Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA (representing the Minister of Indigenous Services)

Respondent

- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASK NATION

Interested Parties

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA BOOK OF AUTHORITIES

February 4, 2019

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CITATION: Brown v. Attorney General of Canada 2014 ONSC 6967
DIVISIONAL COURT FILE NO.: 523/13
DATE: 20141202

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SACHS, NORDHEMER & POMERANCE JJ.

BETWEEN:	)	
	)	
MARCIA BROWN and ROBERT COMMANDA	)	*J. Wilson, M. Cooper & J. Gagne*, for the respondents
	)	
Respondents (Plaintiffs)	)	
	)	
– and –	)	
	)	
THE ATTORNEY GENERAL OF CANADA	)	*O. Young, P. Evraire, Q.C. & M. Bader, Q.C.* for the appellant
	)	
Appellant (Defendant)	)	
	)	
	)	**HEARD at Toronto:** November 13, 2014

NORDHEIMER J.:

[1] This is an appeal, with leave, from the decision of Belobaba J. certifying this proceeding as a class action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

Background

[2] This action has already had a significant procedural history, as I shall explain. The claim itself involves the period between 1965 and 1984, when welfare authorities in Ontario removed many Indian and aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals. It is alleged that many of these children lost their identity as aboriginal persons, and their connection to their aboriginal culture, that

ultimately led to them suffering emotional, psychological and spiritual harm. More specifically, it is alleged that these children were deprived of their culture, customs, traditions, language and spirituality. This led them to experience loss of self-esteem, identity crisis and trauma in trying to re-claim their lost culture and traditions.

[3] The respondents, Marcia Brown and Robert Commanda, are aboriginal persons from Ontario.[1] They were two of these displaced children. In this proposed class action, they sue only Canada, as represented by the Attorney General of Canada, (and who I shall hereafter refer to as "Canada") and not Ontario. In essence, the respondents accuse Canada of failing to ensure that the Ontario child welfare system, which Canada arranged to extend to aboriginal children in Ontario, would protect them generally, and in particular, would ensure the maintenance of their identities as aboriginal persons. The respondents bring their action on behalf of approximately 16,000 aboriginals who, they allege, were the victims of this policy in Ontario between December 1, 1965 and December 31, 1984.

[4] The reason that the claim involves Canada, and not Ontario, is the fact that in the early part of 1966, Canada and Ontario entered into the Canada-Ontario Welfare Services Agreement ("the 1965 Agreement") by which Canada agreed to pay Ontario for the per capita cost of extending certain Provincial welfare programs to "Indians in the Province" as I shall describe in more detail later. The effective date of the 1965 Agreement was December 1, 1965.

[5] The respondents allege that, during the years between December 1, 1965 and December 31, 1984 (when new child welfare legislation came into force in Ontario), Canada wrongfully delegated its exclusive responsibility as guardian, trustee, protector, and fiduciary of aboriginal persons by entering into an agreement with Ontario that authorized a child welfare program that systemically eradicated the aboriginal culture, society, language, customs, traditions, and spirituality of these children.

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[1] Only Marcia Brown was appointed as a representative plaintiff. The certification judge found that Robert Commanda could not be a representative plaintiff because he was neither a registered Indian nor entitled to be registered. He also did not have reserve status. Mr. Commanda was, consequently, not representative of the claims of the class members.

[6] The respondents allege that they personally suffered from Ontario's child protection program in that they experienced psychological problems associated with a loss of culture, self-esteem, and identity. They seek a declaration that Canada breached its fiduciary obligation and duty of care to the class members and, as a consequence of those breaches, claim general damages of $50,000 for each class member; special damages of $25,000 for each class member and punitive, exemplary and aggravated damages of $10,000 for each class member.

[7] Returning to the procedural history of this action, in April 2010, the respondents sought certification of the proceeding as a class action. At the same time, Canada sought, pursuant to Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike out the statement of claim as disclosing no reasonable cause of action. On May 26, 2010, Perell J. "conditionally" certified this proceeding as a class action provided that the respondents delivered an amended statement of claim. In his reasons, Perell J. found that some of the claims that had been advanced by the respondents were unsustainable as pleaded and, consequently, he struck them out. In particular, he found that the 1965 Agreement could not form the basis of a fiduciary duty, and thus an allegation of breach, but allowed that such an action could be maintained, if differently pleaded. He reached the same conclusion regarding the claim in negligence that the respondents had advanced. In the end result, Perell J. certified the proceeding as a class action "[c]onditional upon Ms. Brown and Mr. Commanda delivering a properly pleaded fresh as amended statement of claim", in accordance with his reasons.

[8] Canada sought leave to appeal the decision of Perell J. On February 22, 2011, Swinton J. granted leave. In the interim, the respondents had amended their statement of claim in accordance with the suggestions that Perell J. had made in his reasons. On December 28, 2011, the Divisional Court allowed the appeal. The court found that there was no basis to conditionally certify a class action since, among other things, it would preclude Canada from challenging any amended statement of claim that might be delivered. Consequently, the court struck out the

"existing" statement of claim but with leave to amend.[2] The court also ordered that any certification motion that followed was to be heard before a different judge.

