déclaratoire et sans statuer sur le fond, le juge Cliche est d'avis que celles-ci contiennent suffisamment de motifs pour être présentées à un juge de la Cour supérieure. Le refus de soumettre la décision du Conseil de la magistrature à la révision judiciaire priverait l'appelant de son droit de révision et de son droit d'appel qui, par ailleurs, pourrait être exercé par toute autre personne. Il n'existe aucune raison pour refuser d'exercer sa discrétion.

C. *La Cour d'appel du Québec*

1. Les requêtes en irrecevabilité, [1998] R.J.Q. 1392

a) *Le juge LeBel (majorité)*

Le juge LeBel est d'avis que la compétence attribuée à la Cour d'appel en vertu de l'art. 95 *L.T.J.* exclut l'exercice de la compétence normale de la Cour supérieure en matière de contrôle judiciaire et d'examen des requêtes en jugement déclaratoire. Celle-ci aurait dû refuser d'exercer sa discrétion et rejeter les requêtes. Il estime que la Cour d'appel a la compétence nécessaire pour examiner toutes les questions de fait et de droit rattachées à la demande d'enquête du ministre de la Justice. C'est notamment le cas parce qu'il existe un lien étroit et nécessaire entre les différentes étapes du processus de destitution d'un juge qui implique l'examen de la validité de la première étape par la Cour d'appel. De plus, il s'agit d'une matière d'intérêt public où la diligence s'avère indispensable et dont l'examen est confié dans sa plénitude à la Cour d'appel.

b) *Le juge Beauregard (dissident en partie)*

Le juge Beauregard aurait accueilli le pourvoi du ministre portant sur l'irrecevabilité de la requête pour jugement déclaratoire au motif qu'il n'appartient pas à la Cour supérieure de se prononcer sur la possibilité pour la Cour d'appel de don-or should not grant the request made by the Minister. However, he would have allowed the Minister's appeal on the question of the dismissal of the application for judicial review only in part, finding for the respondent in respect of the fourth conclusion, that the Court of Appeal cannot assume jurisdiction over the application. In his view, the inquiry procedure in the Court of Appeal is not dependent on the legality of the procedure followed by the Conseil de la magistrature. On the other hand, he took the view that the appellant was fully entitled to apply to the Superior Court for judicial review and that he should not be deprived of that remedy. He would therefore have dismissed that aspect of the appeal.

2. Report of the Inquiry Panel, [1998] R.J.Q. 2956

The Court of Appeal rejected the appellant's argument that the fact that the legislature was not involved in any way in the procedure for removing judges set out in s. 95 *C.J.A.* compromises their independence, citing the decision of this Court in *Valente v. The Queen*, [1985] 2 S.C.R. 673. It took the view that the *Courts of Justice Act* establishes a dual screening mechanism which eliminates the possibility of a judge being removed by the government without a review of his conduct by his peers and without an affirmative recommendation of removal.

For the reasons stated by the committee of inquiry of the Conseil de la magistrature, the Court of Appeal was of the opinion that the committee had jurisdiction to hear the complaint. It added that the procedure for the selection of persons qualified for appointment as judges is so closely connected with the exercise of the judicial function that it cannot be dissociated from it. It also considered the structure and functioning of the Conseil and its committee to be in accordance with the requirements of procedural fairness, having regard to the role played by the committee, the procedure that it followed and the composition of the Conseil. For the reasons set out in his opinion, dissenting as to the motions to dismiss, Beauregard J.A. did not

ner suite ou non à la requête du ministre. Il n'aurait cependant accueilli qu'en partie le pourvoi du ministre portant sur l'irrecevabilité de la requête en révision judiciaire faisant droit à la quatrième conclusion selon laquelle la Cour d'appel ne peut se saisir de la requête. Il estime que la procédure d'enquête en Cour d'appel n'est pas tributaire de la légalité de la procédure suivie devant le Conseil de la magistrature. Par ailleurs, il considère que l'appelant avait parfaitement le droit de s'adresser à la Cour supérieure en révision judiciaire et que l'on ne saurait le priver de ce recours. Il aurait donc rejeté cet aspect du pourvoi.

2. Le rapport de la formation d'enquête, [1998] R.J.Q. 2956

La Cour d'appel rejette l'argument de l'appelant 20
selon lequel l'absence de toute intervention de la législature dans la procédure de destitution des juges prévue à l'art. 95 *L.T.J.* compromettrait leur indépendance, en s'appuyant sur l'arrêt de notre Cour dans l'affaire *Valente c. La Reine*, [1985] 2 R.C.S. 673. Elle estime que la *Loi sur les tribunaux judiciaires* établit un mécanisme de double filtre qui évite qu'un juge puisse être destitué par le gouvernement sans un examen de sa conduite par ses pairs et sans une recommandation positive de destitution.

Pour les motifs exposés par le comité d'enquête 21
du Conseil de la magistrature, la Cour d'appel est d'avis que celui-ci avait compétence pour se saisir de la plainte. Elle ajoute que le processus de sélection des personnes aptes à être nommées juges est si intimement lié à l'exercice de la fonction judiciaire qu'il ne saurait en être dissocié. Elle considère également que la structure et le fonctionnement du Conseil et de son comité sont conformes aux exigences de l'équité procédurale et ce, en regard du rôle joué par le comité, de la procédure qu'il a suivie et de la composition du Conseil. Le juge Beauregard ne souscrit pas à cette partie du rapport portant sur la légalité de la recommandation du Conseil de la magistrature pour les motifs

concur in the part of the report relating to the legality of the recommendation made by the Conseil de la magistrature.

exposés dans son jugement dissident sur les requêtes en irrecevabilité.

22 The Court of Appeal next considered the effect of the pardon granted under s. 5(*b*) of the *Criminal Records Act*. It distinguished it from Royal clemency and the free and conditional pardons granted under the *Criminal Code*, R.S.C. 1985, c. C-46. The administrative type of pardon granted to Judge Therrien does not affect his guilt and therefore does not mean that his guilt was expunged retroactively; rather, it results in the total or partial vacation of a conviction and of its legal effects for the future. That pardon therefore does not mean that the person to whom it is granted may deny that he or she has previous convictions when directly asked the question; it merely means that the person may provide an explanation.

La Cour d'appel s'attarde ensuite à l'effet du pardon obtenu en vertu de l'al. 5*b*) de la *Loi sur le casier judiciaire*. Elle le distingue de la clémence royale et du pardon absolu et conditionnel octroyés en vertu du *Code criminel*, L.R.C. 1985, ch. C-46. Le pardon de type administratif accordé au juge Therrien ne remet pas en question sa culpabilité et n'emporte donc pas une annulation rétroactive de celle-ci, mais entraîne la remise totale ou partielle d'une condamnation et de ses effets juridiques pour l'avenir. Ainsi, ce pardon ne permet pas à la personne qui l'a reçu de nier l'existence de condamnations antérieures lorsqu'on lui pose directement la question, mais simplement de fournir une explication.

23 Sections 18.1 and 18.2 of the *Quebec Charter* do not provide any help to the appellant. The first provision prohibits requiring information regarding any ground of discrimination mentioned in s. 10, which does not include previous convictions. Section 18.2 rather deals with using that information to refuse to hire, dismiss or otherwise penalize a person in his employment. Judicial office is not comparable to employment. In addition, even if it were comparable, the nature and requirements of the office could not mean that questions concerning the criminal record of a person aspiring to that office could not be asked. Finally, the candidate tacitly consents to the selection committee questioning him or her regarding his or her past conduct. These findings do not mean that other provisions of the *Canadian Charter* and the *Quebec Charter* prohibiting discrimination are not applicable.

Les articles 18.1 et 18.2 de la *Charte québécoise* ne sont d'aucun secours à l'appelant. La première disposition interdit la demande de renseignements portant sur les motifs de discrimination énumérés à l'art. 10. Or, les condamnations antérieures n'en font pas partie. L'article 18.2 traite plutôt de l'utilisation de ces renseignements pour refuser un emploi, congédier une personne ou autrement la pénaliser dans le cadre de son emploi. La fonction judiciaire ne saurait être assimilée à un emploi. De plus, même si elle l'était, la nature et les exigences de la fonction ne pourraient empêcher les questions sur le passé judiciaire d'une personne qui y aspire. Finalement, le candidat consent implicitement à ce que le comité de sélection l'interroge sur sa conduite passée. Ces conclusions ne signifient pas que d'autres dispositions de la *Charte canadienne* et de la *Charte québécoise* interdisant la discrimination ne trouvent pas application.

24 With that proviso, the selection committee's question was legitimate and called for an honest answer from the appellant. The government might have regarded the events of October 1970 as a youthful indiscretion, but it ought to have been able to do so with full awareness of the circumstances. The appellant knew that he could not be appointed to the bench without disclosing those facts, but he deliberately concealed them, and this

Sous cette réserve, la question du comité de sélection était légitime et appelait une réponse sincère de la part de l'appelant. Le gouvernement aurait pu considérer les événements d'octobre 1970 comme une erreur de jeunesse, mais il devait avoir la possibilité de le faire en toute connaissance de cause. L'appelant savait qu'il ne pourrait être nommé juge sans révéler ces faits, mais il les a volontairement tus et cette conduite justifie de conduct justifies a recommendation to the government that his commission be revoked.

IV. Issues

The questions in issue can be broken down into three different categories: jurisdictional questions, constitutional questions and the substantive issues.

A. *Jurisdictional Questions*

1. Under s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 ("*S.C.A.*"), can the appellant appeal to this Court from a report of the inquiry panel of the Quebec Court of Appeal made pursuant to s. 95 *C.J.A.*, recommending to the government that he be removed?

2. Did the Court of Appeal err in law by declaring that it had jurisdiction to determine questions of law and jurisdiction relating to the inquiry requested by the Minister of Justice under s. 95 *C.J.A.*?

3. Did the Conseil de la magistrature have jurisdiction to investigate the appellant's conduct as regards events relating to his candidacy that occurred before he was appointed as a judge?

B. *Constitutional Questions*

On October 1, 1999, Arbour J. stated the following constitutional questions:

1. Is the rule of law — adopted in 1941 (*Act to amend the Courts of Justice Act*, S.Q. 1941, c. 50, s. 2, assented to on May 17, 1941) and now found in s. 95 of the *Courts of Justice Act*, R.S.Q., c. T-16 — allowing the government to remove a judge without an address of the legislature of no force or effect to the extent that it infringes the structural principle of the independence of the judiciary which is guaranteed by the preamble to the *Constitution Act, 1867*?

2. If the answer to the first question is in the negative, is the rule of law contained in s. 95 of the *Courts of Justice Act*, R.S.Q., c. T-16, of no force or effect on the ground of inconsistency with the structural principle of the independence of the judiciary guaranteed by the preamble to the *Constitution Act, 1867*, to the

recommander la révocation de sa commission au gouvernement.

IV. Les questions en litige

Les questions en litige peuvent être regroupées en trois catégories distinctes : les questions de compétence, les questions constitutionnelles et les questions de fond. 25

A. *Les questions de compétence*

1. En vertu du par. 40(1) de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26 (« *L.C.S.* »), l'appelant peut-il interjeter appel devant notre Cour d'un rapport de la formation d'enquête de la Cour d'appel du Québec fait en vertu de l'art. 95 *L.T.J.* dans lequel elle recommande au gouvernement sa destitution? 26

2. La Cour d'appel a-t-elle erré en droit en se déclarant compétente pour décider des questions de droit et de compétence relatives à l'enquête demandée par le ministre de la Justice en vertu de l'art. 95 *L.T.J.*

3. Le Conseil de la magistrature était-il compétent pour faire enquête sur la conduite de l'appelant à l'égard d'événements relatifs à sa candidature survenus avant qu'il ne soit nommé juge?

B. *Les questions constitutionnelles*

Le 1er octobre 1999, le juge Arbour a formulé les questions constitutionnelles suivantes : 27

1. La règle de droit — adoptée en 1941 (*Loi modifiant la Loi des tribunaux judiciaires*, S.Q. 1941, ch. 50, art. 2, sanctionnée le 17 mai 1941) et actualisée par l'art. 95 de la *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16 — permettant au gouvernement de destituer un juge sans adresse parlementaire est-elle inopérante dans la mesure où elle porterait atteinte au principe structurel de l'indépendance de la magistrature lequel est garanti par le préambule de la *Loi constitutionnelle de 1867*?

2. S'il doit être répondu négativement à la première question, la règle de droit contenue à l'art. 95 de la *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16, est-elle inopérante au motif d'incompatibilité avec le principe structurel de l'indépendance de la magistrature garanti par le préambule de la *Loi constitution-*

extent that the government may dismiss a judge without being bound by the conclusions and recommendations of the report of the Court of Appeal?

C. *Substantive Issues*

28 1. Did the inquiry panel of the Court of Appeal err in fact and in law in its report when it determined that the nature and functioning of and the inquiry process followed by the committee of inquiry of the Conseil de la magistrature met the requirements of procedural fairness?

2. Did the inquiry panel of the Court of Appeal err in fact and in law in its interpretation of the meaning and effect of the pardon obtained by the appellant?

3. Having regard to s. 15(1) of the *Canadian Charter* and the preamble and ss. 4, 5 and 18.2 of the *Quebec Charter*, is the report of the inquiry panel of the Court of Appeal wrong in law and fact?

4. Is the report of the inquiry panel of the Court of Appeal wrong in law and fact having regard to the test for removal of a judge?

V. Analysis

A. *Jurisdictional Questions*

1. Relevant Statutory Provisions

29 *Supreme Court Act*, R.S.C. 1985, c. S-26

2. (1) In this Act,

. . .

"final judgment" means any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding.

. . .

"judgment", when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof, and when used with reference to the Supreme Court, includes any judgment or order of that Court.

nelle de 1867, dans la mesure où le gouvernement peut démettre un juge sans être lié par les conclusions et recommandations du rapport de la Cour d'appel?

C. *Les questions de fond*

1. La formation d'enquête de la Cour d'appel a-t-elle erré en fait et en droit dans son rapport en concluant que la nature, le fonctionnement et le processus d'enquête suivi par le comité d'enquête du Conseil de la magistrature respectaient les exigences de l'équité procédurale?

2. La formation d'enquête de la Cour d'appel a-t-elle erré en fait et en droit dans son interprétation du sens de la portée du pardon obtenu par l'appelant?

3. Eu égard au par. 15(1) de la *Charte canadienne*, ainsi qu'au préambule et aux art. 4, 5 et 18.2 de la *Charte québécoise*, le rapport de la formation d'enquête de la Cour d'appel est-il mal fondé en droit et en fait?

4. Le rapport de la formation d'enquête de la Cour d'appel est-il mal fondé en fait et en droit en regard du critère de destitution d'un juge?

V. Analyse

A. *Les questions de compétence*

1. Les dispositions législatives pertinentes

Loi sur la Cour suprême, L.R.C. 1985, ch. S-26

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« jugement » Selon le cas, toute décision d'une juridiction inférieure, ou tout arrêt ou ordonnance de la Cour.

« jugement définitif » Jugement ou toute autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Code of Civil Procedure, R.S.Q., c. C-25

25. The Court of Appeal is the general appeal tribunal for Québec; it hears appeals from any judgment from which an appeal lies, failing an express provision to the contrary.

31. The Superior Court is the court of original general jurisdiction; it hears in first instance every suit not assigned exclusively to another court by a specific provision of law.

33. Excepting the Court of Appeal, the courts within the jurisdiction of the Legislature of Québec, and bodies politic, legal persons established in the public interest or for a private interest within Québec are subject to the superintending and reforming power of the Superior Court in such manner and form as by law provided, save in matters declared by law to be of the exclusive competency of such courts or of any one of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law.

46. The courts and the judges have all the powers necessary for the exercise of their jurisdiction. They may, in the cases brought before them, even of their own motion, pronounce orders or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to cover cases where no specific remedy is provided by law.

40. (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.

Code de procédure civile, L.R.Q., ch. C-25

25. La Cour d'appel est le tribunal général d'appel pour le Québec; elle connaît de l'appel de tout jugement sujet à ce recours, à moins d'une disposition expresse au contraire.

31. La Cour supérieure est le tribunal de droit commun; elle connaît en première instance de toute demande qu'une disposition formelle de la loi n'a pas attribuée exclusivement à un autre tribunal.

33. À l'exception de la Cour d'appel, les tribunaux relevant de la compétence de la Législature du Québec, ainsi que les corps politiques, les personnes morales de droit public ou de droit privé au Québec, sont soumis au droit de surveillance et de réforme de la Cour supérieure, en la manière et dans la forme prescrites par la loi, sauf dans les matières que la loi déclare être du ressort exclusif de ces tribunaux, ou de l'un quelconque de ceux-ci, et sauf dans les cas où la compétence découlant du présent article est exclue par quelque disposition d'une loi générale ou particulière.

46. Les tribunaux et les juges ont tous les pouvoirs nécessaires à l'exercice de leur compétence. Ils peuvent, dans les affaires dont ils sont saisis, prononcer, même d'office, des injonctions ou des réprimandes, supprimer des écrits ou les déclarer calomnieux, et rendre toutes ordonnances qu'il appartiendra pour pourvoir aux cas où la loi n'a pas prévu de remède spécifique.

Professional Code, R.S.Q., c. C-26

116. A committee on discipline is constituted within each order.

The committee shall be seized of every complaint made against a professional for an offence against this Code, the Act constituting the order of which he is a member or the regulations made under this Code or that Act.

The committee shall also be seized of every complaint made against a former member of an order for an offence referred to in the second paragraph that was committed while he was a member of the order. In such a case, every reference to a professional or a member of the order in the provisions of this Code, the Act constituting the order of which he was a member or a regulation under this Code or the said Act shall be a reference to the former member.

Interpretation Act, R.S.Q., c. I-16

57. The authority given to do a thing shall carry with it all the powers necessary for that purpose.

Courts of Justice Act, R.S.Q., c. T-16

9. The court and the judges thereof shall have an appellate jurisdiction throughout Québec, over all causes, matters or things appealed from all courts wherefrom an appeal lies by law, unless such appeal be expressly directed to be to some other court.

Except where otherwise provided by law, appeals shall be heard before three judges; this number may however be increased by the Chief Justice where he sees fit.

10. The jurisdiction in appeal granted to the court by section 9 shall carry with it all powers necessary to its exercise.

95. The Government may remove a judge only upon a report of the Court of Appeal made after inquiry at the request of the Minister of Justice.

256. The functions of the council are:

. . .

(*c*) to receive and examine any complaint lodged against a judge to whom Chapter III of this Part applies;

Code des professions, L.R.Q., ch. C-26

116. Un comité de discipline est constitué au sein de chacun des ordres.

Le comité est saisi de toute plainte formulée contre un professionnel pour une infraction aux dispositions du présent code, de la loi constituant l'ordre dont il est membre ou des règlements adoptés conformément au présent code ou à ladite loi.

Le comité est saisi également de toute plainte formulée contre une personne qui a été membre d'un ordre pour une infraction visée au deuxième alinéa, commise alors qu'elle était membre de l'ordre. Dans ce cas, une référence au professionnel ou au membre de l'ordre, dans les dispositions du présent code, de la loi constituant l'ordre dont elle était membre ou d'un règlement adopté conformément au présent code ou à ladite loi, est une référence à cette personne.

Loi d'interprétation, L.R.Q., ch. I-16

57. L'autorisation de faire une chose comporte tous les pouvoirs nécessaires à cette fin.

Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16

9. La cour et les juges qui la composent ont une compétence d'appel dans toute l'étendue du Québec, à l'égard de toutes les causes, matières et choses susceptibles d'appel, venant de tous les tribunaux dont, suivant la loi, il y a appel, à moins que cet appel ne soit affecté à la compétence d'un autre tribunal.

Sauf dans les cas prévus par la loi, ces appels sont entendus par trois juges, mais le juge en chef peut augmenter ce nombre lorsqu'il le juge à propos.

10. La compétence accordée à la cour par l'article 9, comme tribunal d'appel, comporte l'attribution de tous les pouvoirs nécessaires pour lui donner effet.

95. Le gouvernement ne peut démettre un juge que sur un rapport de la Cour d'appel fait après enquête, sur requête du ministre de la Justice.

256. Le conseil a pour fonctions:

. . .

c) de recevoir et d'examiner toute plainte formulée contre un juge auquel s'applique le chapitre III de la présente partie;

260. This chapter applies to a judge appointed under this act. . . .

263. The council receives and examines a complaint lodged by any person against a judge alleging that he has failed to comply with the code of ethics.

279. If the report of the inquiry establishes that the complaint is justified, the council, according to the recommendations of the report of the inquiry,

(*a*) reprimands the judge; or

(*b*) recommends that the Minister of Justice and Attorney General file a motion with the Court of Appeal in accordance with section 95.

If it makes the recommendation provided for in paragraph *b*, the council suspends the judge for a period of thirty days.

2. Jurisdiction of the Supreme Court

On June 17, 1999, this Court granted Judge Therrien leave to appeal from two Court of Appeal decisions on the respondents' motions to dismiss and from the report of that Court's inquiry panel, subject to a hearing on the issue of jurisdiction raised by the Attorney General of Quebec. The jurisdiction of the Supreme Court to hear the appeal from the first two decisions is not in dispute. However, the respondents argue that no appeal lies from the Court of Appeal report to this Court since it is not a judgment within the meaning of s. 40(1) *S.C.A.*, but rather an opinion of the Court of Appeal concerning the conduct of a judge resulting only in a recommendation for removal that is not final and not mandatory. For the reasons that follow, I do not share that view and I am rather of the opinion that this Court has jurisdiction to hear this appeal.

Section 40(1) *S.C.A.* confers "comprehensive jurisdiction in federal and provincial laws" on the Supreme Court of Canada: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 859. It provides that an appeal lies to this Court if it meets the following three conditions: (1) it involves a final or other judgment within the

260. Le présent chapitre s'applique à un juge nommé en vertu de la présente loi . . .

263. Le conseil reçoit et examine une plainte portée par toute personne contre un juge et lui reprochant un manquement au code de déontologie.

279. Si le rapport d'enquête établit que la plainte est fondée, le conseil, suivant les recommandations du rapport d'enquête,

a) réprimande le juge; ou

b) recommande au ministre de la Justice et procureur général de présenter une requête à la Cour d'appel conformément à l'article 95.

S'il fait la recommandation prévue par le paragraphe *b*, le conseil suspend le juge pour une période de trente jours.

2. La compétence de la Cour suprême

Le 17 juin 1999, notre Cour a accordé la permission d'en appeler demandée par le juge Therrien à l'encontre de deux décisions de la Cour d'appel statuant sur les requêtes en irrecevabilité des intimées et à l'encontre du rapport de la formation d'enquête de cette même Cour, sous réserve d'une audition sur la question de la compétence soulevée par la procureure générale du Québec. La compétence de la Cour suprême pour entendre l'appel sur les deux premières décisions n'est pas contestée. Par contre, les intimées prétendent que le rapport de la Cour d'appel n'est pas susceptible d'appel devant notre Cour puisqu'il ne s'agit pas d'un jugement au sens du par. 40(1) *L.C.S.*, mais bien d'une opinion de la Cour d'appel relative à la conduite d'un juge qui n'a donné lieu qu'à une recommandation de révocation sans caractère final et obligatoire. Pour les raisons qui suivent, je ne partage pas cette opinion et je suis plutôt d'avis que notre Cour est compétente pour entendre le présent appel. 30

Le paragraphe 40(1) *L.C.S.* confère à la Cour suprême du Canada « une compétence générale en droit fédéral et provincial » : *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, p. 859. Il prévoit qu'un appel peut être interjeté devant notre Cour s'il répond aux trois conditions suivantes : (1) il s'agit d'un jugement définitif ou autre au 31 meaning of s. 2(1) *S.C.A.*; (2) the judgment was rendered by the Federal Court of Appeal or the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case; (3) the Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or of mixed law and fact involved in that question, one that ought to be decided by the Court or is, for any other reason, of such a nature or significance as to warrant decision by it.

32 In this case, it seems to me to be clear that the second and third conditions have been met. Since the dispute relates only to the first condition, it is therefore appropriate to consider it at greater length.

33 The concepts of "judgment" and "final judgment" are respectively defined in s. 2(1) *S.C.A.* as follows: "when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof" (judgment); "any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding" (final judgment). It is worth mentioning that s. 40(1) *S.C.A.* embraces both of these concepts: *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, at para. 25. Although s. 40(1) *S.C.A.* has frequently been applied by this Court, the Court has seldom considered the interpretation of the expressions "judgment" and "final judgment". In *Lady Davis v. Royal Trust Co.*, [1932] S.C.R. 203, at p. 206, Rinfret J., as he then was, referred to the concept of final judgment in the following terms:

> In that definition, the word on which we desire to lay emphasis is the word "determines". In order that a judgment may come under the definition, it must have, "in whole or in part," determined or put an end to the issue raised and in respect to which the judgment was rendered.

This concept was repeated in *Wartime Housing Ltd. v. Madden*, [1945] S.C.R. 169, at p. 172. The English version of s. 2(1) *S.C.A.* is less laconic than the French version, on the concept of judgment, and can provide additional information

sens du par. 2(1) *L.C.S.*; (2) il a été rendu par la Cour d'appel fédérale ou le plus haut tribunal de dernier ressort habilité dans une province à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures; (3) la Cour estime, compte tenu de l'importance de l'affaire pour le public ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie.

En l'espèce, il m'apparaît clair que les deuxième et troisième conditions sont remplies. D'ailleurs, l'objet de la contestation ne porte que sur la première condition sur laquelle il convient donc de s'attarder.

Les concepts de « jugement » et de « jugement définitif » sont définis au par. 2(1) *L.C.S.* comme étant, « toute décision d'une juridiction inférieure » (dans le cas d'un jugement) et tout « [j]ugement ou toute autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance » (dans le cas d'un jugement définitif). Il n'est pas inutile de rappeler que le par. 40(1) *L.C.S.* vise l'un ou l'autre de ces concepts : *A. (L.L.) c. B. (A.)*, [1995] 4 R.C.S. 536, par. 25. Si le par. 40(1) *L.C.S.* a été fréquemment appliqué par notre Cour, celle-ci ne s'est toutefois penchée sur l'interprétation des termes « jugement » et « jugement définitif » qu'en de rares occasions. Dans l'affaire *Lady Davis c. Royal Trust Co.*, [1932] R.C.S. 203, p. 206, le juge Rinfret, alors juge puîné, réfère à la notion de jugement définitif en les termes suivants :

> [TRADUCTION] Dans cette définition, le mot sur lequel nous voulons insister est le mot « détermine ». Pour qu'un jugement corresponde à cette définition, il doit avoir tranché ou réglé « en totalité ou en partie » la question soulevée et faisant l'objet du jugement.

Cette idée fut reprise dans l'affaire *Wartime Housing Ltd. c. Madden*, [1945] R.C.S. 169, p. 172. Quant à la notion de jugement, la version anglaise du par. 2(1) *L.C.S.* est moins laconique et peut fournir des indications supplémentaires sur la regarding the nature of that concept. It uses the expressions "judgment, rule, order, decision, decree, decretal order or sentence". In my view, therefore, the expressions "judgment" and "final judgment" both contrast the concept of a decision, whether final or not, with the concept of mere opinion or advice. In this regard, the jurisdiction of this Court under that provision is closely connected to the fact that the subject matter of the appeal is in the nature of a decision. In this case, that jurisdiction necessarily depends on the nature and effect of the jurisdiction exercised by the Quebec Court of Appeal when it conducts the proceeding set out in s. 95 *C.J.A.*

3. Jurisdiction of the Court of Appeal under s. 95 *C.J.A.*

34 Appellate courts are creatures of statute and their authority is conferred solely by legislation: *R. v. W. (G.)*, [1999] 3 S.C.R. 597, at para. 8. We must therefore begin by considering the instruments by which jurisdiction is assigned. The general jurisdiction of the Quebec Court of Appeal is set out in s. 9 *C.J.A.* and art. 25 of the *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"). It has jurisdiction over all causes, matters or things appealed from. In addition, it is given special jurisdiction by certain specific provisions: this is precisely the situation in the case of s. 95 *C.J.A.* in respect of judicial ethics. What is the extent of the authority thus conferred on it? Is it in the nature of a purely advisory opinion, or of a decision? From a careful study of the law and of its context and purpose, I conclude that the report of the Quebec Court of Appeal pursuant to s. 95 *C.J.A.* is in the nature of a decision. There are several factors that support this conclusion.

35 It is appropriate, first, to consider the ethical context of s. 95 *C.J.A.* The disciplinary process for provincial court judges established by the *Courts of Justice Act* consists of three stages. First, it is the function of the Conseil de la magistrature to receive and examine any complaint lodged against a provincially appointed judge (ss. 256*c*) and 263 *C.J.A.*). If the Conseil establishes that the com-

nature de ce concept. Elle réfère aux termes « *judgment, rule, order, decision, decree, decretal order or sentence* ». Ainsi, à mon avis, les termes « jugement » et « jugement définitif » opposent tous deux la notion de décision, qu'elle soit définitive ou non, à celle de la simple opinion ou consultation. En ce sens, la compétence de notre Cour en vertu de cette disposition est intimement liée au caractère décisionnel de ce qui fait l'objet de l'appel. En l'espèce, elle dépend donc nécessairement de la nature et de la portée de la compétence exercée par la Cour d'appel du Québec dans le cadre de la procédure prévue à l'art. 95 *L.T.J.*

3. La compétence de la Cour d'appel en vertu de l'art. 95 *L.T.J.*

De création législative, les cours d'appel détiennent exclusivement leurs pouvoirs de la loi : *R. c. W. (G.)*, [1999] 3 R.C.S. 597, par. 8. Il s'agit donc d'abord de se pencher sur les textes attributifs de compétence. La compétence générale de la Cour d'appel du Québec figure à l'art. 9 *L.T.J.* et à l'art. 25 du *Code de procédure civile*, L.R.Q., ch. C-25 (« *C.p.c.* »). Elle s'exerce à l'égard de toutes les causes, matières et choses susceptibles d'appel. En outre, certaines dispositions spécifiques lui accordent une compétence particulière : c'est précisément le cas de l'art. 95 *L.T.J.* en matière de déontologie judiciaire. Quelle est la portée des pouvoirs qui lui sont ainsi conférés? Sont-ils de nature purement consultative ou décisionnelle? Une étude attentive de la loi, du cadre dans lequel elle s'inscrit et de la finalité qu'elle poursuit m'amène à conclure que le rapport de la Cour d'appel du Québec, fait conformément à l'art. 95 *L.T.J.*, a un caractère décisionnel. Plusieurs facteurs militent en faveur de cette conclusion.

Il convient d'abord d'examiner le contexte déontologique dans lequel s'inscrit l'art. 95 *L.T.J.* Le processus disciplinaire réservé aux juges des cours provinciales et mis en place par la *Loi sur les tribunaux judiciaires* comporte trois étapes. Il appartient au Conseil de la magistrature au tout premier chef de recevoir et d'examiner toute plainte formulée contre un juge de nomination proplaint is justified following its preliminary inquiry, or if the complaint is lodged by the Minister of Justice, as in the case at bar, the Conseil establishes a committee of five persons chosen from among its members to conduct an inquiry (ss. 268 and 269 *C.J.A.*). If the report of inquiry establishes that the complaint is justified, then following the recommendations of the report of inquiry, the Conseil reprimands the judge, or recommends that the Minister of Justice and Attorney General file a motion with the Court of Appeal in accordance with s. 95 (s. 279 *C.J.A.*). It is therefore in the context of the second stage that a request by the Minister may come before the Court of Appeal. Finally, upon a report of the Court of Appeal, the Minister may remove a judge (s. 95 *C.J.A.*).

36 In those circumstances, when the Minister of Justice makes a request to the Court of Appeal under s. 95 *C.J.A.*, he does so after reading the report of the Conseil de la magistrature, which is involved at a preliminary stage and has already examined the matter. Its committee of inquiry has heard the appropriate witnesses and has gathered the necessary evidence in order to make a determination regarding the allegations of failure to comply with the provisions of the *Judicial Code of Ethics*, R.R.Q. 1981, c. T-16, r. 4.1. For example, I note that in this case, the committee of inquiry sat for eight days and heard more than 15 witnesses. It then analyzed the facts at length and made its findings, and then issued a recommendation. Accordingly, the Minister has the benefit of the administrative body's specialized knowledge and experience.

37 The report of the Court of Appeal is something quite different. First, the terms used by the legislator are different. Section 95 *C.J.A.* does not require that the Court of Appeal make a report of an inquiry, but a report made after inquiry, and it imposes no restrictions in terms of how it should be done. It does not limit the inquiry to collecting and analyzing the facts and evidence relating to the judge's conduct. As I said earlier, this stage, which involves actively seeking out the truth, has already been the subject, first, of an inquiry under the

vinciale (al. 256*c*) et art. 263 *L.T.J.*). Si le Conseil établit que la plainte est fondée à l'issue d'un examen préliminaire ou encore si la plainte est formée par le ministre de la Justice, comme en l'espèce, le Conseil établit un comité formé de cinq personnes choisies parmi ses membres pour mener une enquête (art. 268 et 269 *L.T.J.*). Si le rapport d'enquête établit que la plainte est fondée, le Conseil, suivant les recommandations du rapport d'enquête, réprimande le juge ou recommande au ministre de la Justice et procureur général de présenter une requête à la Cour d'appel conformément à l'art. 95 (art. 279 *L.T.J.*). C'est ainsi que, dans un deuxième temps, la Cour d'appel peut être saisie d'une requête par le ministre. Finalement, sur rapport de la Cour d'appel, le ministre peut démettre le juge de ses fonctions (art. 95 *L.T.J.*).

Dans ce contexte, lorsque le ministre de la Justice soumet une requête en Cour d'appel en vertu de l'art. 95 *L.T.J.*, il le fait après avoir pris connaissance du rapport du Conseil de la magistrature. Celui-ci intervient à un stade préliminaire et a alors déjà étudié la question. Son comité d'enquête a entendu les témoins pertinents et recueilli les éléments de preuve nécessaires afin de se prononcer sur les allégations de non-respect des prescriptions du *Code de déontologie de la magistrature*, R.R.Q. 1981, ch. T-16, r. 4.1. À titre d'illustration, je mentionne qu'en l'espèce, le comité d'enquête a siégé pendant huit jours et a entendu plus de 15 témoins. Il a ensuite longuement analysé les faits, a tiré des conclusions, puis il a émis une recommandation. En ce sens, le ministre bénéficie de la compétence spécialisée de l'organisme administratif.

Le rapport de la Cour d'appel se situe à un tout autre niveau. D'abord, les termes utilisés par le législateur diffèrent. L'article 95 *L.T.J.* n'exige pas que la Cour d'appel remette un rapport d'enquête, mais un rapport, fait après enquête, pour l'accomplissement de laquelle il ne pose aucune restriction. Il ne limite pas cette enquête à la seule recherche et analyse des faits et des éléments de preuve relatifs à la conduite du juge. Comme je viens de le mentionner, cette phase de recherche active de la vérité a déjà fait l'objet, dans un preauthority of the Conseil. It is also revealing that in the case at bar, during the hearing in the Court of Appeal, the parties agreed that all the evidence introduced at the committee of inquiry of the Conseil de la magistrature would be filed in the court, subject to the parties' right to submit additional evidence, which proved unnecessary.

mier temps, d'une enquête sous l'égide du Conseil. Il est d'ailleurs révélateur qu'en l'espèce, lors de l'audition devant la Cour d'appel, les parties aient convenu que tous les éléments de preuve apportés devant le comité d'enquête du Conseil de la magistrature seraient déposés devant la cour, sous réserve de leur droit de présenter des éléments de preuve supplémentaires, ce qui ne s'est pas avéré nécessaire.

38

Second, this is a judicial report and, moreover, one made by the highest court in the province. Its purpose is not simply to assist the Minister in making a decision; rather, it is an essential condition of the proceeding that may lead to the removal of a provincially appointed judge. In fact, Quebec is the only Canadian province that requires that the Court of Appeal be involved in the removal process: P. H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987), at p. 181, and M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), a report prepared for the Canadian Judicial Council, at p. 130. Its report is a mandatory stage in the proceeding that may lead to the removal of a judge of the Court of Québec. The fact that s. 95 *C.J.A.* provides that "[t]he Government may remove a judge only upon a report of the Court of Appeal" (emphasis added) is therefore not happenstance. Accordingly, it plays a vital role in the administration of justice in the province, and this is one factor that suggests that it should be recognized as a decision.

Ensuite, ce rapport relève du domaine judiciaire et, de surcroît, du plus haut tribunal de la province. Il n'existe pas simplement pour assister le ministre dans sa prise de décision, mais il constitue une condition essentielle de la procédure pouvant mener à la destitution d'un juge de nomination provinciale. Le Québec est, d'ailleurs, la seule province canadienne qui exige la participation de sa Cour d'appel dans le processus de destitution : P. H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987), p. 181, et M. L. Friedland, *Une place à part : l'indépendance et la responsabilité de la magistrature au Canada* (1995), un rapport préparé pour le Conseil canadien de la magistrature, p. 145-146. Son rapport est un passage obligé dans la procédure pouvant mener à la destitution d'un juge de la Cour du Québec. Aussi, n'est-ce pas par hasard que l'art. 95 *L.T.J.* précise que « [l]e gouvernement ne peut démettre un juge que sur un rapport de la Cour d'appel » (je souligne). Il joue donc un rôle primordial pour l'administration de la justice dans la province et cet aspect contribue à lui reconnaître un statut décisionnel.

39

I will add, as my third point, that the procedure for removal of a judge established by the *Courts of Justice Act* is part of the more general context of the constitutional requirements relating to judicial independence. The fact that the report of the Court of Appeal is judicial and is in the nature of a decision is one of the conditions that ensure the constitutionality of the process for removal of judges provided by the *C.J.A.* I will return to this question later; for now, suffice it to say that for the purposes of s. 11(*d*) of the *Canadian Charter*, the first of the three essential guarantees of judicial independence is security of tenure. To satisfy this guarantee as

J'ajouterai, dans un troisième temps, que la procédure de destitution d'un juge mise en place par la *Loi sur les tribunaux judiciaires* s'inscrit dans le contexte plus général du respect des exigences constitutionnelles en matière d'indépendance de la magistrature. En effet, le caractère décisionnel et judiciaire du rapport de la Cour d'appel est une des conditions qui assurent la constitutionnalité de la procédure de destitution des juges prévue par la *L.T.J.* Je reviendrai plus loin sur cette question, mais qu'il suffise maintenant de rappeler qu'aux fins de l'al. 11*d*) de la *Charte canadienne*, la première des trois garanties essentielles de l'indépenregards the removal of provincial court judges, the following two criteria must be met: (1) the removal must be for cause, which must be specific and be related to the judge's capacity to perform his or her judicial functions; and (2) there must be a judicial inquiry to establish that such cause exists, at which the judge affected must be afforded an opportunity to be heard: *Valente*, *supra*, at p. 696; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 115. For the province of Quebec, this judicial forum is the Court of Appeal.

dance judiciaire est l'inamovibilité de fonction. Pour satisfaire à cette garantie en matière de révocation des juges des cours provinciales, il faut répondre aux deux critères suivants : (1) la révocation doit être faite pour un motif déterminé lié à la capacité du juge d'exercer ses fonctions judiciaires; et (2) une enquête judiciaire doit être prévue pour établir que ce motif existe dans le cadre de laquelle le juge visé doit avoir l'occasion de s'y faire entendre : *Valente*, précité, p. 696; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 115. La Cour d'appel constitue, pour la province de Québec, ce forum judiciaire.

40 In view of the non-limitative wording of s. 95 *C.J.A.*, and given the importance of the report, in terms of both the process relating to ethics, itself, and the principle of judicial independence, the Court of Appeal has, in my view, very broad powers. It must put together a complete picture of the situation for the Minister of Justice who has requested it, and this means that it has to determine all questions of fact and law relevant to the finding it must ultimately make. Section 10 *C.J.A.* and art. 46 *C.C.P.* expressly provide that the Court of Appeal has all the powers necessary for the exercise of its jurisdiction. This is also what is meant by s. 57 of the Quebec *Interpretation Act*, which provides that the authority given to do a thing shall carry with it all the powers necessary for that purpose.

Eu égard au libellé non restrictif de l'art. 95 *L.T.J.* et étant donné l'importance du rapport, tant au niveau du processus déontologique lui-même qu'en regard du principe de l'indépendance judiciaire, la Cour d'appel dispose, à mon avis, de pouvoirs très larges. Elle doit dresser un portrait complet de la situation au ministre de la Justice qui lui en fait la demande, ce qui implique qu'elle doit se prononcer sur toutes les questions de fait et de droit pertinentes à la conclusion qu'elle doit ultimement tirer. Les articles 10 *L.T.J.* et 46 *C.p.c.* prévoient expressément que la Cour d'appel dispose de tous les pouvoirs nécessaires à l'exercice de sa compétence. C'est là également le sens de l'art. 57 de la *Loi d'interprétation* du Québec, selon lequel l'autorisation de faire une chose comporte tous les pouvoirs nécessaires à cette fin.

41 Thus, as a function that is incidental and necessary to the special jurisdiction conferred on it by s. 95 *C.J.A.*, the court must, *inter alia*, determine the constitutionality of the provisions that form the basis of its immediate jurisdiction. It must also consider any procedural defects that may have tainted the inquiry made under the authority of the Conseil de la magistrature, since that inquiry is an integral part of the disciplinary process. Upon completing that inquiry, the primary purpose of which is to provide a basis for the report and the findings to which it leads, it is required to make a recommendation. Accordingly, the court's power to make a recommendation is closely connected to its power of inquiry.

Ainsi, de façon accessoire et nécessaire à la compétence particulière qui lui est conférée par l'art. 95 *L.T.J.*, la cour devra, notamment, se prononcer sur la constitutionnalité des dispositions qui constituent le fondement de sa compétence immédiate. Elle devra également se pencher sur les vices de procédure susceptibles d'avoir entaché l'enquête faite sous l'égide du Conseil de la magistrature, puisque celle-ci fait partie intégrante du processus disciplinaire. À l'issue de cette enquête, dont la finalité première est d'étayer le rapport et les conclusions qui en émaneront, elle devra formuler une recommandation. En ce sens, le pouvoir de recommandation de la cour est intimement lié à son pouvoir de faire enquête.

In this regard, I would point out that the present situation may be distinguished from the situation in *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385. In *Thomson*, Cory J. considered the meaning to be given to the word "recommendation" as it appears in s. 52(2) of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23. In his view, giving the word its ordinary meaning, it necessarily referred to the offering of advice and should not be taken to mean a binding decision: as he said at p. 399, "[t]he . . . meaning of the word 'recommendation' is not synonymous with 'decision'". The investigation in question was conducted by the Canadian Security Intelligence Service and related to the granting of a security clearance to the respondent in connection with his employment. In the case at bar, the inquiry was conducted by the Court of Appeal, the highest court in the province, and by its very nature is not restricted to gathering information; rather, its aim is legally to determine a situation. Furthermore, the wording of s. 95 *C.J.A.* does not restrict the court to making recommendations.

42 À cet égard, je souligne que la présente situation se distingue de l'affaire *Thomson c. Canada (Sous-ministre de l'Agriculture)*, [1992] 1 R.C.S. 385. Dans l'affaire *Thomson*, le juge Cory s'est penché sur le sens que l'on devait donner au mot recommandation qui figure au par. 52(2) de la *Loi sur le Service canadien du renseignement de sécurité*, L.R.C. 1985, ch. C-23. Selon lui, en donnant à ce mot son sens ordinaire, il référait nécessairement au fait de conseiller et ne saurait équivaloir à une décision obligatoire : « le mot "recommandation" n'est pas synonyme du mot "décision" », déclare-t-il, à la p. 399. Or, l'enquête en question était menée par le Service canadien des renseignements de sécurité et concernait l'octroi d'une habilitation de sécurité à l'intimé dans le cadre de son emploi. En l'espèce, l'enquête est menée par la Cour d'appel, le plus haut tribunal de la province, et n'est pas limitée, de par sa nature même, à la cueillette d'informations, mais vise la détermination juridique d'une situation. De plus, le texte de l'art. 95 *L.T.J.* ne restreint pas la cour à la formulation de recommandations.

Thus, the report of the Court of Appeal amounts to much more than the expression of a mere opinion; rather, it is substantially in the nature of a decision. In the case at bar, this is sufficient to satisfy the definitions of "judgment" or "final judgment" in s. 40(1) *S.C.A.* and to enable this Court to review it. Having regard to that section, the Court of Appeal should not be permitted to make determinations that are final and not subject to appeal on constitutional questions and questions of law that are of such importance for the administration of justice, lest this lead to inequitable results.

43 En ce sens, le rapport de la Cour d'appel constitue bien davantage que l'expression d'une simple opinion, mais revêt un caractère décisionnel important. Cela suffit en l'espèce pour répondre aux définitions de « jugement » ou de « jugement définitif » prévues au par. 40(1) *L.C.S.* et pour permettre à notre Cour de siéger en révision. Eu égard à cet article, on ne saurait permettre à la Cour d'appel, sous peine de produire des résultats inéquitables, de se prononcer sur des questions constitutionnelles et sur des questions de droit aussi importantes pour l'administration de la justice et ce, de façon finale et sans possibilité d'appel.

I will, however, make a few comments in conclusion, regarding three decisions of this Court and of the Privy Council that must be distinguished from the case at bar. The respondents cited first, in support of their argument that the report of the Court of Appeal is not in the nature of a decision, the recent decision of this Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391. In that case, the Court agreed

44 Je formulerai tout de même quelques commentaires en terminant sur trois décisions de notre Cour et du Conseil privé qu'il y a lieu de distinguer du présent cas. Les intimées invoquent d'abord, à l'appui de leur prétention selon laquelle le rapport de la Cour d'appel n'a pas de caractère décisionnel, le récent arrêt de notre Cour dans l'affaire *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391.

with the conclusion reached by the Federal Court of Appeal in *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149, in which that Court was of the opinion that a decision under s. 18(1) of the *Citizenship Act*, R.S.C. 1985, c. C-29, was not a final judgment subject to appeal under the *Federal Court Act*, R.S.C. 1985, c. F-7. This Court said, at para. 52:

> Although the decision followed a hearing at which much evidence was adduced, it was merely a finding of fact by the court, which was to form the basis of a report by the minister and, eventually, a decision by the Governor in Council, as described by ss. 10 and 18(1). The decision did not finally determine any legal rights. [Emphasis added.]

It is the English version of this decision, "The decision did not finally determine any legal rights" (emphasis added), which best conveys the meaning of these remarks, which is that the decision was not final. As I noted earlier, s. 40(1) *S.C.A.* refers to a final or other judgment. Furthermore, the fact situation in *Tobiass* was very different from the situation contemplated by s. 95 *C.J.A.* The Federal Court-Trial Division was conducting an inquiry to determine whether the citizenship that had been granted to the appellants should be revoked. That inquiry, although judicial in nature, is optional and will be held only if the person in respect of whom the decision is to be made has requested, within 30 days, that the case be referred to the court: s. 18 of the *Citizenship Act*. Accordingly, it does not play an essential role in the decision-making process.

45 There is also the recent decision of this Court in *R. v. Kelly*, [2001] 1 R.C.S. 741, 2001 SCC 25, to which I also wish to return. In that case, Major J., for the majority, held that the opinion given by the Ontario Court of Appeal under the referral process set out in s. 690(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46, for the purpose of determining whether certain evidence was admissible as fresh evidence, was no more than an opinion and not a judgment from which an appeal to this Court is available. That decision contains a number of points in common with the decision of the Privy

Dans cette affaire, la Cour a souscrit à la conclusion de la Cour d'appel fédérale dans l'affaire *Luitjens c. Canada (Secrétaire d'État)* (1992), 9 C.R.R. (2d) 149, qui était d'avis qu'une décision visée au par. 18(1) de la *Loi sur la citoyenneté*, L.R.C. 1985, ch. C-29, n'était pas un jugement définitif susceptible d'appel au sens de la *Loi sur la Cour fédérale*, L.R.C. 1985, ch. F-7. Notre Cour s'exprime ainsi, au par. 52 :

> Même si la décision faisait suite à une audience au cours de laquelle de nombreux éléments de preuve ont été produits, il s'agissait simplement d'une conclusion de fait de la part de la Cour, qui devait constituer le fondement d'un rapport du ministre et, à terme, d'une décision du gouverneur en conseil, comme le décrivent l'article 10 et le paragraphe 18(1). La décision n'a déterminé en fin de compte aucun droit juridique. [Je souligne.]

Pour bien comprendre la portée de ces propos, on doit lire la version anglaise des motifs selon laquelle « *The decision did not finally determine any legal rights* » (je souligne), c'est-à-dire de façon définitive. Or, comme je le soulignais précédemment, le par. 40(1) *L.C.S.* vise un jugement définitif ou autre. De plus, l'affaire *Tobiass* se situe dans un contexte fort différent de celui prévu à l'art. 95 *L.T.J.* La Section de première instance de la Cour fédérale est en charge d'une enquête visant à déterminer s'il y a lieu de révoquer le statut de citoyenneté octroyé aux appelants. Bien que judiciaire, cette enquête a un caractère facultatif et ne se tiendra pas si l'intéressé n'a pas dans les 30 jours demandé le renvoi de l'affaire devant la cour : art. 18 de la *Loi sur la citoyenneté*. En ce sens, elle ne joue pas un rôle essentiel dans le processus de décision.

Par ailleurs, notre Cour a rendu récemment une décision dans l'affaire *R. c. Kelly*, [2001] 1 R.C.S. 741, 2001 CSC 25, sur laquelle je désire aussi revenir. Dans cette affaire, le juge Major, au nom de la majorité, a décidé que l'avis rendu par la Cour d'appel de l'Ontario dans le cadre de la procédure de renvoi prévue à l'al. 690*c*) du *Code criminel*, L.R.C. 1985, ch. C-46, qui visait à déterminer si certains éléments de preuve pouvaient être admissibles comme nouvelle preuve, n'était qu'une opinion, et non un jugement susceptible d'appel devant notre Cour. Cette décision com-

Council in *Thomas v. The Queen*, [1980] A.C. 125, cited by the respondents, which was a reference by the Governor-General to the Court of Appeal of New Zealand regarding whether a convicted person should be pardoned. Although these two decisions may bear some *prima facie* resemblance to the present appeal, I believe that the fact situations were different. As I mentioned earlier, the report of the Quebec Court of Appeal has broader effect. Unlike s. 690(*c*) of the *Code*, it is not optional, but essential to the process of removing a judge and the administration of justice in general. Furthermore, the fact that it is judicial and in the nature of a decision is fundamental to the constitutionality of the proceeding as a whole. These considerations do not apply to applications for the mercy of the Crown under s. 690(*c*) of the *Code*.

For all these reasons, I am of the view that the report of the Quebec Court of Appeal is a final or other judgment within the meaning in which it is understood in ss. 2(1) and 40(1) *S.C.A.*, and I find that this Court has jurisdiction to hear the appeal from the report of the Court of Appeal. We must now consider the jurisdictional questions raised with respect to the Superior Court and the Conseil de la magistrature.

4. Jurisdiction of the Superior Court

In its decision on the appeal from the two Superior Court decisions dismissing the motions to dismiss brought by the respondents against the application for judicial review and motion for declaratory judgment by the appellant, the Court of Appeal correctly held that it had jurisdiction to consider all the questions of law and fact connected with the request by the Minister of Justice for an inquiry. It said that the exercise of [TRANSLATION] "[t]he jurisdiction assigned to it for the purposes of that inquiry precludes the exercise of the jurisdiction of the Superior Court" (emphasis added), thus giving the impression that its jurisdiction was exercised exclusively. In the alternative, the Court of Appeal then stated the opinion that it

porte plusieurs points en commun avec l'arrêt du Conseil privé dans l'affaire *Thomas c. The Queen*, [1980] A.C. 125, invoquée par les intimées, et dans laquelle le gouverneur général a formulé un renvoi à la Cour d'appel de la Nouvelle-Zélande sur l'opportunité de gracier un condamné. Bien que ces deux décisions puissent à première vue présenter quelques similitudes avec le présent appel, je crois que le contexte dans lequel elles s'inscrivent diffère. Comme je l'ai mentionné précédemment, le rapport de la Cour d'appel du Québec a une portée plus large. À la différence de l'al. 690*c*) du *Code*, il n'est pas facultatif, mais revêt un caractère essentiel et ce, à l'égard du processus de révocation d'un juge et de l'administration de la justice en général. De plus, son caractère décisionnel et judiciaire est un élément fondamental de la constitutionnalité de l'ensemble de la procédure. Ces considérations sont étrangères aux demandes de clémence de la Couronne en vertu de l'al. 690*c*) du *Code*.

Pour toutes ces raisons, je suis d'avis que le rap- 46
port de la Cour d'appel du Québec constitue un jugement, définitif ou autre, au sens où l'entendent les par. 2(1) et 40(1) *L.C.S.* et je conclus que notre Cour est compétente pour se saisir de l'appel du rapport de la Cour d'appel. Il importe maintenant de traiter des questions de compétence soulevées à l'égard de la Cour supérieure et du Conseil de la magistrature.

4. La compétence de la Cour supérieure

Dans son jugement rendu en appel des deux 47
décisions de la Cour supérieure, qui avait rejeté les requêtes en irrecevabilité présentées par les intimées à l'encontre des requêtes de l'appelant en révision judiciaire et en jugement déclaratoire, la Cour d'appel a, à juste titre, décidé qu'elle avait compétence pour examiner l'ensemble des questions de droit et de fait liées à la demande d'enquête du ministre de la Justice. Elle a déclaré que l'exercice de « [l]a compétence qui lui est attribuée pour les fins de cette enquête exclut l'exercice de celle de la Cour supérieure » (je souligne), donnant ainsi l'impression de l'exercer en exclusivité. Subsidiairement, la Cour d'appel a ensuite émis l'opinion qu'elle exerçait sa compétence de façon con-

exercised its jurisdiction concurrently with the jurisdiction of the Superior Court. LeBel J.A. stated, at pp. 1402-3:

> [TRANSLATION] The context of this special proceeding [provided in s. 95 *C.J.A.*] then makes it pointless for the Superior Court to exercise its ordinary jurisdiction relating to judicial review and consideration of motions for declaratory judgment. . . . For these reasons, the Superior Court should have declined to exercise its jurisdiction in these circumstances and dismissed both motions. [Emphasis added.]

The appellant submits that s. 95 *C.J.A.* did not assign jurisdiction of that nature to the Court of Appeal, either exclusively or concurrently. I am unable to share that view.

48 Under art. 31 *C.C.P.*, the Superior Court hears in first instance every suit not assigned exclusively to another court by a specific provision of law. In my opinion, where a request is properly made to the Court of Appeal by the Minister of Justice under s. 95 *C.J.A.*, following a recommendation to that effect by the Conseil de la magistrature in accordance with s. 279 *C.J.A.*, it is precisely the intent of the legislature that the Court of Appeal determine the matter to the exclusion of any other court. Although this is not spelled out, it clearly follows from the wording and the general scheme of the *Courts of Justice Act*. This is the only interpretation that will give true meaning to the provision in s. 95 *C.J.A.* that "[t]he Government may remove a judge only upon a report of the Court of Appeal" (emphasis added). Furthermore, this interpretation is consistent with the legislature's intention of complying with the constitutional requirements regarding tenure of provincial court judges by assigning responsibility to the Court of Appeal, the highest court in the province, exclusively and in the first instance, for conducting an inquiry and making a report on the conduct of a judge. As a final point, to conclude otherwise would be inimical to the proper administration of justice, since it would encourage a multiplicity of proceedings before various tribunals. It is therefore far preferable to leave it to the Court of Appeal to determine all the questions of law and fact that may be raised

currente à celle de la Cour supérieure. Le juge LeBel s'exprime ainsi, aux p. 1402-1403 :

> Le contexte de cette procédure spéciale [prévue à l'art. 95 *L.T.J.*] rend alors inutile l'exercice par la Cour supérieure de sa compétence normale en matière de contrôle judiciaire et d'examen des requêtes pour jugement déclaratoire. [. . .] Pour ces motifs, la Cour supérieure aurait dû refuser d'exercer sa compétence dans ces circonstances et rejeter les deux requêtes. [Je souligne.]

L'appelant soutient que l'art. 95 *L.T.J.* n'a pas accordé, ni en exclusivité, ni de façon concurrente, une telle compétence à la Cour d'appel. Je ne peux partager cet avis.

En vertu de l'art. 31 *C.p.c.*, la Cour supérieure connaît en première instance de toute demande qu'une disposition formelle de la loi n'a pas attribuée exclusivement à un autre tribunal. Or, à mon avis, lorsque la Cour d'appel est régulièrement saisie d'une requête déposée par le ministre de la Justice conformément à l'art. 95 *L.T.J.*, à la suite d'une recommandation à cet effet formulée par le Conseil de la magistrature conformément à l'art. 279 *L.T.J.*, il est précisément de l'intention du législateur qu'elle le soit à l'exclusion de tout autre tribunal. Si elle n'est pas exprimée littéralement, elle découle clairement du texte et de l'économie générale de la *Loi sur les tribunaux judiciaires*. En effet, c'est la seule interprétation susceptible de donner tout son sens aux termes de l'art. 95 *L.T.J.* selon lesquels « [l]e gouvernement ne peut démettre un juge que sur un rapport de la Cour d'appel » (je souligne). De plus, cette interprétation est conforme à la volonté du législateur de respecter les exigences constitutionnelles en matière d'inamovibilité des juges de cours provinciales en confiant à la Cour d'appel, le plus haut tribunal judiciaire de la province, exclusivement et en première instance, la responsabilité de faire enquête et d'émettre un rapport sur la conduite d'un juge. Finalement, conclure autrement irait à l'encontre d'une saine administration de la justice puisque cela favoriserait la multiplication des recours devant différentes instances. Ainsi, il est de loin préférable de laisser à la Cour d'appel le soin de trancher l'ensemble des questions de droit in the course of the disciplinary process involving the scrutiny of the judge's conduct.

et de fait qui pourraient être soulevées dans le cadre du processus déontologique dont le juge fait l'objet.

49 It may be helpful here to draw a parallel with the interpretation accepted by this Court in relation to arbitration in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. In *Weber*, the Court was asked to determine to what extent s. 45(1) of the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2, which contains a mandatory arbitration clause for the interpretation and application of collective agreements, deprived the ordinary courts of their jurisdiction. McLachlin J., as she then was, stated on behalf of a unanimous Court on this question that the model by which arbitrators have exclusive jurisdiction, to the exclusion of the ordinary courts, should prevail in relation to any disputes arising from the collective agreement. Of the three models proposed (concurrent, overlapping or exclusive), the exclusive jurisdiction model was most consistent with previous jurisprudence, the wording of the Act and the practical effect of a rule of this nature. At the time when *Weber* was decided, s. 45(1) of the Ontario *Labour Relations Act* read as follows:

45. — (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

Although the wording does not refer explicitly to the fact that exercise of the jurisdiction of grievance arbitrators regarding the interpretation, application, administration or alleged violation of the agreement precludes any concurrent proceedings in the ordinary law courts, this Court saw, here as well, the clear expression of the legislature's intention in that regard. However, this Court was careful to say that the model by which arbitrators have exclusive jurisdiction over disputes arising from

Il peut être utile d'établir un parallèle avec l'interprétation retenue par notre Cour en matière d'arbitrage de griefs dans les affaires *St. Anne Nackawic Pulp & Paper Co. c. Syndicat canadien des travailleurs du papier, section locale 219*, [1986] 1 R.C.S. 704, et *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929. Dans l'affaire *Weber*, la Cour fut appelée à déterminer dans quelle mesure le par. 45(1) de la *Loi sur les relations de travail* de l'Ontario, L.R.O. 1990, ch. L.2, qui prévoit une clause d'arbitrage obligatoire en matière d'interprétation et d'application des conventions collectives, dépossédait les tribunaux de droit commun de leur compétence. Le juge McLachlin, alors juge puîné, décidait au nom de la Cour unanime sur cette question, que le modèle de la compétence exclusive de l'arbitre de griefs à l'exclusion des tribunaux de droit commun devait prévaloir à l'égard de tout litige résultant de la convention collective. Parmi les trois modèles proposés (modèles de la concomitance, du chevauchement ou de l'exclusivité), celui de la compétence exclusive convenait le mieux à la jurisprudence antérieure, au libellé de la loi et à l'effet pratique d'une telle règle. Le paragraphe 45(1) de la *Loi sur les relations de travail* de l'Ontario se lisait ainsi à l'époque de l'affaire *Weber* :

45 (1) Chaque convention collective contient une disposition sur le règlement, par voie de décision arbitrale définitive et sans interruption du travail, de tous les différends entre les parties que soulèvent l'interprétation, l'application, l'administration ou une prétendue inexécution de la convention collective, y compris la question de savoir s'il y a matière à arbitrage.

Bien que le texte ne fasse aucune mention explicite du fait que l'exercice de la compétence des arbitres de griefs dans l'interprétation, l'application, l'administration ou la prétendue inexécution de la convention collective exclut toute procédure concomitante devant les tribunaux de droit commun, notre Cour y a vu là aussi l'expression claire de la volonté du législateur en ce sens. Cependant, notre Cour prenait soin de préciser que le modèle de la compétence exclusive des arbitres de griefs à the collective agreement did not close the door to all other actions in the courts between the employer and employee.

l'égard des litiges résultant de la convention collective ne fermait pas la porte à toutes les actions en justice mettant par ailleurs en cause l'employeur et l'employé.

50 In my view, the Quebec legislature did not say anything different with regard to the jurisdiction of the Court of Appeal under s. 95 *C.J.A.* Thus, where a request is referred to it under s. 95 *C.J.A.*, that Court exercises its jurisdiction exclusively. However, as this Court held in *Weber*, *supra*, this model does not operate completely to preclude the ordinary jurisdiction of the Superior Court in other circumstances.

À mon avis, le législateur québécois ne s'est pas exprimé différemment concernant la compétence de la Cour d'appel en vertu de l'art. 95 *L.T.J.* Ainsi, lorsque celle-ci est saisie d'une requête en vertu de l'art. 95 *L.T.J.*, elle exerce sa compétence de façon exclusive. Par ailleurs, comme notre Cour l'affirmait dans l'arrêt *Weber*, précité, ce modèle n'a pas pour effet d'écarter complètement la compétence de droit commun de la Cour supérieure dans d'autres circonstances.

51 In the case at bar, the Court of Appeal had before it the request made by the Minister under s. 95 *C.J.A.* on August 11, 1997. Then, on October 2, 1997, before it commenced its inquiry, the appellant filed his application for judicial review and motion for declaratory judgment in the Superior Court. Therefore, at the point in time when the application and motion were before the Superior Court, the appellant's case had been properly referred by the Minister to the Court of Appeal, to the exclusion of any other court. I therefore find that the Superior Court had no jurisdiction to act in the circumstances.

En l'espèce, la Cour d'appel fut saisie de la requête déposée par le ministre conformément à l'art. 95 *L.T.J.* dès le 11 août 1997. Puis, avant qu'elle ne débute son enquête, l'appelant a déposé ses deux requêtes en révision judiciaire et en jugement déclaratoire en Cour supérieure, soit le 2 octobre 1997. Ainsi, au moment où la Cour supérieure doit se pencher sur ces requêtes, la Cour d'appel est régulièrement saisie du dossier de l'appelant par le ministre et ce, à l'exclusion de tout autre tribunal. Je conclus donc que la Cour supérieure était incompétente à agir dans ces circonstances.

52 The appellant then argues that the effect of this finding is to deprive him of the extraordinary remedies available to all individuals before the courts. In his view, it is absurd that a judge who has been reprimanded can have the inquiry process judicially reviewed (with a right of appeal), as was the case in *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, whereas he, who is threatened with removal, is deprived of any remedy. It is untrue to say that no remedy is available to the appellant. Quite the contrary, the proceeding provided for in s. 95 *C.J.A.* gives him special protection and provides him with a judicial forum in which he can be heard. Furthermore, this is, so to speak, a remedy as of right, since it is a mandatory part of the process that the Minister must follow before removing him from the bench, whereas extraordinary remedies are discretionary. I would add, in conclusion on this point, that the constitutional considerations

L'appelant prétend ensuite qu'une telle conclusion a pour effet de le priver des recours extraordinaires ouverts à tous les justiciables. Il estime qu'il est absurde qu'un juge réprimandé puisse faire réviser judiciairement (avec droit d'appel) le processus d'enquête, comme ce fut le cas dans l'arrêt *Ruffo c. Conseil de la magistrature*, [1995] 4 R.C.S. 267, alors que, menacé de destitution, il soit dépourvu de tout recours. Or, il est faux de dire que l'appelant est dépourvu de tout recours. Bien au contraire, la procédure prévue à l'art. 95 *L.T.J.* lui accorde une protection particulière et lui permet de bénéficier d'un forum judiciaire où il peut se faire entendre. De surcroît, il s'agit en quelque sorte d'un recours de plein droit, puisqu'il constitue un passage obligé pour le ministre avant de procéder à sa destitution, alors que les recours extraordinaires sont de nature discrétionnaire. J'ajouterai finalement que les considérations consthat apply when a judge is reprimanded are not as significant as when his or her appointment may be revoked by the Executive.

5. Jurisdiction of the Conseil de la magistrature

53 The appellant argues that the Conseil de la magistrature has no jurisdiction to review his conduct, since the ethical breach occurred before he was appointed. He is accordingly of the opinion that the misconduct that is the source of the proceedings against him falls under the exclusive jurisdiction of the discipline committee of the Barreau du Québec. I am unable to accept this reasoning, for several reasons.

54 The *Courts of Justice Act* imposes two conditions in order for the Conseil to have jurisdiction. First, it must have jurisdiction over the person who is the subject of the complaint. Section 256*c*) *C.J.A.* states that the functions of the Conseil are "to receive and examine any complaint lodged against a judge to whom Chapter III of this Part applies". Section 260 *C.J.A.* then provides that "[t]his chapter [referring to Chapter III] applies to a judge appointed under this act". In the case at bar, Judge Therrien's notice of appointment confirms that he was appointed as a judge of the Court of Québec pursuant to s. 86 *C.J.A.* Second, the Conseil must have jurisdiction over the subject matter of the complaint. Section 263 *C.J.A.* specifies that the Conseil receives and examines a complaint lodged by any person against a judge alleging that he has failed to comply with the code of ethics. At the hearing before the committee of inquiry of the Conseil de la magistrature, counsel for the Minister of Justice explained that the complaint lodged related to breaches of ss. 2, 4, 5 and 10 of the *Judicial Code of Ethics*, which provide:

2. The judge should perform the duties of his office with integrity, dignity and honour.

4. The judge should avoid any conflict of interest and refrain from placing himself in a position where he cannot faithfully carry out his functions.

5. The judge should be, and be seen to be, impartial and objective.

titutionnelles en jeu lorsqu'un juge est réprimandé sont moindres que lorsque sa commission peut être révoquée par le pouvoir exécutif.

5. La compétence du Conseil de la magistrature

L'appelant prétend que le Conseil de la magistrature n'a pas compétence pour examiner sa conduite étant donné que le manquement déontologique est survenu avant sa nomination. En conséquence, il est d'avis que l'inconduite qui lui est reprochée relève exclusivement du comité de discipline du Barreau du Québec. Je ne peux accepter ce raisonnement pour plusieurs raisons.

La *Loi sur les tribunaux judiciaires* pose une double condition à la compétence du Conseil. Celui-ci doit d'abord avoir compétence sur la personne visée par la plainte. L'alinéa 256*c*) *L.T.J.* indique que le Conseil a pour fonctions « de recevoir et d'examiner toute plainte formulée contre un juge auquel s'applique le chapitre III de la présente partie ». Puis, l'art. 260 *L.T.J.* précise que « [l]e présent chapitre [référant au ch. III] s'applique à un juge nommé en vertu de la présente loi ». En l'espèce, l'acte de nomination du juge Therrien atteste que celui-ci est nommé juge de la Cour du Québec en vertu de l'art. 86 *L.T.J.* Dans un deuxième temps, le Conseil doit avoir compétence sur l'objet de la plainte. L'article 263 *L.T.J.* énonce que le Conseil reçoit et examine une plainte lui reprochant un manquement au code de déontologie. À l'audition devant le comité d'enquête du Conseil de la magistrature, l'avocat du ministre de la Justice précisait que la plainte portée concernait des atteintes aux art. 2, 4, 5 et 10 du *Code de déontologie de la magistrature*, selon lesquels :

2. Le juge doit remplir son rôle avec intégrité, dignité et honneur.

4. Le juge doit prévenir tout conflit d'intérêt et éviter de se placer dans une situation telle qu'il ne peut remplir utilement ses fonctions.

5. Le juge doit de façon manifeste être impartial et objectif.

10. The judge should uphold the integrity and defend the independance of the judiciary, in the best interest of justice and society.

The Conseil de la magistrature therefore had jurisdiction over the person and over the subject matter of the complaint. Whether or not the actions were prior to the appellant's appointment is not relevant under the Act.

55 Furthermore, the Barreau du Québec has no jurisdiction over the actions in question. In *Maurice v. Priel*, [1989] 1 S.C.R. 1023, this Court set out the procedure to be followed in order to determine the jurisdiction of the Law Society of Saskatchewan to proceed with discipline proceedings against the respondent, a judge of the Court of Queen's Bench for Saskatchewan, for breaches of its *Code of Professional Conduct* while he was a practising lawyer. It stated, at p. 1033:

Rather [the case at bar] is concerned with the narrow issue as to whether pursuant to the provisions of *The Legal Profession Act* of Saskatchewan the Law Society of that province can institute discipline proceedings against a judge for alleged misconduct committed while still a lawyer. The resolution of the issue turns solely upon the wording of *The Legal Profession Act* and the *Judges Act*. [Emphasis added.]

56 In Quebec, s. 116 of the *Professional Code* describes the extent of the jurisdiction of the committees on discipline constituted within each professional order:

116. A committee on discipline is constituted within each order.

The committee shall be seized of every complaint made against a professional for an offence against this Code, the Act constituting the order of which he is a member or the regulations made under this Code or that Act.

The committee shall also be seized of every complaint made against a former member of an order for an offence referred to in the second paragraph that was committed while he was a member of the order. In such a case, every reference to a professional or a member of the order in the provisions of this Code, the Act constituting the order of which he was a member or a regula-

10. Le juge doit préserver l'intégrité et défendre l'indépendance de la magistrature, dans l'intérêt supérieur de la justice et de la société.

Le Conseil de la magistrature avait donc compétence sur la personne et sur l'objet de la plainte. Que les gestes soient antérieurs à la nomination de l'appelant ou non n'est pas un critère pertinent au sens de la loi.

Par ailleurs, le Barreau du Québec n'a aucune compétence sur les actions reprochée. Dans l'affaire *Maurice c. Priel*, [1989] 1 R.C.S. 1023, notre Cour indiquait la démarche à suivre afin de déterminer la compétence de la Law Society of Saskatchewan pour engager des procédures disciplinaires contre l'intimé, un juge de la Cour du Banc de la Reine de la Saskatchewan, pour des manquements à son *Code de déontologie* alors qu'il exerçait la profession d'avocat. Elle mentionnait, à la p. 1033 :

La présente affaire porte plutôt sur la question limitée de savoir si, selon *The Legal Profession Act* de la Saskatchewan, la Law Society de cette province peut engager des procédures disciplinaires contre un juge pour l'inconduite dont il aurait fait preuve pendant qu'il était encore avocat. La réponse à cette question dépend uniquement du texte de *The Legal Profession Act* et de la *Loi sur les juges*. [Je souligne.]

Au Québec, l'art. 116 du *Code des professions* précise l'étendue de la compétence des comités de discipline constitués dans chacun des ordres professionnels :

116. Un comité de discipline est constitué au sein de chacun des ordres.

Le comité est saisi de toute plainte formulée contre un professionnel pour une infraction aux dispositions du présent code, de la loi constituant l'ordre dont il est membre ou des règlements adoptés conformément au présent code ou à ladite loi.

Le comité est saisi également de toute plainte formulée contre une personne qui a été membre d'un ordre pour une infraction visée au deuxième alinéa, commise alors qu'elle était membre de l'ordre. Dans ce cas, une référence au professionnel ou au membre de l'ordre, dans les dispositions du présent code, de la loi constituant l'ordre dont elle était membre ou d'un règlement tion under this Code or the said Act shall be a reference to the former member. [Emphasis added.]

Although the complaint lodged against Judge Therrien concerns allegations of misconduct committed while he was a lawyer, something that is expressly provided for in the third paragraph of s. 116, it does not relate to any "offence against this Code, the Act constituting the order of which he [was] a member or the regulations made under this Code or that Act".

Apart from the statutory provisions, a number of other reasons stated both by the committee of inquiry of the Conseil de la magistrature and by the Court of Appeal may be raised. For example, in the interests of judicial independence, it is important that discipline be dealt with in the first place by peers. I agree with the following remarks by Professor H. P. Glenn in his article "Indépendance et déontologie judiciaires" (1995), 55 *R. du B.* 295, at p. 308:

> [TRANSLATION] If we take as our starting point the principle of judicial independence — and I emphasize the need for this starting point in our historical, cultural and institutional context — I believe that it must be concluded that the primary responsibility for the exercise of disciplinary authority lies with the judges at the same level. To place the real disciplinary authority outside that level would call judicial independence into question.

In addition, as I said in *Ruffo*, *supra*, at p. 309, the committee of inquiry is responsible for preserving the integrity of the whole of the judiciary. Accordingly, it must be able to examine the past conduct of a judge, if it is relevant to the assessment of his candidacy, having regard to his capacity to carry out his judicial functions, and to determine, based on that, whether it may reasonably undermine public confidence in the incumbent of the office. In this case, the appellant's actions, though predating his appointment, were alleged to have had that kind of impact on the performance of his functions. In conclusion on this point, I am of the same view as LeBel J.A., who held that the process of selecting persons qualified for appointment as judges is so closely related to the exercise

adopté conformément au présent code ou à ladite loi, est une référence à cette personne. [Je souligne.]

Si la plainte formulée contre le juge Therrien concerne des allégations d'inconduite commises alors qu'il était avocat, ce qui est expressément prévu par le troisième alinéa de l'art. 116, celle-ci ne vise aucune « infraction aux dispositions du présent code, de la loi constituant l'ordre dont il [était] membre ou des règlements adoptés conformément au présent code ou à ladite loi ».

Au-delà des textes de loi, plusieurs autres raisons soulevées tant par le comité d'enquête du Conseil de la magistrature que par la Cour d'appel peuvent être invoquées. Ainsi, au nom de l'indépendance de la magistrature, il importe que la discipline relève au premier chef des pairs. Je partage les propos suivants du professeur H. P. Glenn, dans son article « Indépendance et déontologie judiciaires » (1995), 55 *R. du B.* 295, p. 308 : 57

> Si l'on part du principe de l'indépendance judiciaire — et j'insiste sur la nécessité de ce point de départ dans notre contexte historique, culturel et institutionnel — je crois qu'il faut conclure que la première responsabilité pour l'exercice du pouvoir disciplinaire repose sur les juges d'un même ordre. Situer le véritable pouvoir disciplinaire à l'extérieur de cet ordre serait mettre en question l'indépendance judiciaire.

De plus, comme je l'affirmais dans l'arrêt *Ruffo*, précité, p. 309, le comité d'enquête a la responsabilité de veiller à l'intégrité de l'ensemble de la magistrature. En ce sens, il doit pouvoir examiner la conduite passée d'un juge si celle-ci est pertinente à l'appréciation de sa candidature, eu égard à sa capacité d'exercer ses fonctions judiciaires et pour décider si, en conséquence, elle peut raisonnablement porter atteinte à la confiance du public envers le titulaire de la charge. En l'espèce, les gestes posés par l'appelant, bien qu'antérieurs à sa nomination, lui sont reprochés comme ayant une telle incidence sur l'exécution de ses fonctions. Finalement, je partage le point de vue exprimé par le juge LeBel de la Cour d'appel selon lequel le processus de sélection des personnes aptes à être 58 of the judicial function itself that it cannot be dissociated from it.

nommées juges est si intimement lié à l'exercice même de la fonction judiciaire qu'il ne saurait en être dissocié.

B. *Constitutional Questions*

B. *Les questions constitutionnelles*

1. Relevant Statutory Provisions

1. Les dispositions législatives pertinentes

59 *Constitution Act, 1867*

Loi constitutionnelle de 1867

[Preamble]

[Préambule]

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

Considérant que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (*Dominion*) sous la couronne du Royaume-Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni:

. . .

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.

Canadian Charter of Rights and Freedoms

Charte canadienne des droits et libertés

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

11. Any person charged with an offence has the right

11. Tout inculpé a le droit :

. . .

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

2. Issues and Appellant's Arguments

60 Individual and institutional impartiality and independence are key elements in the function of a judge; they are inherent in the very definition of a judge and are an integral part of the constitutional structure of the parliamentary democracy of the United Kingdom, which we have inherited through the preamble to our Constitution: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 70-71, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at paras. 92 and 106. Section 11(*d*) of the *Canadian Charter* refers specifically to these elements in defining the rights of the accused: *Valente*, *supra*, at p. 679; *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 282 and 284. Sections 96 to 100 of the *Constitution Act, 1867* also guarantee these elements in respect of judges of the superior courts: *Beauregard*, *supra*, at pp. 71-73, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at paras. 105, 124-26. The scope of these various sources of judicial independence, and how they interact, are at the core of the constitutional issue in this case.

61 First, the appellant submits that the legal rule set out in s. 95 *C.J.A.*, by which a provincial court judge may be removed without an address of the legislature, is contrary to the principles of judicial impartiality and independence embodied in the preamble. While he acknowledges that this Court disposed of this question in *Valente*, *supra*, at p. 697, he argues that it did so only in the context of s. 11(*d*) of the *Canadian Charter*, which deals exclusively with criminal matters. In a non-criminal context, the preamble would apply and afford greater protection than s. 11(*d*). Regarding security of tenure, it would afford the same protection to provincial court judges as to judges of the superior courts, who cannot be removed without an address of Parliament in accordance with s. 99 of the *Constitution Act, 1867*. The appellant is also of the opinion that the province of Quebec did not have the necessary legislative jurisdiction to repeal the

2. Les questions en litige et les prétentions de l'appelant

Impartialité et indépendance, tant individuelles qu'institutionnelles, sont des éléments essentiels à la fonction du juge, tiennent de sa définition même et font partie intégrante de la structure constitutionnelle de la démocratie parlementaire de la Grande-Bretagne dont le préambule de notre Constitution nous fait les héritiers : *Beauregard c. Canada*, [1986] 2 R.C.S. 56, p. 70-71, et le *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 92 et 106. L'alinéa 11*d*) de la *Charte canadienne* en fait la mention spécifique au chapitre des droits de l'accusé : *Valente*, précité, p. 679; *R. c. Généreux*, [1992] 1 R.C.S. 259, p. 282 et 284. Les articles 96 à 100 de la *Loi constitutionnelle de 1867* en assurent aussi le respect au niveau des juges des cours supérieures : *Beauregard*, précité, p. 71-73, et *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 105, 124-126. La portée et l'interaction de ces différents fondements de l'indépendance judiciaire sont au cœur du présent litige constitutionnel.

Dans un premier temps, l'appelant soutient que la règle de droit prévue à l'art. 95 *L.T.J.*, selon laquelle il est possible de destituer un juge d'une cour provinciale sans adresse parlementaire, est contraire à ces principes d'impartialité et d'indépendance judiciaire enchâssés dans le préambule. Il reconnaît que notre Cour a statué sur cette question dans le cadre de l'arrêt *Valente*, précité, p. 697, mais il prétend qu'elle ne l'a fait que dans le contexte de l'al. 11*d*) de la *Charte canadienne*, lequel vise exclusivement les matières pénales. En contexte autre que pénal, le préambule prendrait la relève et offrirait une protection supérieure à celle de l'al. 11*d*). En matière d'inamovibilité, il accorderait la même protection aux juges des cours provinciales qu'aux juges des cours supérieures qui ne peuvent être destitués sans une adresse parlementaire, conformément à l'art. 99 de la *Loi constitutionnelle de 1867*. De plus, l'appelant estime que la province de Québec n'avait pas la compétence législative requise pour abroger en 1941, par requirement for an address of the legislature when it enacted s. 95 *C.J.A.* in 1941.

62 Second, the appellant argues that s. 95 *C.J.A.* undermines the structural principle of judicial independence embodied in the preamble to the *Constitution Act, 1867*, since the removal of a judge of the Court of Québec is a matter within the sole discretion of the Minister of Justice, who is not required either to table the report of the Court of Appeal in the National Assembly or to follow it. Once again, he is of the opinion that the preamble affords greater protection than is provided by s. 11(*d*) of the *Canadian Charter*. I will address these two arguments in turn.

3. The Requirement for an Address of the Legislature

63 It is worth mentioning at the outset that the Court of Québec, like the Ontario Provincial Court or courts at the same level in other provinces, is not a superior court as defined in s. 96 of the *Constitution Act, 1867*. Its judges are therefore not covered by the specific conditions set out in ss. 96 to 100 of the *Constitution Act, 1867*, *inter alia* that the removal of a judge must follow the joint address procedure set out in s. 99(1). However, should this standard, while not directly applicable to them, be imposed as a constitutional requirement in respect of provincial court judges? This Court examined that question in relation to s. 11(*d*) in *Valente*, *supra*, to which we should briefly return.

64 *Valente* raised the issue of whether a judge of the Ontario Provincial Court hearing criminal cases, whose independence and impartiality are expressly guaranteed by s. 11(*d*) of the *Canadian Charter*, was an independent tribunal within the meaning of that provision. Le Dain J. wrote the judgment on behalf of the Court. First, he stated the three essential conditions of judicial independence for purposes of s. 11(*d*): security of tenure, financial security and institutional independence with respect to matters of administration bearing

l'adoption de l'art. 95 *L.T.J.*, cette exigence de l'adresse parlementaire.