[9] The respondents appealed to the Court of Appeal from the decision of the Divisional Court. On January 17, 2013, the Court of Appeal dismissed their appeal. The Court of Appeal essentially agreed with the Divisional Court's reasoning that one could not conditionally certify a class action because it would restrict the right of a defendant to challenge the sufficiency of any amended statement of claim. As Rosenberg J.A. said, at para. 52:

> As both Swinton J. and the Divisional Court noted, it is not self-evident that there are viable causes of action. The plain and obvious test sets a low threshold, but it will still be necessary for a court to determine whether the causes of action suggested by the case management judge can pass that test. The [Attorney General of Canada] is entitled to an opportunity to show that the causes of action are not viable.

[10] The respondents sought certification for the second time in July 2013. The certification motion was heard by Belobaba J. Canada again brought a motion, under Rule 21, to strike out the statement of claim as still not disclosing a reasonable cause of action. On September 27, 2013, Belobaba J. certified the proceeding as a class action. He dismissed Canada's Rule 21 motion.

[11] Canada sought leave to appeal the decision of Belobaba J. On March 11, 2014, Matheson J. granted leave. This is how the matter arrives before the Divisional Court for the second time.

[12] Central to the issues raised by all of these proceedings is whether the respondents have advanced a proper claim for breach of fiduciary duty and/or for negligence arising out of the actions that were taken by Canada, both in entering into the 1965 Agreement and thereafter. Before this court, no other issues are raised respecting the certification of this proceeding as a class action. It is only the issue whether a proper cause of action is pleaded that is in dispute. Consequently, it is really the dismissal of the Rule 21 motion that is at the heart of this appeal. The propriety of the certification order is, of course, nonetheless engaged because s. 5(1)(a) of

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[2] I am assuming that the Divisional Court's reference to the "existing" statement of claim was intended as a reference to the first statement of claim, and not the amended statement of claim that was prepared subsequent to the decision of Perell J.

the *Class Proceedings Act, 1992*, requires that the statement of claim disclose a cause of action as a prerequisite to certification.

Analysis

[13] I believe that it is worthwhile to start my analysis with a review of the basic principles that apply to a motion under Rule 21. Those principles are well-established. They are:

(a) the statement of claim should not be struck out unless it is "plain and obvious" that the claim discloses no reasonable cause of action: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959;

(b) the allegations in the statement of claim are to be taken as being true or capable of being proven unless they are patently ridiculous or incapable of proof: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.);

(c) the statement of claim is to be read generously with due allowance for drafting deficiencies: *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441;

(d) the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence: *Hunt v. Carey Canada Inc.*

[14] These principles must be applied, however, in the context of the case that is before us. Aboriginal claims are ones that are particularly undeveloped and fluid. This point was made in *Bonaparte v. Canada (Attorney General),* [2003] 2 C.N.L.R. 43 (Ont. C.A.) where the court said, at para. 32:

> Further, as Binnie J.'s review of the law in *Wewaykum Indian Band* reveals, fiduciary law in Canada, particularly in respect of the Crown's relationship with Aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence.

[15] The court should, therefore, approach with considerable caution any invitation to strike out, at this preliminary stage, a claim such as this one.

A. Fiduciary duty

[16] I begin with the asserted claim for breach of fiduciary duty. I do so because the fiduciary duty claim appears to be the more significant and broader claim of the two. It is also clear, as will become apparent later, that the determination of the survival of the fiduciary duty claim will, for all intents and purposes, preordain the result respecting the claim in negligence.

[17] An appropriate starting point for the challenge to the fiduciary duty claim is the Supreme Court of Canada's decision in *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261. This was also a proposed class action and it also involved a challenge to the causes of action asserted that included a claim for breach of fiduciary duty involving, in that case, the Province of Alberta. In the course of her reasons, McLachlin C.J.C. set out three elements that would identify the existence of a fiduciary duty in situations that were not covered by an existing category in which fiduciary duties have been recognized. I note that the parties are agreed that the claim being advanced here does not fall into any previously recognized category of fiduciary duty. It is acknowledged to be a "novel" claim.

[18] The three elements identified by McLachlin C.J.C. are (paras. 30-34):

> (i) the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary;
>
> (ii) the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them;
>
> (iii) to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary.

[19] The decision in *Alberta* then went on to consider how fiduciary duties can arise in the government context. McLachlin, C.J.C. noted that governments will owe fiduciary duties "only in limited and special circumstances". This was due to the fact that public law duties will not typically give rise to a fiduciary relationship because of the necessary exercise of discretion that accompanies public law duties. In this respect, however, it is again important to remember that this is an aboriginal claim. The relationship between Canada and its aboriginal peoples is

distinct. On that point, I note that it is conceded in this case that Canada stands in a fiduciary relationship to aboriginal peoples.[3] The issue is whether that fiduciary relationship gives rise, in turn, to a fiduciary duty.