Dans un deuxième temps, l'appelant prétend que l'art. 95 *L.T.J.* porte atteinte au principe structurel de l'indépendance judiciaire enchâssé dans le préambule de la *Loi constitutionnelle de 1867*, car la destitution d'un juge de la Cour du Québec ne relève que du pouvoir discrétionnaire du ministre de la Justice, qui n'est ni tenu de déposer le rapport de la Cour d'appel devant l'Assemblée nationale ni tenu de s'y conformer. Encore une fois, il est d'avis que le préambule offre une protection supérieure à celle de l'al. 11*d*) de la *Charte canadienne*. J'aborderai ces deux arguments à tour de rôle.

3. L'exigence de l'adresse parlementaire

D'entrée de jeu, il n'est pas inutile de rappeler que la Cour du Québec, comme c'est le cas de la Cour provinciale de l'Ontario ou de celles de même niveau des autres provinces, n'est pas une cour supérieure visée par l'art. 96 de la *Loi constitutionnelle de 1867*. Ses juges ne sont donc pas visés par les modalités particulières prévues aux art. 96 à 100 de la *Loi constitutionnelle de 1867*, notamment par l'assujettissement de la destitution d'un juge à la procédure d'une adresse conjointe prévue au par. 99(1). Cependant, sans leur être applicable directement, cette norme doit-elle être imposée comme exigence constitutionnelle à l'égard des juges des cours provinciales? Notre Cour a examiné la question dans le contexte de l'al. 11*d*), dans l'arrêt *Valente*, précité, sur lequel il importe de revenir brièvement.

L'affaire *Valente* soulevait la question de savoir si un juge de la Cour provinciale de l'Ontario siégeant en matière pénale, dont l'indépendance et l'impartialité sont garanties de façon expresse par l'al. 11*d*) de la *Charte canadienne*, constituait un tribunal indépendant au sens de cette disposition. Le juge Le Dain écrit le jugement au nom de la Cour. D'abord, il détermine les trois conditions essentielles de l'indépendance judiciaire au sens de l'al. 11*d*), soit l'inamovibilité, la sécurité financière et l'autonomie administrative relativement directly on the exercise of its judicial function: *Valente*, *supra*, at pp. 694, 704 and 708 (see also *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 132; *Généreux*, *supra*, at pp. 285-86; *Ruffo*, *supra*, at para. 40; and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 115).

Le Dain J. next said that although it may be desirable, it is not reasonable to apply the most elaborate and rigorous conditions of judicial independence as constitutional requirements, since s. 11(*d*) of the *Canadian Charter* may have to be applied to a variety of tribunals. These essential conditions should instead respect that diversity and be construed flexibly. Accordingly, there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing. It will be sufficient if the essence of these conditions is respected: *Valente*, *supra*, at pp. 692-93 (see also *Lippé*, *supra*, at p. 142; *Généreux*, *supra*, at pp. 284-86 and 304; and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 167).

In his view, the essence of security of tenure for purposes of s. 11(*d*) of the *Canadian Charter* is that the appointment be made until an age of retirement, for a fixed term, or for a specific adjudicative task, and that the tenure be secure against interference by the Executive or other appointing authority in a discretionary manner: *Valente*, *supra*, at p. 698 (see also *Généreux*, *supra*, at p. 285). More specifically, as regards removal of provincial court judges, it will be sufficient if the following two criteria are met: (1) the judge may be removed only for cause related to his or her capacity to perform judicial functions and (2) there must be a judicial inquiry to establish that such cause exists, at which the judge must be given an opportunity to be heard: *Valente*, *supra*, at pp. 697-98 (see also *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 115).

Accordingly, it is not necessary, for purposes of s. 11(*d*) of the *Canadian Charter*, that the proce-

aux questions qui ont un effet direct sur l'exercice des fonctions judiciaires : *Valente*, précité, p. 694, 704 et 708 (voir aussi les arrêts *R. c. Lippé*, [1991] 2 R.C.S. 114, p. 132; *Généreux*, précité, p. 285-286; *Ruffo*, précité, par. 40; et le *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 115).

Le juge Le Dain mentionne ensuite que, bien que ce puisse être souhaitable, il n'est pas raisonnable de poser comme exigences constitutionnelles les conditions les plus rigoureuses et élaborées de l'indépendance judiciaire parce que l'al. 11*d*) de la *Charte canadienne* est susceptible de s'appliquer à une grande diversité de tribunaux. Ces conditions essentielles devront plutôt respecter cette diversité et être interprétées de façon souple. Ainsi, il ne saurait être question d'imposer une norme uniforme ou de dicter une formule législative particulière qui devrait prévaloir. Il suffira que l'essence de ces conditions soit respectée : *Valente*, précité, p. 692-693 (voir aussi les arrêts *Lippé*, précité, p. 142; *Généreux*, précité, p. 284-286 et 304; et le *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 167). 65

À son avis, l'essence de la garantie d'inamovibilité aux fins de l'al. 11*d*) de la *Charte canadienne* est que la nomination soit faite jusqu'à l'âge de la retraite, pour une durée fixe ou pour une charge *ad hoc*, et que cette fonction soit à l'abri de toute intervention discrétionnaire de la part de l'exécutif ou de l'autorité responsable des nominations : *Valente*, précité, p. 698 (voir aussi l'arrêt *Généreux*, précité, p. 285). Plus spécifiquement, en matière de révocation des juges des cours provinciales, il suffira de répondre aux deux critères suivants : (1) le juge ne peut être révoqué que pour un motif déterminé lié à sa capacité d'exercer ses fonctions judiciaires et (2) une enquête judiciaire doit être prévue pour établir l'existence de ce motif dans le cadre de laquelle le juge doit avoir l'occasion de se faire entendre : *Valente*, précité, p. 697-698 (voir aussi le *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 115). 66

En ce sens, il n'est pas nécessaire, aux fins de l'al. 11*d*) de la *Charte canadienne*, que la procé- 67 dure to remove a provincial court judge who hears criminal cases include an address of Parliament. Although in this regard superior court judges enjoy the higher degree of constitutional guarantee modelled on the *Act of Settlement* of 1701 (12 & 13 Will. 3, c. 2) and set out in s. 99 of the *Constitution Act, 1867*, that standard should not be imposed as a constitutional requirement: *Valente*, *supra*, at pp. 695, 697-98 (see also *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 115). Le Dain J. also said, at p. 697:

> Similarly, it may be desirable, as now provided for in s. 56(1), that a judge should be removable from office only on an address of the legislature, but again I do not think it is reasonable to require this as essential for security of tenure for purposes of s. 11(*d*) of the *Charter*. It may be that the requirement of an address of the legislature makes removal of a judge more difficult in practice because of the solemn, cumbersome and publicly visible nature of the process, but the requirement of cause, as defined by statute, together with a provision for judicial inquiry at which the judge affected is given a full opportunity to be heard, is in my opinion a sufficient restraint upon the power of removal for purposes of s. 11(*d*). [Emphasis added.]

68 I am of the opinion that this should also apply to provincial courts and the judges of those courts when they hear non-criminal matters, and that their independence is protected by the preamble to the *Constitution Act, 1867*. First, stricter procedural measures in relation to removal cannot be required in their case than are required for the judge exercising his or her jurisdiction in criminal cases. Their functions are essentially the same and can be distinguished from the functions of a judge hearing criminal cases only to the extent that the subject matter of the cases is less likely to directly affect the freedom of the individual before the court and violate the guarantees set out in ss. 7 and 11 of the *Canadian Charter*. Second, although the protection of s. 11(*d*) is available only to persons charged with an offence, it "reflects or embodies the traditional constitutional value of judicial independence": *Valente*, *supra*, at p. 685 (see also *Reference re Remuneration of Judges of the Provincial*

dure de révocation d'un juge d'une cour provinciale, lorsqu'il siège en matière pénale, comprenne une adresse parlementaire. Bien qu'à cet égard, les juges des cours supérieures bénéficient du plus haut degré de garantie constitutionnelle inspiré de l'*Act of Settlement* de 1701 (12 & 13 Will. 3, ch. 2) et prévu à l'art. 99 de la *Loi constitutionnelle de 1867*, cette norme ne saurait être imposée comme exigence constitutionnelle : *Valente*, précité, p. 695, 697-698 (voir aussi le *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 115). Le juge Le Dain s'exprime ainsi à la p. 697 :

> De même, il est peut-être souhaitable, comme le prévoit maintenant le par. 56(1), qu'un juge ne puisse être révoqué que sur adresse du corps législatif mais, ici encore, je ne pense pas qu'il soit raisonnable d'exiger cela comme étant essentiel à l'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*. Il se peut que la nécessité d'une adresse du corps législatif rende la révocation d'un juge plus difficile en pratique à cause de la solennité, de la lourdeur et de la visibilité de la procédure, mais qu'un motif soit nécessaire, comme le définit la loi, et qu'une enquête judiciaire soit prévue au cours de laquelle le juge visé a pleinement l'occasion de se faire entendre, constituent à mon avis, une restriction suffisante du pouvoir de révocation pour les fins de l'al. 11*d*). [Je souligne.]

Je suis d'avis qu'il doit en être également ainsi pour les cours provinciales et leurs juges lorsqu'ils siègent dans des matières autres que pénales et que leur indépendance est protégée par le préambule de la *Loi constitutionnelle de 1867*. D'abord, on ne saurait exiger à leur égard des mesures procédurales qui soient plus strictes en matière de destitution que celles requises pour le juge lorsqu'il exerce sa compétence en matière pénale. Leurs fonctions sont essentiellement les mêmes et ne se distinguent de celles d'un juge en matière pénale qu'en autant que leur objet est moins susceptible de toucher directement la liberté d'un justiciable et de porter atteinte aux garanties des art. 7 et 11 de la *Charte canadienne*. Ensuite, bien que l'al. 11*d*) ne bénéficie qu'aux personnes faisant l'objet d'une inculpation, il « reflète ou renferme la valeur constitutionnelle traditionnelle qu'est l'indépendance judiciaire » : *Valente*, précité, p. 685 (voir aussi *Renvoi sur la rémunération des juges de cours pro-*

Court, *supra*, at para. 111). That same constitutional value is also embodied in the preamble to our Constitution. Accordingly, the preamble cannot afford greater protection than what is guaranteed by s. 11(*d*) of the *Canadian Charter*.

The appellant further submits that this Court should revisit the conclusion reached in *Valente* in light of its recent judgment in *Reference re Remuneration of Judges of the Provincial Court*, *supra*. He relies on certain remarks by Lamer C.J., for the majority, at para. 162 of the decision:

> Rather, all that *Valente* held is that s. 11(*d*) does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions do to superior court judges. *In the particular circumstances*, though, s. 11(*d*) may in fact provide the same level of protection to provincial court judges as the judicature provisions do to superior court judges. [Underlining in original; italics added.]

Taken in isolation, this passage provides no support for the appellant's submissions. Furthermore, when put back in its context, it can only reinforce the conclusions of this Court in *Valente*. *Reference re Remuneration of Judges of the Provincial Court*, *supra*, raised the specific question of whether the guarantee of judicial independence, and primarily the financial security aspect, restricted the manner by and extent to which the government and provincial legislatures can reduce salaries of provincial court judges. A majority of the Court found that for purposes of s. 11(*d*) of the *Canadian Charter*, judges' salaries may be reduced, increased or frozen provided that the government refers consideration of the proposed measure to an independent commission. In reaching that conclusion, Lamer C.J. relied on *Beauregard*, *supra*, which dealt with the degree of protection to which superior court judges were entitled under s. 100 of the *Constitution Act, 1867*. Thus, attempting to determine the

vinciales, précité, par. 111). Cette même valeur constitutionnelle est enchâssée dans le préambule de notre Constitution. En ce sens, le préambule ne saurait accorder une protection supérieure à celle garantie par l'al. 11*d*) de la *Charte canadienne*.

69 L'appelant soutient par ailleurs que notre Cour devrait revenir sur cette conclusion retenue dans l'arrêt *Valente* à la lumière de son récent jugement dans le *Renvoi sur la rémunération des juges de cours provinciales*, précité. Il s'appuie sur certains propos tenus par le juge en chef Lamer, au nom de la majorité, au par. 162 du jugement :

> Au contraire, cet arrêt [*Valente*] a tout au plus établi que, en principe, l'al. 11*d*) ne garantit pas automatiquement aux cours provinciales le même degré de protection que celui accordé aux juges des cours supérieures par l'art. 100 et les autres dispositions relatives à la magistrature. *Dans les circonstances de l'espèce*, toutefois, l'al. 11*d*) peut en fait accorder aux juges des cours provinciales le même degré de protection que celui garanti aux juges des cours supérieures par les dispositions relatives à la magistrature. [Soulignement dans l'original; italiques ajoutés.]

70 Pris isolément, ce passage ne saurait venir appuyer les prétentions de l'appelant. Mieux encore, replacé dans son contexte, il ne saurait que renforcer les conclusions de notre Cour dans l'arrêt *Valente*. Le *Renvoi sur la rémunération des juges de cours provinciales*, précité, soulevait la question précise de savoir si la garantie d'indépendance de la magistrature, et principalement le volet de la sécurité financière, avait pour effet de restreindre les moyens par lesquels le gouvernement et les assemblées législatives des provinces peuvent réduire les traitements des juges des cours provinciales et, le cas échéant, de limiter l'ampleur de ces réductions. La Cour, à la majorité, conclut, qu'aux fins de l'al. 11*d*) de la *Charte canadienne*, les traitements des juges peuvent être réduits, haussés ou bloqués en autant que le gouvernement ait recours à une commission indépendante pour examiner la mesure proposée. Pour parvenir à cette conclusion, le juge en chef Lamer s'appuie sur l'arrêt *Beauregard*, précité, qui portait sur le niveau de protection accordé aux juges des cours supérieures en vertu de l'art. 100 de la *Loi constitutionnelle de 1867*. Ainsi, tentant de déterminer l'applicabilité

applicability of that decision to the interpretation of s. 11(*d*), he said, at paras. 160-61:

> Since *Beauregard* defines the scope of Parliament's powers with respect to the remuneration of superior court judges, it was argued before this Court that it had no application to the cases at bar.
>
> To some extent, this question was dealt with in *Valente*, where the Court held that s. 11(*d*) did not entitle provincial court judges to a number of protections which were constitutionally guaranteed to superior court judges. For example, while superior court judges may only be dismissed by a resolution of both Houses of Parliament, this Court expressly rejected the need for the dismissal of provincial court judges by provincial legislatures. [Emphasis added.]

I do not see in this passage any questioning of the conclusions reached in *Valente*; those conclusions were rather affirmed. Like Le Dain J., I therefore find that it is not necessary that the procedure to remove a provincial court judge include an address of the legislature within the meaning of the preamble to the *Constitution Act, 1867*.

71 The appellant's final argument is that the Quebec National Assembly did not have the necessary legislative jurisdiction to repeal the requirement for an address of the legislature for provincial court judges. First, I have shown that there is no such requirement. It may indeed be an ideal but it is not necessary in order to comply with the Constitution. Furthermore, the jurisdiction of provincial legislatures over provincial courts derives expressly from ss. 92(14) and (4) of the *Constitution Act, 1867*, concerning respectively "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts" and "The Establishment and Tenure of Provincial Offices". In exercising their jurisdiction, and within the limitations of the constitutional requirements, provincial legislatures are authorized to adopt separate rules for the functioning of the various judicial councils they establish: *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 167.

de cette décision pour l'interprétation de l'al. 11*d*), il déclare, aux par. 160-161 :

> Puisque l'arrêt *Beauregard* définit l'étendue des pouvoirs du Parlement relativement à la rémunération des juges des cours supérieures, il a été plaidé devant notre Cour qu'il était inapplicable en l'espèce.
>
> Dans une certaine mesure, cette question a été tranchée dans l'arrêt *Valente*, où notre Cour a statué que l'al. 11*d*) n'accorde pas aux juges des cours provinciales un certain nombre des protections garanties par la Constitution aux juges des cours supérieures. Par exemple, alors que ces derniers ne peuvent être révoqués que par suite d'une résolution des deux chambres du Parlement, notre Cour a expressément écarté la nécessité que les juges des cours provinciales soient révoqués par les assemblées législatives provinciales. [Je souligne.]

Je ne vois pas là une remise en question des conclusions de l'arrêt *Valente*, mais, bien au contraire, leur consécration. À l'instar du juge Le Dain, je conclus donc qu'il n'est pas nécessaire que la procédure de révocation d'un juge d'une cour provinciale comprenne une adresse parlementaire aux fins du préambule de la *Loi constitutionnelle de 1867*.

L'appelant soutient finalement que l'Assemblée nationale du Québec n'avait pas la compétence législative requise pour abroger l'exigence de l'adresse parlementaire pour les juges des cours provinciales. D'abord, j'ai démontré qu'une telle exigence n'existe pas. Elle peut certes constituer un idéal, mais elle n'est pas nécessaire pour se conformer à la Constitution. Par ailleurs, la compétence des législatures provinciales sur les cours provinciales découle expressément des par. 92(14) et (4) de la *Loi constitutionnelle de 1867* concernant respectivement « [l']administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province » et « [l]a création et la tenure des charges provinciales ». Dans l'exercice de leurs compétences et dans les limites des exigences constitutionnelles, les législatures provinciales sont autorisées à établir des règles de fonctionnement distinctes pour les différents conseils de la magistrature qu'elles mettent sur pied : *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 167.

4. The Requirement that the Executive be Bound by the Court of Appeal Report

In my view, the implications of the second argument put forward by the appellant for judicial independence are more significant. Indeed, what we must consider is whether the judicial function is genuinely secure against any discretionary interference by the Executive or other appointing authority, as required by *Valente*, *supra*, p. 698, where a government is not bound by the findings and recommendations of a judicial inquiry body concerning the removal of a provincial court judge.

Le Dain J. considered this issue in *Valente*. At pp. 697-98, he said:

> Whether or not the Executive should be bound by the report of the judicial inquiry — that is, whether the power to remove should be conditional upon a finding of cause by the judicial inquiry, as is now provided by s. 56(1) of the *Courts of Justice Act, 1984* — I find more difficult. Certainly, it is preferable, but I do not think it can be required as essential to security of tenure for purposes of s. 11(*d*). The existence of the report of the judicial inquiry is a sufficient restraint upon the power of removal, particularly where, as provided by s. 4 of the *Provincial Courts Act*, the report is required to be laid before the legislature.

This statement must be explained and put back in its context. First, I note that Le Dain J. expressed great reluctance to conclude that the Executive did not necessarily have to be bound by the findings of a judicial inquiry body exonerating a judge in order to comply with the requirements of judicial independence; he took pains to point out that this issue was "more difficult" to determine, that it would certainly be "preferable" to conclude otherwise, but that this was not necessary "particularly where . . . the report is required to be laid before the legislature". In addition, although this Court did reach that conclusion, it was not unaware that this aspect of the Ontario legislation had been amended while the case was under appeal. Section 56(1) of the new *Courts of Justice*

4. L'exigence que le pouvoir exécutif soit lié par le rapport de la Cour d'appel

72 J'estime que le second argument soulevé par l'appelant a des implications plus importantes en matière d'indépendance judiciaire. En effet, il y a lieu de se demander si la fonction judiciaire est véritablement à l'abri de toute intervention discrétionnaire de la part de l'exécutif ou de l'autorité responsable des nominations, comme l'exige l'arrêt *Valente*, précité, p. 698, lorsqu'un gouvernement n'est pas lié par les conclusions et recommandations d'un organisme d'enquête judiciaire concernant la destitution d'un juge de cour provinciale.

73 Le juge Le Dain a examiné la question dans l'arrêt *Valente*. Il s'exprimait ainsi, aux p. 697-698 :

> J'estime qu'il est plus difficile de déterminer si l'exécutif doit ou non être lié par le rapport de l'enquête judiciaire, c.-à-d. si le pouvoir de révocation doit être assujetti à la condition que l'enquête judiciaire ait constaté l'existence d'un motif, comme le prévoit maintenant le par. 56(1) de la *Loi de 1984 sur les tribunaux judiciaires*. Cela est certainement préférable, mais je ne pense pas que cela puisse être posé comme essentiel à l'inamovibilité pour les fins de l'al. 11*d*). L'existence du rapport d'enquête judiciaire constitue une restriction suffisante du pouvoir de révocation, particulièrement lorsque, comme le prévoit l'art. 4 de la *Loi sur les cours provinciales*, le rapport doit être déposé devant le corps législatif.

74 Cette affirmation doit être nuancée et replacée dans son contexte. D'abord, je note que le juge Le Dain émettait de sérieuses réserves à conclure que le pouvoir exécutif ne devait pas nécessairement être lié par les conclusions d'exonération de l'organisme d'enquête judiciaire pour se conformer aux exigences de l'indépendance judiciaire; il ne manquait pas de souligner que cette question était « plus difficile » à trancher, qu'il serait certes « préférable » de conclure autrement, mais qu'il n'était pas nécessaire « particulièrement lorsque [. . .] le rapport doit être déposé devant le corps législatif ». De plus, bien que notre Cour ait conclu en ce sens, elle n'était pas non plus sans ignorer que cet aspect de la législation ontarienne avait été modifié en cours d'instance. En effet, la nouvelle

Act, 1984, S.O. 1984, c. 11, specifically provided that the Executive was bound to accept a finding of the judicial inquiry body exonerating the judge. Le Dain J. expressly acknowledged, in one of the introductory paragraphs of his reasons, that "[s]ubsequent changes in the law governing the Provincial Court (Criminal Division) and its judges [were] relevant to the question of the continuing independence of the tribunal to which the matter [might] be remitted for determination": *Valente*, at pp. 683-84. Furthermore, it is important to point out that the issue of the deference that the Executive must show for a decision of the judicial inquiry body had not been included in the list of the grounds of appeal raised by the appellant before this Court: *Valente*, at pp. 680-82. As a result, the remarks of Le Dain J. were merely *obiter dicta*, and do not bind the courts below and need not today be overruled by this Court: *Reference re Remuneration of Judges of the Provincial Court*, *supra*, par. 168.

Loi de 1984 sur les tribunaux judiciaires, L.O. 1984, ch. 11, prévoyait précisément à son par. 56(1) que l'exécutif serait tenu d'accepter une conclusion d'exonération formulée par l'organisme d'enquête judiciaire. Le juge Le Dain reconnaissait expressément, dans un paragraphe introductif de ses motifs, que « [l]es changements subséquents apportés au droit régissant la Cour provinciale (Division criminelle) et ses juges [étaient] pertinents en ce qui concerne la question de l'indépendance permanente du tribunal auquel l'affaire [pourrait] être renvoyée » : *Valente*, p. 683-684. Par ailleurs, il importe de souligner que la question de la déférence que doit manifester le pouvoir exécutif à l'endroit de la décision de l'organisme d'enquête judiciaire ne faisait pas partie de la liste de moyens soulevés par l'appelant devant notre Cour : *Valente*, p. 680-682. En ce sens, les commentaires formulés par le juge Le Dain ne sont qu'une opinion incidente qui ne saurait lier les juridictions inférieures et que notre Cour n'a pas à renverser aujourd'hui : *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 168.

75 To the foregoing, I would finally add that the decision of this Court was based on a review of all the relevant provisions of the provincial legislation in force at that time regarding the tenure of judges. That analysis established that "[i]n some cases the executive government is bound by the report of the inquiry; in most cases the government is not bound by it": *Valente*, at p. 696. The situation today is quite different.

À ces motifs, j'ajouterai finalement que la décision de notre Cour reposait sur une étude de l'ensemble des dispositions pertinentes des lois provinciales en matière d'inamovibilité des juges qui étaient alors en vigueur. Cette analyse révélait que « [d]ans certains cas, le pouvoir exécutif était lié par le rapport d'enquête; dans la plupart des cas, le gouvernement ne l'est pas » : *Valente*, p. 696. La situation est bien différente aujourd'hui.

76 A current survey of provincial legislation actually establishes the following facts. In British Columbia and Newfoundland, the judicial council (or in British Columbia a judge of the provincial Supreme Court) may directly recommend removal of a judge without the need for any government involvement, subject, however, to an appeal to the provincial Court of Appeal: see ss. 28(1) and 29 of the *Provincial Court Act*, R.S.B.C. 1996, c. 379, and ss. 22 and 23 of the *Provincial Court Act, 1991*, S.N. 1991, c. 15. In Ontario, the Northwest Territories and Nunavut, after the judicial council has recommended that a judge be removed, it pro-

En effet, le présent recensement des lois provinciales révèle plutôt les faits suivants. En Colombie-Britannique et à Terre-Neuve, le Conseil de la magistrature (ou en Colombie-Britannique, un juge de la Cour suprême de la province) peut directement recommander de démettre un juge de ses fonctions sans qu'aucune intervention du gouvernement ne soit nécessaire, sujet toutefois à un appel à la Cour d'appel de la province : voir le par. 28(1) et l'art. 29 de la *Provincial Court Act*, R.S.B.C. 1996, ch. 379, et les art. 22 et 23 de la *Provincial Court Act, 1991*, S.N. 1991, ch. 15. En Ontario, dans les Territoires du Nord-Ouest ainsi vides a copy of its recommendation to the Minister, who must table it before the legislature. The latter may then make a recommendation for removal without any involvement on the part of the government: see s. 51.8, *Courts of Justice Act*, R.S.O. 1990, c. C.43, and s. 31.8, *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2. In every other province, the government makes the decision to remove a judge without a prior address of the legislature, but is bound by the recommendation of the judicial council. In Alberta, Saskatchewan, Prince Edward Island and Nova Scotia, the Lieutenant-Governor in Council may make an order for that purpose only upon a recommendation of the judicial council: see ss. 32.6(2)(*h*), 32.7(2) and 32.91 of the *Judicature Act*, R.S.A. 1980, c. J-1, ss. 62(2)(*a*) and 62(7) of the *Provincial Court Act, 1998*, S.S. 1998, c. P-30.11, s. 10(7) of the *Provincial Court Act*, R.S.P.E.I. 1988, c. P-25, and s. 6(4) of the *Judges of the Provincial Court Act*, R.S.N.S. 1989, c. 238. Finally, in Manitoba, New Brunswick and Yukon, if the judicial council (or the judicial ethics tribunal in Yukon) recommends that the judge be removed (that decision is subject to appeal to the provincial or territorial Court of Appeal in Manitoba and Yukon), the Lieutenant-Governor in Council (or the Commissioner in Executive Council in Yukon) must act on the recommendation: see ss. 39.1(1)(*h*) and 39.4 of the *Provincial Court Act*, R.S.M. 1987, c. C275, ss. 6.11(4)(*d*) and 6.11(8) of the *Provincial Court Act*, R.S.N.B. 1973, c. P-21, and ss. 49(3)(*d*) and 50(2) of the *Territorial Court Act*, S.Y. 1998, c. 26. From this view of the legislative landscape, I conclude that every Canadian province has taken the necessary measures to ensure that provincial court judges are secure against any discretionary interference by the Executive, in that the Executive remains bound by the finding of a judicial inquiry body exonerating a judge.

qu'au Nunavut, une fois que le Conseil de la magistrature a recommandé la destitution d'un juge, il fournit une copie de sa recommandation au ministre qui doit la déposer devant l'Assemblée législative. Cette dernière peut ensuite formuler une recommandation à cet effet sans aucune intervention du gouvernement : voir l'art. 51.8 de la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, et l'art. 31.8 de la *Loi sur la Cour territoriale*, L.R.T.N.-O. 1988, ch. T-2. Dans toutes les autres provinces, le gouvernement prend la décision de destituer un juge sans qu'il n'y ait eu au préalable d'adresse parlementaire, mais il est lié par la recommandation du Conseil de la magistrature. En Alberta, en Saskatchewan, à l'Île-du-Prince-Édouard et en Nouvelle-Écosse, ce n'est que si le Conseil de la magistrature recommande la destitution du juge, que le lieutenant-gouverneur en conseil peut émettre un décret en ce sens : voir l'al. 32.6(2)*h*), le par. 32.7(2) et l'art. 32.91 de la *Judicature Act*, R.S.A. 1980, ch. J-1; l'al. 62(2)*a*) et le par. 62(7) de la *Provincial Court Act, 1998*, S.S. 1998, ch. P-30.11; le par. 10(7) de la *Provincial Court Act*, R.S.P.E.I. 1988, ch. P-25, et le par. 6(4) de la *Judges of the Provincial Court Act*, R.S.N.S. 1989, ch. 238. Finalement, au Manitoba, au Nouveau-Brunswick et au Yukon, si le Conseil de la magistrature (ou le tribunal de déontologie judiciaire dans le cas du Yukon) recommande la destitution du juge (laquelle décision est sujette à appel à la Cour d'appel de la province ou du territoire dans le cas du Manitoba et du Yukon), le lieutenant-gouverneur en conseil (ou le commissaire en conseil exécutif dans le cas du Yukon) doit y donner suite : voir l'al. 39.1(1)*h*) et l'art. 39.4 de la *Loi sur la Cour provinciale*, L.R.M. 1987, ch. C275; l'al. 6.11(4)*d*) et le par. 6.11(8) de la *Loi sur la Cour provinciale*, L.R.N.-B. 1973, ch. P-21, et l'al. 49(3)*d*) et le par. 50(2) de la *Loi sur la Cour territoriale*, L.Y. 1998, ch. 26. Ce portrait de la situation m'amène à conclure que l'ensemble des provinces canadiennes ont pris les mesures nécessaires pour s'assurer que les juges de cours provinciales soient à l'abri de toute intervention discrétionnaire de la part de l'exécutif en faisant en sorte que ce dernier demeure lié par une conclusion d'exonération formulée par l'organisme d'enquête judiciaire.

77 In my view, Quebec is not an exception in this regard. Although the government makes the final decision regarding removal, as I stated in *Ruffo*, *supra*, at paras. 67 and 89, nonetheless the government, under the actual terms of s. 95 *C.J.A.*, "may remove a judge only upon a report of the Court of Appeal" (emphasis added). The use of that wording is not a mere question of style; rather, it indicates a real intention on the part of the legislature that the Executive be bound by a finding of the Court of Appeal exonerating the judge. I am therefore of the opinion that s. 95 *C.J.A.* meets this constitutional requirement.

78 To conclude on this question, I would point out that although it was raised by the parties, in the case at bar the Court of Appeal actually concluded in its report that there was justification for the revocation of the appellant's commission. Thus, there is no danger that the scenario of the government not being bound by a finding of the Court of Appeal exonerating the appellant will arise.

5. Answers to the Constitutional Questions

79 I would therefore answer the constitutional questions as follows:

1. Is the rule of law — adopted in 1941 (*Act to amend the Courts of Justice Act*, S.Q. 1941, c. 50, s. 2, assented to on May 17, 1941) and now found in s. 95 of the *Courts of Justice Act*, R.S.Q., c. T-16 — allowing the government to remove a judge without an address of the legislature of no force or effect to the extent that it infringes the structural principle of the independence of the judiciary which is guaranteed by the preamble to the *Constitution Act, 1867*?

No.

2. If the answer to the first question is in the negative, is the rule of law contained in s. 95 of the *Courts of Justice Act*, R.S.Q., c. T-16, of no force or effect on the ground of inconsistency with the structural principle of the independence of the judiciary guaranteed by the preamble to the *Constitution Act, 1867*, to the extent that the government may dismiss a judge with-

À mon avis, le Québec ne fait pas figure d'exception à ce chapitre. Bien que le gouvernement soit le titulaire de la décision finale en matière de destitution, comme je l'affirmais dans l'affaire *Ruffo*, précité, par. 67 et 89, il demeure que celui-ci, selon les termes mêmes de l'art. 95 *L.T.J.*, « ne peut démettre un juge que sur un rapport de la Cour d'appel » (je souligne). L'emploi d'une telle formulation n'est pas qu'une simple question de style, mais indique une volonté réelle du législateur que le pouvoir exécutif soit lié par une conclusion d'exonération prononcée par la Cour d'appel. Je suis donc d'avis que l'art. 95 *L.T.J.* respecte cette exigence constitutionnelle.

En terminant, je soulignerai que bien que cette question fut soulevée par les parties à l'instance, en l'espèce, la Cour d'appel a effectivement conclu dans son rapport à l'existence d'un motif justifiant la révocation de la commission de l'appelant. Ainsi, l'hypothèse suivant laquelle le gouvernement ne serait pas lié par la conclusion d'exonération prononcée par la Cour d'appel ne risque pas de se présenter.

5. Les réponses aux questions constitutionnelles

Je réponds donc aux questions constitutionnelles de la façon suivante :

1. La règle de droit — adoptée en 1941 (*Loi modifiant la Loi des tribunaux judiciaires*, S.Q. 1941, ch. 50, art. 2, sanctionnée le 17 mai 1941) et actualisée par l'art. 95 de la *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16 — permettant au gouvernement de destituer un juge sans adresse parlementaire est-elle inopérante dans la mesure où elle porterait atteinte au principe structurel de l'indépendance de la magistrature lequel est garanti par le préambule de la *Loi constitutionnelle de 1867*?

Non.

2. S'il doit être répondu négativement à la première question, la règle de droit contenue à l'art. 95 de la *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16, est-elle inopérante au motif d'incompatibilité avec le principe structurel de l'indépendance de la magistrature garanti par le préambule de la *Loi constitutionnelle de 1867*, dans la mesure où le gouvernement

out being bound by the conclusions and recommendations of the report of the Court of Appeal?

No.

C. *Rules of Procedural Fairness*

1. Relevant Statutory Provisions

Courts of Justice Act, R.S.Q., c. T-16

268. The council may, after examining a complaint, decide to make an inquiry. It must make an inquiry, however, if the complaint is lodged by the Minister of Justice or if the latter requests it pursuant to the third paragraph of section 93.1.

269. To conduct an inquiry on a complaint, the council establishes a committee consisting of five persons chosen from among its members and designates a chairman among them.

Three persons are a quorum of the committee.

272. The committee hears the parties, their attorneys and their witnesses.

It may inquire into the relevant facts and call any person apt to testify on such facts.

The witnesses may be examined or cross-examined by the parties.

275. The committee may make rules of procedure or rules of practice for the conduct of an inquiry.

If necessary, the committee or one of its members makes the orders of procedure, based on the Code of Civil Procedure (chapter C-25), that are necessary for the carrying out of its duties.

277. The committee submits the report of its inquiry and its recommendations to the council. It transmits that report to the Minister of Justice; in addition, it transmits a copy of its record of the inquiry in the case where the council makes the recommendation provided for in paragraph *b* of section 279.

278. If the report of the inquiry establishes that the complaint is not justified, the council notifies the judge concerned, the Minister of Justice and the plaintiff. That notice states the grounds on which it is based.

279. If the report of the inquiry establishes that the complaint is justified, the council, according to the recommendations of the report of the inquiry,

peut démettre un juge sans être lié par les conclusions et recommandations du rapport de la Cour d'appel?

Non.

C. *Les règles d'équité procédurale*

1. Les dispositions législatives pertinentes

Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16 80

268. Le conseil peut, après l'examen d'une plainte, décider de faire enquête. Il est tenu cependant de faire enquête si la plainte est portée par le ministre de la Justice ou si ce dernier lui fait une demande en vertu du troisième alinéa de l'article 93.1.

269. Pour mener l'enquête sur une plainte, le conseil établit un comité formé de cinq personnes choisies parmi ses membres et il désigne parmi elles un président.

Le quorum du comité est de trois personnes.

272. Le comité entend les parties, leur procureur ainsi que leurs témoins.

Il peut s'enquérir des faits pertinents et convoquer toute personne apte à témoigner sur ces faits.

Les témoins peuvent être interrogés ou contre-interrogés par les parties.

275. Le comité peut adopter des règles de procédure ou de pratique pour la conduite d'une enquête.

S'il est nécessaire, le comité ou l'un de ses membres rend, en s'inspirant du Code de procédure civile (chapitre C-25), les ordonnances de procédure nécessaires à l'exercice de ses fonctions.

277. Le comité soumet son rapport d'enquête et ses recommandations au conseil. Il transmet au ministre de la Justice ce rapport; de plus, il lui transmet copie de son dossier d'enquête dans le cas où le conseil fait la recommandation prévue par le paragraphe *b* de l'article 279.

278. Si le rapport d'enquête établit que la plainte n'est pas fondée, le conseil en avise le juge concerné, le ministre de la Justice et le plaignant. Cet avis est motivé.

279. Si le rapport d'enquête établit que la plainte est fondée, le conseil, suivant les recommandations du rapport d'enquête, (*a*) reprimands the judge; or

(*b*) recommends that the Minister of Justice and Attorney General file a motion with the Court of Appeal in accordance with section 95.

281. The council may retain the services of an advocate or of another expert to assist the committee in the conduct of its inquiry.

a) réprimande le juge; ou

b) recommande au ministre de la Justice et procureur général de présenter une requête à la Cour d'appel conformément à l'article 95.

281. Le conseil peut retenir les services d'un avocat ou d'un autre expert pour assister le comité dans la conduite de son enquête.

2. Duty to Act Fairly

81 Since *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, compliance with the rules of natural justice, which was required of the courts, has been extended to all administrative bodies acting under statutory authority, where they are expressed as the rules of procedural fairness ("duty to act fairly"). The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20. The Conseil de la magistrature and its committee of inquiry are not exceptions and are therefore subject to this principle. In *Ruffo*, *supra*, following a review of the various judicial ethics arrangements in Canada, I found accordingly, at para. 77:

> In short, each system has its own rules, but they are all based on the same guiding principle: ensuring compliance with judicial ethics through proceedings that comply fully with the duty to act fairly.

2. L'obligation d'agir équitablement

Depuis l'arrêt *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, le respect des règles de la justice naturelle, qui était le lot des tribunaux judiciaires, a été étendu à l'ensemble des organismes administratifs qui agissent sous l'autorité de la loi sous le vocable de règles d'équité procédurale (« *duty to act fairly* »). Il suffit qu'une décision administrative soit susceptible de porter atteinte aux « droits, privilèges ou biens d'une personne » pour que le processus dans lequel elle s'inscrit doive être respectueux de l'obligation d'agir équitablement : *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, p. 653, et *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 20. Le Conseil de la magistrature et son comité d'enquête n'y font pas exception et sont donc assujettis à ce principe. Dans l'arrêt *Ruffo*, précité, après un recensement des différents systèmes de déontologie judiciaire à l'échelle nationale, je concluais en ce sens, au par. 77 :

> Chaque système, en somme, est pourvu de règles qui lui sont propres, mais qui n'en sont pas moins l'expression du même principe directeur : veiller au respect de la déontologie judiciaire au moyen de procédures qui soient les plus harmonieuses avec l'obligation d'agir équitablement.

82 Essentially, the duty to act fairly has two components: the right to be heard (the *audi alteram partem* rule) and the right to an impartial hearing (the *nemo judex in sua causa* rule). The nature and extent of the duty may vary with the specific context and the various fact situations dealt with by the administrative body, as well as the nature of the disputes it must resolve: *Syndicat des employés de production du Québec et de l'Acadie v. Canada*

L'obligation d'agir équitablement comporte essentiellement deux volets, soit le droit d'être entendu (règle *audi alteram partem*) et le droit à une audition impartiale (règle *nemo judex in sua causa*). La nature et la portée de cette obligation peuvent varier en fonction du contexte particulier et des différentes réalités auxquelles l'organisme administratif est confronté ainsi que de la nature des litiges qu'il est appelé à trancher : *Syndicat des*

(Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at pp. 895-96, cited with approval in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 22, and *Ruffo*, *supra*, at para. 88. Thus, in *Baker*, *supra*, at paras. 23-28, L'Heureux-Dubé J. specifically pointed out that several factors have been recognized in the jurisprudence as relevant to determining what is required by the duty of procedural fairness in a given set of circumstances. While she did not provide a comprehensive list of such factors, she referred to: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) respect for the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures. It is from this perspective that I will now consider the allegations of breach of the rules of procedural fairness made by the appellant in the instant case.

(a) *Right to be Heard*

The appellant contends, first, that he did not receive sufficient notice of the findings that might be made by the committee of inquiry and was not granted a supplementary hearing, separate from the first, to state his views regarding appropriate sanctions for his conduct.