[20] The decision in *Alberta* makes reference to the issue of fiduciary duties as they relate to aboriginal peoples. In particular, the decision refers to the Supreme Court's earlier decision in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and observes that, in *Guerin*, the court had noted:

> … that the fiduciary duty owed to the Aboriginal peoples of Canada is unique and grounded in analogy to private law …

[21] That point made, McLachlin C.J.C. went on to distinguish the fiduciary duty as it relates to aboriginal peoples from other types of fiduciary relationships. In essence, McLachlin C.J.C. sets up this particular form of fiduciary duty as a category unto itself arising from the "unique and historic nature of Crown-Aboriginal relations". She said, at para. 38:

> Noting the unique nature of the fiduciary duty owed by the Crown in the Aboriginal context, courts have suggested that this duty must be distinguished from other relationships: [citation omitted]

[22] The existence of fiduciary duties between the Crown and aboriginal peoples was, more recently, directly addressed in *Manitoba Metis Federation Inc. v. Canada (Attorney General),* [2013] 1 S.C.R. 623. This was a land claim case but it raised the issue of whether a fiduciary duty had arisen in the context of that case. In considering when a fiduciary duty can arise, McLachlin C.J.C. and Karakatsanis J. said, at para. 49:

> In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.

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[3] That concession would appear to be unavoidable given various decisions by the Supreme Court of Canada on this issue including *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1108.

[23] With those principles in mind, I have concluded that the asserted claim of a fiduciary duty in this case is sufficiently made out on the facts as pleaded that it cannot be said that it is plain and obvious that the claim does not raise a reasonable cause of action. I reach that conclusion for the following reasons.

[24] Returning to the three elements set out in *Alberta*, it is at least arguable that Canada had a responsibility to act in the best interests of the members of the class. Each member of the proposed class was, at the relevant time, a child who was in need of protection. No issue is taken with that latter fact nor is any challenge raised to the court orders that removed these children from their aboriginal homes and placed them in non-aboriginal homes. In my view, the 1965 Agreement can be argued to be evidence of the obligation that Canada considered that it had to the aboriginal peoples generally and these children in particular. The preamble to the 1965 Agreement states that:

> … the principal objective was the provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable in other communities;

That conclusion is also consistent with the "high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples": *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at para. 79.

[25] In making that observation, I am aware that the mere fact that the argument can be made, does not mean that it will be successful. However, that is not the point on a motion under Rule 21. As I earlier noted, it is only necessary to conclude that the allegations are capable of proof. The merits are up to a trial judge to determine.

[26] Returning to the elements identified in *Alberta*, it is clear that there is a defined class of persons who were vulnerable to the discretionary authority that Canada held over them. All of the persons covered by the 1965 Agreement were "Indians with Reserve Status". Canada had a discretionary power over those persons as such. It is acknowledged by Canada that it could have set up its own child welfare system to deal with these persons. Instead, it chose to delegate that responsibility to Ontario, which was already providing such services to all other residents of the

Province. While that approach undoubtedly made good sense from a practical and efficiency point of view, Canada cannot avoid its responsibilities as a fiduciary by delegating its discretionary authority to another.

[27] Like any other fiduciary, if Canada does so delegate, it remains responsible for ensuring that its delegate carries out those fiduciary responsibilities in a proper manner: *Reference re Broome v. Prince Edward Island*, [2010] 1 S.C.R. 360 at para. 54. The allegation here, among others, is that Canada failed to do so. The finding that a fiduciary duty arises and that Canada's actions in negotiating and signing the 1965 Agreement might be a breach of that duty is consistent with the *sui generis* relationship between Canada and its aboriginal peoples. It also reflects the risk, commented on in *Wewaykum*, where Binnie J. said, at para. 80:

> … but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude.

It is, of course, the respondents' claim that the 1965 Agreement reflects government misconduct or ineptitude.

[28] Finally, I do not take Canada to quarrel with the fact that its actions could affect the legal or substantial practical interests of the beneficiaries, i.e., the members of the class. In any event, it would be hard to see how it could be suggested that removing a child from his/her family and placing the child in the care of others could do anything other than affect the child's most basic interests.

[29] I conclude, therefore, that each of the three elements set out in *Alberta* for the creation of a fiduciary duty are, at least arguably, met in this case. That is sufficient to get the respondents over the relatively low threshold for defeating a motion under Rule 21.

[30] In reaching that conclusion, I am mindful of the fact that a fiduciary duty does not arise between the Crown and aboriginal peoples with respect to all aspects of the relationship between the two. As was clearly stated in *Wewaykum*, the fiduciary duty arises only in relation to specific aboriginal interests. Cases, such as *Guerin,* have imposed a fiduciary duty in respect of aboriginal lands because of the central role that land played in aboriginal economies and culture.

Here, we are not dealing with just one aspect of that culture. Rather, we are dealing with a person's connection to that culture as a whole. It is difficult to see a specific interest that could be of more importance to aboriginal peoples than each person's essential connection to their aboriginal heritage. In addition, on this point, the importance of aboriginal rights cannot be disputed. They are specifically "recognized and affirmed" by s. 35(1) of the *Constitution Act, 1982* and a long line of authorities.