He argues that at the time of the argument before the committee of inquiry on March 26, 1997, his counsel expressed the wish to make submissions regarding the sanctions applicable to the appellant's breaches of the code of ethics should the committee find that the complaint was justified. He stated at that time that he would prefer to be aware of the extent and gravity of the breaches found to have been committed before making argument. In response to this concern, the committee of inquiry sent a letter to counsel for the appellant, on May 30, 1997, in which it stated that it did not wish to communicate a portion of its inquiry report in advance, since the report constituted a

employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne), [1989] 2 R.C.S. 879, p. 895-896, propos cités avec approbation dans l'arrêt *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcools)*, [1996] 3 R.C.S. 919, par. 22, et *Ruffo*, précité, par. 88. Ainsi, dans l'arrêt *Baker*, précité, par. 23-28, le juge L'Heureux-Dubé rappelait précisément que la jurisprudence reconnaît plusieurs facteurs pour déterminer les exigences de l'équité procédurale dans un contexte donné. Sans en dresser une liste exhaustive, elle mentionne : (1) la nature de la décision recherchée et le processus suivi pour y parvenir; (2) la nature du régime législatif et les termes de la loi en vertu de laquelle l'organisme en question agit; (3) l'importance de la décision pour les personnes visées; (4) les attentes légitimes de la personne qui conteste la décision; et (5) le respect des choix de procédure que l'organisme administratif a lui-même faits, particulièrement quand la loi lui en confie le soin. C'est dans cet esprit que j'examinerai maintenant les allégations de violation des règles de l'équité procédurale soulevées par l'appelant en l'espèce.

a) *Le droit d'être entendu*

L'appelant prétend d'abord qu'il n'a pas bénéficié d'un préavis suffisant quant aux conclusions susceptibles d'être tirées par le comité d'enquête et qu'il n'a pas obtenu une audition supplémentaire et distincte de la première afin d'exprimer son point de vue sur les sanctions appropriées à sa conduite. 83

Il fait valoir que, lors de la séance de plaidoiries tenue le 26 mars 1997 devant le comité d'enquête, son procureur a exprimé le souhait de faire des représentations sur les sanctions applicables aux manquements déontologiques de l'appelant si le comité en arrivait à la conclusion que la plainte était fondée. Il mentionnait alors qu'il préférait connaître l'ampleur et la gravité des manquements retenus avant de se prononcer. En réponse à cette préoccupation, le comité d'enquête envoyait le 30 mai 1997 une lettre au procureur de l'appelant dans laquelle il disait souhaiter ne pas communiquer de façon préliminaire une partie de son rapport d'enquête puisque celui-ci constituait un tout 84 whole which it was inappropriate to sever; it accordingly invited him to make all [TRANSLATION] "relevant submissions concerning the sanction to be recommended should the Committee's report determine that the complaint is justified". The plaintiff, the Minister of Justice of Quebec, had already indicated that he planned to leave the matter to the committee's discretion. When counsel for the appellant initially declined to make representations, the committee repeated its invitation. Eventually, on July 11, 1997, the committee submitted its report without having received any submissions on behalf of the appellant, or the Minister.

qu'il n'était pas opportun de scinder, et qu'en conséquence, il l'invitait à lui faire part de « toutes les représentations pertinentes relatives à la sanction à recommander, advenant que le rapport du Comité établisse que la plainte est fondée ». Le plaignant, le ministre de la Justice du Québec, avait, quant à lui, déjà fait part de son intention de s'en remettre à la discrétion du comité. Devant un premier refus du procureur de l'appelant de présenter son point de vue, le comité réitère son invitation. Finalement, le comité soumet son rapport le 11 juillet 1997 sans avoir reçu de représentations de la part de l'appelant ou encore du ministre.

(i) Whether Notice was Given

(i) L'existence d'un préavis

85 First, the appellant relies on the decision of this Court in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, to require notice, in confidence, informing him before the conclusion of the hearings as to the various findings that might be made against him. In my view, that decision is of no assistance to the appellant in the case at bar. That requirement was imposed in a very particular context, one that is unique to commissions of inquiry which have a duty to "investigate and report on the state and management of the business, or any part of the business, of the department . . . and the conduct of any person in that service" (s. 6, *Inquiries Act*, R.S.C. 1985, c. I-11). In the course of such an inquiry, the commissioners have the authority to make a finding of misconduct against specific organizations or individuals and are required, where that is the case, to give those persons who are not parties to the inquiry warning of findings which may be made against them in the final report (para. 56).

D'abord, l'appelant invoque l'arrêt de notre Cour dans l'affaire *Canada (Procureur général) c. Canada (Commission d'enquête sur le système d'approvisionnement en sang au Canada)*, [1997] 3 R.C.S. 440, pour exiger un préavis, sous le sceau de la confidentialité, l'informant avant la fin des audiences des différentes conclusions susceptibles d'être tirées contre lui. Je considère que cette décision n'est d'aucun secours à l'appelant en l'espèce. Cette exigence fut formulée dans un contexte bien particulier, propre aux commissions d'enquête chargées de « faire enquête et rapport sur toute question touchant l'état et l'administration des affaires de son ministère, [. . .] sur la conduite, [. . .] de toute personne y travaillant » (art. 6 de la *Loi sur les enquêtes*, L.R.C. 1985, ch. I-11). Dans le cadre de cette enquête, les commissaires ont le pouvoir d'imputer une faute à des organismes ou à des personnes en particulier et doivent, le cas échéant, donner à ces personnes, qui ne sont pas parties à l'enquête, un préavis les informant des conclusions susceptibles d'être tirées à leur égard dans le rapport final (par. 56).

86 In the case in bar, the committee of inquiry of the Conseil de la magistrature did not hold a general inquiry; it examined a specific complaint made against a particular judge. That judge was a party to the proceedings from the outset and was accordingly informed of the allegations made against him. In any case, I am of the view that the appellant had sufficient advance notice in the cir-

En l'espèce, le comité d'enquête du Conseil de la magistrature ne tient pas une enquête en général, il étudie une plainte précise portée à l'encontre d'un juge en particulier. Ce juge est partie prenante dès le début des procédures et est, en conséquence, informé de ce qui lui est reproché. De toute façon, j'estime que l'appelant a bénéficié d'un préavis suffisant dans les circonstances de cette affaire.

cumstances of this case. In accordance with s. 266 *C.J.A.*, on receipt of the complaint the Conseil forwarded a copy of it to the judge. Furthermore, on February 6, 1997, the respondents filed a pleading entitled [TRANSLATION] "Particulars voluntarily provided by the plaintiff", in which they detailed the subject matter of the complaint. In the circumstances, the appellant was well aware of all the findings of misconduct that might be made against him, and the committee of inquiry complied with its duty to act fairly in that regard.

(ii) Separate Supplemental Hearing

The appellant also contends that he had a right to a separate hearing on the question of sanctions, citing the procedure followed by the British Columbia Securities Commission and considered by this Court in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 608. While Iacobucci J. did not specify whether the procedure in question was necessary or even desirable in order to comply with the requirements of procedural fairness, he did say simply that this was the procedure chosen by the Commission for its inquiry.

Similarly, the committee of inquiry of the Conseil de la magistrature was master of its own procedure in the case at bar. In *Les tribunaux administratifs au Canada : Procédure et preuve* (1997), at p. 92, Professor Y. Ouellette comments as follows on the autonomy of administrative tribunals in developing their own quasi-judicial procedure:

> [TRANSLATION] From the time that the first appellate administrative tribunals emerged in the United Kingdom early in the century, advocates of judicialization and advocates of procedural autonomy confronted each other, and the question was raised at that time as to whether or not judicial procedure should be used as a suppletive source or as a model to be emulated. *Local Government Board v. Arlidge* [[1915] A.C. 120 (H.L.)] may be regarded as the leading decision, firmly moving procedure in the direction of autonomy and dejudicialization. . . .
>
> Lord Haldane began by explaining that granting appellate jurisdiction to an administrative agency rather than a court was the expression of a change in legisla-

Conformément à l'art. 266 *L.T.J.*, sur réception de la plainte, le Conseil en communiquait une copie au juge. De plus, le 6 février 1997, les intimées déposaient un acte de procédure intitulé « Précisions volontairement fournies par le plaignant » dans lequel elles précisaient l'objet de la plainte. Dans ce contexte, l'appelant connaissait très bien l'ensemble des conclusions d'inconduite susceptibles d'être tirées contre lui et l'obligation d'agir équitablement qui incombait au comité d'enquête a été respectée à cet égard.

(ii) L'audition supplémentaire et distincte

87 L'appelant prétend aussi avoir droit à une audition distincte sur les sanctions. Il s'appuie sur la procédure utilisée par la Commission des valeurs mobilières de la Colombie-Britannique et examinée par notre Cour dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 608. Sans préciser s'il s'agissait là d'une procédure nécessaire, ou même souhaitable, pour se conformer aux exigences de l'équité procédurale, le juge Iacobucci mentionne simplement que c'était la procédure choisie par la Commission dans le cadre de son enquête.

88 Au même titre, le comité d'enquête du Conseil de la magistrature était-il maître de sa procédure en l'espèce. Le professeur Y. Ouellette, dans son ouvrage *Les tribunaux administratifs au Canada : Procédure et preuve* (1997), p. 92, commente ainsi l'autonomie dont jouissent les tribunaux administratifs dans l'élaboration de leur procédure quasi judiciaire :

> Dès l'apparition des premiers tribunaux administratifs d'appel au Royaume-Uni au début du siècle, les partisans de la judiciarisation et ceux de l'autonomie de la procédure se sont affrontés et l'on s'est alors demandé si la procédure judiciaire devait ou non servir de source supplétive ou de modèle à imiter. L'affaire *Local Government Board c. Arlidge* [[1915] A.C. 120 (H.L.)] peut être considérée comme l'arrêt de principe, orientant résolument la procédure vers l'autonomie et la déjudiciarisation . . .
>
> D'abord, Lord Haldane explique que l'octroi d'une compétence d'appel à un organisme administratif plutôt qu'à un tribunal judiciaire exprime un changement de

tive policy and that the consequences of this political choice must be accepted. The agency must, of course, act in a judicial manner, but it must be assumed, absent any indication to the contrary, that the legislator wished to let the agency determine its own procedure so that it could act efficiently. Lord Shaw even went so far as to warn the judiciary against the temptation to impose its own methods on administrative tribunals. It is to him that we owe the famous proposition: the tribunal is the master of its own procedure.

89 The Quebec legislature has formally recognized this autonomy in the specific case of the committee of inquiry of the Conseil de la magistrature by enacting s. 275 *C.J.A.*, expressly authorizing it to make rules of procedure or rules of practice that it may find appropriate for the conduct of an inquiry, and to make the orders, based on the *Code of Civil Procedure*, that are necessary for the carrying out of its duties. Thus, the committee was fully justified, out of concern for efficiency, in refusing to hold a separate hearing.

90 Furthermore, the facts of this case show that the committee of inquiry made a genuine effort to allow the appellant to make representations. While it informed him that the report to be submitted to the Conseil de la magistrature could not be severed in order to issue part of it in advance, it twice gave the appellant an opportunity to be heard, in writing, and even orally, on the question of the various applicable sanctions.

91 I therefore find that the appellant's right to be heard was fully respected in the circumstances and I reject that ground of appeal. It remains to consider the second aspect of the duty to act fairly: the right to an impartial hearing.

(b) *Right to an Impartial Hearing*

92 The appellant argues that the decision-making structures of the Conseil de la magistrature are also contrary to the rules of procedural fairness, in that the Conseil is bound to follow the recommendations of its committee of inquiry. He says that although the Conseil may delegate its power of inquiry it must still be the ultimate decision-maker.

politique du législateur et qu'il faut accepter les conséquences de ce choix politique. L'organisme doit certes agir judiciairement, mais on doit considérer que le législateur, en l'absence d'indication contraire, a voulu laisser l'organisme décider de sa procédure pour pouvoir agir efficacement. Lord Shaw va même jusqu'à mettre en garde le pouvoir judiciaire contre la tentation d'imposer ses propres méthodes aux tribunaux administratifs. C'est à lui que l'on doit la célèbre proposition : le tribunal est maître de sa procédure.

Le législateur québécois a consacré cette autonomie dans le cas particulier du comité d'enquête du Conseil de la magistrature par l'adoption de l'art. 275 *L.T.J.*, en lui permettant expressément d'adopter les règles de procédure ou de pratique qu'il juge convenir aux circonstances de son enquête et de rendre, en s'inspirant du *Code de procédure civile*, les ordonnances nécessaires à l'exercice de ses fonctions. Ainsi, le comité était pleinement justifié de refuser la tenue d'une audience séparée dans un souci d'efficacité.

Par ailleurs, il ressort des faits de cette affaire que le comité d'enquête a fait un effort réel pour permettre à l'appelant de présenter son point de vue. Tout en l'informant que le rapport à déposer au Conseil de la magistrature ne pouvait être scindé afin d'en faire connaître un aspect de façon préliminaire, il a fourni à l'appelant, et ce, à deux reprises, l'occasion de se faire entendre, par écrit et même verbalement, sur les différentes sanctions applicables.

Je conclus donc que le droit de l'appelant d'être entendu a été pleinement respecté dans les circonstances et je rejette ce moyen d'appel. Reste à examiner le second volet que comporte l'obligation d'agir équitablement, soit le droit à une audition impartiale.

b) *Le droit à une audition impartiale*

L'appelant prétend que la structure décisionnelle du Conseil de la magistrature est également contraire aux règles de l'équité procédurale, en ce que le Conseil est contraint de suivre les recommandations de son comité d'enquête. Il précise que s'il est possible pour le Conseil de déléguer son pouvoir d'enquête, il doit demeurer l'ultime décideur.

In the alternative, if the committee is validly invested with decision-making authority, judicial independence may be infringed, since this committee may be made up of persons who are not the appellant's peers. As a final point, the appellant is of the view that the functioning of the committee of inquiry raises a reasonable apprehension of institutional bias, in that an independent counsel plays the role of judge and party.

(i) Decision-making Structures of the Conseil and its Committee

The Conseil Does Not Exercise its Decision-Making Authority Itself

It is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or implicit authority of the legislation, in accordance with the maxim hallowed by long use in the courts, *delegatus non potest delegare*: *Peralta v. Ontario*, [1988] 2 S.C.R. 1045, aff'g (1985), 49 O.R. (2d) 705. In the case at bar it was specifically the intent of the legislature that decision-making authority be assigned to a committee of inquiry.

First, s. 269 *C.J.A.* expressly permits the Conseil to delegate its jurisdiction to inquire into a complaint to a committee consisting of five persons chosen from among its members. The exercise of this jurisdiction is not contested. The delegation of decision-making authority is also found in the express terms of the legislation. In accordance with s. 277 *C.J.A.*, the committee submits its report and its recommendations to the Conseil. Sections 278 and 279 *C.J.A.* then provide that the Conseil is bound by the conclusions drawn by the committee. Under s. 278, if the report establishes that the complaint is not justified, the Conseil notifies the judge concerned, the Minister of Justice and the plaintiff. Thus, in this first situation, the legislature has provided that the Conseil merely transmits the committee's decision to the interested parties without revisiting the committee's decision, sitting on appeal from it, or reviewing it in any way. Furthermore, under s. 279, if the report of the inquiry

Subsidiairement, si le comité est valablement investi du pouvoir décisionnel, il y a un accroc à l'indépendance judiciaire puisque ce comité peut être composé de personnes qui ne sont pas les pairs de l'appelant. Finalement, l'appelant est d'avis que le fonctionnement du comité d'enquête soulève une crainte raisonnable de partialité institutionnelle, en ce qu'un procureur indépendant joue le rôle de juge et partie.

(i) La structure décisionnelle du Conseil et de son comité

Le Conseil n'exerce pas lui-même son pouvoir décisionnel

Il est bien connu que l'organisme qui se voit attribuer l'exercice d'un pouvoir en vertu de sa loi habilitante doit l'exercer lui-même et ne peut le déléguer à l'un de ses membres ou à une minorité de ceux-ci sans l'autorisation expresse ou implicite de la loi et ce, conformément à la maxime consacrée par la jurisprudence *delegatus non potest delegare* : *Peralta c. Ontario*, [1988] 2 R.C.S. 1045, conf. (1985), 49 O.R. (2d) 705. Or, en l'espèce, il était précisément dans l'intention du législateur de confier le pouvoir décisionnel à un comité d'enquête. 93

D'abord, l'art. 269 *L.T.J.* permet expressément au Conseil de déléguer sa compétence d'enquête sur une plainte à un comité formé de cinq personnes choisies parmi ses membres. L'exercice de cette compétence n'est d'ailleurs pas contesté. La délégation du pouvoir de décision ressort également des termes exprès de la loi. Conformément à l'art. 277 *L.T.J.*, le comité soumet son rapport et ses recommandations au Conseil. Les articles 278 et 279 *L.T.J.* précisent ensuite que le Conseil est lié par les conclusions tirées par le comité. En effet, en vertu de l'art. 278, si le rapport d'enquête établit que la plainte n'est pas fondée, le Conseil en avise le juge concerné, le ministre de la Justice et le plaignant. Ainsi, dans cette première situation, le législateur a prévu que le Conseil ne ferait que transmettre la décision du comité aux personnes intéressées sans qu'il soit question de revenir sur la décision du comité, de siéger en appel de celle-ci ou de la réviser d'une quelconque façon. Par 94 establishes that the complaint is justified, the Conseil, according to the recommendations of the report of the inquiry, reprimands the judge or recommends that the Minister file a motion with the Court of Appeal in accordance with s. 95 *C.J.A.* In this second situation, once again, the legislature has provided that the Conseil shall yield to the committee's decision. I acknowledged this situation in *Ruffo*, at para. 67, where I pointed out that "[u]nder s. 279 *CJA*, if the report establishes that the complaint is justified, the Conseil must implement the Comité's recommendations" (emphasis added). I therefore find that the terms used by the legislation are mandatory and reflect a clear intent on the part of the legislature to authorize delegation of the powers of inquiry and decision regarding the justification for a complaint.

ailleurs, en vertu de l'art. 279, si le rapport d'enquête établit que la plainte est fondée, le Conseil, suivant les recommandations du rapport d'enquête, réprimande le juge ou recommande au ministre de présenter une requête à la Cour d'appel conformément à l'art. 95 *L.T.J.* Encore une fois, dans cette seconde situation, le législateur a prévu que le Conseil se plie à la décision du comité. J'ai reconnu cet état de fait dans l'affaire *Ruffo*, par. 67, où je soulignais qu'« [a]ux termes de l'art. 279 *LTJ*, si le rapport établit que la plainte est fondée, le Conseil se doit de mettre en œuvre les recommandations du Comité » (je souligne). Je conclus donc que les termes utilisés par la loi sont impératifs et reflètent une intention claire du législateur d'autoriser la délégation des pouvoirs d'enquête et de décision sur le bien-fondé d'une plainte.

95 Furthermore, the legislature has provided the Conseil de la magistrature with this particular method of operation for obvious reasons of administrative efficiency. It takes into account the unique situations of disciplinary bodies, and in particular the financial resources allocated to them and the often variable availability of their members. Although this process is more efficient, it in no way compromises procedural fairness. In carrying out its inquiry, the committee respects the rights of each party involved. It hears the parties, their attorneys and their witnesses, who may be examined or cross-examined by the parties (s. 272 *C.J.A.)*. If necessary, the committee makes orders as to procedure based on the *Code of Civil Procedure* (s. 275 *C.J.A.)*.

Par ailleurs, le législateur a doté le Conseil de la magistrature de ce mode particulier de fonctionnement pour des raisons évidentes d'efficacité administrative. Il tient compte des réalités qui sont propres aux organismes disciplinaires, notamment des ressources financières qui lui sont attribuées et de la disponibilité souvent variable de chacun de ses membres. Tout en gagnant en efficacité, ce processus ne compromet aucunement l'équité procédurale. Le comité poursuit son enquête dans le respect des droits de chacune des parties intéressées. En effet, il entend les parties, leur procureur et leurs témoins qui pourront être interrogés ou contre-interrogés par les parties (art. 272 *L.T.J.*). S'il l'estime nécessaire et en s'inspirant du *Code de procédure civile*, il peut aussi rendre les ordonnances de procédure nécessaires à l'exercice de ses fonctions (art. 275 *L.T.J.*).

96 To conclude, and as I have already pointed out in these reasons, provincial legislatures have all the necessary jurisdiction to determine the procedures that will ensure the security of tenure of provincial court judges in compliance with the rules of procedural fairness, to the extent that those rules follow the requirements of judicial independence: *Reference re Remuneration of Judges of the Pro-*

Finalement et comme je le soulignais plus tôt dans les présents motifs, les législatures provinciales ont toute la compétence nécessaire pour décider des procédures destinées à assurer l'inamovibilité des juges des cours provinciales dans le respect des règles de l'équité procédurale dans la mesure où celles-ci respectent les exigences de l'indépendance judiciaire : *Renvoi sur la rémuné-*

vincial Court, *supra*, at para. 167. This further ground of appeal must therefore be dismissed.

Composition of the Conseil

It should be recalled, first, that under s. 248 *C.J.A.*, the Conseil de la magistrature is composed of 14 members: the chief judge of the Court of Québec who is also its chairman, the senior associate chief judge and the three associate chief judges of the Court of Québec, one of the chief judges of the Municipal Courts of Laval, Montréal or Québec, one judge chosen among the persons exercising the functions of chief judge of the Labour Court, president of the Human Rights Tribunal, or chairman of the Professions Tribunal, three judges chosen among the judges of the Municipal Courts (two judges chosen among the Municipal Courts of Laval, Montréal or Québec and appointed upon the recommendation of the Conférence des juges du Québec, and one judge chosen among the other Municipal Courts and appointed upon the recommendation of the Conférence des juges municipaux du Québec), two advocates appointed upon the recommendation of the Barreau du Québec and two persons who are neither judges nor advocates. In 1998, another member was added, namely the chief judge of the municipal courts, bringing the number to 15: S.Q. 1998, c. 30, s. 40.

The appellant argues that the involvement of one of the four persons who are not members of the judiciary in the decision-making process violates the collective or institutional dimension of the structural principle of judicial independence, in that only a body composed of judges may recommend the removal of a judge. He relies on certain remarks by Lamer C.J. in *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 120:

> The guarantee of security of tenure, for example, may have a collective or institutional dimension, such that only a body composed of judges may recommend the removal of a judge. However, I need not decide that particular point here. [Emphasis added.]

ration des juges de cours provinciales, précité, par. 167. Cet autre moyen d'appel doit donc être rejeté.

La composition du Conseil

Rappelons d'abord qu'en vertu de l'art. 248 *L.T.J.*, le Conseil de la magistrature est formé de 14 membres, soit du juge en chef de la Cour du Québec qui en est également le président, du juge en chef associé et des trois juges en chef adjoints de la Cour du Québec, de l'un des juges en chef des cours municipales de Laval, Montréal ou Québec, d'un juge choisi parmi les personnes exerçant la fonction de juge en chef du Tribunal du travail, de président du Tribunal des droits de la personne ou du Tribunal des professions, de trois juges choisis parmi les juges des cours municipales (deux juges choisis parmi les cours municipales de Laval, Montréal et Québec et nommés sur la recommandation de la Conférence des juges du Québec, et un juge choisi parmi les autres cours municipales et nommé sur la recommandation de la Conférence des juges municipaux du Québec), de deux avocats nommés sur la recommandation du Barreau du Québec et de deux personnes qui ne sont ni juges ni avocats. Depuis 1998, un membre a été ajouté, soit le juge en chef des cours municipales, portant ce nombre à 15 : L.Q. 1998, ch. 30, art. 40. 97

L'appelant prétend que la participation de l'une de ces quatre personnes non membres de la magistrature au processus décisionnel porte atteinte à la dimension collective ou institutionnelle du principe structurel de l'indépendance judiciaire, en ce que seul un organisme composé de juges peut recommander la révocation d'un juge. Il s'appuie sur certains propos du juge en chef Lamer dans le *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 120 : 98

> Par exemple, l'inamovibilité peut avoir une dimension collective ou institutionnelle, en ce que seul un organisme composé de juges peut recommander la révocation d'un juge. Cependant, je n'ai pas à trancher ce point en l'espèce. [Je souligne.]

This passage speaks for itself and cannot provide a basis for the appellant's argument. This is a matter on which this Court has not yet expressed a view.

Ce passage parle de lui-même et ne saurait servir de fondement à la prétention de l'appelant. Il s'agit d'une question sur laquelle notre Cour n'a pas encore exprimé d'opinion.

99 Although he too does not state a definitive opinion, Professor Friedland, in the report he prepared for the Canadian Judicial Council, *supra*, nevertheless refers to that possibility, at p. 137.

Sans arrêter lui non plus d'opinion tranchée, le professeur Friedland, dans son rapport préparé pour le Conseil canadien de la magistrature, *op. cit.*, évoque tout de même cette possibilité, à la p. 154 :

(Whether there should be lay participation on the Canadian Judicial Council itself is an issue that I have not dealt with in this Report.)

. . .

Finally, we come to lay participation in formal Inquiries. The Act specifies that the Inquiry may include one or more lawyers. Recent formal Inquiries (Gratton and Marshall) have included two lawyers appointed by the Minister of Justice. It would be better to provide that non-judicial participation could be by both a lawyer and a lay person. And again, it should not be the government that selects the individuals; there should be some objective method of selecting a pool. . . .

(La question de savoir s'il conviendrait d'assurer une participation du public au sein du Conseil canadien de la magistrature n'a pas été abordée dans le présent rapport).

. . .

Enfin, nous traiterons de la participation aux enquêtes formelles de personnes qui ne sont ni juges ni avocats. La loi précise que le comité d'enquête peut comprendre un avocat ou plus. Les récents comités d'enquête officielle (Gratton et Marshall) comprenaient deux avocats nommés par le ministre de la Justice. Il vaudrait mieux prévoir que le Comité comprenne, outre les juges, à la fois un avocat et un représentant du public. Encore une fois, le choix de ces personnes ne devrait pas relever du gouvernement, mais s'effectuer selon une méthode objective parmi un groupe de personnes . . .

100 The disciplinary process in Quebec has a number of unique features. First, it must be borne in mind that the report and recommendations of the committee of inquiry of the Conseil de la magistrature are merely the first stage of a potentially three-stage process put in place by the *Courts of Justice Act*. Thus, in the second stage, the Court of Appeal becomes involved and conducts a second inquiry into the conduct of the judge in question and makes its own report. In the case at bar, a panel of five judges of the Court of Appeal was established. Furthermore, the powers assigned to the Conseil are limited. Pursuant to s. 279 *C.J.A.*, if the report of the inquiry establishes that the complaint is justified, the Conseil may reprimand the judge or recommend that the Minister initiate the procedure provided by s. 95 *C.J.A.*, under which the Court of Appeal becomes involved. A recommendation to remove a provincial court judge is therefore within the exclusive jurisdiction of the

Le processus disciplinaire québécois comporte plusieurs particularités. D'abord, il faut rappeler que le rapport ainsi que les recommandations formulées par le comité d'enquête du Conseil de la magistrature ne constituent que la première étape dans un processus mis en place par la *Loi sur les tribunaux judiciaires*, lequel peut ultimement en comporter trois. Ainsi, dans un deuxième temps, la Cour d'appel intervient et mène une seconde enquête sur la conduite du juge concerné et produit son propre rapport. En l'espèce, une formation de cinq juges de la Cour d'appel a été constituée. De plus, les pouvoirs attribués au Conseil sont limités. Conformément à l'art. 279 *L.T.J.*, si le rapport d'enquête établit que la plainte est fondée, le Conseil peut réprimander le juge ou recommander au ministre d'entamer la procédure prévue à l'art. 95 *L.T.J.* dans le cadre de laquelle la Cour d'appel intervient. Une recommandation de destitution d'un juge d'une cour provinciale est donc exclusihighest court in the province. See *Ruffo*, *supra*, at para. 89.

vement réservée au plus haut tribunal de la province. Voir *Ruffo*, précité, par. 89.

In these circumstances, the presence of persons who are not members of the judiciary at a preliminary stage may seem valuable in that it may provide input for the deliberations of the committee members and bring another perspective to the perceptions that members of the legal profession (in the case of the lawyers) and the general public (in the case of the other members) have of the judiciary. In my view, and in the specific circumstances of this case, the composition of the committee of inquiry of the Conseil de la magistrature complies with the structural principle of judicial independence and the rules of procedural fairness.

101 Dans ce contexte, la présence de personnes non membres de la magistrature à un stade préliminaire peut apparaître utile en ce qu'elle peut alimenter la réflexion des membres du comité et apporter un autre regard sur la perception qu'ont les membres de la profession juridique (dans le cas des avocats) et le public en général (dans le cas des autres membres) de la magistrature. À mon sens, et dans les circonstances particulières de l'espèce, je suis d'avis que la composition du comité d'enquête du Conseil de la magistrature est conforme au principe structurel de l'indépendance judiciaire et aux règles de l'équité procédurale.

(ii) Appearance of Institutional Bias

(ii) L'apparence de partialité institutionnelle

The appellant's final argument is that there is the appearance of institutional bias, since the committee of inquiry uses the services of counsel who acts as both judge and party. The concept of institutional impartiality was recognized and adopted by this Court for the first time in *Lippé*, *supra*, at p. 140. It should be noted that the test developed by the courts for identifying this situation was: would an informed person viewing the matter realistically and practically, and having thought the matter through, have a reasonable apprehension of bias in a large number of cases? I will now examine the situation raised by the appellant.

102 L'appelant prétend finalement qu'il y a apparence de partialité institutionnelle, car le comité d'enquête utilise les services d'un procureur qui agit à la fois en tant que juge et partie. Ce concept d'impartialité institutionnelle a été reconnu et consacré pour la première fois par notre Cour dans l'arrêt *Lippé*, précité, p. 140. Il convient de rappeler le critère élaboré par la jurisprudence pour déceler cet état : une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique, aurait-elle une crainte raisonnable de partialité dans un grand nombre de cas? J'examinerai maintenant la situation soulevée par l'appelant.

Under s. 281 *C.J.A.*, the Conseil may retain the services of an advocate or of another expert to assist the committee in the conduct of its inquiry. My comments in *Ruffo*, *supra*, regarding the nature of the mandate assigned to the committee of inquiry provide some insight that is useful for disposing of this question. Thus, at paras. 72-74, I said:

103 En vertu de l'art. 281 *L.T.J.*, le Conseil peut retenir les services d'un avocat ou d'un autre expert pour assister le comité dans la conduite de son enquête. Les propos que j'ai tenus dans l'arrêt *Ruffo*, précité, concernant la nature du mandat confié au comité d'enquête fournissent un éclairage intéressant pour disposer de cette question. Ainsi, aux par. 72-74, j'affirme :

> Accordingly, as the statutory provisions quoted above illustrate, <u>the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.</u>

> Aussi, comme le révèlent les dispositions législatives précitées, <u>le débat qui prend place devant lui n'est-il pas de l'essence d'un litige dominé par une procédure contradictoire mais se veut plutôt l'expression de fonctions purement investigatrices, marquées par la recherche active de la vérité</u>.

In light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself, on which the *CJA* confers a pre-eminent role in establishing rules of procedure, researching the facts and calling witnesses. Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.

Moreover, it is for this purpose and in order to conduct the inquiry for which it is responsible that the Conseil may retain the services of an advocate, as provided by s. 281 *CJA*. [Emphasis added; emphasis in original omitted.]

This passage clearly shows that the committee's purpose is not to act as a judge or even as a decision-maker responsible for settling a dispute; on the contrary, it is to gather the facts and evidence in order, ultimately, to make a recommendation to the Conseil de la magistrature. It also illustrates the intention of avoiding the creation of an adversarial atmosphere between two opponents each seeking to prevail. When there was no judge or parties, counsel for the committee could not have been in a conflict of interest. For instance, when he examined and cross-examined the witnesses he was not acting as a prosecutor, but rather was providing the committee with help and assistance in carrying out the mandate assigned to it by the statute.

104 I would also add that the committee's recommendation is not final with respect to the outcome of the disciplinary process, which then falls within the jurisdiction of the Court of Appeal and thereafter, if applicable, the Minister of Justice: *Ruffo*, *supra*, at para. 89. Accordingly, the role played by the independent counsel neither violates procedu-

Dans cette perspective, la véritable conduite de l'affaire n'est pas du ressort des parties, mais bien du Comité lui-même, à qui la *LTJ* confie un rôle prééminent dans l'établissement de règles de procédure, de recherche des faits et de convocation de témoins. Toute idée de poursuite se trouve donc écartée sur le plan structurel. La plainte, à cet égard, n'est qu'un mécanisme de déclenchement. Elle n'a pas pour effet d'initier une procédure litigieuse entre deux parties. Vu cette absence de contentieux, si le Conseil décide de faire enquête après l'examen d'une plainte portée par un de ses membres, le Comité ne devient pas de ce fait juge et partie: comme je l'ai souligné plus haut, la fonction première du Comité est la recherche de la vérité; or celle-ci n'emprunte pas la voie d'un *lis inter partes* mais celle d'une véritable enquête où le Comité, par ses propres recherches, celles du plaignant et du juge qui fait l'objet de la plainte, s'informe de la situation en vue de décider de la recommandation qui soit la plus adéquate, au regard des circonstances de l'affaire qui lui est soumise.

C'est d'ailleurs dans la perspective qui précède et pour tenir l'enquête dont la responsabilité lui incombe que le Conseil peut retenir les services d'un avocat, comme le prévoit l'art. 281 *LTJ*. [Je souligne; soulignement dans l'original omis.]

Ce passage reflète bien que le but recherché par le comité n'est pas d'agir en tant que juge ou même en tant que décideur chargé de trancher un litige, mais au contraire, de recueillir les faits et les éléments de preuve afin de formuler ultimement une recommandation au Conseil de la magistrature. Il illustre également cette volonté de ne pas créer un climat contentieux où s'affronteraient deux opposants à la recherche d'une victoire. En l'absence de juge et de parties, le procureur du comité ne pouvait être en situation de conflit d'intérêts. Ainsi, en interrogeant et contre-interrogeant les témoins, il n'a pas agi comme un poursuivant, mais a fourni une aide et assistance au comité dans l'accomplissement du mandat qui lui était confié par la loi.

J'ajouterais également que la recommandation du comité n'est pas définitive quant à l'issue du processus disciplinaire. Celui-ci relève ensuite de la Cour d'appel, puis, le cas échéant, du ministre de la Justice : *Ruffo*, précité, par. 89. En conséquence, le rôle joué par le procureur indépendant ne saurait porter atteinte à l'équité procédurale, ni ral fairness nor raises a reasonable apprehension of bias in a large number of cases in the mind of an informed person viewing the matter realistically and practically, and having thought the matter through.

soulever une crainte raisonnable de partialité dans un grand nombre de cas chez une personne bien renseignée qui étudierait la question en profondeur de façon réaliste et pratique.

D. *Appellant's Conduct*

D. *La conduite de l'appelant*

1. Relevant Statutory Provisions

1. Les dispositions législatives pertinentes

105

Canadian Charter of Rights and Freedoms

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

Charte canadienne des droits et libertés

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12

4. Every person has a right to the safeguard of his dignity, honour and reputation.

5. Every person has a right to respect for his private life.

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

18.1 No one may, in an employment application form or employment interview, require a person to give information regarding any ground mentioned in section 10 unless the information is useful for the application of section 20 or the implementation of an affirmative action program in existence at the time of the application.

18.2 No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the

Charte des droits et libertés de la personne, L.R.Q., ch. C-12

4. Toute personne a droit à la sauvegarde de sa dignité, de son honneur et de sa réputation.

5. Toute personne a droit au respect de sa vie privée.

10. Toute personne a droit à la reconnaissance et à l'exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, la grossesse, l'orientation sexuelle, l'état civil, l'âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l'origine ethnique ou nationale, la condition sociale, le handicap ou l'utilisation d'un moyen pour pallier ce handicap.

Il y a discrimination lorsqu'une telle distinction, exclusion ou préférence a pour effet de détruire ou de compromettre ce droit.

18.1 Nul ne peut, dans un formulaire de demande d'emploi ou lors d'une entrevue relative à un emploi, requérir d'une personne des renseignements sur les motifs visés dans l'article 10 sauf si ces renseignements sont utiles à l'application de l'article 20 ou à l'application d'un programme d'accès à l'égalité existant au moment de la demande.

18.2 Nul ne peut congédier, refuser d'embaucher ou autrement pénaliser dans le cadre de son emploi une personne du seul fait qu'elle a été déclarée coupable d'une infraction pénale ou criminelle, si cette infraction employment or if the person has obtained a pardon for the offence.

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

Criminal Records Act, R.S.C. 1970, c. 12 (1st Supp.)

5. The grant of a pardon

(*a*) is evidence of the fact that the Board, after making proper inquiries, was satisfied that an applicant was of good behaviour and that the conviction in respect of which the pardon is granted should no longer reflect adversely on his character; and

(*b*) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of such conviction, subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder.

Criminal Records Act, R.S.C. 1985, c. C-47

5. The grant of a pardon

(*a*) is evidence of the fact that the Board, after making proper inquiries, was satisfied that the applicant for the pardon was of good behaviour and that the conviction in respect of which the pardon is granted should no longer reflect adversely on his character; and

(*b*) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of the conviction, subject by virtue of any Act of Parliament or a regulation made thereunder.

6. (1) The Minister may, by order in writing addressed to any person having the custody or control of any judicial record of a conviction in respect of which a pardon has been granted, require that person to deliver that record into the custody of the Commissioner.

(2) Any record of a conviction in respect of which a pardon has been granted that is in the custody of the Commissioner or of any department or agency of the

n'a aucun lien avec l'emploi ou si cette personne en a obtenu le pardon.

20. Une distinction, exclusion ou préférence fondée sur les aptitudes ou qualités requises par un emploi, ou justifiée par le caractère charitable, philanthropique, religieux, politique ou éducatif d'une institution sans but lucratif ou qui est vouée exclusivement au bien-être d'un groupe ethnique est réputée non discriminatoire.

Loi sur le casier judiciaire, S.R.C. 1970, ch. 12 (1^er^ suppl.)

5. L'octroi d'un pardon

a) est la preuve du fait que la Commission, après avoir effectué une enquête suffisante, est convaincue que le requérant a eu une bonne conduite et que la condamnation à l'égard de laquelle le pardon est accordé ne devrait plus nuire à sa réputation; et

b) à moins que le pardon ne soit révoqué par la suite, annule la condamnation pour laquelle il est accordé et, sans restreindre la portée générale de ce qui précède, élimine toute déchéance que cette condamnation entraîne, pour la personne ainsi déclarée coupable, en vertu de toute loi du Parlement du Canada ou d'un règlement établi sous son régime.

Loi sur le casier judiciaire, L.R.C. 1985, ch. C-47

5. La réhabilitation a les effets suivants :

a) d'une part, elle sert de preuve du fait que la Commission, après avoir mené les enquêtes appropriées, a été convaincue que le demandeur s'est bien conduit et que la condamnation en cause ne devrait plus ternir sa réputation;

b) d'autre part, sauf révocation ultérieure, elle efface les conséquences de la condamnation et, notamment, fait cesser toute incapacité que celle-ci pouvait entraîner aux termes d'une loi fédérale ou de ses règlements.

6. (1) Le ministre peut, par écrit, ordonner à toute personne ayant la garde ou la responsabilité du dossier judiciaire relatif à la condamnation visée par la réhabilitation de le remettre au commissaire.

(2) Tout dossier ou relevé de la condamnation visée par la réhabilitation que garde le commissaire ou un ministère ou organisme fédéral doit être classé à part

Government of Canada shall be kept separate and apart from other criminal records, and no such record shall be disclosed to any person, nor shall the existence of the record or the fact of the conviction be disclosed to any person, without the prior approval of the Minister.

(3) The Minister shall, before granting the approval for disclosure referred to in subsection (2), satisfy himself that the disclosure is desirable in the interests of the administration of justice or for any purpose related to the safety or security of Canada or any state allied or associated with Canada.

7. A pardon may be revoked by the Board

(*a*) if the person to whom it is granted or issued is subsequently convicted of an offence punishable on summary conviction under an Act of Parliament or a regulation made under an Act of Parliament;

(*b*) on evidence establishing to the satisfaction of the Board that the person to whom it was granted or issued is no longer of good conduct; or

(*c*) on evidence establishing to the satisfaction of the Board that the person to whom it was granted or issued knowingly made a false or deceptive statement in relation to the application for the pardon, or knowingly concealed some material particular in relation to that application.

8. No person shall use or authorize the use of an application form for or relating to any of the following matters that contains a question that by its terms requires the applicant to disclose a conviction in respect of which a pardon that has not been revoked or ceased to have effect has been granted or issued to the applicant:

(*a*) employment in any department as defined in section 2 of the *Financial Administration Act*;

(*b*) employment by any Crown corporation as defined in section 83 of the *Financial Administration Act*;

(*c*) enrolment in the Canadian Forces; or

(*d*) employment on or in connection with the operation of any work, undertaking or business that is within the legislative authority of Parliament.

Criminal Records Act, R.S.C. 1985, c. C-47 (as in force on August 1, 2000)

5. The pardon

(*a*) is evidence of the fact

des autres dossiers ou relevés relatifs à des affaires pénales et il est interdit de le communiquer, d'en révéler l'existence ou de révéler le fait de la condamnation sans l'autorisation préalable du ministre.

(3) Pour donner l'autorisation prévue au paragraphe (2), le ministre doit être convaincu que la communication sert l'administration de la justice ou est souhaitable pour la sûreté ou sécurité du Canada ou d'un État allié ou associé au Canada.