B. Negligence

[31] The respondents also assert a claim in negligence. Canada complains that the motion judge did not undertake a proper *Anns/Cooper* analysis of the negligence claim. I do not agree. Not only did the motion judge expressly refer to the *Anns/Cooper* test, he clearly applied it in reaching his decision.

[32] The components of the *Anns/Cooper* test are set out in *R. v. Imperial Tobacco Canada Ltd.,* [2011] 3 S.C.R. 45 where McLachlin C.J.C. said, at para. 39:

> At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: [citation omitted]

[33] The motion judge found that there was a sufficient relationship of proximity demonstrated between Canada and the respondents. As may be apparent from my analysis of the fiduciary duty claim, I reach the same conclusion. Canada acknowledges that there is a fiduciary relationship between Canada and aboriginal peoples. As I have explained above, Canada assumed an obligation towards aboriginal peoples regarding the provision of Provincial welfare programs to them. Canada chose to fulfill that obligation by entering into the 1965 Agreement with Ontario. It is certainly arguable that, by taking those steps, Canada demonstrated a sufficient relationship of proximity to the members of the proposed class. It is equally arguable that, in doing so, Canada ought to have recognized that the failure to take reasonable care, to ensure that the welfare programs were administered properly, might foreseeably cause harm to

the members of the class. This is especially so given that the persons affected, in this particular instance and by this particular welfare program, were children.

[34] Canada says that proximity cannot be established because the respondents "do not plead that federal actors had any direct, supervisory or other operational role in the design or delivery of the child welfare programs delivered to Indians on reserves in Ontario".[4] I do not accept that the plaintiffs need to plead that fact in order to establish an arguable case on proximity. As I have already said, it is not the fact that Canada negligently designed or negligently delivered the child welfare program that is in issue in this case. Rather, the allegation is that Canada failed to ensure that Ontario delivered an appropriate child welfare program when Canada delegated its obligations, in this regard, to Ontario through the 1965 Agreement. That allegation, among others, is specifically pleaded.[5]

[35] Canada also complains that the respondents have not pleaded that they relied on any "expectations, representations, communications or other interactions of a 'close and direct' nature with Canada's officials following their apprehension or removal from their parental homes". With respect, it is not reasonable to expect children to have that degree of awareness. Indeed, if such an allegation had been made, I suspect that Canada would have argued that it was one that was "patently ridiculous". The respondents, as children, were entitled to rely on the basic premise that any authority dealing with them would do so with due consideration for their best interests. In this case, the respondents plead that Canada did not ensure that that was done.

[36] In terms of the second stage of the Anns/Cooper test, Canada submits that the motion judge did not:

> …address the significant concern that, to impose a private law duty of care or fiduciary duty in this case, would effectively penalize Canada for having used its spending power to ensure that Ontario had the capacity to provide Indian children in need of protection with that very protection.[6]

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[4] Appellant's factum, para. 67
[5] Statement of claim, para. 29
[6] Appellant's factum, para. 70

[37] The fact is, as the motion judge found, there was nothing that prevented Canada from ensuring, as part of the 1965 Agreement, that Ontario would carry out its welfare programs in an appropriate way. The fact that Canada was trying to do something positive for these children does not remove the need for Canada to undertake its good work free of negligence. In other words, a duty of care is not eliminated just because the person who has the duty is engaged in what is intended to be an affirmative or beneficial act.

[38] No other policy reasons are advanced for why Canada should not be subject to a duty of care in carrying out its responsibilities to aboriginal peoples regarding their ability to access appropriate welfare programs. Certainly, it is difficult to see any policy reason that would negate that duty in the situation where children are directly affected. I note, in passing on this point, that the argument that was advanced before the motion judge that Canada could not impose conditions on Ontario as part of the 1965 Agreement, because it would involve a constitutionally improper interference with Provincial jurisdiction, was not advanced here.

[39] Before concluding, I make four other observations. The first observation is that I accept that the amended statement of claim may not plead these two causes of action flawlessly. However, the causes of action are sufficiently pleaded to permit Canada to understand the nature of the claims and to be able to respond to them. Much time and effort has already been spent in this case over the adequacy of the statement of claim and I do not believe that it serves the interests of any of the parties to engage, any further, in the exercise of trying to create the perfect pleading. If Canada requires any particulars regarding the allegations in the amended statement of claim in order to plead to it, then Canada can utilize its rights under the *Rules of Civil Procedure* to seek those particulars.

[40] I would add, on that point, the caution, recently expressed by the Supreme Court of Canada, regarding the problems that are inherent in crafting a pleading in a case such as this. In *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, McLachlin C.J.C. said, at para. 23:

> Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader

> society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved. [emphasis added]

[41] The second observation is that I recognize that my reasoning in this matter may differ, in some respects, from that employed by the motion judge. I mention this because a central facet of Canada's submissions was its criticism of the motion judge's reasoning. In particular, Canada criticized the motion judge for engaging in reasoning regarding the effect of the 1965 Agreement, and its role in this claim, which was said to be directly contrary to the reasoning used by the first motion judge. On this appeal, however, it must be remembered that the issue is not whether the motion judge reached his decision for the right reasons. The issue is whether the decision is correct.

[42] The third observation follows on the second. Much was made of an alleged conflict between the two motion judges' reasons regarding the 1965 Agreement. Indeed, it is this alleged conflict that appears to have been central to the decision of Matheson J. to grant leave to appeal. As I have already said, any conflict between those reasons is not particularly relevant to my conclusion that the amended statement of claim discloses reasonable causes of action. The first motion judge found that the 1965 Agreement could not form the basis for a claim for breach of fiduciary duty. That conclusion does not preclude reliance on the 1965 Agreement to prove the material fact that there was a breach of that fiduciary duty or a breach of the duty of care. In other words, while I agree with the first motion judge that the 1965 Agreement could not, by itself, be relied on for the creation of the fiduciary duty, the 1965 Agreement is still very much a relevant fact to the allegation that Canada failed to honour its fiduciary duty or failed to fulfill its duty of care. In my view, that is the way in which the 1965 Agreement is used in the amended statement of claim, and that use does not offend the reasons of the first motion judge.

[43] The fourth observation involves what happened after the hearing. Five days after the hearing concluded, counsel for the respondents wrote to the court to draw to our attention the decision in *Anderson v. Canada (Attorney General),* [2011] N.J. No. 445 (C.A.) and to make brief submissions regarding its relevance. In light of this development, we permitted the appellant to file brief written submissions, which the appellant did. I make two comments on

this situation. One is that it runs afoul of the point that Borins J. made in *Walker Estate v. York Finch General Hospital*, [1998] O.J. No. 2271 (Gen. Div.) where he spoke about the "practice" that had developed of counsel corresponding with the court after a hearing has been completed. In complaining about that practice and urging that it be stopped, Borins J. encapsulates the very problem regarding that practice into which this court was placed. He said, at para. 34:

> The practice of communicating directly with a motions judge, or a trial judge, after a hearing has been concluded, puts the judge in a difficult position. The judge feels that it might be unfair to the party to ignore the communication, with the result that the judge re-opens the hearing, or takes the additional material into consideration. In my view, a judge need not consider uninvited communications sent directly to him or her after the conclusion of the hearing. Indeed, I do not believe that I would be criticized if I ignored the materials sent to me by counsel in this case.

I note in this regard that this was not a "late breaking" decision to which counsel could not have referred during the course of the argument.

[44] Nonetheless, we have considered the decision. Having done so, I do not find that it adds much to the analysis already undertaken in terms of the proper principles to be applied. It does, however, represent an example where another court has permitted, what might be referred to as a "novel" claim, to proceed in circumstances that have some similarity to the circumstances here. It does serve to reinforce the conclusion, that I have already reached, that aboriginal claims are ones that are particularly undeveloped and fluid and, consequently, greater latitude should be accorded to them in terms of the "plain and obvious" test.

Conclusion

[45] The appeal is dismissed.

[46] If the parties cannot agree, they may file written submissions on the costs of the appeal. The respondents shall file their submissions within thirty days of the date of the release of these

reasons and the appellant shall file its submissions within fifteen days thereafter. The submissions of each party shall not exceed ten pages in length. No reply submissions shall be filed without leave of the court.

NORDHEIMER J.

SACHS J.

POMERANCE J.

Date of Release:

CITATION: Brown v. Attorney General of Canada 2014 ONSC 6967
DIVISIONAL COURT FILE NO.: 523/13

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

SACHS, NORDHEMER & POMERANCE JJ.

BETWEEN:

MARCIA BROWN and ROBERT COMMANDA

Respondent

– and –

THE ATTORNEY GENERAL OF CANADA

Appellant

REASONS FOR JUDGMENT

NORDHEIMER J.

Date of Release:

Her Majesty The Queen as represented by the Minister of Indian and Northern Affairs Canada and the Attorney General of Canada *Appellant*

and

Batchewana Indian Band *Appellant*

v.

John Corbiere, Charlotte Syrette, Claire Robinson and Frank Nolan, each on their own behalf and on behalf of all non-resident members of the Batchewana Band *Respondents*

and

Aboriginal Legal Services of Toronto Inc., Congress of Aboriginal Peoples, Lesser Slave Lake Indian Regional Council, Native Women's Association of Canada and United Native Nations Society of British Columbia *Interveners*

INDEXED AS: CORBIERE *v.* CANADA (MINISTER OF INDIAN AND NORTHERN AFFAIRS)

File No.: 25708.

1998: October 13; 1999: May 20.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Equality rights — Indian bands — Elections of chiefs and band councils — Voting restrictions — Legislation providing that only band members "ordinarily resident on the reserve" entitled to vote in band elections — Whether legislation infringes s. 15(1) of Canadian Charter of Rights and Freedoms — If so, whether infringement justified under s. 1 of Charter — Canadian Charter of

Sa Majesté la Reine représentée par le ministre des Affaires indiennes et du Nord canadien et le procureur général du Canada *Appelante*

et

La bande indienne de Batchewana *Appelante*

c.