7. La Commission peut révoquer la réhabilitation dans l'un ou l'autre des cas suivants :

a) le réhabilité est condamné pour une nouvelle infraction à une loi fédérale ou à ses règlements punissable sur déclaration de culpabilité par procédure sommaire;

b) il existe des preuves convaincantes, selon elle, du fait que le réhabilité a cessé de bien se conduire;

c) il existe des preuves convaincantes, selon elle, que le réhabilité avait délibérément, à l'occasion de sa demande de réhabilitation, fait une déclaration inexacte ou trompeuse, ou dissimulé un point important.

8. Nul ne peut utiliser ou permettre d'utiliser une demande d'emploi comportant une question qui, par sa teneur, obligerait un réhabilité à révéler une condamnation visée par une réhabilitation qui n'a pas été révoquée ou annulée contenue dans un formulaire ayant trait à :

a) l'emploi dans un ministère, au sens de l'article 2 de la *Loi sur la gestion des finances publiques*;

b) l'emploi auprès d'une société d'État, au sens de l'article 83 de la *Loi sur la gestion des finances publiques*;

c) l'enrôlement dans les Forces canadiennes;

d) l'emploi dans une entreprise qui relève de la compétence législative du Parlement ou en rapport avec un ouvrage qui relève d'une telle compétence.

Loi sur le casier judiciaire, L.R.C. 1985, ch. C-47 (dans la version en vigueur le 1er août 2000)

5. La réhabilitation a les effets suivants :

a) d'une part, elle sert de preuve des faits suivants :

(i) that, in the case of a pardon for an offence referred to in paragraph 4(*a*), the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and

(ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character; and

(*b*) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament, other than section 109, 110, 161 or 259 of the *Criminal Code* or subsection 147.1(1) of the *National Defence Act*, or of a regulation made under an Act of Parliament.

(i) dans le cas d'une réhabilitation octroyée pour une infraction visée à l'alinéa 4*a*), la Commission, après avoir mené les enquêtes, a été convaincue que le demandeur s'est bien conduit,

(ii) dans le cas de toute réhabilitation, la condamnation en cause ne devrait plus ternir la réputation du demandeur;

b) d'autre part, sauf cas de révocation ultérieure ou de nullité, elle entraîne le classement du dossier ou du relevé de la condamnation à part des autres dossiers judiciaires et fait cesser toute incapacité — autre que celles imposées au titre des articles 109, 110, 161, et 259 du *Code criminel* ou du paragraphe 147.1(1) de la *Loi sur la défense nationale* — que la condamnation pouvait entraîner aux termes d'une loi fédérale ou de ses règlements.

Professional Code, R.S.Q., c. C-26

45. The Bureau may refuse to issue a permit to or enter on the roll any applicant who

(1) has been the subject of a decision of a Canadian court finding him guilty of a criminal offence which, in the reasoned opinion of the Bureau, is related to the practice of the profession, unless he has obtained a pardon;

Code des professions, L.R.Q., ch. C-26

45. Le Bureau peut refuser la délivrance d'un permis ou l'inscription au tableau lorsque la personne qui en fait la demande:

1° a fait l'objet d'une décision d'un tribunal canadien la déclarant coupable d'une infraction criminelle qui, de l'avis motivé du Bureau, a un lien avec l'exercice de la profession, sauf si elle a obtenu le pardon;

Courts of Justice Act, R.S.Q., c. T-16

262. The code of ethics determines the rules of conduct and the duties of the judges towards the public, the parties to an action and the advocates, and it indicates in particular which acts or omissions are derogatory to the honour, dignity or integrity of the judiciary and the functions or activities that a judge may exercise without remuneration notwithstanding section 129.

263. The council receives and examines a complaint lodged by any person against a judge alleging that he has failed to comply with the code of ethics.

279. If the report of the inquiry establishes that the complaint is justified, the council, according to the recommendations of the report of the inquiry,

(*a*) reprimands the judge; or

(*b*) recommends that the Minister of Justice and Attorney General file a motion with the Court of Appeal in accordance with section 95.

Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16

262. Le code de déontologie détermine les règles de conduite et les devoirs des juges envers le public, les parties à une instance et les avocats et il indique notamment les actes ou les omissions dérogatoires à l'honneur, à la dignité ou à l'intégrité de la magistrature et les fonctions ou les activités qu'un juge peut exercer à titre gratuit malgré l'article 129.

263. Le conseil reçoit et examine une plainte portée par toute personne contre un juge et lui reprochant un manquement au code de déontologie.

279. Si le rapport d'enquête établit que la plainte est fondée, le conseil, suivant les recommandations du rapport d'enquête,

a) réprimande le juge; ou

b) recommande au ministre de la Justice et procureur général de présenter une requête à la Cour d'appel conformément à l'article 95.

If it makes the recommendation provided for in paragraph *b*, the council suspends the judge for a period of thirty days.

Judicial Code of Ethics, R.R.Q. 1981, c. T-16, r. 4.1

2. The judge should perform the duties of his office with integrity, dignity and honour.

4. The judge should avoid any conflict of interest and refrain from placing himself in a position where he cannot faithfully carry out his functions.

5. The judge should be, and be seen to be, impartial and objective.

10. The judge should uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society.

Regulation respecting the procedure for the selection of persons apt for appointment as judges, R.R.Q. 1981, c. T-16, r. 5

7. A candidate is deemed to have accepted that an investigation be carried out with respect to him with the Bar and with police authorities.

18. The committee determines the competence of the candidate for appointment as a judge. For that purpose, it assesses the personal and intellectual qualities of the candidate as well as his experience.

The committee assesses, in particular, the candidate's degree of legal knowledge in the areas of law in which the judge will perform his duties, as well as his capacity for judgment, his insight, his ability for evaluation, his sense of decision and his concept of a judge's duty.

2. Appellant's Arguments

The appellant argues, first, that the pardon he was granted under the *Criminal Records Act*, R.S.C. 1985, c. C-47 ("*C.R.A.*") (formerly R.S.C. 1970, c. 12 (1st Supp.)) retroactively vacated his conviction and allows him to deny its existence when he is asked whether he has "been in trouble with the law". He then claims the protection of the Canadian and Quebec charters. More specifically, he believes that he was discriminated against on the basis of a criminal record, contrary to s. 15 of the *Canadian Charter*, and was dismissed or other-

S'il fait la recommandation prévue par le paragraphe *b*, le conseil suspend le juge pour une période de trente jours.

Code de déontologie de la magistrature, R.R.Q. 1981, ch. T-16, r. 4.1

2. Le juge doit remplir son rôle avec intégrité, dignité et honneur.

4. Le juge doit prévenir tout conflit d'intérêt et éviter de se placer dans une situation telle qu'il ne peut remplir utilement ses fonctions.

5. Le juge doit de façon manifeste être impartial et objectif.

10. Le juge doit préserver l'intégrité et défendre l'indépendance de la magistrature, dans l'intérêt supérieur de la justice et de la société.

Règlement sur la procédure de sélection des personnes aptes à être nommées juges, R.R.Q. 1981, ch. T-16, r. 5

7. Un candidat est réputé accepter qu'une vérification soit faite à son sujet auprès du Barreau et des autorités policières.

18. Le comité détermine l'aptitude du candidat à être nommé juge. À cette fin, il évalue les qualités personnelles et intellectuelles du candidat ainsi que son expérience.

Il évalue notamment le degré de connaissance juridique de cette personne dans les domaines du droit dans lesquels le juge exercera ses fonctions, sa capacité de jugement, sa perspicacité, sa pondération, son esprit de décision et la conception qu'elle se fait de la fonction de juge.

2. Les prétentions de l'appelant

L'appelant prétend d'abord que le pardon qu'il a obtenu en vertu de la *Loi sur le casier judiciaire*, L.R.C. 1985, ch. C-47 (« *L.C.J.* ») (auparavant S.R.C. 1970, ch. 12 (1er suppl.)), a annulé rétroactivement sa condamnation et lui permet de nier son existence lorsqu'on lui demande s'il a eu « des démêlés avec la justice ». Il invoque ensuite la protection des chartes canadienne et québécoise. Plus particulièrement, il estime avoir été victime de discrimination fondée sur l'existence d'antécédents judiciaires, contrairement à l'art. 15 de la *Charte* 106 wise penalized in his employment owing to the mere fact that he was granted a pardon, contrary to s. 18.2 of the *Quebec Charter*. He also submits that his rights to dignity, honour and reputation, and to private life, which are protected by ss. 4 and 5 of the *Quebec Charter*, have been infringed, since the existence of his conviction has been disclosed despite the pardon, and he was defamed by members of the legislature. Finally, the appellant questions the application of the test for removal in his specific case. In his view, his conduct has not been so manifestly and profoundly destructive of the impartiality, integrity and independence of the justice system that the confidence of the public in his capacity to carry out his functions would be undermined.

canadienne et avoir été congédié ou autrement pénalisé dans le cadre de son emploi du seul fait qu'il a obtenu un pardon contrairement à l'art. 18.2 de la *Charte québécoise*. Il soutient également que ses droits à la dignité, à l'honneur et à la réputation, et à la vie privée protégés par les art. 4 et 5 de la *Charte québécoise* ont été brimés puisque l'existence de sa condamnation a été révélée malgré le pardon et qu'il fut l'objet de diffamation de la part des parlementaires. Finalement, l'appelant remet en question l'application du critère de destitution dans son cas particulier. Selon lui, sa conduite ne porte pas si manifestement et si totalement atteinte aux notions d'impartialité, d'intégrité et d'indépendance de la justice au point d'ébranler la confiance du public en sa capacité d'exercer ses fonctions.

107 By making these arguments, the appellant is inviting this Court to examine the very foundations of our justice system. The decision is, first and foremost, closely connected to the role a judge is called upon to play in that system and to the image of impartiality, independence and integrity he or she must project and strive to maintain.

En soulevant de tels arguments, l'appelant demande que notre Cour se penche sur les fondements mêmes de notre système de justice. La décision est, avant toute chose, intimement liée au rôle que le juge est appelé à y jouer et à l'image d'impartialité, d'indépendance et d'intégrité qu'il doit dégager et s'efforcer de préserver.

3. The Role of the Judge: "A Place Apart"

3. Le rôle du juge : « une place à part »

108 The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

La fonction judiciaire est tout à fait unique. Notre société confie d'importants pouvoirs et responsabilités aux membres de sa magistrature. Mis à part l'exercice de ce rôle traditionnel d'arbitre chargé de trancher les litiges et de départager les droits de chacune des parties, le juge est aussi responsable de protéger l'équilibre des compétences constitutionnelles entre les deux paliers de gouvernement, propres à notre État fédéral. En outre, depuis l'adoption de la *Charte canadienne*, il est devenu un défenseur de premier plan des libertés individuelles et des droits de la personne et le gardien des valeurs qui y sont enchâssées : *Beauregard*, précité, p. 70, et *Renvoi sur la rémunération des juges de cours provinciales*, précité, par. 123. En ce sens, aux yeux du justiciable qui se présente devant lui, le juge est d'abord celui qui dit la loi, qui lui reconnaît des droits ou lui impose des obligations.

If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

109 Puis, au-delà du juriste chargé de résoudre les conflits entre les parties, le juge joue également un rôle fondamental pour l'observateur externe du système judiciaire. Le juge constitue le pilier de l'ensemble du système de justice et des droits et libertés que celui-ci tend à promouvoir et à protéger. Ainsi, pour les citoyens, non seulement le juge promet-il, par son serment, de servir les idéaux de Justice et de Vérité sur lesquels reposent la primauté du droit au Canada et le fondement de notre démocratie, mais il est appelé à les incarner (le juge Jean Beetz, Présentation du premier conférencier de la Conférence du 10[e] anniversaire de l'Institut canadien d'administration de la justice, propos recueillis dans *Mélanges Jean Beetz* (1995), p. 70-71).

Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.

(Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

110 En ce sens, les qualités personnelles, la conduite et l'image que le juge projette sont tributaires de celles de l'ensemble du système judiciaire et, par le fait même, de la confiance que le public place en celui-ci. Le maintien de cette confiance du public en son système de justice est garant de son efficacité et de son bon fonctionnement. Bien plus, la confiance du public assure le bien-être général et la paix sociale en maintenant un État de droit. Dans un ouvrage destiné à ses membres, le Conseil canadien de la magistrature explique :

> La confiance et le respect que le public porte à la magistrature sont essentiels à l'efficacité de notre système de justice et, ultimement, à l'existence d'une démocratie fondée sur la primauté du droit. De nombreux facteurs peuvent ébranler la confiance et le respect du public à l'égard de la magistrature, notamment : des critiques injustifiées ou malavisées; de simples malentendus sur le rôle de la magistrature; ou encore toute conduite de juges, en cour ou hors cour, démontrant un manque d'intégrité. Par conséquent, les juges doivent s'efforcer d'avoir une conduite qui leur mérite le respect du public et ils doivent cultiver une image d'intégrité, d'impartialité et de bon jugement.

(Conseil canadien de la magistrature, *Principes de déontologie judiciaire* (1998), p. 14)

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they

111 La population exigera donc de celui qui exerce une fonction judiciaire une conduite quasi irréprochable. À tout le moins exigera-t-on qu'il paraisse

give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette:

[TRANSLATION] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of "elites" in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others.

("Figure actuelle du juge dans la cité" (1999), 30 *R.D.U.S.* 1, at pp. 11-12)

In *The Canadian Legal System* (1977), Professor G. Gall goes even further, at p. 167:

The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.

112 The reasons that follow therefore cannot disregard two fundamental premises. First, and following from the foregoing, they cannot be dissociated from the very particular context of the judicial function. The judge is in "a place apart" in our society and must conform to the demands of this exceptional status (Friedland, *supra*). On the other hand, we also must not forget that this Court is sitting on appeal from the report of the inquiry panel of the Quebec Court of Appeal, to which a specific function has been assigned by s. 95 *C.J.A.* As I said earlier, the Court of Appeal, when it makes its report under that provision, is called upon to play a fundamental role in terms of both the ethical process itself and the principle of judicial independence. This Court must therefore respect that jurisdiction and show it the proper deference. This is

avoir un tel comportement. Il devra être et donner l'apparence d'être un exemple d'impartialité, d'indépendance et d'intégrité. Les exigences à son endroit se situent à un niveau bien supérieur à celui de ses concitoyens. Le professeur Y.-M. Morissette exprime bien ce propos :

[L]a vulnérabilité du juge est nettement plus grande que celle du commun des mortels, ou des «élites» en général : c'est un peu comme si sa fonction, qui consiste à juger autrui, lui imposait de se placer hors de portée du jugement d'autrui.

(« Figure actuelle du juge dans la cité » (1999), 30 *R.D.U.S.* 1, p. 11-12)

Le professeur G. Gall, dans son ouvrage *The Canadian Legal System* (1977), va encore plus loin à la p. 167 :

[TRADUCTION] Les membres de notre magistrature sont, par tradition, astreints aux normes de retenue, de rectitude et de dignité les plus strictes. La population attend des juges qu'ils fassent preuve d'une sagesse, d'une rectitude, d'une dignité et d'une sensibilité quasi-surhumaines. Sans doute aucun autre groupe de la société n'est-il soumis à des attentes aussi élevées, tout en étant tenu d'accepter nombre de contraintes. De toute façon, il est indubitable que la nomination à un poste de juge entraîne une certaine perte de liberté pour la personne qui l'accepte.

Les motifs qui suivent ne sauraient donc faire abstraction de deux prémisses fondamentales. D'abord et dans la lignée de ce qui précède, ils ne sauraient être dissociés du contexte très particulier dans lequel la fonction judiciaire s'inscrit. La magistrature occupe une « place à part » dans notre société et elle doit se conformer aux exigences requises par ce statut exceptionnel (Friedland, *op. cit.*). Par ailleurs, nous ne saurions également perdre de vue que notre Cour siège en appel du rapport de la formation d'enquête de la Cour d'appel du Québec, laquelle est dépositaire d'une fonction particulière qui lui est confiée par l'art. 95 *L.T.J.* Comme je le mentionnais précédemment, la Cour d'appel, lorsqu'elle rédige son rapport en vertu de cette disposition, est appelée à jouer un rôle fondamental tant au niveau du processus déontologique lui-même qu'à l'égard de l'application du principe de l'indépendance judiciaire. Notre Cour se doit the approach that I shall now take in moving on to the final part of these reasons.

donc de respecter cette compétence et de faire preuve de déférence en son endroit. C'est suivant cette approche que j'aborde à l'instant la dernière partie de ces motifs.

4. Meaning and Effect of the Pardon

4. Le sens et la portée du pardon

113 At common law, a pardon is an expression of the sovereignty of the monarch, the result of the unilateral and discretionary exercise of the Royal prerogative of mercy or clemency. In Canada, a pardon is also derived from the powers of the Crown. Thus, the provisions contained in Canadian statute law, including the *Criminal Code*, merely prescribe various ways to exercise that prerogative, without limiting its scope: s. 749 of the *Criminal Code*. See also *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] S.C.R. 269, *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 876-77, and, more generally, H. Dumont, *Pénologie — Le droit canadien relatif aux peines et aux sentences* (1993), at pp. 539-70.

En common law, le pardon est l'expression de la souveraineté du Roi, le résultat de l'exercice unilatéral et discrétionnaire de sa prérogative royale de grâce ou de clémence. Au Canada, le pardon tire également son origine des pouvoirs de la Couronne. Les textes législatifs canadiens, dont le *Code criminel*, ne font que prescrire différentes façons de l'exercer, sans pour autant en limiter la portée : art. 749 du *Code criminel*. Voir aussi *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] R.C.S. 269; le *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753, p. 876-877, et, plus généralement, H. Dumont, *Pénologie — Le droit canadien relatif aux peines et aux sentences* (1993), p. 539-570.

114 Professor Dumont breaks the various types of pardon found in the *Criminal Code* down into the following categories: (1) the ordinary and partial pardon provided in ss. 748(1) and 748.1(1) of the *Code*, which consists of the remission, in whole or in part, of a sentence without reviewing the issue of the person's guilt; (2) the conditional pardon granted under s. 748(2) of the *Code*, which can amend the initial sentence imposed by the court and make it subject to certain conditions; (3) the free pardon also granted under subss. 748(2) and (3) of the *Code*, by virtue of which a person is deemed never to have committed the offence in respect of which it is granted, and (4) the pardon granted after a referral for hearing or referral to a court of appeal in accordance with s. 690 of the *Code* or s. 53 *S.C.A.* which results in a new trial or a new hearing.

Le professeur Dumont regroupe les différentes formes de pardon que l'on retrouve au *Code criminel* dans les catégories suivantes : (1) le pardon ordinaire et partiel prévu aux par. 748(1) et 748.1(1) du *Code* qui comporte la remise d'une sentence ou d'une partie de celle-ci sans remettre en question la culpabilité de la personne; (2) le pardon conditionnel obtenu en vertu du par. 748(2) du *Code* qui permet de modifier la peine initialement imposée par le tribunal et de l'assortir de certaines conditions; (3) le pardon absolu aussi obtenu en vertu des par. 748(2) et (3) du *Code* selon lesquels une personne est réputée n'avoir jamais commis l'infraction à l'égard de laquelle il est accordé et (4) le pardon obtenu après le renvoi à procès ou le renvoi à une cour d'appel conformément à l'art. 690 du *Code* ou à l'art. 53 *L.C.S.*, qui donne lieu à la tenue d'un nouveau procès ou d'une nouvelle audition.

115 Also, Parliament may legislate regarding pardons in the exercise of its jurisdiction over criminal law. For example, it has established a procedure for administrative pardons, under the

Par ailleurs, le législateur fédéral peut également légiférer en matière de pardon dans l'exercice de sa compétence en droit criminel. Il a ainsi créé une procédure de réhabilitation administrative, sous la exclusive authority of the National Parole Board, which is set out in the *Criminal Records Act*. A pardon of that nature may be granted, after inquiry, to any applicant who has been convicted of an offence under a federal Act or regulations thereunder. This is the procedure by which the Governor General in Council granted a pardon to Richard Therrien on August 20, 1987. What then is the effect of this kind of pardon? More specifically, did it mean that the appellant could completely deny the existence of the conviction in respect of which it was granted and answer "no" to the question asked by the committee for the selection of persons qualified for appointment as judges? The Court of Appeal did an exhaustive review of this issue. It found that the pardon granted to the appellant does not affect his guilt, but does result in the complete remission of his conviction and its legal effects for the future. Here we need to revisit some aspects of its analysis.

116 Sections 5 and 6(2) *C.R.A.* set out the effects of granting a pardon: (1) it is evidence that the National Parole Board, after making the inquiries specified in the Act, was satisfied that the applicant was of good conduct and that the conviction in respect of which it is granted should no longer reflect adversely on his character; (2) it vacates the conviction and removes any disqualification to which the person is subject by virtue of any federal Act or regulation made thereunder; and (3) it results in any record of the conviction being kept separate and apart: in other words, the criminal record is expunged. In and of themselves, these provisions do not persuade me that the pardon can operate to retroactively wipe out the conviction. Rather, they are an expression of the fact that it still exists, combined with a desire to minimize its future consequences. Section 5(*a*)(ii) *C.R.A.* provides that the pardon is evidence that "the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character" (emphasis added), implying that it still exists and could so reflect. Second, the effects of the pardon are limited to the legal disqualifications created by federal statutes or the regulations thereunder and therefore exclude all the

responsabilité exclusive de la Commission nationale des libérations conditionnelles, et prévue à la *Loi sur le casier judiciaire*. Cette réhabilitation peut être accordée, après enquête, à toute personne condamnée pour une infraction à une loi fédérale ou à ses règlements qui en fait la demande. C'est en vertu de cette procédure que le 20 août 1987, le gouverneur général en conseil a accordé un pardon à Richard Therrien. Quel est donc l'effet d'une telle réhabilitation? Plus précisément, permettait-elle à l'appelant de nier complètement l'existence de la condamnation pour laquelle elle lui avait été accordée et de répondre « non » à la question soulevée par le comité de sélection des personnes aptes à être nommées juges? La Cour d'appel a fait une étude exhaustive de cette question. Elle conclut que la réhabilitation obtenue par l'appelant ne remet pas en question sa culpabilité, mais entraîne la remise totale de sa condamnation et des effets juridiques pour l'avenir. Il importe de revenir sur certains éléments de son analyse.

L'article 5 et le par. 6(2) *L.C.J.* énoncent les effets de l'octroi d'une réhabilitation : (1) elle sert de preuve que la Commission nationale des libérations conditionnelles, après avoir mené les enquêtes prévues par la loi, est convaincue que le demandeur s'est bien conduit et que la condamnation pour laquelle elle est accordée ne devrait plus ternir sa réputation; (2) elle efface les conséquences de la condamnation et fait cesser les incapacités qu'elle pouvait entraîner aux termes d'une loi fédérale ou de ses règlements; et (3) elle entraîne la mise à l'écart de tout dossier portant sur la condamnation, soit la radiation du casier judiciaire. En elles-mêmes, ces dispositions ne me convainquent pas que la réhabilitation puisse avoir pour effet d'anéantir rétroactivement la condamnation. Elles sont davantage l'expression du maintien de son existence, jumelée à une volonté d'en minimiser les conséquences à l'avenir. En effet, le sous-al. 5*a*)(ii) *L.C.J.* précise que la réhabilitation sert de preuve que « la condamnation en cause ne devrait plus ternir la réputation du demandeur » (je souligne), sous-entendant qu'elle existe toujours et qu'elle pourrait le faire. Ensuite, les effets de la réhabilitation sont limités aux incapacités juridiques créées par la loi fédérale ou ses règlements post-sentence consequences provided in provincial legislation, which also suggests that the pardon has only limited effect. Third, the information contained in the criminal record is not destroyed but is kept separate and apart, whence it may re-emerge should the pardoned person subsequently be no longer of good conduct.

117 In support of the opposing argument, the appellant refers us to the English version of s. 5 *C.R.A.* which, at first sight, appears to have another meaning. When it was enacted in 1970, its English and French versions read as follows:

> **5.** The grant of a pardon
>
> (*a*) is evidence of the fact that the Board, after making proper inquiries, was satisfied that an applicant was of good behaviour and that the conviction in respect of which the pardon is granted should no longer reflect adversely on his character; and
>
> (*b*) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of such conviction, subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder.
>
> **5.** L'octroi d'un pardon
>
> *a*) est la preuve du fait que la Commission, après avoir effectué une enquête suffisante, est convaincue que le requérant a eu une bonne conduite et que la condamnation à l'égard de laquelle le pardon est accordé ne devrait plus nuire à sa réputation; et
>
> *b*) à moins que le pardon ne soit révoqué par la suite, annule la condamnation pour laquelle il est accordé et, sans restreindre la portée générale de ce qui précède, élimine toute déchéance que cette condamnation entraîne, pour la personne ainsi déclarée coupable, en vertu de toute loi du Parlement du Canada ou d'un règlement établi sous son régime. [Emphasis added.]

When it was revised in 1985, the French version was amended so that the words "*efface les conséquences de la condamnation*" were substituted for "*annule la condamnation*". However, the English version remained almost unchanged, retaining throughout the years the words "vacates the conviction", which generated some debate. Did the

et excluent donc l'ensemble des conséquences postpénales prévues aux lois provinciales, ce qui laisse également croire que la réhabilitation n'a qu'une portée limitée. Finalement, les renseignements contenus au casier judiciaire ne sont pas détruits, mais mis à l'écart d'où ils risquent de ressurgir advenant une nouvelle inconduite de la personne réhabilitée.

Pour appuyer l'argument contraire, l'appelant nous renvoie à la version anglaise de l'art. 5 *L.C.J.* qui, à première vue, peut sembler retenir un autre sens. Lors de son adoption, en 1970, il se lisait ainsi dans ses versions anglaise et française :

> **5.** The grant of a pardon
>
> (*a*) is evidence of the fact that the Board, after making proper inquiries, was satisfied that an applicant was of good behaviour and that the conviction in respect of which the pardon is granted should no longer reflect adversely on his character; and
>
> (*b*) unless the pardon is subsequently revoked, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of such conviction, subject by virtue of any Act of the Parliament of Canada or a regulation made thereunder.
>
> **5.** L'octroi d'un pardon
>
> *a*) est la preuve du fait que la Commission, après avoir effectué une enquête suffisante, est convaincue que le requérant a eu une bonne conduite et que la condamnation à l'égard de laquelle le pardon est accordé ne devrait plus nuire à sa réputation; et
>
> *b*) à moins que le pardon ne soit révoqué par la suite, annule la condamnation pour laquelle il est accordé et, sans restreindre la portée générale de ce qui précède, élimine toute déchéance que cette condamnation entraîne, pour la personne ainsi déclarée coupable, en vertu de toute loi du Parlement du Canada ou d'un règlement établi sous son régime. [Je souligne.]

Lors de la révision de 1985, la version française a été modifiée pour inclure les mots « efface les conséquences de la condamnation » en lieu et place de « annule la condamnation ». Toutefois, la version anglaise est demeurée, à peu de choses près, la même au fil des ans conservant l'emploi des mots « *vacates the conviction* », ce qui a contribué à fact that no changes were made to the English version reflect a mere oversight, or did the amendment to the French version indicate that Parliament had intended to harmonize it with the English version? In the *Oxford English Dictionary* (2nd ed. 1989), vol. XIX, at p. 385, we see that the expression "vacate" means "to make void in law, to deprive of legal authority, validity, force, efficacy or value, to render inoperative or to annul or cancel", which does not necessarily involve retroactive effects. Thus, it is possible to make something void, deprive it of any effect or authority or annul it for the future only. It is therefore highly probable that the amendments to the French version were intended only to better convey the meaning of the English version.

susciter une certaine controverse. L'absence de changements apportés à la version anglaise relevait-elle de la simple omission ou la modification de la version française traduisait-elle une volonté législative d'harmoniser cette dernière avec le texte anglais? La consultation du *Oxford English Dictionary* (2e éd. 1989), vol. XIX, p. 385, nous apprend que le terme « *vacate* » signifie [TRADUCTION] « rendre nul et sans effet en droit, dépouiller de toute autorité, validité, force, efficacité ou valeur sur le plan juridique, rendre inopérant ou frapper de nullité », ce qui n'emporte pas nécessairement la rétroactivité de ses effets. Aussi est-il possible de rendre nul, de priver de tout effet ou autorité ou d'annuler une chose pour l'avenir seulement. Il est donc fort probable que les modifications apportées au texte français ne l'ont été qu'afin de mieux exprimer le sens véhiculé par la version anglaise.

118 In connection with a proposed reform of the *Criminal Records Act* in 1992, Parliament considered whether it would be advisable to add a provision to allow those who receive a pardon to deny the conviction ("deeming provision"). The interdepartmental committee struck to consider various avenues instead opted to recommend maintaining the status quo in this regard. Its view was that the Act should not be amended to include a provision of that type, thus demonstrating its opposition to what had been referred to as "legislated lying". As an alternative, it proposed the publication of bulletins indicating the effects of having records "sealed" once a pardon is granted, pointing out that information cannot be released: *Proposal for Reform of the Criminal Records Act* (July 20, 1991), Explanatory document prepared by the Solicitor General of Canada, at pp. 10-11, Recommendation No. 7. See also T. J. Singleton, "La discrimination fondée sur le motif des antécédents judiciaires et les instruments anti-discriminatoires canadiens" (1993), 72 *Can. Bar Rev.* 456, at p. 463.

Le législateur fédéral s'est d'ailleurs penché sur l'opportunité d'ajouter une disposition permettant à la personne réhabilitée de nier l'existence de sa condamnation dans le cadre d'un projet de réforme de la *Loi sur le casier judiciaire* en 1992 (« *deeming provision* »). Le comité interministériel chargé d'étudier les différentes avenues recommandait plutôt le maintien du statu quo en la matière. Il était d'avis que la loi ne devait pas être modifiée pour y inclure une telle disposition manifestant ainsi son opposition à ce que d'aucuns appelaient un « mensonge autorisé par la loi ». En échange, il proposait la publication de bulletins d'information afin d'expliquer les effets de la mise à l'écart d'un dossier à la suite de l'obtention d'une réhabilitation, notamment du fait que l'information qu'il contient ne puisse plus être révélée : *Proposition de réforme de la Loi sur le casier judiciaire* (20 juillet 1991), Document explicatif du Solliciteur général du Canada, p. 10-11, Recommandation no 7. Voir aussi T. J. Singleton, « La discrimination fondée sur le motif des antécédents judiciaires et les instruments anti-discriminatoires canadiens » (1993), 72 *R. du B. can.* 456, p. 463.

119 I note in passing that the interpretation holding that the Act does not allow a person to deny that he or she was convicted is also consistent with the

Je note en passant que l'interprétation selon laquelle la loi ne permet pas de nier l'existence de la condamnation s'inscrit également dans la lignée most recent amendments to the Act in 2000, although those amendments cannot be set up against the appellant in this case. The *Act to amend the Criminal Records Act and to amend another Act in consequence*, S.C. 2000, c. 1, s. 4 (proclaimed in force August 1, 2000 by Order SI/2000-73, vol. 134, p. 2033), amends the French and English versions. For example, in the French version of s. 5 the words "*entraîne le classement du dossier ou du relevé de la condamnation à part des autres dossiers judiciaires*" are substituted for "*efface les conséquences de la condamnation*". In my view, these changes embody the meaning that Parliament has always intended the Act to have. Apart from the various disqualifications that a conviction may lead to under federal statutes or regulations, as referred to in s. 5, the other "conséquences" associated with the existence of a criminal record that the pardon sought to eliminate for the future are all covered by keeping the information associated with the existence of a criminal record separate and apart. That information then becomes private to the individual and cannot be disclosed without the prior approval of the Minister. Professor Dumont shares this view:

> [TRANSLATION] This legal construction of the stigmatization or legal recognition of the fiction of dishonour, is so evident that the pardon process in the *Criminal Records Act* consists, first and foremost, of terminating the use and distribution of the information recorded in the criminal record, restoring the confidential status of information relating to an individual's criminal history and returning that information to the private sphere. <u>From that point of view, the Act creates not so much a procedure for obtaining a pardon as a mechanism consisting of withdrawing information relating to an individual's criminal history from circulating.</u> [Emphasis added.]

("Le casier judiciaire : criminel un jour, criminel toujours?", in *Le respect de la vie privée dans l'entreprise : de l'affirmation à l'exercice d'un droit* (1995), at p. 115)

120 In the case at bar, the Court of Appeal reached the same conclusion by referring to the other provisions of the Act. "Every component [of an Act] contributes to the meaning as a whole, and the whole gives meaning to its parts": P.-A. Côté, *The*

des dernières modifications apportées à la loi en 2000, bien que celles-ci ne soient pas opposables à l'appelant en l'espèce. La *Loi modifiant la Loi sur le casier judiciaire et une autre loi en conséquence*, L.C. 2000, ch. 1, art. 4 (entrée en vigueur le 1er août 2000 par décret TR/2000-73, vol. 134, p. 2033), modifie les versions française et anglaise. Ainsi, les mots « efface les conséquences de la condamnation » à l'art. 5 sont remplacés par « entraîne le classement du dossier ou du relevé de la condamnation à part des autres dossiers judiciaires ». À mon avis, ces changements viennent consacrer le sens que le Parlement a toujours voulu conférer à la loi. Outre les différentes incapacités que la condamnation pouvait entraîner aux termes d'une loi fédérale ou de ses règlements dont l'art. 5 fait mention, les autres « conséquences » associées à l'existence d'antécédents judiciaires que la réhabilitation visait à éliminer pour l'avenir se résument à la mise à l'écart des informations entourant la condamnation. Celles-ci font désormais partie de la vie privée de l'individu et ne sauraient être divulguées sans l'autorisation préalable du ministre. Le professeur Dumont partage cette opinion :

> Cette construction juridique de la stigmatisation ou la reconnaissance juridique de la fiction du déshonneur est si évidente que le mécanisme de réhabilitation prévu dans la *Loi sur le casier judiciaire* consiste d'abord et avant tout à mettre fin à l'utilisation et à la diffusion de l'information consignée dans le casier judiciaire, à redonner un statut confidentiel aux renseignements sur le passé pénal d'une personne et à les remettre dans le domaine de la vie privée. <u>De ce point de vue, la loi crée moins une procédure visant à obtenir un pardon qu'un mécanisme consistant à retirer de la circulation les informations concernant le passé judiciaire pénal d'une personne.</u> [Je souligne.]

(« Le casier judiciaire : criminel un jour, criminel toujours? », dans *Le respect de la vie privée dans l'entreprise : de l'affirmation à l'exercice d'un droit* (1995), p. 115)

En l'espèce, la Cour d'appel arrive à cette même conclusion en se référant aux autres dispositions de la loi. En effet, « chaque élément [d'une loi] contribue au sens de l'ensemble et l'ensemble, au sens de chacun des éléments » : P.-A. Côté, *Interpréta-*

Interpretation of Legislation in Canada (3rd ed. 2000), at p. 308; see also *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 365 (*per* Lamer J.). Several provisions of the *Criminal Records Act* would be meaningless if the construction suggested by the appellant were accepted. Sections 6(2) and 6(3) *C.R.A.* permit the Minister to disclose the conviction if he is satisfied that the disclosure is desirable in the interests of the administration of justice or for any purpose related to the safety or security of Canada or any state allied or associated with Canada. Section 7 *C.R.A.* permits the National Parole Board to revoke the pardon if the person is subsequently convicted of another offence, is no longer of good conduct or knowingly made a false or deceptive statement in relation to the application for the pardon. Finally, s. 8 *C.R.A.* specifically provides that no person shall ask a question relating to an application for federal employment that by its terms requires the applicant to disclose a conviction in respect of which a pardon has been granted. The purpose of all these sections is to eliminate the potential future effects of the conviction, which would be pointless if the conviction were deemed never to have existed. Section 8 is particularly instructive for our purposes. If the very essence of the pardon were that the pardoned person could deny the existence of the conviction, Parliament would not have felt the need to enact that provision. (R. P. Nadin-Davis, "Canada's *Criminal Records Act*: Notes on How Not to Expunge Criminal Convictions" (1980-81), 45 *Sask. L. Rev.* 221)

121 It is also useful to draw a comparison with certain federal statutes. Interpretations favouring harmony between the various statutes enacted by the same government should indeed prevail. This presumption is even stronger when the statutes relate to the same subject matter: Côté, *supra*, at pp. 342 *et seq*. Thus, as I have already pointed out, s. 748(3) of the *Criminal Code* expressly provides that where the Governor in Council grants a free pardon to any person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted. Furthermore, s. 36(1) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, expressly provides that the finding of

tion des lois (3e éd. 1999), p. 388; voir aussi *Dubois c. La Reine*, [1985] 2 R.C.S. 350, p. 365 (le juge Lamer). Or, plusieurs dispositions de la *Loi sur le casier judiciaire* n'auraient aucun sens si on retenait l'interprétation suggérée par l'appelant. Les paragraphes 6(2) et (3) *L.C.J.* permettent au ministre de communiquer le fait de la condamnation, s'il est convaincu que la communication sert l'administration de la justice ou est souhaitable pour la sûreté ou sécurité du Canada ou d'un État allié ou associé au Canada. L'article 7 *L.C.J.* permet à la Commission nationale des libérations conditionnelles de révoquer la réhabilitation lorsque le réhabilité est condamné pour une nouvelle infraction, qu'il a cessé de bien se conduire ou qu'il a sciemment fait une déclaration inexacte à l'occasion de sa demande de réhabilitation. Finalement, l'art. 8 *L.C.J.* prévoit spécifiquement que nul ne peut, dans le cadre d'une demande d'emploi relevant de la compétence du fédéral, poser une question qui, par sa teneur, obligerait un réhabilité à révéler sa condamnation. Ces articles ont tous pour objet d'éliminer les effets potentiels futurs de la condamnation, ce qui serait inutile si la condamnation était réputée ne pas avoir existé. L'article 8 est particulièrement révélateur à nos fins. S'il tenait de l'essence même du pardon de permettre au réhabilité de nier l'existence de la condamnation, le législateur n'aurait pas senti le besoin de le préciser explicitement. (R. P. Nadin-Davis, « Canada's *Criminal Records Act*: Notes on How Not to Expunge Criminal Convictions » (1980-81), 45 *Sask. L. Rev.* 221)

Il est également utile d'établir une comparaison avec certaines lois fédérales. L'interprète des lois doit en effet favoriser l'harmonie des divers textes législatifs qui émanent d'une même autorité. Cette présomption se trouve renforcée lorsqu'on est en présence de lois qui portent sur la même matière : Côté, *op. cit.*, p. 433 et suiv. Ainsi, comme je le soulignais précédemment, le par. 748(3) du *Code criminel* prévoit expressément que si le gouverneur en conseil accorde un pardon absolu à une personne, celle-ci est par la suite réputée n'avoir jamais commis l'infraction à l'égard de laquelle le pardon est accordé. De plus, le par. 36(1) de la *Loi sur les jeunes contrevenants*, L.R.C. 1985, ch. Y-1, guilt relating to a young offender for whom the court has directed an absolute discharge or for whom all the dispositions and all their terms have ceased to have effect shall be deemed never to have existed. The *Criminal Records Act* contains no provision of such scope. The fact that Parliament opted instead to use the term "*réhabilitation*" in the French version of the Act, thus stressing the future effects of the law, was therefore not random.

Accordingly, I find, as did the Court of Appeal, that an objective analysis of the Act does not support the appellant's argument that the pardon retroactively wipes out his conviction. Professor Dumont accurately summarizes the essence of what I have said:

> [TRANSLATION] It seems clear that the *Criminal Records Act* grants a pardon which is designed only to put an end to the negative effects of a conviction. An administrative pardon, which adopts the features of a *partial* and *conditional* pardon, is not equivalent to a retroactive acquittal, as a free pardon may be, by virtue of the Royal prerogative or the *Criminal Code*; accordingly, an administrative pardon does not logically result in retroactive annulment or neutralization of the conviction. [Emphasis in original.]

("Le casier judiciaire : criminel un jour, criminel toujours?", *supra*, at p. 132)

In conclusion, I will say a few words about the appellant's argument that in order to determine the effect of the pardon he was granted under the *Criminal Records Act*, the Court should adopt an "objective-subjective approach", which would involve both doing an objective analysis of the law and considering the opinion the appellant subjectively formed about his pardon. I do not believe that the way in which a statute is interpreted may vary, depending on the opinion formed by an individual, especially when that person is himself a member of the legal profession.

On the other hand, even if we did have to put ourselves in the appellant's position, I would point

prévoit explicitement que la déclaration de culpabilité visant un adolescent pour lequel le tribunal a ordonné la libération inconditionnelle ou pour lequel les décisions ainsi que toutes leurs conditions ont cessé de produire leurs effets, est réputée n'avoir jamais existé. La *Loi sur le casier judiciaire* ne prévoit aucune disposition ayant une telle portée. Aussi n'est-ce pas par hasard que le législateur fédéral a plutôt choisi d'utiliser le terme « réhabilitation » dans la version française de la loi, insistant ainsi sur ses effets futurs.