John Corbiere, Charlotte Syrette, Claire Robinson et Frank Nolan, en leur nom personnel et au nom de tous les membres non résidents de la bande de Batchewana *Intimés*

et

Aboriginal Legal Services of Toronto Inc., Congrès des peuples autochtones, Lesser Slave Lake Indian Regional Council, Association des femmes autochtones du Canada et United Native Nations Society of British Columbia *Intervenants*

RÉPERTORIÉ: CORBIERE *c.* CANADA (MINISTRE DES AFFAIRES INDIENNES ET DU NORD CANADIEN)

Nº du greffe: 25708.

1998: 13 octobre; 1999: 20 mai.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droits à l'égalité — Bandes indiennes — Élections des chefs et des conseils de bandes — Restrictions du droit de vote — Disposition législative indiquant que seuls les membres de la bande qui «réside[nt] ordinairement sur la réserve» ont qualité pour voter aux élections de la bande — Cette disposition législative porte-t-elle atteinte aux droits garantis par l'art. 15(1) de la Charte canadienne des droits et libertés? — Dans l'affirmative, cette atteinte est-elle justifiée au regard de l'article

Rights and Freedoms, ss. 1, 15(1) — Indian Act, R.S.C., 1985, c. I-5, s. 77(1).

Constitutional law — Charter of Rights — Remedy — Indian Act voter eligibility provisions violating Charter equality rights — Whether declaration of invalidity and suspension of effect of declaration appropriate remedy — Whether Indian band which brought Charter challenge should be exempted from suspension of effect of declaration.

Indians — Elections of chiefs and band councils — Voting restrictions — Legislation providing that only band members "ordinarily resident on the reserve" entitled to vote in band elections — Whether legislation violating Charter equality rights — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Indian Act, R.S.C., 1985, c. I-5, s. 77(1).

Courts — Supreme Court of Canada — Jurisdiction — Constitutional questions — Court's jurisdiction to restate constitutional questions or make declaration of invalidity broader than that contained within questions.

The respondents, on their own behalf and on behalf of all non-resident members of the Batchewana Indian Band, sought a declaration that s. 77(1) of the *Indian Act*, which requires that band members be "ordinarily resident" on the reserve in order to vote in band elections, violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Fewer than one third of the registered members of the band lived on the reserve. The Federal Court, Trial Division found that as it related to the disposition of reserve lands or Indian monies held for the band as a whole, s. 77(1) infringed the rights guaranteed by s. 15(1) and that the infringement was not justified under s. 1 of the *Charter*. The court granted a declaration of invalidity of s. 77(1) in its entirety and suspended the declaration for a period of 10 months. The court noted that the declaration was confined to the Batchewana Band because the pleadings and the evidence related only to that band. The Federal Court of Appeal affirmed the judgment but modified the remedy granted at trial. The court determined that the appropriate remedy was a constitutional exemption because other bands might be able to demonstrate an Aboriginal right under s. 35 of the *Constitution Act, 1982* to exclude non-residents from voting. The court declared

premier de la Charte? — Charte canadienne des droits et libertés, art. 1, 15(1) — Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 77(1).

Droit constitutionnel — Charte des droits — Réparation — Droits à l'égalité garantis par la Charte violés par les dispositions de la Loi sur les Indiens relatives à l'admissibilité à voter — La déclaration d'invalidité et la suspension de la prise d'effet de cette déclaration sont-elles la réparation qui convient? — La bande indienne qui a présenté la contestation fondée sur la Charte devrait-elle être exemptée de la suspension de la prise d'effet de la déclaration?

Indiens — Élections des chefs et des conseils de bandes — Restrictions du droit de vote — Disposition législative indiquant que seuls les membres de la bande qui «réside[nt] ordinairement sur la réserve» ont qualité pour voter aux élections de la bande — Cette disposition législative viole-t-elle les droits à l'égalité garantis par la Charte? — Charte canadienne des droits et libertés, art. 1, 15(1) — Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 77(1).

Tribunaux — Cour suprême du Canada — Compétence — Questions constitutionnelles — Pouvoir de la Cour de reformuler des questions constitutionnelles ou de prononcer une déclaration d'invalidité de portée plus large que celle demandée dans les questions.

Les intimés, en leur nom personnel et au nom de tous les membres non résidents de la bande indienne de Batchewana, ont sollicité un jugement déclaratoire portant que le par. 77(1) de la *Loi sur les Indiens* — qui exige que les membres d'une bande «réside[nt] ordinairement» dans une réserve pour être habiles à voter à l'élection du conseil de la bande — contrevient au par. 15(1) de la *Charte canadienne des droits et libertés.* Moins du tiers des membres inscrits de la bande vivaient dans les réserves. La Section de première instance de la Cour fédérale a conclu que, dans la mesure où il concerne la façon de disposer des terres de la réserve ou de sommes d'argent des Indiens détenues au profit de l'ensemble de la bande, le par. 77(1) violait les droits garantis par le par. 15(1) et que cette violation n'était pas justifiée au regard de l'article premier de la *Charte*. Le tribunal a déclaré le par. 77(1) invalide en totalité et a suspendu la prise d'effet de cette déclaration pour une période de 10 mois. Le tribunal a souligné que le jugement déclaratoire ne s'appliquait qu'à la bande de Batchewana, étant donné que les actes de procédure et les éléments de preuve présentés ne se rapportaient qu'à cette dernière. La Cour d'appel fédérale a confirmé le jugement, mais a modifié la réparation accordée en

that the words "and is ordinarily resident on the reserve" in s. 77(1) contravened s. 15(1) of the *Charter* only in relation to the Batchewana Band. The declaration of invalidity was not suspended.