À l'instar de la Cour d'appel, je conclus donc qu'une analyse objective de la loi ne permet pas de soutenir, comme le fait l'appelant, que le pardon anéantit rétroactivement sa condamnation. Le professeur Dumont résume bien l'esprit de mon propos : 122

> Il nous paraît clair que la *Loi sur le casier judiciaire* octroie un pardon qui vise seulement à faire cesser les effets négatifs d'une condamnation. Empruntant les caractéristiques d'un pardon *partiel* et *conditionnel*, la réhabilitation administrative n'est pas assimilable à une déclaration d'innocence à rebours, comme peut l'être le pardon absolu en vertu de la prérogative royale ou du *Code criminel*; par conséquent, la réhabilitation administrative n'entraîne pas logiquement la négation ou la neutralisation rétroactive de la condamnation. [Italiques dans l'original.]

(« Le casier judiciaire : criminel un jour, criminel toujours? », *loc. cit*., p. 132)

En terminant, je dirai quelques mots de l'argument soumis par l'appelant selon lequel, pour déterminer la portée de la réhabilitation qu'il a obtenue conformément à la *Loi sur le casier judiciaire*, la Cour doit retenir une « approche objective-subjective » selon laquelle il faut, à la fois, faire une analyse objective de la loi et considérer l'opinion que s'est subjectivement formée à l'appelant à l'égard de son pardon. Je ne crois pas que l'interprétation de la loi soit susceptible de varier selon l'opinion que s'en fait le justiciable et, particulièrement, lorsque ce justiciable est lui-même un juriste. 123

Par ailleurs, même si l'on devait se placer dans la position de l'appelant, je tiens à rappeler que la 124 out that the question asked by the selection committee did not relate directly to the appellant's criminal record; rather, it but was much more general in scope, referring to his "trouble with the law". That expression can cover numerous situations, ranging from a mere arrest to being charged with an offence and awaiting trial, or being charged and subsequently acquitted after a trial. It can also refer to disciplinary proceedings initiated by the professional order to which the person belongs. Ultimately, it could even include being a party to a civil or family law proceeding. It therefore also includes the actual fact of the appellant's pardon.

125 Furthermore, the Court of Appeal held that the appellant's record contained sufficient evidence tending to establish that he was aware of the meaning and effect of the *Criminal Records Act*, and that he deliberately and subjectively ignored them. In its report, it states that the appellant's decision to conceal his convictions was not the result of a good faith misinterpretation of the applicable laws ([1998] R.J.Q. 2956, at p. 2972). After hearing lengthy testimony, including that of the appellant, and analyzing the evidence adduced, the majority of the committee of inquiry summarized the situation as follows:

> [TRANSLATION] He understood the importance and the gravity of the duty of transparency during the first selection process: he said that to him it was obvious, "natural", he had to answer <u>the</u> question.
>
> After striking out with the second selection committee, he was content to do some extremely cursory research into the effects of the pardon. Just a little more research would easily have led him to a different conclusion.
>
> Without regard for the importance of the office he was applying for, he decided, of his own volition, to minimize the consequences of his actions. He looked at the law and interpreted it in his own interests. He rationalized the whole thing, made a mental reservation, and constructed an opinion that offended reality using arguments which did not, in the form in which he presented them, amount to a lie. He deliberately failed to reveal a

question posée par le comité de sélection ne visait pas directement le casier judiciaire de l'appelant, mais avait une portée beaucoup plus générale, soit ses « démêlés avec la justice ». L'expression « démêlés avec la justice » peut inclure bon nombre de situations, de la simple arrestation au fait d'être inculpé pour une infraction et dans l'attente d'un procès ou au fait d'être inculpé et, par la suite, acquitté à l'issue de ce procès. Elle peut aussi faire référence à des instances disciplinaires entamées par l'ordre professionnel auquel on appartient. À la limite, elle peut inclure le fait d'être partie à une cause civile ou familiale. En ce sens, elle inclut également le fait même du pardon obtenu par l'appelant.

En outre, la Cour d'appel a jugé que le dossier de l'appelant contenait suffisamment d'éléments de preuve tendant à démontrer que M[e] Therrien connaissait le sens et la portée de la *Loi sur le casier judiciaire* et qu'il les a subjectivement et volontairement ignorés. Dans son rapport, elle mentionne que la décision de l'appelant de taire ses condamnations ne résulte pas d'une interprétation erronée faite de bonne foi des lois applicables ([1998] R.J.Q. 2956, p. 2972). Après avoir longuement entendu les témoins, dont l'appelant, et analysé la preuve soumise, les membres majoritaires du comité d'enquête résument la situation ainsi :

> Il a compris l'importance et la gravité de cette obligation de transparence lors du premier concours; il était pour lui évident, « naturel », dit-il, il devait répondre à <u>la</u> question.
>
> Après son échec lors du deuxième comité de sélection, il se satisfait de recherches extrêmement sommaires sur les conséquences du pardon. Une étude le moindrement plus poussée l'aurait facilement amené à une autre conclusion.
>
> Sans égard pour l'importance de la fonction qu'il postule, il décide lui-même de minimiser les conséquences de ses actes. Il prend en main la loi, l'interprète selon ses fins. Il rationalise le tout, fait une restriction mentale: se forge une opinion contraire à la réalité en utilisant des arguments dont la présentation formelle ne constitue pas un mensonge. Il omet volontairement de dévoiler un fait que le comité devait connaître. Il substi-

fact of which the committee ought to be made aware. He substituted his own judgment for the judgment of the selection committee. [Emphasis in original.]

When the appellant appeared before the selection committee in 1996, it was not to assert his right to be appointed as a judge. An appointment to the judiciary is more in the nature of a "privilege" granted to a person who has all the qualities considered to be necessary for the office. If, as the appellant contends, the *Criminal Records Act* leaves room for doubt or for more than one interpretation, he should have left it up to the selection committee to decide this.

I therefore find that while a pardon does not make the past go away, it expunges consequences for the future. The integrity of the pardoned person is restored, and he or she need not suffer the effects associated with the conviction in an arbitrary or discriminatory manner, a situation which the Canadian and Quebec charters tend to protect against. I will now consider those provisions.

5. <u>The Protection Afforded by the Canadian and Quebec Charters</u>

(a) *Section 15 of the Canadian Charter*

The appellant acknowledges that it is possible to interpret the provisions of the *Judicial Code of Ethics* and those of the *Regulation respecting the procedure for the selection of persons apt for appointment as judges* so that they are compatible with s. 15 of the *Canadian Charter*. However, he argues that the government's actions in this case infringed his right to equality, to which he is entitled regardless of his criminal record. He made two separate sub-arguments which I will now address.

First, he believes that he was discriminated against by the members of the first three selection committees based on his criminal record. He referred to the testimony of certain members, Judge Jean-Pierre Bonin and Nicole Gibeau, who expressed the view that having a criminal record disqualified him from holding the office of judge. What this boils down to is: either the appellant raises this situation to demonstrate the seriousness of the prejudice he has suffered, or he does so in

tue son propre jugement à celui du comité de sélection. [Souligné dans l'original.]

126 Lorsque l'appelant se présente devant le comité de sélection en 1996, il n'est pas là pour faire valoir son droit à être nommé juge. Une nomination à la magistrature relève davantage d'un « privilège » accordé à une personne qui réunit les qualités jugées nécessaires pour occuper la fonction. Si, comme le prétend l'appelant, la *Loi sur le casier judiciaire* laissait place au doute ou à plus d'une interprétation, il se devait de laisser au comité de sélection le soin d'en juger.

127 Je conclus donc que, sans faire disparaître le passé, le pardon efface les conséquences pour l'avenir. L'intégrité de la personne réhabilitée est rétablie et elle ne doit pas subir les effets liés à sa condamnation de façon arbitraire ou discriminatoire, ce que tendent à protéger les chartes canadienne et québécoise. C'est vers ces dispositions que je me pencherai maintenant.

5. <u>La protection des chartes canadienne et québécoise</u>

a) *L'article 15 de la Charte canadienne*

128 L'appelant reconnaît qu'il est possible d'interpréter les dispositions du *Code de déontologie de la magistrature* ainsi que celles du *Règlement sur la procédure de sélection des personnes aptes à être nommées juges*, de façon conforme à l'art. 15 de la *Charte canadienne*. Toutefois, il prétend que les actions du gouvernement en l'espèce ont porté atteinte à son droit à l'égalité sans égard à ses antécédents judiciaires. Il soumet deux sous-arguments distincts que j'aborde à l'instant.

129 D'abord, il estime avoir fait l'objet de discrimination fondée sur ses antécédents judiciaires de la part des membres des trois premiers comités de sélection. Il réfère aux témoignages de certains d'entre eux, le juge Jean-Pierre Bonin et M[e] Nicole Gibeau, selon lesquels l'existence d'un antécédent judiciaire le disqualifiait pour occuper un poste de juge. De deux choses l'une : ou bien l'appelant fait état de cette situation afin de démontrer la gravité du préjudice qu'il a subi, ou bien il le fait pour

order to challenge the propriety of the question at an interview for the purpose of recommending persons qualified for appointment as judges. In the first case, I would point out that the motives of the selection committee members are not on trial here and that if they were this Court is not the appropriate forum for settling that question. In the second case, as I will explain, when I analyze the second argument, having a criminal record is relevant as a criterion for assessing a person's capacity to be appointed as a judge. I would therefore reject this first argument.

contester la pertinence de cette question dans le cadre d'une entrevue ayant pour objectif de recommander des personnes aptes à être nommées juges. Dans la première hypothèse, je souligne que la présente affaire ne constitue pas un procès d'intentions des membres du comité de sélection et que, le cas échéant, notre Cour n'est pas le forum approprié pour se prononcer sur cette question. Dans la seconde, et comme je le mentionnerai dans le cadre de l'analyse du second argument, l'existence d'antécédents judiciaires est un critère pertinent pour déterminer la capacité d'une personne à être nommée juge. Je rejetterais donc ce premier moyen.

130 Second, the appellant contends that the decision by the Minister of Justice to initiate the removal process under s. 263 *C.J.A.* and ss. 2, 4, 5 and 10 of the *Judicial Code of Ethics* was actually based on the fact that he has a criminal record, not that he refused to disclose it, which was merely a pretext. He therefore believes that his right to equality, which is protected by s. 15 of the *Canadian Charter*, has been infringed. I would start by saying that, like the Court of Appeal and the Conseil de la magistrature, I take the view that the decision by the Minister of Justice was based primarily, perhaps exclusively, on the appellant's failure to disclose to the members of the selection committee that he had been in trouble with the law. On the other hand, if it were also related in part to the fact that he had a criminal record, I do not find that this would infringe the appellant's equality rights.

Dans un deuxième temps, l'appelant prétend que la décision du ministre de la Justice d'entamer le processus de destitution conformément à l'art. 263 *L.T.J.* et aux art. 2, 4, 5 et 10 du *Code de déontologie de la magistrature* s'appuie sur l'existence même de ses antécédents judiciaires et non sur son refus de le divulguer, lequel n'a constitué qu'un prétexte. En ce sens, il estime que l'on a porté atteinte à son droit à l'égalité protégé par l'art. 15 de la *Charte canadienne*. D'emblée, je dirai qu'à l'instar de la Cour d'appel et de la majorité du Conseil de la magistrature, je suis d'avis que la décision du ministre de la Justice repose principalement, voire exclusivement, sur l'omission de l'appelant de révéler l'existence de ses démêlés avec la justice aux membres du comité de sélection. Par ailleurs, si elle devait également porter en partie sur l'existence d'antécédents judiciaires, je considère que celle-ci ne porterait pas atteinte au droit à l'égalité de l'appelant.

131 In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, this Court held that the three-stage analysis that applies in respect of s. 15(1) had to assign considerable weight to the subject-matter and context of the infringement. At paragraph 88, Iacobucci J. stated that anyone who claimed under that subsection must prove the following three aspects: (1) the existence of differential treatment between the claimant and others based on personal characteristics, (2) differential treatment based on enumerated or analogous grounds, and (3) differential treatment that dis-

Dans l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, notre Cour précisait que la démarche en trois étapes applicable à l'égard du par. 15(1) devait accorder une importance marquée à l'objet et au contexte entourant la violation. Au paragraphe 88, le juge Iacobucci rappelle que la personne qui l'invoque doit établir les trois aspects suivants : (1) il existe une différence de traitement entre le demandeur et d'autres personnes en raison de caractéristiques personnelles, (2) la différence de traitement est fondée sur un motif énuméré ou analogue, et criminates by imposing a burden upon or withholding a benefit from the claimant and thereby infringing his or her dignity (that is, perpetuates or promotes the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration). A person who claims under s. 15(1) may rely on a series of contextual factors in order to demonstrate that his or her dignity has been infringed.

In the case at bar, if the decision by the Minister to lodge an ethics complaint against the appellant was based on the existence of a criminal record, I acknowledge that there was differential treatment between the appellant and others who did not have such a criminal history. I also assume, for our purposes, but without deciding the issue, that a criminal record is an analogous ground of discrimination for the purposes of s. 15(1) of the *Canadian Charter*. However, the Minister's decision cannot be regarded as discriminatory when we consider the relevant contextual factors: the decision took into account the appellant's situation as a whole, as well as the situation of people who come before the court and are entitled to the highest degree of integrity, impartiality and independence on the part of the members of the judiciary in whom they place their confidence. I will now consider the allegations that the appellant's rights under the *Quebec Charter* were infringed.

(b) *Quebec Charter*

(i) Right to Dignity, Honour and Respect for Reputation and Private Life

The appellant contends that his rights to dignity, honour, reputation and private life, which are protected by ss. 4 and 5 of the *Quebec Charter*, were infringed in this case and that certain members of the government disclosed information that was then confidential by virtue of his pardon and under ss. 5 and 6(2) *C.R.A.* He adds that he was the victim of an impassioned public debate in the media and the political arena, during which some elected

(3) la différence de traitement est discriminatoire en ce qu'en le privant d'un avantage ou en lui imposant un fardeau, elle porte atteinte à sa dignité (c'est-à-dire qu'elle perpétue l'opinion que l'individu touché est moins capable ou moins digne d'être reconnu ou valorisé en tant qu'être humain ou membre de la société canadienne, qui mérite le même intérêt, le même respect et la même considération). La personne qui invoque le par. 15(1) peut s'appuyer sur une série de facteurs contextuels pour démontrer que l'on a porté atteinte à sa dignité.

En l'espèce, si la décision du ministre de déposer une plainte déontologique contre l'appelant est fondée sur la présence d'antécédents judiciaires, je 132
reconnais que l'appelant a subi une différence de traitement par rapport à d'autres personnes qui ne présentent pas un tel passé pénal. Je prends également pour acquis, à nos fins, mais sans toutefois en décider, que les antécédents judiciaires constituent un motif de discrimination analogue au sens du par. 15(1) de la *Charte canadienne*. Cependant, la décision du ministre ne peut être considérée discriminatoire à la lumière des facteurs contextuels pertinents. En effet, la décision du ministre a pris en considération l'ensemble de la situation de l'appelant ainsi que celle des justiciables qui sont en droit d'obtenir la plus grande intégrité, impartialité et indépendance de la part des membres de la magistrature envers lesquels ils accordent leur confiance. Je me penche maintenant sur les allégations de violation des droits de l'appelant en vertu de la *Charte québécoise*.

b) *La Charte québécoise*

(i) Le droit à la dignité, à l'honneur et au respect de la réputation, et à la vie privée

L'appelant prétend que ses droits à la dignité, à 133
l'honneur et la réputation et à la vie privée, protégés par les art. 4 et 5 de la *Charte québécoise*, ont été atteints en l'espèce en ce que certains membres du gouvernement ont dévoilé des informations devenues confidentielles en raison de l'obtention de son pardon et conformément à l'art. 5 et au par. 6(2) *L.C.J.* Il ajoute avoir été la victime d'un débat public enflammé tant dans l'arène

representatives or journalists made insulting, defamatory and untrue remarks regarding the nature of his involvement in the events of the October Crisis. He was successively accused of having been a member of the F.L.Q. and of having participated in the kidnapping and even the murder of the minister Pierre Laporte. That these statements are false is not in dispute. However, I do not intend to state an opinion on these arguments, since this Court is not the appropriate forum in which to do so. As I said earlier, the motives of members of the government are not on trial here, which members in any event enjoy parliamentary immunity when addressing the legislative assembly; nor is this an action for damages against journalists. There is no evidence before us on these matters. I will therefore refrain from any comment whatsoever.

médiatique que politique au cours duquel certains parlementaires ou journalistes ont tenu des propos injurieux, diffamatoires et mensongers quant à la nature de son implication dans les événements de la Crise d'octobre. À tour de rôle, il fut accusé d'avoir été membre du F.L.Q. et d'avoir participé à l'enlèvement, voire à l'assassinat du ministre Pierre Laporte. La fausseté de ces affirmations n'est pas contestée. Je n'ai toutefois pas l'intention de me prononcer sur ces arguments puisque notre Cour ne constitue pas le forum approprié pour ce faire. Comme je le mentionnais précédemment, la présente affaire ne constitue pas un procès d'intentions à l'encontre des membres du gouvernement qui, par ailleurs, bénéficient d'une immunité parlementaire lorsqu'ils s'adressent aux membres de l'Assemblée législative, ou encore d'une action en dommages-intérêts à l'encontre de journalistes. Nous ne disposons d'aucune preuve à cet égard. Je m'abstiens donc de formuler quelque commentaire que ce soit.

(ii) Protection From Discrimination

(ii) La protection à l'encontre de la discrimination

134 The appellant contends that the complaint lodged by the Minister of Justice was based on the fact that he had a criminal record, while his failure to disclose it was really only a pretext. Thus, he submits that he was penalized in his employment owing to the mere fact that he was convicted of a criminal offence even though he had been pardoned for that offence, contrary to s. 18.2 of the *Quebec Charter*. He also contends that he was indirectly discriminated against when he was asked the illegal and abusive question by the members of the selection committees regarding his criminal history: "Have you ever been in trouble with the law or with the Barreau?" The appellant suggests that, in order to comply with the *Quebec Charter* requirements, the question should have been formulated as follows: "Have you ever been convicted of a penal or criminal offence connected with the function of judge, for which you have not been pardoned?"

L'appelant prétend que le dépôt de la plainte par le ministre de la Justice est fondé sur l'existence de son antécédent judiciaire alors que l'omission de le révéler n'en a constitué que le prétexte. Ainsi, il soutient qu'il a été pénalisé dans le cadre de son emploi du seul fait qu'il a été déclaré coupable d'une infraction criminelle et ce, même s'il en a obtenu le pardon, le tout contrairement à l'art. 18.2 de la *Charte québécoise*. Il prétend également avoir indirectement fait l'objet de discrimination découlant de la question illégale et abusive posée par les membres des comités de sélection quant à son passé judiciaire : « Est-ce que vous avez déjà eu des démêlés avec la justice ou avec le Barreau? » Pour se conformer aux exigences de la *Charte québécoise*, l'appelant suggère que la question aurait dû être formulée de la façon suivante : « Avez-vous déjà été trouvé coupable d'une infraction pénale ou criminelle ayant un lien avec la fonction de juge pour laquelle vous n'avez pas obtenu de pardon? »

135 I would start by saying, as the respondents say in their factum, that lodging a complaint merely

Comme le mentionnent les intimées dans leur mémoire, je tiens à souligner d'entrée de jeu que le triggered the disciplinary process that was conducted in respect of the appellant in this case. Since then, both the committee of inquiry of the Conseil de la magistrature and the Quebec Court of Appeal have considered the appellant's conduct. It must be borne in mind that this Court is hearing an appeal from the report of the Court of Appeal; we should therefore examine these issues from the standpoint of the reasons stated by the Court of Appeal in support of its recommendation for removal rather than from the standpoint of the complaint by the Minister of Justice.

dépôt de la plainte ne constitue que le déclenchement du processus disciplinaire dont l'appelant fut l'objet en l'espèce. Depuis celle-ci, le comité d'enquête du Conseil de la magistrature ainsi que la Cour d'appel du Québec se sont penchés sur la conduite de l'appelant. Notre Cour, faut-il le rappeler, siège en appel du rapport de la Cour d'appel; il convient donc plutôt d'examiner ces questions sous l'angle des motifs retenus par la Cour d'appel pour justifier sa recommandation de révocation que sous celui de la plainte du ministre de la Justice.

First, we must determine whether the committee for the selection of persons qualified for appointment as judges could legally, and without discriminating, ask a question concerning the appellant's trouble with the law. In my view, the provisions of the *Quebec Charter* are of no help in preventing an employer, assuming that the selection committee were an employer, from asking him a question of this nature during an interview. As the Court of Appeal points out, the *Quebec Charter* draws a clear distinction between the protection it affords against the discriminatory collection of information and protection against the discriminatory use of that information.

D'abord, il s'agit de déterminer si le comité de sélection des personnes aptes à être nommées juges pouvait légalement et sans discrimination poser une question portant sur les démêlés avec la justice de l'appelant. Je suis d'avis que les dispositions de la *Charte québécoise* ne sont d'aucun secours pour empêcher un employeur, le comité de sélection en fut-il un, de lui poser une telle question au cours d'une entrevue. Comme le souligne la Cour d'appel, la *Charte québécoise* fait clairement une distinction entre la protection qu'elle confère à l'encontre de la cueillette discriminatoire d'informations et celle à l'encontre de l'utilisation discriminatoire de ces informations. 136

Section 18.1 provides that no one may, in an employment interview, require a person to give information regarding any ground mentioned in s. 10 unless the information is useful for the application of s. 20. First, as I will explain below, it is uncertain whether judicial office is included in the expression "employment" in ss. 18.1 and 18.2; if that is not the case, the appellant would not be protected by the *Quebec Charter* against a question concerning his criminal record. Second, if judicial office were included, a criminal record, even one for which a pardon has been granted, is not included in the grounds listed in s. 10. Nor is it included in the concept of social condition, which appears in that section: see *Commission des droits de la personne du Québec v. Cie Price Ltée*, J.E. 81-866 (Sup. Ct.); *Commission des droits de la personne du Québec v. Ville de Beauport*, [1981] C.P. 292. In fact, it was in response to the conservative approach taken by the courts in interpret-

L'article 18.1 prévoit que nul ne peut, lors d'une entrevue relative à un emploi, requérir d'une personne des renseignements sur les motifs visés dans l'art. 10 sauf si ces renseignements sont utiles à l'application de l'art. 20. Premièrement, comme je l'expliquerai plus loin, il n'est pas certain que la fonction judiciaire soit visée par le terme « emploi » prévu aux art. 18.1 et 18.2, auquel cas l'appelant ne bénéficierait d'aucune protection à l'encontre d'une question portant sur ses antécédents judiciaires dans la *Charte québécoise*. Puis, si tel était le cas, les antécédents judiciaires, même pardonnés, ne font pas partie des motifs énumérés à l'art. 10. Ils ne sont pas non plus compris dans la notion de condition sociale qui, elle, y figure : voir notamment *Commission des droits de la personne du Québec c. Cie Price Ltée*, J.E. 81-866 (C.S.); *Commission des droits de la personne du Québec c. Ville de Beauport*, [1981] C.P. 292. C'est d'ailleurs en réaction à cette approche conservatrice des 137 ing social condition that the legislature amended the *Quebec Charter* in 1982 by adding s. 18.2: S.Q. 1982, c. 61, s. 5; see also Singleton, *supra*, at p. 472. Finally, even if the information related to one of the grounds listed in s. 10, the question would still be permitted in the selection process for persons qualified for appointment as judges, since the distinction is based on the aptitudes or qualifications required for judicial office, which is deemed non-discriminatory by s. 20 of the *Quebec Charter*.

tribunaux quant à l'interprétation de la condition sociale que le législateur a modifié la *Charte québécoise* en 1982 pour y ajouter l'art. 18.2 : L.Q. 1982, ch. 61, art. 5; voir aussi Singleton, *loc. cit.*, p. 472. Finalement, même si l'information portait sur l'un des motifs prévus à l'art. 10, la question serait toujours permise dans le cadre d'un processus de sélection des personnes aptes à être nommées juges puisqu'il s'agit d'une distinction fondée sur les aptitudes ou les qualités requises par la fonction judiciaire, laquelle est réputée non discriminatoire en vertu de l'art. 20 de la *Charte québécoise*.

138 The appellant cited the fact that he had a pardon as justification for answering "no" to the selection committee's question. As I explained earlier, the appellant's pardon did not mean that he could deny the existence of his conviction or, more generally, that he had been in trouble with the law. Thus, the pardon did not relieve the appellant of the obligation to answer the question asked by the committee, since it did not make the matter irrelevant, having regard to s. 18 of the *Regulation respecting the procedure for the selection of persons apt for appointment as judges*, according to which the committee determines the competence of the candidate for appointment as a judge. However, it did mean that the appellant could, as he did at interviews prior to the one that led to his candidacy being recommended, provide an explanation regarding his conviction and state that he had been pardoned.

L'appelant se fonde sur l'existence d'un pardon pour justifier la réponse négative qu'il a donnée au comité de sélection. Or, comme je l'expliquais précédemment, le pardon de l'appelant ne lui permettait pas de nier l'existence de sa condamnation ou encore, de façon plus générale, ses démêlés avec la justice. Ainsi, ce pardon ne dispensait pas l'appelant de répondre à la question posée par le comité puisque celui-ci ne rendait pas la chose non pertinente à l'égard de l'art. 18 du *Règlement sur la procédure de sélection des personnes aptes à être nommées juges* selon lequel le comité détermine l'aptitude du candidat à être nommé juge. Par contre, elle permettait à l'appelant, comme il l'avait fait lors d'entrevues antérieures à celle ayant conduit à la recommandation de sa candidature, de fournir une explication sur sa condamnation et de faire état de sa réhabilitation.

139 At the hearing, counsel for the appellant also suggested to the Court that since the Minister of Justice could have obtained information about the appellant's criminal record by referring to the file prepared by the police under s. 7 of the *Regulation respecting the procedure for the selection of persons apt for appointment as judges*, the appellant could legitimately not have answered the question asked by the committee and relied on the police investigation. In his submission, the Minister has two separate sources for obtaining information and running checks when considering candidates qualified for appointment as judges: one is the selection committee and the other is the police. In this case,

À l'audience, le procureur de l'appelant suggérait également à cette Cour que puisque le ministre de la Justice pouvait être informé des antécédents judiciaires de l'appelant en faisant appel au dossier constitué par les forces policières conformément à l'art. 7 du *Règlement sur la procédure de sélection des personnes aptes à être nommées juges*, l'appelant pouvait légitimement ne pas répondre à la question posée par le comité et se fier à l'enquête policière. En effet, selon lui, le ministre dispose de deux systèmes d'information et de vérification distincts lors de l'examen des candidats aptes à être nommés juges, soit celui constitué par le comité de sélection et celui constitué par les forces policières.

for a reason that remains unexplained, although the information regarding the appellant's conviction was in the database, it escaped the notice of the police and was not communicated to the Minister. While I recognize that the file created by the police is a supplementary source of information, it cannot replace the selection committee, which has a duty to use every means at its disposal to satisfy itself as to the quality of the candidate, and is accordingly entitled to know whether the candidate has been in trouble with the law and even that he has been pardoned, regardless of whether or not the police authorities have created a file. I therefore find that the appellant could have been asked the question about being in trouble with the law by the members of the selection committee without infringing the provisions of the *Quebec Charter*.

En l'espèce, pour une raison qui demeure inexpliquée, les renseignements sur la condamnation de l'appelant, bien que figurant dans la banque de données, ont échappé à l'attention des autorités policières et n'ont pas été communiqués au ministre. Je reconnais que le dossier constitué par les forces policières constitue un moyen d'information complémentaire, mais il ne saurait remplacer le comité de sélection. Celui-ci a le devoir de s'assurer par tous les moyens mis à sa disposition de la qualité du candidat et est, en conséquence, en droit de savoir si le candidat a eu des démêlés avec la justice, voire le fait qu'il a été pardonné, et ce, indépendamment du fait que les services policiers ont constitué un dossier ou non. Je conclus donc que la question des démêlés avec la justice pouvait être posée à l'appelant par les membres du comité de sélection et ce, sans porter atteinte aux dispositions de la *Charte québécoise*.

140 There is one remaining question: can the provisions of the *Quebec Charter* prevent the appellant from being removed? Section 18.2 provides that no one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence. Whether this section applies will depend on whether four essential conditions are met: (1) a dismissal, a refusal to hire or any kind of penalty; (2) in the person's employment; (3) owing to the mere fact that the person was convicted of a penal or criminal offence; (4) if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence. It will also depend, above all, on whether this provision is applicable to judicial office. On that point, the Court of Appeal noted that it would be somewhat surprising if the prohibition in s. 18.2 of the *Quebec Charter* were to prevent the fact that someone had criminal convictions from being taken into account in recruiting a judge. That court found it hard to believe that the legislature implicitly wished to deprive the government of the discretion to refuse to vest judicial authority, especially in criminal matters, in a person whose past [TRANSLATION] "might sometimes

Une question demeure : les dispositions de la *Charte québécoise* peuvent-elles empêcher la révocation de l'appelant? L'article 18.2 prévoit que nul ne peut congédier, refuser d'embaucher ou autrement pénaliser dans le cadre de son emploi une personne du seul fait qu'elle a été déclarée coupable d'une infraction pénale ou criminelle, si cette infraction n'a aucun lien avec l'emploi ou si cette personne en a obtenu le pardon. L'application de cet article dépend de la mise en œuvre de quatre conditions essentielles : (1) un congédiement, un refus d'embauche ou une pénalité quelconque; (2) dans le cadre d'un emploi; (3) du seul fait qu'une personne a été déclarée coupable d'une infraction pénale ou criminelle; (4) si l'infraction n'a aucun lien avec l'emploi ou si elle en a obtenu le pardon. Elle dépend également, et avant toute chose, de l'applicabilité de cette disposition à la fonction judiciaire. À cet égard, la Cour d'appel soulignait qu'il serait plutôt étonnant que l'interdiction prévue à l'art. 18.2 de la *Charte québécoise* interdise de tenir compte de l'existence de condamnations judiciaires dans le recrutement d'un juge. Elle pouvait difficilement croire que le législateur ait implicitement voulu priver le gouvernement du pouvoir discrétionnaire de refuser de confier des pouvoirs judiciaires, particulièrement en matière pénale, à une personne dont le passé « pourrait, à l'occasion, make counsel or the judge himself ill at ease". I share this opinion. I am satisfied, after careful examination of the conditions that must be met if s. 18.2 is to apply, that it cannot apply to judges. However, I propose to consider those conditions one by one.

141 First, insofar as judicial office is an employment and a person can be dismissed from that employment, there is no doubt that the appellant runs the risk of being dismissed or at least severely penalized by the recommendations made by the Conseil de la magistrature and the Court of Appeal, and so the first condition has been met. However, the Court of Appeal held that judicial office was not an employment within the meaning intended by s. 18.2, by reason of the history of the judiciary and the nature, characteristics and requirements of the office. These findings in fact reflect the constitutional reality of judicial office, which requires that judges not be subject to any bureaucratic higher authority, or be a party to any relationship of subordination such as is traditionally characteristic of the employer-employee relationship, other than in respect of certain administrative aspects of the office such as workload allocation and scheduling of court sittings and certain duties associated with the enforcement of judicial ethics, which are assigned to the chief judge: see s. 96 *C.J.A.* and *Ruffo*, *supra*, at para. 59. In addition, although judges perform their functions for remuneration, their financial security is one of the three essential conditions of judicial independence for the purposes of s. 11(*d*) of the *Canadian Charter* and the preamble to the *Constitution Act, 1867*, which require that the right to salary and pension be established by law and that any salary reduction, increase or freeze be the subject of a specific process allowing avoidance of any possibility of real or perceived interference by the Executive: *Valente*, *supra*, at p. 704, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at paras. 131 and 287. Finally, the hiring and firing process for judges is substantially different from the normal procedure used for most employments. As the case at bar illustrates, the appointment and removal of members of the judiciary are governed by a series of constitutional requirements that are

être source de malaises chez le plaideur ou chez le juge lui-même ». Je partage cette opinion. Un examen attentif des conditions d'application de l'art. 18.2 me convainc que celui-ci ne saurait être applicable aux juges. Je me propose tout de même de les examiner à tour de rôle.

D'abord, dans la mesure où la fonction de juge constitue un emploi et que l'on puisse en être congédié, il ne fait aucun doute que l'appelant encourt le risque d'être congédié ou du moins fortement pénalisé par les recommandations formulées par le Conseil de la magistrature et la Cour d'appel, de sorte que la première condition est remplie. Cependant, la Cour d'appel a jugé que la fonction de juge ne constituait pas un emploi au sens où l'entend l'art. 18.2 et ce, en raison de l'histoire de la magistrature, la nature, les caractéristiques et les exigences de la fonction. Ces conclusions sont, en effet, le reflet d'une réalité constitutionnelle propre à la fonction judiciaire. Celle-ci exige que le juge ne soit soumis à aucune autorité hiérarchiquement supérieure ou qu'il ne soit lié par aucune relation de subordination qui caractérise traditionnellement la relation employeur-employé, mis à part certains aspects administratifs de sa charge comme la répartition du travail et la fixation des séances de la cour, ainsi que certaines tâches liées à l'application de la déontologie judiciaire, qui relèvent du juge en chef : voir art. 96 *L.T.J.* et *Ruffo*, précité, par. 59. De plus, bien que le juge exerce ses fonctions moyennant rétribution, sa sécurité financière constitue l'une des trois conditions essentielles de l'indépendance judiciaire au sens de l'al. 11*d*) de la *Charte canadienne* et du préambule de la *Loi constitutionnelle de 1867* qui exigent que le droit au traitement et à la pension soit prévu par la loi et que toute réduction, hausse ou gel des traitements fasse l'objet d'un processus particulier permettant d'éviter toute possibilité d'ingérence, réelle ou perçue, de la part de l'exécutif : *Valente*, précité, p. 704, et *Renvoi sur la rémunération des juges de cours provinciales*, par. 131 et 287. Finalement, le processus d'embauche et de congédiement d'un juge s'éloigne considérablement de la procédure habituelle utilisée pour la majorité des emplois. La nomination et la destitution des membres de la magistrature, la présente affaire en témoigne, sont intended to protect their security of tenure: *Valente*, at p. 698.

The restrictive nature of s. 18.2 of the *Quebec Charter* has been a topic of some comment in the legal literature. Singleton criticizes the limited scope of the protection provided against this type of discrimination. In his view, s. 18.2 would not cover the professions: Singleton, *supra*, at p. 474. See also Dumont, "Le casier judiciaire : criminel un jour, criminel toujours?", *supra*, at pp. 134 *et seq*. I find it to be particularly instructive that s. 45 of the *Professional Code* provides, with respect to all the professions it governs, that any Bureau established within a professional order may refuse to issue a permit or to enter on the roll any applicant who has been the subject of a decision finding him guilty of a criminal offence which is related to the practice of the profession, unless he has obtained a pardon. This provision would seem to supplement the protection provided by the *Quebec Charter* in respect of employment and to fill the gaps it left. Thus, having regard to the choice to use the word "employment" in s. 18.2, I am of the view that it was not the legislature's intent to include the judiciary. However, I will nonetheless consider whether the final two conditions apply, for the purposes of the present analysis.

What must now be determined is whether the appellant was dismissed owing to the mere fact that he was convicted of a criminal offence. The complaint lodged by the Minister of Justice against the appellant refers to failure to disclose important information concerning the trouble he was in with the law, and not to the fact that he had a conviction. The Minister alleges that [TRANSLATION] "Judge Therrien may have been in trouble with the law in the early 1970s" and "may have failed to disclose that information in response to questions asked in that regard by the selection committee members". While the majority of the committee of inquiry did not directly address the issue from the standpoint of s. 18.2, they stressed the appellant's duty of transparency at the selection interviews

soumises à une série d'exigences constitutionnelles afin de protéger leur inamovibilité : *Valente*, p. 698.

Le caractère restrictif de l'art. 18.2 de la *Charte* 142
québécoise a fait l'objet de certains commentaires dans la doctrine. L'auteur Singleton déplore la portée limitée de la protection conférée contre cette forme de discrimination. Selon lui, l'art. 18.2 ne comprendrait pas les professions : Singleton, *loc. cit*., p. 474. Voir aussi Dumont, « Le casier judiciaire : criminel un jour, criminel toujours? », *loc. cit.*, p. 134 et suiv. Je trouve en effet particulièrement révélateur que l'art. 45 du *Code des professions* vienne préciser, en ce qui concerne l'ensemble des professions qu'il régit, que tout bureau institué au sein d'un ordre professionnel puisse refuser la délivrance d'un permis ou d'une inscription au tableau de l'ordre lorsque la personne qui en fait la demande a fait l'objet d'une décision de condamnation à une infraction criminelle ayant un lien avec la profession et pour laquelle elle n'a pas obtenu le pardon. Cette disposition semble ajouter à la protection conférée par la *Charte québécoise* en matière d'emploi et en combler les lacunes. Ainsi, eu égard au terme « emploi » choisi à l'art. 18.2, je suis d'avis qu'il n'était pas de l'intention du législateur de viser les membres de la magistrature. Je me pencherai tout de même sur l'application des deux dernières conditions aux fins de la présente analyse.

Il s'agit maintenant de déterminer si l'appelant a 143
été congédié du seul fait qu'il a été déclaré coupable d'une infraction criminelle. La plainte déposée par le ministre de la Justice à l'endroit de l'appelant fait état d'une omission de révéler des informations importantes concernant ses démêlés avec la justice et non de l'existence de la condamnation. Le ministre allègue que « le juge Therrien aurait eu des démêlés avec la justice criminelle au début des années 1970 » et « aurait omis de révéler ces informations suite aux questions posées à cet effet par les membres du comité de sélection ». Les membres majoritaires du comité d'enquête, sans qu'ils aient directement abordé la question sous l'angle de l'art. 18.2, ont insisté sur l'obligation de transparence qui incombait à l'appelant lors des

and found that this [TRANSLATION] "reluctance, mental reservation or rationalization" undermined public confidence in him. It is also plain from the report of the Court of Appeal that the appellant's failure to disclose that he had a criminal record was the only reason that could have been regarded as justifying its recommendation for removal. I agree with that assessment of the situation; the appellant's failure to reveal that he had been in trouble with the law is undoubtedly instructive for a selection committee charged with assessing the qualifications and aptitudes of a candidate for judicial appointment. I do not see any other argument that was not considered by the Court of Appeal and that persuades me to differ with its findings. I therefore find that the recommendations made by the Conseil de la magistrature and the Court of Appeal were not made owing to the mere fact that the appellant had been convicted of a criminal offence; rather, they were made solely because he had failed to disclose his criminal record to the selection committee.

entrevues de sélection et ont conclu que cette « réticence, restriction mentale, [ou] rationalisation » minait la confiance du public envers lui. Il ressort finalement de la lecture du rapport de la Cour d'appel que l'omission de l'appelant de révéler l'existence de son antécédent judiciaire ait constitué le seul motif susceptible d'être jugé comme justifiant sa recommandation de destitution. Je partage cette évaluation de la situation; l'omission de l'appelant de révéler l'existence de ses démêlés avec la justice est certes révélatrice pour un comité de sélection appelé à évaluer les qualités et les aptitudes d'un candidat à être nommé juge. Je ne vois aucun autre argument qui ne fut pas examiné par la Cour d'appel et qui me convainc de m'écarter des conclusions tirées par celle-ci. Je conclus donc que les recommandations formulées par le Conseil de la magistrature et la Cour d'appel ne l'ont pas été du seul fait que l'appelant a été déclaré coupable d'une infraction criminelle, mais exclusivement parce que celui-ci a omis de révéler ses antécédents judiciaires au comité de sélection.

144 On the last remaining condition, I am satisfied that it was not the intent of the legislature that s. 18.2 should apply to judges. This condition in fact contains two separate conditions: (a) the offence was in no way connected with the employment, or (b) regardless of any connection with the employment, the person has obtained a pardon for the offence. The appellant falls within the second situation since on August 20, 1987, the Governor General granted him a pardon under the *Criminal Records Act* and since the *Quebec Charter* makes no distinction based on which type of pardon may have been obtained.

Finalement, une analyse de la dernière condition me convainc qu'il n'était pas de l'intention du législateur que l'art. 18.2 soit applicable aux juges. Cette condition en comporte en fait deux, distinctes : (a) l'infraction commise n'a aucun lien avec l'emploi ou (b) sans égard à tout lien avec l'emploi, la personne condamnée pour cette infraction en a obtenu le pardon. L'appelant est visé par la seconde situation puisque, le 20 août 1987, le gouverneur général lui a accordé une réhabilitation en vertu de la *Loi sur le casier judiciaire* et que la *Charte québécoise* ne fait aucune distinction entre les différents types de pardons obtenus.

145 The second situation is one in which no exception to the application of that provision is possible. If a pardon has been granted and the other three conditions are also met, the probable finding will be that there was discrimination against the person who received the pardon. It should be noted that s. 20, which provides that a distinction based on the aptitudes or qualifications required for an employment is deemed non-discriminatory, has no application in respect of s. 18.2. Section 18.2 is a

La seconde situation semble d'application absolue. L'obtention d'un pardon, une fois les trois autres conditions également rencontrées, emporte vraisemblablement une conclusion de discrimination à l'endroit de son bénéficiaire. En effet, il convient de noter que l'art. 20, selon lequel une distinction fondée sur les aptitudes ou qualités requises par un emploi est réputée non discriminatoire, n'est d'aucune application à l'égard de l'art. 18.2. Disposition à circuit fermé, l'art. 18.2

self-contained provision and has its own rules governing exceptions. This internal justification mechanism would otherwise duplicate the mechanism in s. 20. See C. Brunelle, "La Charte québécoise et les sanctions de l'employeur contre les auteurs d'actes criminels œuvrant en milieu éducatif" (1995), 29 *R.J.T.* 313, at pp. 336-37; Singleton, *supra*, at p. 473, and Commission des droits de la personne et des droits de la jeunesse du Québec, *Lignes directrices pour l'application de l'article 18.2* (document adopted at the 306th (special) session of the Commission held on May 12,1988, by its resolution COM-306-9.1.2), at p. 4. A provision of that nature can hardly be reconciled with the requirements of judicial office. In my opinion the legislature, being concerned with preserving the independence, impartiality and integrity of the judiciary, cannot have intended to deprive the government of its discretion to refuse to vest judicial authority in candidates whose past would be likely to undermine the invaluable confidence of the public in its justice system. For these reasons, I find that s. 18.2 does not apply to the appellant's situation. I will now consider the nature of the sanction that the majority of the Conseil de la magistrature and the Court of Appeal chose to impose on him.

6. The Choice of the Proper Sanction

The complaint lodged against the appellant alleges that he failed to disclose that he had been in trouble with the law during the 1970s, in response to questions he was asked on that subject by the members of the committee to select persons qualified for appointment as judges. In so doing, he allegedly failed in his duty to uphold the integrity and independence of the judiciary and the duty to perform the duties of his office with dignity and honour, in accordance with s. 262 *C.J.A.* and ss. 2, 4, 5 and 10 of the *Judicial Code of Ethics*. The majority of the committee of inquiry established by the Conseil de la magistrature found that the appellant's conduct was so manifestly and profoundly destructive of public confidence in him and in the justice system as a whole that a reprimand could not restore that confidence. Accordingly, because of the gravity and the continuing

contient son propre régime d'exception. Ce mécanisme interne de justification ferait double emploi avec celui contenu à l'art. 20. Voir C. Brunelle, « La Charte québécoise et les sanctions de l'employeur contre les auteurs d'actes criminels œuvrant en milieu éducatif » (1995), 29 *R.J.T.* 313, p. 336-337; Singleton, *loc. cit.*, p. 473, et Commission des droits de la personne et des droits de la jeunesse du Québec, *Lignes directrices pour l'application de l'article 18.2* (document adopté à la 306e séance (spéciale) de la Commission, tenue le 12 mai 1988, par sa résolution COM-306-9.1.2), p. 4. Une telle disposition est difficilement conciliable avec les exigences de la fonction judiciaire. À mon avis, le législateur, ayant le souci de préserver l'indépendance, l'impartialité et l'intégrité des membres de la magistrature, ne peut avoir voulu priver le gouvernement du pouvoir discrétionnaire de refuser de confier des pouvoirs judiciaires à certains candidats dont le passé serait susceptible d'ébranler la précieuse confiance que porte le public dans son système de justice. Pour ces motifs, je conclus que l'art. 18.2 n'est pas applicable à la situation de l'appelant. Je me pencherai maintenant sur la nature de la sanction que la majorité des membres du Conseil de la magistrature et de la Cour d'appel ont choisi de lui imposer.

6. Le choix de la sanction appropriée

La plainte déposée à l'encontre de l'appelant lui reproche d'avoir omis de révéler qu'il avait eu des 146
démêlés avec la justice dans les années 70 à la suite de questions posées à cet effet par les membres du comité de sélection des personnes aptes à être nommées juges. Ce faisant, il aurait manqué à son devoir de préserver l'intégrité et l'indépendance de la magistrature ainsi qu'à celui de remplir son rôle avec dignité et honneur conformément à l'art. 262 *L.T.J.* et aux art. 2, 4, 5 et 10 du *Code de déontologie de la magistrature*. La majorité des membres du comité d'enquête formé par le Conseil de la magistrature a conclu que la conduite de l'appelant minait si manifestement et si totalement la confiance du public en son endroit, et à l'endroit de l'ensemble du système de justice qu'une réprimande ne saurait la rétablir. Ainsi, en raison de la gravité et de la continuité de l'offense,

nature of the offence, it was appropriate to recommend the applicant's removal. The inquiry panel of the Court of Appeal made the same finding. In the opinion of that Court, the appellant's conduct was so blameworthy that it entitled the government to remove him without violating the principle of judicial independence. The fact that he deliberately concealed his conviction and deprived the selection committee of relevant information concerning his competence to be appointed as a judge warrants the recommendation that his commission be revoked.

il y avait donc lieu de recommander la destitution de l'appelant. La formation d'enquête de la Cour d'appel a conclu dans le même sens. À son avis, l'appelant a eu une conduite tellement blâmable qu'elle permet au gouvernement de le destituer sans violer le principe de l'indépendance judiciaire. Le fait qu'il ait volontairement tu l'existence de sa condamnation et privé le comité de sélection d'informations pertinentes quant à sa capacité d'être nommé juge justifie de recommander la révocation de sa commission.

147 The public's invaluable confidence in its justice system, which every judge must strive to preserve, is at the very heart of this case. The issue of confidence governs every aspect of this case, and ultimately dictates the result. Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office (Friedland, *supra*, at pp. 80-81).

La précieuse confiance que porte le public envers son système de justice et que chaque juge doit s'efforcer de préserver est au cœur du présent litige. Elle en délimite les moindres contours et en dicte l'ultime conclusion. Aussi, avant de formuler une recommandation de destitution à l'endroit d'un juge, doit-on se demander si la conduite qui lui est reprochée porte si manifestement et si totalement atteinte à l'impartialité, à l'intégrité et à l'indépendance de la magistrature qu'elle ébranle la confiance du justiciable ou du public en son système de justice et rend le juge incapable de s'acquitter des fonctions de sa charge (Friedland, *op. cit.*, p. 89-91).

148 In applying this test to the appellant's situation, we cannot disregard the context in which this disciplinary proceeding took place. First, as I said in the introduction to this part of the reasons, the legislature has chosen to assign the important responsibility of determining whether the conduct of a provincial court judge warrants a recommendation for removal from office exclusively to the Court of Appeal, under s. 95 *C.J.A.* This is a very special role, perhaps a unique one, in terms of both the disciplinary process and the principles of judicial independence that our Constitution protects. Accordingly, this Court should only review the assessment made by the Court of Appeal if it is clearly in error or seriously unfair.

Dans l'application de ce critère à la situation de l'appelant, on ne saurait ignorer le contexte dans lequel cette procédure disciplinaire s'inscrit. D'abord, et comme je le mentionnais en introduction à cette partie des motifs, le législateur a choisi de confier l'importante responsabilité de déterminer si la conduite d'un juge de cour provinciale justifiait une recommandation de révocation de ses fonctions en exclusivité à la Cour d'appel en vertu de l'art. 95 *L.T.J.* Il s'agit d'un rôle très particulier, voire unique, tant au niveau du processus déontologique qu'à l'égard des principes de l'indépendance judiciaire protégés par notre Constitution. En ce sens, notre Cour ne saurait revenir sur l'appréciation qu'a faite la Cour d'appel que si celle-ci est clairement erronée ou profondément injuste.

149 We also cannot disregard the fact that the appellant's situation makes this an unprecedented case in a number of respects. Not only is it most exceptional for proceedings that may ultimately lead to

Par ailleurs, on ne saurait passer sous silence le fait que la situation de l'appelant constitue une affaire sans précédent à plusieurs égards. Non seulement la fréquence avec laquelle des procédures removal of a judge to be initiated, but the actions that lie at the heart of the proceedings against him took place in a very particular context. The appellant's failure to disclose his conviction occurred during the process to select persons qualified for appointment as judges and not during the exercise of his judicial functions. This distinction is of some consequence in terms of how certain fundamental principles relating to judicial independence will be applied. As I said earlier, the Canadian Constitution protects the security of tenure of members of the judiciary by ensuring that they are protected against any arbitrary interference by the Executive. While a review of the actions of the judge, in his capacity as a judge, involves a high risk of interference by the Executive in the performance of his judicial functions and raises questions about the independence of the judiciary, when we examine the circumstances surrounding the appointment of this judge and, more specifically, the statements he made when he was still only a candidate, we need have fewer concerns in that regard. In this case, apart from his competence to perform the duties of office, it is the appellant's qualifications to be appointed as a judge that are in issue. The appointment of a judge is a sign of confidence in him or her personally: *Ruffo*, *supra*, at para. 106. The issue before the Court of Appeal was therefore whether the fact that the appellant was not fully candid and had failed to disclose relevant information when he was a candidate for the office of judge betrayed that confidence.

150 When we read the report of the Court of Appeal, it is plain that the Court made a thorough study and a balanced assessment of the appellant's situation. It focused its decision on upholding the integrity of the judicial office, and in this we cannot but concur. In the circumstances, and since it is the judicial forum appointed by the legislature to make determinations concerning the conduct of a judge, and since a recommendation for removal in this case would not amount to arbitrary interference by the Executive in the exercise of the judicial function, I am of the opinion that we should not review

pouvant ultimement mener à la destitution d'un juge sont engagées est-elle tout à fait exceptionnelle, mais également les gestes qui lui sont reprochés ont été posés dans un contexte très particulier. En effet, l'omission de l'appelant de révéler l'existence de sa condamnation a eu lieu dans le cadre du processus de sélection des personnes aptes à être nommées juges et non dans l'exercice de ses fonctions en tant que juge. Cette distinction n'est pas sans importance en regard de l'application de principes fondamentaux en matière d'indépendance judiciaire. Comme je le mentionnais précédemment, la Constitution canadienne protège l'inamovibilité de fonction des membres de la magistrature en s'assurant qu'ils demeurent à l'abri de toute intervention arbitraire de l'exécutif. Alors qu'un examen des gestes posés par le juge, en tant que juge, comporte un risque élevé d'intervention de l'exécutif dans l'accomplissement de la fonction judiciaire et peut mettre en cause l'indépendance de la magistrature, une étude des circonstances entourant sa nomination et plus particulièrement des déclarations de ce juge alors qu'il n'était encore qu'un candidat, suscite moins d'inquiétudes à cet égard. En l'espèce, au-delà de sa compétence à exercer la fonction, ce sont les qualifications de l'appelant à être nommé juge qui sont remises en question. Or, la nomination d'un juge témoigne de la confiance mise en sa personne : *Ruffo*, précité, par. 106. Il s'agissait ainsi pour la Cour d'appel de déterminer si le fait que l'appelant ait manqué de transparence et omis de révéler des informations pertinentes, alors qu'il était candidat au poste de juge a porté atteinte à cette marque de confiance.

Il ressort clairement de la lecture du rapport de la Cour d'appel que celle-ci a fait une étude approfondie et une appréciation nuancée de la situation de l'appelant. Elle a centré sa décision sur le maintien de l'intégrité de la fonction judiciaire dont nous ne pouvons que convenir. Dans ces circonstances, et eu égard aux faits qu'elle constitue le forum judiciaire désigné par le législateur pour se prononcer sur la conduite d'un juge et qu'une recommandation de destitution en l'espèce ne saurait équivaloir à une intervention arbitraire de l'exécutif dans l'exercice de la fonction judiciaire, the sanction that the Court of Appeal chose to impose. The appellant's conduct has sufficiently undermined public confidence, rendering him incapable of performing the duties of his office. Accordingly, the recommendation that the appellant's commission be revoked is the necessary conclusion.

151 In closing, I will say that in reaching this conclusion I am not unaware that this case represented, in a sense, an invitation to society to be ever more generous. The pardon that the appellant was granted is an act of generosity, of brotherhood, but also an act of justice on the part of society. It is undoubtedly desirable that such gestures be praised and encouraged. However, we cannot ignore the unique role embodied by the judge in that society, and the extraordinary vulnerability of the individuals who appear before that judge seeking to have their rights determined, or when their lives or liberty are at stake. Above all, a person who appears before a judge is entitled to have justice done in his or her case, and that justice be seen to be done by the general public. That kind of generosity is not something that a person can be compelled to offer. In the specific circumstances of the case at bar, the values of forgiveness and selfless generosity must therefore yield to the values of justice and the all-important integrity of the justice system.

VI. Disposition

152 The constitutional questions are answered as follows:

1. Is the rule of law — adopted in 1941 (*Act to amend the Courts of Justice Act*, S.Q. 1941, c. 50, s. 2, assented to on May 17, 1941) and now found in s. 95 of the *Courts of Justice Act*, R.S.Q., c. T-16 — allowing the government to remove a judge without an address of the legislature of no force or effect to the extent that it infringes the structural principle of the independence of the judiciary which is guaranteed by the preamble to the *Constitution Act, 1867*?

Answer: No.

2. If the answer to the first question is in the negative, is the rule of law contained in s. 95 of the *Courts of*

je suis d'avis qu'il n'y a pas lieu de revenir sur le choix de la sanction imposée par la Cour d'appel. La conduite de l'appelant a suffisamment ébranlé la confiance de la population pour le rendre incapable de s'acquitter des fonctions de sa charge. Ainsi, la recommandation de révocation de la commission de l'appelant est la conclusion qui s'impose.

En terminant, je dirai que je n'arrive pas à cette conclusion sans avoir pris conscience du fait que cette affaire représentait, en quelque sorte, une invitation pour la société à se dépasser. La réhabilitation accordée à l'appelant constitue un geste de générosité, de fraternité, mais aussi de justice posé par la société. Il est certes souhaitable que de tels gestes soient valorisés et encouragés. Par ailleurs, on ne saurait ignorer le rôle unique incarné par le juge dans cette même société, ainsi que l'extraordinaire vulnérabilité du justiciable qui se présente devant lui, alors qu'il cherche à faire déterminer ses droits ou encore, alors que sa vie ou sa liberté est en jeu. Ce justiciable a, avant toute chose, le droit à ce que justice soit rendue à son égard et que se dégage une perception à cet effet dans la population en général, de telle sorte que l'on ne saurait lui imposer un tel acte de générosité. Dans les circonstances particulières de cette affaire, les valeurs de pardon et de dépassement de soi doivent donc céder le pas à celles de la justice et de son importante intégrité.

VI. Dispositif

Les questions constitutionnelles reçoivent les réponses suivantes :

1. La règle de droit — adoptée en 1941 (*Loi modifiant la Loi des tribunaux judiciaires*, S.Q. 1941, ch. 50, art. 2, sanctionnée le 17 mai 1941) et actualisée par l'art. 95 de la *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16 — permettant au gouvernement de destituer un juge sans adresse parlementaire est-elle inopérante dans la mesure où elle porterait atteinte au principe structurel de l'indépendance de la magistrature lequel est garanti par le préambule de la *Loi constitutionnelle de 1867*?

Réponse : Non.

2. S'il doit être répondu négativement à la première question, la règle de droit contenue à l'art. 95 de la

> *Justice Act*, R.S.Q., c. T-16, of no force or effect on the ground of inconsistency with the structural principle of the independence of the judiciary guaranteed by the preamble to the *Constitution Act, 1867*, to the extent that the government may dismiss a judge without being bound by the conclusions and recommendations of the report of the Court of Appeal?

Answer: No.

153 For the foregoing reasons, I would therefore dismiss the appeal and affirm the decisions of the Court of Appeal on the motions to dismiss as well as the report by the inquiry panel of the Court of Appeal, without costs.

Appeal dismissed.

Solicitors for the appellant: Hébert, Bourque & Downs, Montréal.

Solicitors for the respondent the Minister of Justice: Goodman, Phillips & Vineberg, Montréal.

Solicitors for the respondent the Attorney General of Quebec: Bernard, Roy & Associés, Montréal.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitors for the interveners the Office des droits des détenus and the Association des services de réhabilitation sociale du Québec: Grey Casgrain, Montréal.

> *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16, est-elle inopérante au motif d'incompatibilité avec le principe structurel de l'indépendance de la magistrature garanti par le préambule de la *Loi constitutionnelle de 1867*, dans la mesure où le gouvernement peut démettre un juge sans être lié par les conclusions et recommandations du rapport de la Cour d'appel?

Réponse : Non.

Pour les motifs qui précèdent, je suis donc d'avis de rejeter le présent pourvoi, de confirmer les décisions de la Cour d'appel ayant statué sur les requêtes en irrecevabilité ainsi que le rapport de la formation d'enquête de la Cour d'appel, le tout sans frais.

Pourvoi rejeté.

Procureurs de l'appelant : Hébert, Bourque & Downs, Montréal.

Procureurs de l'intimée la ministre de la Justice : Goodman, Phillips & Vineberg, Montréal.

Procureurs de l'intimée la procureure générale du Québec : Bernard, Roy & Associés, Montréal.

Procureur de l'intervenant le procureur général de l'Ontario : Le procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Le procureur général du Nouveau-Brunswick, Fredericton.

Procureurs des intervenants l'Office des droits des détenus et l'Association des services de réhabilitation sociale du Québec : Grey Casgrain, Montréal.

TAB 7

LAW SOCIETY TRIBUNAL
APPEAL DIVISION

Citation: *Law Society of Upper Canada v. Tunney,* 2016 ONLSTA 20
Date: October 25, 2016
Tribunal File No.: PAP13/15

BETWEEN:

The Law Society of Upper Canada

Applicant / Respondent in appeal

- and -

Joshua Craig Leslie Tunney

Respondent / Appellant in appeal

Before: Christopher D. Bredt (chair)
Cathy Corsetti
W. Paul Dray
Howard Goldblatt
Catherine Strosberg

Heard: April 7, 2016, in Toronto, Ontario

Appearances: Ryan Clements, for the Respondent in appeal
Ryan Jefferies, for the Appellant

Summary:
TUNNEY – Licensing – Good character – Appeals – Following a good character hearing the paralegal Applicant was denied a class P-1 licence – The hearing panel found the Applicant had not met his onus of establishing he was presently of good character, in that he failed to demonstrate "a high level of maturity and insight" about his past misconduct or about "what is required of a paralegal, from an ethical perspective" – On appeal the Law Society conceded, and the panel agreed, that the hearing panel had erred by: (i) characterizing the Applicant's past misconduct as involving "criminal convictions" when in fact he had been discharged of two criminal charges and the third charge was a provincial regulatory offence; and (ii) attaching "unwarranted importance to the absence of medical evidence on the issue of current marijuana use," when the Applicant's evidence on the subject was not challenged and he had no notice of, or ability to respond to, the panel's concerns in this regard – The appeal panel also considered the effect of a record suspension (formerly called a "pardon") in a good character determination, and held that while it did not preclude the panel's consideration of the underlying misconduct, it was a factor that likely operated in favour of the applicant, though a case by case analysis is required – The appeal was allowed and a class P-1 licence granted to the Applicant – The Applicant's prior misconduct was "relatively minor," he demonstrated remorse and had no further misconduct in the intervening six years – No costs were sought or ordered.

REASONS FOR DECISION

[1] Christopher D. Bredt and Cathy Corsetti (for the panel):– This is an appeal brought by Joshua Craig Tunney (the "applicant"), from the decision and order of the hearing panel dismissing his application for a P1 licence.[1] The hearing below was a good character hearing based on concerns arising out of the applicant's conviction for certain offences prior to his application for a P1 licence. The hearing panel held that the applicant failed to discharge the onus on him to establish on a balance of probabilities that he was presently of good character, and dismissed his application for a class P1 licence.

[2] At the hearing of the appeal, counsel for the Law Society conceded that the hearing panel had committed a number of errors and invited us either to send the application back for a new hearing before a different panel, or alternatively, determine the application ourselves. We allowed the appeal and decided to determine the application ourselves. We then granted the class P1 licence with written reasons to follow. These are our reasons.

BACKGROUND

[3] Joshua Craig Tunney is a 26-year-old paralegal applicant. He applied for a paralegal licence on May 7, 2012.

[4] The applicant obtained his diploma in paralegal studies on June 16, 2011 from Durham College. He first wrote the licensing exam in August 2012 but was

[1] *Tunney v. Law Society of Upper Canada*, 2015 ONLSTH 202.

unsuccessful and passed it on his second attempt in October 2012. The applicant also commenced an undergraduate degree in Legal Studies in 2011 at the University Of Ontario Institute Of Technology ("UOIT") in Oshawa, and obtained his Bachelor of Arts degree, with Honours and a specialization in human rights law, in Spring 2014.

[5] In the good character section of the Licensing Process Application, the applicant reported that he had two criminal "findings of guilt" and one provincial offence "conviction". The reporting of these offences formed the basis of the Law Society's subsequent investigation into the applicant's character.

[6] The Law Society provided written confirmation to the applicant, by letter dated September 7, 2012, that an investigation into his character had been authorized pursuant to s. 27(2) of the *Law Society Act*. The applicant was asked to provide further information and documentation in relation to his reported offences, including a "personal response" about the nature of his good character and two "references in writing from individuals who can attest to your current level of good character".

[7] The applicant provided the Law Society with his personal response about the nature of his good character by letter dated October 2, 2012. He explained that certain "key qualities" of good character, which he possessed, included demonstrating "honesty and candor in anything that I engage in; whether it is completing an everyday task, helping someone else, or correcting something I do not believe to be right". He also indicated that he always conducts himself with "courteousness and respectfulness" and has "a great awareness for equality". He further noted that he always takes "responsibility for [his] actions and mistakes" and ensures that "all necessary steps are taken to correct the issue."

[8] The applicant also provided two reference letters in early October 2012. Mr. Steven Cate, a licensed accountant, prepared a letter dated October 1, 2012 indicating that he has known the applicant for over 15 years and that the applicant was a good friend of his son. Mr. Cate noted that over the years he has witnessed the applicant "achieve many great accomplishments as well as a few mistakes". He added that the applicant "always carried himself with honesty, integrity and respect" and that when he made a mistake "he always makes sure he does everything he can to rectify the situation". When contacted by the Law Society investigator in April 2013, Mr. Cate indicated he was unaware of the applicant's criminal charges.

[9] The second reference letter, dated October 1, 2012, was prepared by Ms. Irene Brown, a registered nurse. Ms. Brown indicated that she has known the applicant for 12 years, as his mother was her colleague. She observed that the applicant had "matured into a dependable, honest, caring and responsible adult". She commented on his volunteering activity at a soup kitchen and at the hospital where she works, where he was "well-liked by patients and staff" and an "asset to our

Dialysis department". Ms. Brown was aware of his previous arrests.

THE APPLICANT'S PRIOR OFFENCES

[10] As set out above, the applicant reported his prior offences in his licensing application. As part of its investigation, the Law Society obtained various court and police documentation in relation to the prior offences.

(i) The Mischief Offence

[11] The applicant was charged in August 2008 with the *Criminal Code of Canada*[2] ("*Criminal Code*") offence of mischief. He had thrown a piece of fruit into his neighbour's backyard and it hit the neighbour's home. The applicant testified that this was "one of the stupidest things" he had ever done. He signed an undertaking that he would observe a curfew and not consume alcohol while the charge was outstanding.

[12] Just prior to the mischief charge being withdrawn (as a result of the applicant's participation in a diversion program), the applicant was charged on October 26, 2008 with failing to comply with the terms of the undertaking. He had been located by police outside of his home after the 9:00 p.m. curfew and had apparently consumed alcohol. He was 19 years old at the time and testified that he did not realize that the conditions were still in effect because of his unfamiliarity with the diversion process.

[13] On December 8, 2008, the applicant pled guilty to failing to comply with the curfew term of the undertaking. The judge imposed a conditional discharge with a one-year term of probation. The other charge, in relation to the alcohol condition, was withdrawn by the Crown. As noted, the underlying mischief charge was withdrawn by the Crown as a result of the applicant's participation in the diversion program.

(ii) The Driving without Insurance Offence

[14] In 2010 the applicant pled guilty and was convicted of operating a motor vehicle without insurance, contrary to the *Compulsory Automobile Insurance Act*. He initially received a fine of $2,500 but this was subsequently reduced to $500. He paid the fine in full and on time. The applicant testified that this was his "own negligence" as his insurance policy had expired about one month before he was stopped and charged by police.

(iii) The Marijuana Offence

[15] The applicant was charged on March 10, 2010 with the criminal offence of

[2] RSC 1985, c. C-46

possession of marijuana for the purpose of trafficking. In the context of a roadside investigation of a minor vehicle collision, the police found approximately 178 grams of marijuana, along with a digital scale, in a back pack located in the rear seat area of the applicant's vehicle. The applicant had $3,765 in cash in his pocket as well as a carton of rolling papers. At the time the applicant was 20 years old and in his first year of the paralegal program at Durham College.

[16] On May 16, 2011, the charge for the (indictable) offence of possession for the purpose of trafficking was amended on consent to the (summary conviction) offence of simple possession and the applicant pled guilty to this lesser offence. On sentence he received a conditional discharge with a two-year term of probation. His probation order required that he complete 200 hours of community service and to forfeit the cash found on him.

[17] The applicant completed the 200 hours of community service on September 20, 2011, in "record time" and "with a very positive outlook and an outstanding work ethic", according to his probation officer. Afterwards the applicant continued to volunteer weekly at St. Vincent Pallotti's Kitchen, a "soup-kitchen", and was still doing so at the time of the hearing in October 2015. The applicant testified at the hearing about the nature of this work and the personal satisfaction he receives from it.

EVIDENCE AT THE HEARING

[18] The parties filed an agreed statement of facts ("ASF"). It contained a number of errors in describing the applicant's prior offences. It characterized them as "three convictions", and "3 criminal matters" and listed the driving without insurance conviction under the heading "The Applicant's Criminal Charges and Dispositions". The ASF also refers, at times, to the disposition for the marijuana and failure to comply offence as a "conditional discharge".

[19] The applicant testified at the hearing, during which the circumstances surrounding the marijuana offence figured prominently. In examination-in-chief he reiterated the position he had communicated to the investigator: The marijuana was for personal consumption and he did not have the intention to traffic. He explained that the reason he had such a large quantity was because buying in bulk saved him money "as opposed to buying ten dollar pieces now and again". He explained that because he had intended to purchase more marijuana (than the approximately 178 grams he actually purchased) he had left over money, thereby providing a reason for the large amount of cash. He further explained that the digital scale was used to measure the weight of the amounts he was consuming and purchasing.

[20] The applicant testified that the marijuana offence was an "immense wake-up call" and that the consequences of his actions have affected him in "numerous ways". It has steered him away from marijuana and he has worked "exceptionally hard" on

his education in the hopes of entering the legal professions. He has gained an appreciation of the impact of the criminal justice system on individuals and the people around them. In response to a question from the panel, the applicant noted that his trouble with the law had inspired him "to help individuals who were once in my shoes and maybe aren't fully familiarized with the legal system".

[21] The applicant testified that he established a lot of new relationships through school, including with a number of individuals who are currently working in the legal professions. He has supportive colleagues, family members and former professors who "are willing to lend out their support and companionship if said situations do arise".

[22] Two character witnesses testified at the applicant's hearing. Mr. Richard Thompson, a supervisor at the soup kitchen where the applicant volunteers, described him as a good person and worker and someone he trusted. The second witness was Mr. Watson, the owner of "Tranquility Home Comfort" where the applicant worked for the previous three years. He described the applicant as "hard-working, determined and loyal" and advised that he had received many compliments from customers about him as an employee.

REASONS OF THE HEARING PANEL

[23] The panel was "not satisfied that the evidence establishes, on the balance of probabilities, that Mr. Tunney has been untruthful" about the marijuana offence; that is, it accepted his evidence that he was not possessing marijuana for the purpose of trafficking in March 2010.[3] The panel then turned to the factors that are typically considered in good character hearings (*i.e.*, the "*Armstrong* factors"), noting that the Law Society was taking no position on whether the applicant ought to be granted a P1 licence. The panel ultimately dismissed the applicant's application, finding that he had "failed to discharge the onus on him to establish on the balance of probabilities that he is presently of good character."[4] According to the panel, the evidence did not demonstrate that the applicant currently possesses the requisite good judgment, respect for the law and strong moral fibre.

[24] In discussing the nature and duration of the applicant's misconduct, the panel referred to the applicant's conditional discharge for the simple possession of marijuana (and for failure to comply with his undertaking) as a criminal "conviction".[5] The panel also referred to his driving without insurance conviction under the *Compulsory Automobile Insurance Act* as a "criminal" conviction.[6] The panel referred to the applicant's "criminal record" in relation to these prior offences.

[3] Above, note 1 at para. 3.
[4] Above, note 1 at para. 39.
[5] Above, note 1 at paras. 1, 3, 22, 26, 29 and 35.
[6] Above, note 1 at paras. 1, 25, 26, 29 and 35.

[25] The panel held that the "crux" of their concern about the applicant's judgment came from the applicant's two "criminal offences" – referring to possession of marijuana and driving without insurance – which were committed while he was a paralegal student. For the panel, this behaviour from 2010 showed "a marked lack of maturity" and "a glaring lack of judgment" that was not adequately allayed by the "commendable" evidence presented at the hearing.

[26] The panel observed that the applicant had expressed "some degree of remorse" and engaged in rehabilitative efforts in the context of his education and volunteer service. The panel also noted that he had been "steadily employed for almost three years with a heating company" and "has done commendable volunteer work over a sustained period". Notwithstanding these "external steps" during the intervening five years, the panel held that the applicant had failed to demonstrate "a high level of maturity and insight" about his past misconduct or about "what is required of a paralegal, from an ethical perspective."[7]

The panel observed that the applicant had testified he "no longer consumed illegal drugs" and that having been exposed to people with addiction issues has been "a powerful motivator to him to avoid a similar fate." The panel, however, noted that there was "no evidence of any formal rehabilitative efforts" and, furthermore, the applicant "did not provide details regarding how long he has been drug-free, in terms of personal usage, nor did he lead any medical evidence on that matter."[8] This type of information would have been beneficial to its deliberations.[9] The panel was concerned that it had not heard from anyone who was fully aware of the circumstances of the applicant's drug use and who could comment on "how or whether his character had changed since March 2010."[10]

ISSUES AND ANALYSIS

[27] This appeal raises the following issues:

i. What is the appropriate standard of review?

ii. What errors were made by the hearing panel?

iii. What is the effect of a pardon or record suspension in a Law Society good character hearing?

iv. Should a P1 licence issue?

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[7] Above, note 1 at para. 37.
[8] Above, note 1 at para. 32.
[9] Above, note 1 at para. 38.
[10] Above, note 1 at para. 38.

(i) What is the Appropriate Standard of Review?

[28] The standard of review to be applied by the Appeal Division is reasonableness on questions of fact, including assessments of credibility or questions of mixed fact and law, and correctness on issues of law alone.[11]

(ii) What Errors Were Made by the Hearing Panel?

[29] As noted at the outset of these reasons, the Law Society conceded that the panel below made a number of errors of law. We summarize these errors below.

[30] First, the hearing panel mischaracterized the applicant's conviction under the *Compulsory Automobile Insurance Act* as a "criminal" conviction. Driving without insurance is not a criminal offence, but rather a strict liability offence that is prosecuted pursuant to the *Provincial Offences Act*.[12] While non-criminal driving offences may, in certain cases, be material to the licensing process, in this case it should not have weighed heavily against the applicant's character or judgment.

[31] Second, the hearing panel mischaracterized the applicant's conditional discharge in relation to the possession of marijuana charge (and the failure to comply with an undertaking) as a criminal conviction. The failure to distinguish between a conditional discharge and a conviction caused the hearing panel to overlook the remedial significance of a conditional discharge.

[32] In fairness to the hearing panel, and as noted above, the ASF filed by the parties before them made the same mistakes in mischaracterizing these offences. However, these mischaracterizations figured prominently in the hearing panel's reasons, and appeared to have had the effect of casting the applicant's past in a more unfavourable light.

[33] The third error committed by the hearing panel was its reference to the fact that the applicant did not provide details regarding how long he had been drug-free, in terms of personal usage, nor did he lead any medical evidence on the matter. The hearing panel specifically noted that this type of information would have been beneficial to its deliberations. However, the absence of medical evidence was never raised before or during the hearing by either the Law Society or the hearing panel. The applicant would have had no ability to realistically know about or respond to this concern. The applicant's evidence about his current marijuana use was not challenged or contradicted, and the hearing panel provided no reason for discounting his testimony on the subject.

[34] In summary, the Law Society conceded that the hearing panel erred by

[11] *Law Society of Upper Canada v. Mucha*, 2008 ONLSAP 5 at para. 7 and *Purewal v. Law Society of Upper Canada*, 2009 ONLSAP 10 at para. 8.
[12] RSO 1990, c. P.43.

mischaracterizing aspects of the applicant's prior conduct which, in turn, may have caused the panel to over-emphasize the seriousness of the prior conduct and to fail to give adequate consideration to the remedial significance of a conditional discharge disposition. Further, given the evidentiary record and the position of the parties, the hearing panel appears to have attributed unwarranted importance to the absence of medical evidence on the issue of current marijuana use, while failing to give him notice of, and the ability to respond to, their concern on this issue.

[35] As this was not a case where the hearing panel's errors resulted in an incomplete record through the exclusion of otherwise admissible evidence, we concluded that a new hearing was not necessary. Instead, we determined that we would review the record and make a decision that "ought to or could have been made".[13]

[36] Before turning to the good character test, there is one further issue that we address below.

(iii) What is the Effect of a Pardon or Record Suspension in a Law Society Good Character Hearing?

[37] One of the issues raised by the applicant at the appeal hearing was the effect of a pardon or record suspension in the context of a good character hearing. The applicant relied upon s. 6.1(1) of the *Criminal Records Act*[14] which provides as follows:

> **Discharges**
>
> 6.1 (1) No record of a discharge under section 730 of the *Criminal Code* that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if
>
> (a) more than one year has elapsed since the offender was discharged absolutely; or
>
> (b) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

[38] Section 2.3 of the *Criminal Records Act* sets out the effect of a record suspension. It provides:

[13] Section 49.35(2)(a), *Law Society Act*; *Law Society of Upper Canada v. Melnick*, 2013 ONLSAP 27 at para. 136.
[14] RSC 1985, c. C-47.

Effect of record suspension

2.3 A record suspension

(a) is evidence of the fact that

(i) the Board, after making inquiries, was satisfied that the applicant was of good conduct, and

(ii) the conviction in respect of which the record suspension is ordered should no longer reflect adversely on the applicant's character; and

(b) unless the record suspension is subsequently revoked or ceases to have effect, requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament — other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the *Criminal Code*, subsection 147.1(1) or section 227.01 or 227.06 of the National *Defence Act* or section 36.1 of the *International Transfer of Offenders Act*.

[39] The applicant argued that since the time prescribed under s. 6.1 of the *Criminal Records Act* has expired, the hearing panel should have identified the fact that the applicant had received a statutory pardon or record suspension; and, accordingly the finding of guilt should have no longer reflected adversely on the applicant's character as provided for in s. 2.3 of the *Criminal Records Act*. We note that this argument does not appear to have been raised before the hearing panel.

[40] The Law Society did not accept the applicant's submission that the effect of a statutory pardon is such that the underlying conduct can no longer operate against an applicant in a licensing hearing. Given the potential importance of this issue in good character hearings, we asked the parties for additional written submissions on the issue.

[41] Prior to 2012, the equivalent of a record suspension was a pardon, and s. 5 of the *Criminal Records Act* was similar to the current s. 2.3 set out above. The pre-2012 provision was considered by the Supreme Court of Canada in *Therrien*:[15]

> Sections 5 and 6(2) *C.R.A.* set out the effects of granting a pardon: (1) it is evidence that the National Parole Board, after making the inquiries specified in the Act, was satisfied that the applicant was of good conduct

[15] *Therrien (re)*, 2001 SCC 35 at para. 116.

> and that the conviction in respect of which it is granted should no longer reflect adversely on his character; (2) it vacates the conviction and removes any disqualification to which the person is subject by virtue of any federal Act or regulation made thereunder; and (3) it results in any record of the conviction being kept separate and apart: in other words, the criminal record is expunged. In and of themselves, these provisions do not persuade me that the pardon can operate to retroactively wipe out the conviction. Rather, they are an expression of the fact that it still exists, combined with a desire to minimize its future consequences. Section 5(a)(ii) *C.R.A*. provides that the pardon is evidence that "the conviction in respect of which the pardon is granted or issued <u>should no longer reflect adversely</u> on the applicant's character" (emphasis added), implying that it still exists and could so reflect. Second, the effects of the pardon are limited to the legal disqualifications created by federal statutes or the regulations thereunder and therefore exclude all the post-sentence consequences provided in provincial legislation, which also suggests that the pardon has only limited effect. Third, the information contained in the criminal record is not destroyed but is kept separate and apart, whence it may re-emerge should the pardoned person subsequently be no longer of good conduct.

[42] Thus, the Court noted that the language of the provision, that the conviction in respect of which the pardon is granted "should no longer reflect adversely", was conditional and implied that the conviction still existed, and could still reflect adversely on an individual.

[43] In *Montreal (City) v. Quebec*,[16] the Supreme Court of Canada considered the effect of a pardon in the context of the *Quebec Charter of Human Rights and Freedoms* (the "*Charter*"). Section 18.2 of the *Charter* provides:

> No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the <u>mere fact</u> that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person had obtained a pardon for the offence. [emphasis added]

[44] The facts in *Montreal (City)* involved an individual who had pled guilty to a charge of theft in summary conviction proceedings and was conditionally discharged pursuant to s. 730 of the *Criminal Code*. Thereafter, the individual applied for employment as a police officer and her application was rejected because she did not satisfy the criteria of "good moral character". Deschamps J. commented as follows with respect to the effect of the pardon:

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[16] *Montreal (City) v. Quebec (CDPDJ)*, 2008 SCC 48.

An employer is therefore entitled to consider the facts that resulted in a finding of guilt in assessing whether a candidate has the qualifications required for a job. Those facts are inevitably part of the candidate's past. However, the employer must also consider the fact that the person has been pardoned.

Indeed, the fact that a candidate's good moral character, and thus his or her entire file, is considered does not justify a decision that is inconsistent with the fact that the candidate has been pardoned. A conviction or, in the case of a discharge, a finding of guilt "should" no longer reflect adversely on a person's character following a pardon. The positive effect of a pardon as it reflects on a person's character may, however, be countered by adducing evidence of delinquent behaviour or of facts indicating a lack of probity, although this evidence cannot be limited solely to the finding of guilt.

To justify an objection based on moral character, the employer's inquiry must uncover conduct or facts that, when considered in light of the circumstances in which the person committed the crime for which the pardon was obtained, support a conclusion that this person is unfit for the job. The employer must show that the decision was not based on the mere fact of the finding of guilt.

Thus, the facts giving rise to a finding of guilt can be helpful in showing that a person is unfit for service as a police officer. In this context, the facts considered at the time the finding of guilt was made may reveal deficiencies that are relevant to the decision the employer must make. The Commission's position — which, I should add, the Court of Appeal endorsed (paras. 58-59) — that the facts giving rise to a finding of guilt may not be considered in deciding whether a candidate meets the good moral character criterion provided for in the *By-law respecting standards for hiring* must therefore be rejected.[17]

[45] In dissenting (but not on this point) reasons, Charron, J. provided the following rationale for why a pardon should not preclude any consideration of the underlying criminal conviction:

Further, if a pardon were to provide an absolute protection as contended, it would result in the following absurdities. The protection under s. 18.2 of the *Charter* does not extend to reprehensible conduct that has not been the subject matter of a charge. Nor does it extend to the commission of criminal acts in respect of which a criminal proceeding has not resulted in a finding of guilt. An employer who requires its employees to be of high moral character could justifiably refuse to hire persons who have engaged in

[17] Above at paras. 26 to 29.

questionable activities that fall well short of criminal behaviour, or criminal activities that never formed the subject matter of a charge. However, the same employer would be prohibited from refusing to hire a person who has committed a criminal act that has been proven beyond a reasonable doubt, if that person has obtained a pardon. And this, even if the acts in question had an undeniable relation to the aptitudes or qualifications for the job. Further, because the standard of proof in a criminal case is higher than in a civil proceeding, an employer could justify the refusal to hire based on proof of reprehensible acts in respect of which the candidate has been charged but acquitted. However, in making its decision, the same employer could not consider criminal acts in respect of which the candidate was found guilty when they are the subject of a subsequent pardon.[18]

[46] The Law Society points out that the provisions in the Ontario *Human Rights Code*[19] are materially different than the provision in the Quebec *Charter* considered in *Montreal (City)*. Section 5(1) of Ontario *Human Rights Code* provides for protection against discrimination in the employment context:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. [emphasis added]

A "record of offence" is defined in s. 10 to include "a conviction for […] an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked".