Held: The appeal should be dismissed but the remedy designed by the Court of Appeal should be modified.

Before any question of constitutional exemption is considered, the legislation in its general application should be examined. In this case, because the general issues were addressed in the plaintiffs' statement of claim, and were argued before this Court and the Federal Court of Appeal, such an analysis will not take any parties by surprise. The constitutional questions, as formulated, address only the situation of the members of the Batchewana Band. The Court's jurisdiction to restate constitutional questions, or make a declaration of invalidity broader than that contained within them is appropriately exercised when, as in this case, doing so does not, in substance, deprive attorneys general of their right to notice of the fact that a given legislative provision is at issue in this Court, or deprive those who have a stake in the outcome of the opportunity to argue the substantive issues relating to this question.

Per Lamer C.J. and Cory, McLachlin, Major and Bastarache JJ.: The test applicable to a s. 15(1) analysis has been described in *Law*. The first step is to determine whether the impugned law makes a distinction that denies equal benefit or imposes an unequal burden. The s. 77(1)'s exclusion of off-reserve band members from voting privileges on band governance satisfies this requirement. The second step is to determine whether the distinction is discriminatory. It is the first inquiry under this step that poses a problem, i.e. that of establishing whether the distinction is made on the basis of an enumerated ground or a ground analogous to it. The answer to this question will be found in considering the general purpose of s. 15(1) to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy

première instance. Elle a statué que la réparation convenable était une exemption constitutionnelle, puisqu'il était possible que d'autres bandes soient en mesure d'établir l'existence d'un droit ancestral visé à l'art. 35 de la *Loi constitutionnelle de 1982* leur permettant d'interdire aux membres non résidents de voter. La cour a déclaré que les mots «et réside ordinairement sur la réserve» au par. 77(1) contreviennent au par. 15(1) de la *Charte* uniquement en ce qui concerne la bande de Batchewana. La prise d'effet de la déclaration d'invalidité n'a pas été suspendue.

Arrêt: Le pourvoi est rejeté, mais la réparation fixée par la Cour d'appel est modifiée.

Avant d'amorcer l'analyse de la question de l'exemption constitutionnelle, il faut examiner l'application générale de la disposition législative. Dans la présente affaire, étant donné que les questions générales ont été abordées dans la déclaration des appelants et plaidées devant notre Cour et devant la Cour d'appel fédérale, les parties ne sont pas prises au dépourvu par une telle analyse. Les questions constitutionnelles, telles qu'elles ont été formulées, ne visent que la situation des membres de la bande de Batchewana. La Cour exerce de façon appropriée son pouvoir de reformuler des questions constitutionnelles ou de prononcer une déclaration d'invalidité de portée plus large que celle demandée dans les questions lorsque, comme dans la présente affaire, l'exercice de ce pouvoir ne prive pas les procureurs généraux de leur droit d'être avisés du fait que la constitutionnalité d'une disposition législative donnée est contestée devant notre Cour, et ne prive pas ceux qui sont concernés par l'issue du litige de la possibilité de se faire entendre sur les questions de fond se rapportant à cette question.

Le juge en chef Lamer et les juges Cory, McLachlin, Major et Bastarache: Le critère applicable pour l'analyse fondée sur le par. 15(1) a été décrit dans *Law*. La première étape consiste à déterminer si le texte de loi contesté établit une distinction qui dénie l'égalité de bénéfice de la loi ou impose un fardeau inégal. Le fait que le par. 77(1) dénie aux membres hors réserve des bandes indiennes le droit de voter à l'égard de l'administration de leur bande respective respecte cette exigence. La deuxième étape consiste à déterminer si la distinction est discriminatoire. C'est la première question de cette étape qui pose problème, c.-à-d. celle de savoir si la distinction contestée est fondée sur un motif énuméré ou un motif analogue. Pour répondre à cette question, il faut tenir compte de l'objectif général du par. 15(1), qui est, d'une part, d'empêcher que l'on porte atteinte à la dignité humaine en imposant à des

of respect and consideration. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. These markers of discrimination do not change from case to case, depending on the government action challenged. What varies is whether the enumerated and analogous grounds amount to discrimination in the particular circumstances of the case. Once a distinction on an enumerated or analogous ground is established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case. To identify a ground of distinction as analogous, one must look for grounds of distinction that are like the grounds enumerated in s. 15. These grounds have in common the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second step of the analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. The conflation of the inquiry into the basis of the distinction and the inquiry into whether, on the facts of the case, that distinction affronts s. 15 is to be avoided.