[47] However, the Ontario *Human Rights Code* has a separate section prohibiting discrimination in relation to "vocational associations", including self-governing professions such as the Law Society. Section 6 provides:

> Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

[48] It is important to note that the enumerated ground of "record of offences", which is present in the employment context, is absent as a ground of protection afforded to membership and "vocational associations". As a matter of statutory interpretation, there is a strong inference that "record of offences" was deliberately excluded as a prohibited ground of discrimination with respect to membership in "vocational

[18] Above, note 16 at para. 68.
[19] RSO 1990, c. H.19.

associations". We accept the Law Society's argument that the *Human Rights Code* does not preclude the Tribunal's ability to rely upon pardoned criminal offences in considering whether a licensee applicant is of good character.

[49] There are a number of Tribunal decisions that have considered a variety of criminal charges, convictions, pardoned convictions and other related matters in the context of a good character hearing. These include:

- criminal convictions[20] (including pardoned convictions[21] and *Youth Criminal Justice Act* convictions[22]);
- criminal discharges (including, as here, statutorily pardoned discharges)[23];
- withdrawn criminal charges;[24] and
- outstanding criminal charges.[25]

[50] However, the only previous case to which we were referred that considered *Montreal (City)* and the pre-2012 provision (s. 5) of the *Criminal Records Act*, is *Smith v. Law Society of Upper Canada.*[26] In that case, the panel held that in view of the pardon, little if any weight should be attached to the criminal convictions in considering the good character of the applicant.

[51] In our view, the existence of a pardon and/or a discharge disposition does not preclude a hearing panel from considering the facts underlying the prior, pardoned conduct or the facts underlying a prior, pardoned discharge in the context of a good character hearing. The existence of a pardon and/or a discharge disposition is a relevant fact that must be considered, and in many cases is likely to operate in the applicant's favour. However, this is not necessarily so. Each case must be approached on a case-by-case basis in accordance with the *Armstrong*[27] factors and other relevant information.

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20 *Blackburn v. Law Society of Upper Canada*, 2010 ONLSHP 112; *Alessandro v. Law Society of Upper Canada*, 2009 ONLSHP 40; *Noel v. Law Society of Upper Canada*, 2009 ONLSHP 36; *Smithen v. Law Society of Upper Canada*, 2011 ONLSHP 44; *Law Society of Upper Canada v. Melnick*, 2013 ONLSAP 27; *Schuchert*, *Re*, 2001 CanLII 21499; *Eberhard v. Law Society of Upper Canada*, 2010 ONLSHP 16; *Stephenson v. Law Society of Upper Canada*, 2010 ONLSHP 17; and *Walpole v. Law Society of Upper Canada*, 2010 ONLSHP 69.

21 *Schuchert, Re*, 2001 CanLII 21499; *Ashamall v. Law Society of Upper Canada*, 2009 ONLSHP 52; *Canizares v. Law Society of Upper Canada*, 2009 ONLSHP 34; and *Smith v. Law Society of Upper Canada*, 2011 ONLSHP 58.

22 *T. (S.A.) v. Law Society of Upper Canada*, 2015 ONLSTH 22.

23 *Owusu v. Law Society of Upper Canada*, 2015 ONLSTH 163 and *Law Society of Upper Canada v. Hope*, 2007 ONLSHP 20.

24 *Manilla v. Law Society of Upper Canada*, 2011 ONLSAP 10; *Birman v. Law Society of Upper Canada*, 2006 ONLSHP 32; and *Bonollo v. Law Society of Upper Canada*, 2009 ONLSHP 113.

25 *Stevens v. Law Society of Upper Canada*, 2005 ONLSHP 15.

26 Above, note 21 at paras. 183 to 189.

27 *Armstrong v. Law Society of Upper Canada*, 2009 ONLSHP 29.

(iv) Should a P1 Licence Issue in the Circumstances of This Case?

[52] Our case law has determined that there are a number of factors, which should be considered in determining a good character hearing. These factors include:

(a) the nature and duration of misconduct;

(b) whether the applicant is remorseful;

(c) what rehabilitative efforts, if any, have been taken, and the success of such efforts;

(d) the applicant's conduct since the proven misconduct; and

(e) the passage of time since the misconduct.[28]

Below, we consider each of these factors.

<u>The Nature and Duration of the Misconduct</u>

[53] The prior offences are relatively minor. The mischief offence related to the applicant throwing a piece of fruit into the neighbour's backyard, hitting the neighbour's home. Although this charge was withdrawn as a result of the applicant participating in a diversion program, he was subsequently charged with failing to comply with the terms of an undertaking. This related to being outside of his home after a 9:00 p.m. curfew and consuming alcohol. He was found guilty of failing to comply with the curfew term of the undertaking and received a conditional discharge. Driving without insurance is a regulatory offence for which the applicant was fined $500, which he paid in full and on time. The offence of possession of marijuana resulted in a conditional discharge with a two-year term of probation.

[54] An important factor in this case is the fact that the prescribed time under s. 6.1 of the *Criminal Records Act* has elapsed, and accordingly the applicant's record has been suspended. Given the passage of time, and the nature of the offences, we give little weight to the prior offences.

<u>Whether the Applicant is Remorseful</u>

[55] The applicant's evidence at the hearing showed he was remorseful. He described the conduct that lead to the mischief charge as "one of the stupidest things" he had ever done, acknowledged that he was negligent in failing to renew his insurance policy, and testified that the marijuana offence was "an immense wake-up call".

<u>Rehabilitative Efforts</u>

[56] The probation order for the applicant's conditional discharge on the marijuana

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[28] Above.

offence required that he complete 200 hours of community service, which he did in record time “with a very positive outlook and outstanding work ethic”, according to his probation officer. Following the court-ordered community service, the applicant has continued to volunteer at St. Vincent Pallotti’s soup kitchen. Character witnesses included a supervisor at the soup kitchen who described the applicant as a good person and worker and someone he trusted. His employer for the past three years described the applicant as “hard-working, determined and loyal”.

The Applicant’s Conduct Since the Misconduct and Passage of Time

[57] It is now 2016, and there have been no further offences since the conduct that led to the marijuana offence in March 2010.

CONCLUSION

[58] Considering all of the evidence before us, it is apparent that the applicant made a number of mistakes when he was a teenager and in his early 20s. Since that time he has taken steps to rehabilitate himself and to pursue a career as a paralegal. Given the passage of time, the record suspension, and the fact that there have been no further offences or misconduct since the March 2010 marijuana charge, we are of the view that the applicant has satisfied his onus and established that he is presently of good character.

[59] Accordingly the appeal is allowed and the applicant is granted a class P1 licence.

[60] Neither the Law Society nor the applicant sought costs.

[61] We would like to thank counsel in this matter for the assistance they provided to us in considering the complex issues raised by this appeal.

TAB 8

M.E.H. v. Williams; The Ottawa Citizen (a division of Postmedia Network Inc.) et al., Intervenors

[Indexed as: H. (M.E.) v. Williams]

108 O.R. (3d) 321

2012 ONCA 35

Court of Appeal for Ontario,
Doherty, R.P. Armstrong and Hoy JJ.A.
January 24, 2012

Civil procedure -- Non-publication order -- Respondent intending to bring divorce proceedings against notorious sexual predator and murderer and applying successfully for non-publication and sealing orders -- Media organizations' appeal allowed -- Applicable standard of review of motion judge's decision being correctness -- Motion judge's finding that orders were necessary to prevent serious risk to proper administration of justice not supported by evidence.

The respondent's husband, W, was a sexual predator and murderer whose prosecution attracted intense media attention. The respondent intended to commence divorce proceedings against W. She brought a motion for non-publication and sealing orders. Her request was based entirely on the affidavit of her treating psychiatrist, Dr. Q. Media organizations were granted intervenor status and opposed the motion. The motion was granted. The media organizations appealed.

Held, the appeal should be allowed.

Any discretionary non-publication or sealing order must be consistent with Canadian Charter of Rights and Freedoms principles. If the order goes beyond the scope tolerated by the proper application of Charter principles, the making of the order constitutes an error of law. The applicable standard of review of the motion judge's decision was correctness. Even on a deferential standard of review, the orders could not stand as the motion judge's finding that the orders were necessary to prevent a serious risk to the proper administration of justice was unreasonable on the evidence proffered by the respondent. The absence of any affidavit from the respondent significantly undermined the weight that could be given to Dr. Q's opinion. Without evidence from the respondent, much of what Dr. Q. said was properly characterized as speculation and assumption. Dr. Q's opinion as to the need for the non-publication and sealing orders was premised on his belief that the media had engaged and would continue to engage in an unrelenting and very intrusive invasion of the respondent's privacy. There was no evidence to support that belief. Consequently, Dr. Q's opinion did not provide the kind of convincing evidence needed to meet the rigorous standard demanded by the necessity branch of the Dagenais/Mentuck test.

Cases referred to

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, 120 D.L.R. (4th) 12, 175 N.R. 1, J.E. 95-30, 76 O.A.C. 81, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 51 A.C.W.S. (3d) 1045, 25 W.C.B. (2d) 304; R. v. Mentuck, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73, 2001 SCC 76, 205 D.L.R. (4th) 512, 277 N.R. 160, [2002] 2 W.W.R. 409, J.E. 2001-2142, 163 Man. R. (2d) 1, 158 C.C.C. (3d) 449, 47 C.R. (5th) 63, 51 W.C.B. (2d) 349, apld

Other cases referred to

B. (A.) v. Bragg Communications Inc., [2011] N.S.J. No. 113, 2011 NSCA 26, 228 C.R.R. (2d) 181, 301 N.S.R. (2d) 34, 97 C.P.C. (6th) 54, 80 C.C.L.T. (3d) 180; Canadian Broadcasting Corp. v. Canada (Attorney General), [2011] 1 S.C.R. 19, [2011] S.C.J. No. 2, 2011 SCC 2, 2011EXP-346, 411 N.R. 23, J.E. 2011-189, 264 C.C.C. (3d) 1, 328 D.L.R. (4th) 128; [page322] Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, 132 D.L.R. (3d) 385, 40 N.R. 181, 49 N.S.R. (2d) 609, 65 C.C.C. (2d) 129, 26 C.R. (3d) 193, 7 W.C.B. 154, EYB 1982-149378; Ottawa Citizen

Group Inc. v. R. (2005), 75 O.R. (3d) 590, [2005] O.J. No. 2209, 255 D.L.R. (4th) 149, 201 O.A.C. 208, 197 C.C.C. (3d) 514, 31 C.R. (6th) 144, 131 C.R.R. (2d) 332, 66 W.C.B. (2d) 580 (C.A.); P.A.B.D. #1 (Re), [2005] N.J. No. 394, 2005 NLTD 214, 253 Nfld. & P.E.I.R. 141, 20 C.P.C. (6th) 306, 144 A.C.W.S. (3d) 446 (S.C. (T.D.)); R. v. Canadian Broadcasting Corp. (2010), 102 O.R. (3d) 673, [2010] O.J. No. 4615, 2010 ONCA 726, 221 C.R.R. (2d) 242, 271 O.A.C. 7, 262 C.C.C. (3d) 455, 327 D.L.R. (4th) 470; R. v. Lavallee, [1990] 1 S.C.R. 852, [1990] S.C.J. No. 36, 108 N.R. 321, [1990] 4 W.W.R. 1, J.E. 90-735, 67 Man. R. (2d) 1, 55 C.C.C. (3d) 97, 76 C.R. (3d) 329, 10 W.C.B. (2d) 101; Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 2002 SCC 41, 211 D.L.R. (4th) 193, 287 N.R. 203, J.E. 2002-803, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 18 C.P.R. (4th) 1, 93 C.R.R. (2d) 219, 113 A.C.W.S. (3d) 36; Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41, 2005 SCC 41, 253 D.L.R. (4th) 577, 335 N.R. 201, J.E. 2005-1234, 200 O.A.C. 348, 197 C.C.C. (3d) 1, 29 C.R. (6th) 251, 132 C.R.R. (2d) 178, 65 W.C.B. (2d) 621, affg (2003), 67 O.R. (3d) 577, [2003] O.J. No. 4006, 232 D.L.R. (4th) 217, 178 O.A.C. 60, 178 C.C.C. (3d) 349, 17 C.R. (6th) 392, 110 C.R.R. (2d) 288, 59 W.C.B. (2d) 515 (C.A.); Vancouver Sun (Re), [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41, 2004 SCC 43, 240 D.L.R. (4th) 147, 322 N.R. 161, [2005] 2 W.W.R. 671, 199 B.C.A.C. 1, 33 B.C.L.R. (4th) 261, 184 C.C.C. (3d) 515, 21 C.R. (6th) 142, 120 C.R.R. (2d) 203, 61 W.C.B. (2d) 216

Statutes referred to

Canadian Charter of Rights and Freedoms

Supreme Court Act, R.S.C. 1985, c. S-26, s. 40 [as am.]

APPEAL from a non-publication order and a sealing order of Mackinnon J. (2011), 105 O.R. (3d) 344, [2011] O.J. No. 1739, 2011 ONSC 2022 (S.C.J.).

Richard G. Dearden and Ryan Kennedy, for intervenors (appellants).

Mary Jane Binks, Q.C., and Jonathan M. Richardson, for respondent.

The judgment of the court was delivered by

DOHERTY J.A.: --

I

Overview

[1] The respondent proposes to commence a proceeding in which she will seek a divorce and corollary relief from her husband, David Russell Williams ("Williams"). She brought a motion seeking an order sealing the entire record in the proceeding she proposes to bring against Williams. Alternatively, the respondent sought an order banning publication of the medical [page323] evidence relied on in support of her motion and banning publication of any financial or medical records that may be produced during the proceedings against Williams. Although not specifically requested in the notice of motion, the respondent also sought an order prohibiting publication of any information that would identify her by name as the person bringing the proceedings against Williams.

[2] Williams did not oppose the motion. Various media organizations were served with notice of the motion and several, including the Ottawa Citizen and the Canadian Broadcasting Corporation (appellants), were granted intervenor status on the motion. They opposed the motion.

[3] The motion judge made a non-publication and sealing order. The orders were broad, but not as broad as requested by the respondent. The terms of the non-publication order can be summarized as follows:

-- A term banning publication of any information that served to identify the name, address or contact information of the respondent. She was to be referred to in the title of proceedings as M.E.H. Any accounts relating to the divorce proceedings were to refer to her by those initials or as the wife of Williams.

-- A term banning publication of any photograph or likeness of the respondent in any report or publication relating to the motion or to any aspect of the divorce proceeding.

-- A term banning publication of the name, address or contact coordinates of the respondent's employer in any report or publication relating to the motion or divorce proceedings.

-- A term banning publication of the respondent's social insurance number, her date and place of birth, the address of her real property, the names of any financial institutions with which she deals and the respondent's account numbers at those institutions in any report or publication relating to the motion or the divorce proceedings.

-- A term banning publication of any information filed in the divorce proceedings referable to the assets or liabilities of the respondent not derived from transfers or assignments to her from Williams after February 2010.

[4] To give effect to the non-publication order, the motion judge provided that a redacted version of the record with the [page324] information covered by the non-publication order removed from it would constitute the public record of the proceedings.

[5] In addition to the non-publication order, the motion judge ordered that any tax returns or income and expense portions of financial statements filed in the divorce proceedings by the respondent could be filed under seal.

[6] The motion judge also made a non-publication order in respect of the medical information filed on the motion and the domestic contract between Williams and the respondent produced on the motion. While the order itself is not clear, the parties have proceeded on the basis that the non-publication order with respect to the medical information and the domestic contract does not extend to the references to that information in the motion judge's reasons. I will also proceed on that basis.

[7] The appellants appeal from the order of the motion judge. They challenge most, but not all, of the terms of the order. The appellants do not challenge the non-publication order as it relates to the respondent's social insurance number, her date of birth or her bank account numbers. They also do not challenge the non-publication order applicable to the medical information and the domestic contract produced on the motion.

[8] I do not understand the appellants to concede that the unchallenged aspects of the motion judge's order were properly made. Instead, they simply choose not to make any arguments against those parts of the order because they regard the information covered by those terms to be irrelevant to their purposes, and they accept that the references in the motion judge's reasons to the medical evidence and the domestic contract are sufficient for their purposes.

[9] I would allow the appeal. The motion judge correctly identified the applicable legal principles. However, the evidence cannot support her conclusion that the orders were necessary to prevent a serious risk to the proper administration of justice. Absent that finding, the orders could not have been made under the controlling jurisprudence.

II

Background

[10] In February 2010, Williams, who was at the time a colonel in the Canadian Forces and the commander of the air force base at Trenton, Ontario, was charged with two counts of first degree murder, two counts each of sexual assault and forcible confinement, and 82 counts of break and enter. The allegations were stunning in their depravity, especially in light of Williams' [page325] high military rank and his apparently sterling character. In October 2010, Williams pled guilty to the charges and was sentenced to life imprisonment without eligibility for parole for 25 years on both counts of first degree murder. Concurrent sentences were imposed on the other charges.

[11] Understandably, the charges and prosecution of Williams sparked widespread public interest. That interest has been reflected in intense media coverage, particularly when the charges were laid and when Williams pled guilty and was sentenced.

[12] According to the material filed on the motion, and I do not understand the appellants to challenge this, the respondent was shocked and devastated by the charges laid against her husband. Through the revelations that followed the laying of the charges, the respondent learned that her husband, to whom she had been married for many years and who she believed to be a highly respected, successful and loving man, was in reality a sexual predator and cold-blooded serial murderer. On the unchallenged evidence, the respondent is indeed yet another victim of Williams' depravity.

[13] The respondent finds herself associated in media reports with Williams, now one of Canada's most notorious murderers. Some media reports have identified her by name and referred to her place of employment and her position there. The respondent's photograph has appeared in the newspaper in association with some of these articles.

III

The Proceedings on the Motion

(i) The submissions

[14] The respondent's request for non-publication and sealing orders was based entirely on the affidavit of her treating psychiatrist, Dr. W. Quan. He was cross-examined on his affidavit.

[15] Counsel for the respondent argued that Dr. Quan's evidence established a real and substantial risk to the respondent's mental well-being if the media was allowed to identify her by name or other details and/or publish the kind of financial and personal information routinely filed in divorce proceedings and available to the media in Ontario. Respondent's counsel submitted that the evidence went beyond evidence demonstrating the respondent's personal distress and

embarrassment and spoke to the respondent's ability to gain access to the courts, an issue of public importance to the administration of justice. Counsel contended that a litigant like the respondent, who is required to go to court to obtain a divorce to sever her relationship with her [page326] husband, should not be put in a position where the publicity attendant upon gaining that court access would pose a substantial risk to the litigant's mental health.

[16] Counsel for the respondent next argued that the salutary effects of the non-publication and sealing orders sought outweighed the deleterious effects of those orders, including the inevitable negative impact on freedom of expression and the open court principle. Counsel stressed that while divorce proceedings, like any court proceeding, have an important public component, the matters at issue in this proceeding were essentially private matters between the respondent and Williams.

[17] Counsel for the appellants submitted that, absent an affidavit from the respondent, the evidence of Dr. Quan was inadmissible. Counsel further submitted that even if Dr. Quan's evidence was admissible, it did not provide the kind of convincing evidence needed to establish harm to the administration of justice that would warrant the wide-ranging non-publication and sealing orders sought.

[18] Counsel stressed the absence of any affidavit from the respondent and her ongoing participation since June 2010 in a lawsuit in which she and Williams are defendants in a fraudulent conveyance action brought by one of Williams' victims. The respondent's statement of defence and an affidavit she filed in that proceeding revealed a good deal of the information that she sought cloaked in non-publication and sealing orders in her pending divorce proceedings. No non-publication or sealing order had been made in respect of the respondent's identity or the information contained in her statement of defence and the affidavit filed in the fraudulent conveyance action. The media had referred to the contents of that material and nothing filed on the motion suggested that the media reports had caused any harm to the respondent or

interfered with her ability to defend herself in that proceeding.

[19] The appellants also led evidence on the motion that the respondent's lawyer had given an interview to a reporter of the Ottawa Citizen in late December 2010 in which she identified the respondent by name, referred to her place of employment, her intention to seek a divorce and described in a generic way the material that would be filed in the anticipated divorce proceeding. The media again reported on this information in early 2011. The respondent led no evidence that she suffered any adverse consequences from the media reports.

[20] Counsel for the appellant also rejected the characterization of the litigation as essentially a private matter. He submitted that media access to and reporting on divorce proceedings, as [page327] with other court proceedings, furthered the transparency of those proceedings, the public accountability of those involved in the proceedings and in some cases the reliability of the results achieved. Counsel stressed that transparency, accountability and reliability are all essential to the continued public confidence in and respect for the administration of justice. On a more specific plane, counsel submitted that the division of property between the respondent and Williams, especially as it related to his military pension, was a matter of public interest.

(ii) The motion judge's reasons

[21] The motion judge appreciated that the order sought was an extraordinary one in that it would compromise the open court principle, which she described (at para. 6) as one of "fundamental importance . . . to our democratic society". She approached her task using the two-step approach identified in a series of cases from the Supreme Court of Canada involving non-publication orders and/or sealing orders: see Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41, 2005 SCC 41, at para. 26; Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 2002 SCC 41, at paras. 45-46; R. v. Mentuck, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73, 2001 SCC 76, at para. 32. This approach is commonly referred to as the

Dagenais/Mentuck test.

[22] In Mentuck, Iacobucci J. said, at para. 32:

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[23] The motion judge concluded (at para. 27) that the first requirement in Mentuck had been met by the respondent:

The Applicant has shown a real and substantial risk to herself which goes beyond personal sensibilities or discomfort, mere embarrassment or personal preference. She requires access to this court in order to obtain a divorce and to finalize her financial affairs with the Respondent. There is a real risk that her fragile recovery could be compromised by the likely renewed publicity that the proposed litigation will occasion. She has established a real and serious risk to the public interest that access to the court not be barred by personal consequences of publicity.

(Emphasis added) [page328]

IV

Analysis

[24] The first branch of the two-part inquiry set out in Mentuck, described as the "necessity" branch, is the focus of this appeal. Before turning to the evidence, I will set out some of the important features of that branch of the test.

(i) There must be a public interest at stake

[25] Mentuck describes non-publication and sealing orders as potentially justifiable if "necessary in order to prevent a

serious risk to the proper administration of justice". A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the Dagenais/Mentuck test: Sierra Club of Canada, at paras. 46-51, 55. The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test: Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 185 S.C.R.; Sierra Club of Canada, at para. 55; B. (A.) v. Bragg Communications Inc., [2011] N.S.J. No. 113, 2011 NSCA 26, 301 N.S.R. (2d) 34, at paras. 73-75.

[26] The respondent framed her claim in terms of her right to gain access to the courts to seek legal redress. I agree with her contention that access to the courts is an essential component of the "proper administration of justice". There is no need to give any further consideration to other interests which may qualify under the first branch of the Dagenais/Mentuck test.

[27] There can be no doubt that an individual's right to seek and obtain appropriate relief in a court proceeding is a matter of significant public interest impacting on the proper administration of justice. The public interest in access to the courts for legal relief is particularly important where that access is required to give legal effect to a decision as integral to personal autonomy as the decision to seek a divorce. If insisting on the openness usually demanded of court proceedings will effectively close the courtroom door to a litigant because of the physical and/or emotional consequences to that litigant of maintaining the openness of the courts, I am satisfied that the first component of the Dagenais/Mentuck test would be made out assuming that there was no reasonable alternative to some limit on the openness of [page329] the courts. The court would then have to go on and address the

competing interests under the second component of that test before deciding what limit, if any, would be placed on the openness of the courts.

[28] Counsel for the appellants accepted that access to the courts is a matter of public interest that affects the proper administration of justice. He submitted that the public interest is engaged only where it is established that the litigant would not go to court absent the privacy protections afforded by the non-publication and sealing orders.

[29] In my view, it is not necessary that a litigant establish that he or she would not go to court absent the privacy protections requested. Access to the courts should not come at the cost of a substantial risk of serious debilitating emotional or physical harm to the party seeking access. Access to the courts at that cost would be more illusory than real.

[30] The distinction between personal emotional distress and embarrassment, which cannot justify limiting publication of or access to court proceedings and records, and serious debilitating physical or emotional harm that goes to the ability of a litigant to access the court is one of degree. Expert medical opinion firmly planted in reliable evidence of the specific circumstances and the condition of the litigant will usually be crucial in drawing that distinction: see P.A.B.D. #1 (Re), [2005] N.J. No. 394, 2005 NLTD 214 (S.C. (T.D.)), at para. 43.

(ii) The necessity inquiry comes first

[31] The necessity branch focuses exclusively on the existence of a serious risk to a public interest that can only be addressed by some form of non-publication or sealing order. The potential benefits of the order are irrelevant at this first stage of the inquiry: Mentuck, at para. 34. Unless a serious risk to a public interest is established, the court does not proceed to the second branch of the inquiry where competing interests must be balanced.

[32] As there is no balancing of competing interests at the first stage, it is wrong at that stage to consider the extent

to which the societal interests underlying and furthered by freedom of expression and the open court principle are engaged in that particular case. Even if those values are only marginally engaged (the respondent's submission in this case), restriction on media access to and publication in respect of court proceedings cannot be justified unless it is necessary to prevent a serious risk to a public interest. A court faced with a case like this one where decency suggests some kind of protection for the respondent [page330] must avoid the temptation to begin by asking: where is the harm in allowing the respondent to proceed with some degree of anonymity and without her personal information being available to the media? Rather, the court must ask: has the respondent shown that without the protective orders she seeks there is a serious risk to the proper administration of justice?

(iii) Freedom of expression and the open court principle

[33] In approaching the necessity branch of the inquiry, the high constitutional stakes must be placed at the forefront of the analysis. Freedom of expression, including freedom of the press and other media communications, is a constitutionally protected fundamental freedom. The constitutional right to freedom of expression protects the media's access to and ability to report on court proceedings. The exercise of this fundamental freedom in the context of media coverage of court proceedings is essential to the promotion of the open court principle, a central feature of not only Canadian justice, but Canadian democracy: Canadian Broadcasting Corp. v. Canada (Attorney General), [2011] 1 S.C.R. 19, [2011] S.C.J. No. 2, 2011 SCC 2, at paras. 1-2; Vancouver Sun (Re), [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41, 2004 SCC 43, at para. 26; Ottawa Citizen Group Inc. v. R. (2005), 75 O.R. (3d) 590, [2005] O.J. No. 2209 (C.A.), at paras. 50-55; R. v. Canadian Broadcasting Corp. (2010), 102 O.R. (3d) 673, [2010] O.J. No. 4615, 2010 ONCA 726, at paras. 22-24.

[34] Limits on freedom of expression, including limits that restrict media access to and publication of court proceedings, can be justified. However, the centrality of freedom of expression and the open court principle to both Canadian democracy and individual freedoms in Canada demands that a

party seeking to limit freedom of expression and the openness of the courts carry a significant legal and evidentiary burden. Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards": R. v. Canadian Broadcasting Corp., at para. 40; Toronto Star Newspapers Ltd. v. Ontario (2003), 67 O.R. (3d) 577, [2003] O.J. No. 4006 (C.A.), at para. 19, affd [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41, 2005 SCC 41, at para. 41; see, also, Ottawa Citizen Group, at para. 54.

V

Standard of Review

[35] As I have already indicated, the motion judge applied the correct legal principles to the facts as she found them. Normally, [page331] this kind of exercise attracts a deferential standard of review: see, e.g., Bragg Communications, at paras. 36, 100-103. However, in Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, at pp. 864-65 S.C.R., Lamer J., for the majority, held that any discretionary order banning publication must be consistent with Canadian Charter of Rights and Freedoms principles and that, if the order goes beyond the scope tolerated by the proper application of Charter principles, the making of the order constitutes an error of law. The same analysis has been applied to sealing orders: Ottawa Citizen Group, at para. 26.

[36] Although Dagenais and Ottawa Citizen Group both involved prerogative writ challenges to non-publication and sealing orders, I see no reason to characterize the nature of the decision differently because it is challenged by way of appeal rather than prerogative writ. I note that in Mentuck, an appeal to the Supreme Court pursuant to s. 40 of the Supreme Court Act, R.S.C. 1985, c. S-26, the court, without alluding to the standard of review, reviewed the orders made by the trial judge using a correctness standard: Mentuck, at paras. 41-43, 46-47; see, also, Sierra Club of Canada, at para. 48.

[37] The characterization of non-publication and sealing orders that are not Charter compliant as errors in law strongly implies a review of those orders on a correctness standard. In

my view, the motion judge's decision should be reviewed on a correctness standard. However, as I will explain in my review of the evidence, I am also satisfied that the motion judge's finding that the orders were necessary to prevent a serious risk to the proper administration of justice was unreasonable on the evidence proffered by the respondent. Consequently, even on a deferential standard of review, the orders cannot stand.

VI

Should the Order Have Been Granted?

(i) Dr. Quan's evidence

[38] Dr. Quan first saw the respondent in March 2010, about one month after Williams was charged. He has continued to see her about once a month since then. Dr. Quan described the respondent as initially "devastated" by the revelations about Williams. She was shocked, confused, unable to sleep, unable to focus and she had difficulties with her memory. The respondent felt as though her entire life had been "turned upside down". She found herself continually thinking about Williams' victims. [page332]

[39] In the weeks immediately following the revelations, the respondent could not stay in the family home or go to work. Within about two to three months, she had returned to her home and was working full-time at her former position.

[40] The respondent has no immediate family, but does have strong support from a group of close friends and neighbours. Her employer and co-workers have been supportive. The respondent's job is a demanding but fulfilling one. It is very important to her.

[41] Dr. Quan indicated that the respondent improved quite quickly after the intense initial shock of the disclosures about Williams. She had made significant gains by the summer of 2010. Dr. Quan reported continued progress in December 2010, despite the very intense publicity during the trial proceedings in October. The respondent had wisely mitigated the impact of those proceedings on her by leaving the country for a holiday while those proceedings were ongoing.

[42] Dr. Quan reported that the respondent's physical symptoms included weight loss, back pain, headaches and temporomandibular joint dysfunction caused by clenching her teeth. She also exhibited depressive symptomatology of a moderate degree of severity, anxiety of a moderate degree of severity, ongoing symptoms of emotional shock and certain post-traumatic stress disorder symptoms of a moderate degree of severity. She had not required hospitalization, medication or treatment other than her monthly meetings with Dr. Quan.

[43] Dr. Quan stressed that the respondent was very apprehensive about the publicity that would flow from her divorce proceedings. Each wave of publicity precipitated by a court proceeding increased her anxiety and presented coping challenges for her. The respondent believed that her job was threatened by the ongoing media coverage connecting her to Williams.

[44] Dr. Quan believed that obtaining a divorce and related corollary relief was important to the respondent as it would enable her to make a complete break from Williams. This break was important to her emotional well-being.

[45] The tenor of Dr. Quan's opinion is captured in his letter to counsel in December 2010, his report in January 2011 and his affidavit in February 2011. In the report, Dr. Quan stated:

> [The respondent] is a private individual and she does need calm, peace and quiet in order to continue functioning normally. She currently feels that she has no privacy left. If pushed beyond her ability to cope, [the respondent] will definitely become more seriously ill and most likely incapable of working any further. She has been successful in her workplace through sheer drive, determination and effort despite significant emotional distress and problems. If pushed further by constant invasions of her privacy, there is a [page333] very strong possibility that [the respondent] will deteriorate and be incapable of functioning at her current level of ability.

[The respondent] is intending to seek a divorce from her husband. I support this decision since it will be of therapeutic benefit to her. However, I fear the added media attention this would attract would be severely detrimental and that it would probably result in a deterioration of her emotional heath.

[46] In the letter, Dr. Quan opined:

[T]here is a very real and grave potential that her fragile recovery can be seriously compromised if she cannot be protected from the persistent, insistent and incessant efforts of the media to gain entry into her private life.

[The respondent] has made a very concerted and courageous effort to return to a normal productive life dedicated to the common good. These efforts are at risk of being destroyed by the unwanted, undeserved and unproductive efforts of media to meddle in her private life.

[47] In his affidavit dated February 2, 2011, Dr. Quan reiterated the same concerns:

[6] In particular I was concerned that [the respondent's] precarious mental and emotional state would be imperilled if she continued to be the subject of media harassment regarding her private life and Mr. Williams.

. . . . .

[19] [. . . The respondent] currently has a very tenuous hold on her mental health and is a mere shadow of her usual self.

[20] [The respondent] requires calm, peace and quiet if she is to continue functioning normally, which I believe will not occur if her application for divorce plays out in the media.

[21] In particular, her employment has been what has enabled her to keep what remains of her mental health intact. [The respondent] is particularly distressed and threatened that she will be unable to continue her current position if the media onslaught continues.

[22] I believe that if pushed further by constant invasions of her privacy, there is a very strong possibility that [the respondent] will deteriorate and be incapable of functioning at her current level of ability.

[48] Dr. Quan did not offer any opinion as to whether the respondent would seek a divorce if she was not guaranteed the kind of anonymity and privacy she sought through the non-publication and sealing orders.

[49] Dr. Quan acknowledged in cross-examination that he had virtually no first-hand knowledge of any of the media coverage as it related to the respondent. He testified that he did his best not to read any of the newspaper reports that referred to the respondent.

[50] Dr. Quan was also cross-examined about the impact of the publicity on the respondent's employment. He agreed that he had no contact with anyone at the respondent's place of [page334] employment and had no knowledge of how, if at all, the media coverage could affect that employment. Dr. Quan acknowledged that he understood from the respondent's comments to him that her employer had been supportive during the ordeal.

(ii) Assessing Dr. Quan's evidence

[51] Counsel for the appellants argued that Dr. Quan's evidence was not admissible in that it was based on statements made to him by the respondent. Counsel submitted that without an affidavit from the respondent attesting to the truth of what she said to Dr. Quan, and without affording the appellants the opportunity to test her assertions by cross-examination, Dr. Quan could not rely on the respondent's statements for their truth.

[52] I do not agree that Dr. Quan's evidence was inadmissible. Dr. Quan is a qualified clinical psychiatrist. He saw the respondent about a dozen times between March 2010 and March 2011. He based his clinical judgment as to the respondent's mental state on his observations of her over one year, the results of certain psychological tests he

administered, a report from the family doctor and things said to him by the respondent. These are sources that clinical psychiatrists routinely look to when forming their opinions. Dr. Quan was entitled to advance the opinion he did: see R. v. Lavallee, [1990] 1 S.C.R. 852, [1990] S.C.J. No. 36.

[53] There is, however, force to the appellants' submission that the absence of any affidavit from the respondent significantly undermines the weight that can be given to Dr. Quan's opinion. Without evidence from the respondent, much of what Dr. Quan said in his letters and reports is properly characterized as speculation and assumption.

[54] It is clear that Dr. Quan's opinion as to the need for the non-publication and sealing orders was premised on his belief that the media had engaged in an unrelenting and very intrusive invasion of the respondent's privacy beginning when Williams was charged and continuing through to the proposed divorce proceedings. Dr. Quan's letters to counsel and his report are replete with phrases like "the media onslaught", the "media harassment regarding her private life", "the constant invasions of her privacy", "the media feeding frenzy", "the unwanted, undeserved and unproductive efforts of media to meddle in her private life" and the "persistent, insistent and incessant efforts of the media to gain entry into her private life".

[55] There is quite simply no evidence to support any of these characterizations. The respondent was clearly the person who [page335] could have spoken most directly to her experiences with the media and the nature and degree to which her privacy had been invaded by the media. She chose not to do so.

[56] In the same vein, Dr. Quan expressed the view that the publicity surrounding the proposed divorce proceeding could adversely affect the respondent's employment which in turn could cause significant damage to her emotional well-being. Once again, there was no evidence to suggest any possible harm to the respondent's employment. If the potential for that harm existed, the respondent or her employer were the logical

persons to give that evidence.

[57] Assuming that Dr. Quan's opinion goes so far as to assert a real risk that the respondent would suffer the degree of emotional harm required to engage the public interest in maintaining access to the courts, that opinion rests entirely on his assumption that the respondent would be subject to media harassment occasioned by "persistent, insistent and incessant" efforts to invade her privacy. These assumptions have no foundation in the evidence. Consequently, Dr. Quan's opinion cannot be said to provide the kind of convincing evidence needed to meet the rigorous standard demanded by the necessity branch of the Dagenais/Mentuck test.

[58] I also have difficulty squaring Dr. Quan's opinion as to the dire potential effect of publicity surrounding the divorce proceeding with the respondent's reaction to the publicity surrounding the earlier court proceedings involving Williams. She has endured, and I would say overcome, the worst of the media storm surrounding Williams. After the intense initial shock, she has picked up the pieces of her life and gone about the business of living that life. There is no reason to think that any publicity arising from the divorce proceedings will come remotely close to the publicity that surrounded Williams' criminal proceedings at which Williams' crimes and his confessions to those crimes were publicly examined in minute detail. Any media attention arising from the divorce proceeding will surely be short-lived and hardly front page news.

[59] Dr. Quan's opinion is also contradicted by the unchallenged evidence concerning the fraudulent conveyance proceeding. In that proceeding, the plaintiff, one of Williams' sexual assault victims, claims that Williams fraudulently transferred the family home to the respondent. The respondent's statement of defence and the contents of her affidavit have been referred to in the media.

[60] There was no evidence filed on this motion to suggest that the media coverage of the fraudulent conveyance proceeding has [page336] amounted to a "feeding frenzy" or has been "persistent, insistent and incessant". Perhaps, more to the

point, there was no evidence filed on the motion that media access to the fraudulent conveyance proceeding and publication of material filed in that proceeding have in any way negatively affected the respondent's ability to fully participate in that proceeding. The media's reporting of the fraudulent conveyance claim and the absence of evidence of any adverse impact on the respondent are significant as there is likely to be an overlap between the issues in that proceeding and some of the issues that may arise in the divorce proceeding.

[61] The evidence filed on the motion by the appellants of the media reaction to the proposed divorce proceeding also undermines Dr. Quan's opinion. On that evidence, a reporter from the Ottawa Citizen sought information about the potential divorce proceedings from the respondent's lawyer. He did not approach the respondent directly. In the ensuing interview, counsel provided information, much of which the respondent now seeks to have cloaked in the non-publication and sealing orders. That information was reported in the press in a matter-of-fact way. There was no evidence filed on the motion that the media reporting of the respondent's name, her intention to seek a divorce and a generic description of the material that would be filed in the divorce proceeding had any negative impact on the respondent or had in any way affected her decision to proceed with the divorce action.

VII

Conclusion

[62] The motion judge erred in law in exercising her discretion in favour of granting the non-publication and sealing orders. The material presented by the respondent did not provide the kind of convincing evidence needed to satisfy the first branch of the Dagenais/Mentuck test. It is consequently unnecessary to consider the second branch of that test. The orders made by the motion judge must be set aside.

[63] I would allow the appeal and with one modification set aside the sealing and non-publication orders made except to the extent that those orders were not challenged on appeal (see para. 7, above). The one modification relates to the non-publication order made with respect to the medical

information filed on the motion. As indicated above (para. 6), the parties agree that the motion judge's non-publication order referable to the medical information did not extend to the references to that [page337] information in her reasons. The appellants did not challenge that part of the non-publication order. I would vary that part of the order to provide that the non-publication order with respect to the medical information does not extend to references to that information found in either the motion judge's reasons or these reasons.

[64] The interim order made on consent at the oral argument of this appeal prohibiting publication of material filed or information referred to in this court where that material or information was subject to the orders made on the motion expires with the release of these reasons. Normally, this court's order would take effect immediately. However, given the subject matter of this order, unless it is held in abeyance for some brief period of time, the respondent would not have any meaningful opportunity to consider what steps, if any, she should take to challenge this order. I would direct that the order of this court take effect 14 days after the release of these reasons. The order of the motion judge and the interim order of this court will remain in effect until then unless otherwise ordered.

[65] The appellants are entitled to their costs, if demanded, both here and on the motion. I would fix the costs of the appeal in the amount of $15,000, inclusive of disbursements and HST.

[66] The court was advised that the motion judge fixed the costs of the motion at $25,000 in favour of the respondent. The parties cannot agree as to the appropriate order in respect of the costs of the motion. This court is not in a position to fix those costs. I would remit the matter of the costs of the motion to the motion judge.

Appeal allowed.

TAB 9

***Criminal Records Act*, R.S.C., 1985, c. C-47, sections 6.1(1), 8**

Section 6.1(1)

Discharges
6.1 (1) No record of a discharge under section 730 of the Criminal Code that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if

(a) more than one year has elapsed since the offender was discharged absolutely; or

(b) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

Section 8

Use of information

(8) A person or organization that acquires information under this section in relation to an application for a position shall not use it or communicate it except in relation to the assessment of the application.

TAB 10

Section 18.2

18.2. No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

TAB 11

Ontario *Human Rights Code,* R.S.O. 1990, c. H.19, sections 1, 2, 3, 5(1), 24(b)

Section 1

Services
1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Section 2

Accommodation
2. (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance.

Harassment in accommodation
(2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance.

Section 3

Contracts
3. Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Section 5(1)

Employment
5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Section 24(b)

Special employment
24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment;

B E T W E E N

CANADIAN IMPERIAL BANK OF COMMERCE -and- 1299746 ONTARIO INC. o/a COMPUQUEST2000, et al.

Applicant Respondents

Court File No. CV-16-11369-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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