In this case, the exclusion of off-reserve members of an Indian band from the right to vote in band elections, pursuant to s. 77(1) of the *Indian Act*, is inconsistent with s. 15 of the *Charter*. Section 77(1) excludes off-reserve band members from voting privileges on band governance, and this exclusion is based on Aboriginality-residence (off-reserve band member status). "Aboriginality-residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is a ground analogous to those enumerated in s. 15. The distinction goes to a personal characteristic essential to a band member's personal identity. Off-reserve Aboriginal band members can change their status to on-reserve Aboriginals only at great cost, if at all. The situation of off-reserve Aboriginal band members is therefore unique and immutable. Lastly, when the relevant *Law* factors are applied, the impugned distinction amounts to

individus un désavantage fondé sur des stéréotypes et des préjugés sociaux, et, d'autre part, de contribuer à l'établissement d'une société où tous les individus sont jugés dignes de respect et de considération. Les motifs énumérés et les motifs analogues constituent des indicateurs permanents de l'existence d'un processus décisionnel suspect ou de discrimination potentielle. Ces indicateurs de discrimination ne varient pas d'une affaire à l'autre, selon la mesure gouvernementale qui est contestée. La variable est la réponse à la question de savoir si les motifs énumérés et les motifs analogues sont source de discrimination dans les circonstances particulières d'une affaire donnée. Une fois établie la présence d'une distinction fondée sur un motif énuméré ou analogue, le tribunal amorce l'examen du contexte et des faits propres à l'affaire dont il est saisi pour déterminer si la distinction constitue de la discrimination dans ce cas particulier. Pour qualifier d'analogue un motif de distinction, il faut chercher des motifs de distinction semblables aux motifs énumérés à l'art. 15. Le point commun entre ces motifs est le fait qu'ils sont souvent à la base de décisions stéréotypées, fondées non pas sur le mérite de l'individu mais plutôt sur une caractéristique personnelle qui est soit immuable, soit modifiable uniquement à un prix inacceptable du point de vue de l'identité personnelle. Ce fait tend à indiquer que l'objet de l'identification de motifs analogues à la deuxième étape de l'analyse est de découvrir des motifs fondés sur des caractéristiques qu'il nous est impossible de changer ou que le gouvernement ne peut légitimement s'attendre que nous changions pour avoir droit à l'égalité de traitement garantie par la loi. Il faut éviter de fusionner l'analyse du fondement de la distinction et celle de la question de savoir si, à la lumière des faits de l'affaire, cette distinction contrevient à l'art. 15.

Dans la présente affaire, le fait de dénier aux membres des bandes indiennes résidant hors des réserves le droit de voter aux élections des bandes conformément au par. 77(1) de la *Loi sur les Indiens* est incompatible avec l'art. 15 de la *Charte*. Le paragraphe 77(1) dénie aux membres hors réserve des bandes indiennes le droit de voter à l'égard de l'administration de leur bande respective, pour le motif fondé sur l'autochtonité-lieu de résidence (la qualité de membre hors réserve d'une bande indienne). Le facteur de l'«autochtonité-lieu de résidence» constitue un motif analogue à ceux énumérés à l'art. 15 lorsqu'il se rapporte à la question de savoir si un membre d'une bande autochtone vit dans la réserve ou en dehors de celle-ci. La distinction se rapporte à une caractéristique personnelle essentielle de l'identité personnelle des membres des bandes indiennes. Les membres hors réserve d'une

discrimination. Off-reserve band members have important interests in band governance. By denying them the right to vote and participate in their band's governance, s. 77(1) perpetuates the historic disadvantage experienced by off-reserve band members. The complete denial of that right treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off the reserve. Section 77(1) reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality. The conclusion that discrimination exists at the third step of the *Law* test does not depend on the composition of the off-reserve band members group, its relative homogeneity or the particular historical discrimination it may have suffered. It is the present situation of the group relative to that of the comparator group, on-reserve band members, that is relevant.

No case has been made for the application of s. 25 of the *Charter*. Furthermore, the infringement is not justified under s. 1 of the *Charter*. While the restriction on voting in s. 77(1) is rationally connected to the aim of the legislation, which is to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council, s. 77(1) does not minimally impair the s. 15 rights. Even if it is accepted that some distinction may be justified in order to protect legitimate interests of band members living on the reserve, it has not been demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through the democratic process of elections is necessary. As an appropriate remedy, the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* are declared to be inconsistent with s. 15(1) of the *Charter* but the implementation of the declaration of invalidity is suspended for 18 months. No constitutional exemption is granted to the Batchewana Band during the period of suspension because, in the particular circumstances of this case, it would appear to be preferable to develop an electoral

bande autochtone ne peuvent devenir des membres habitant la réserve qu'à un prix considérable, si tant est qu'ils le peuvent. La situation des membres hors réserve d'une bande autochtone est, en conséquence, unique et immuable. En dernier lieu, lorsqu'on applique les facteurs pertinents énoncés dans *Law*, la distinction reprochée constitue de la discrimination. Les membres hors réserve d'une bande autochtone ont des intérêts importants à faire valoir en ce qui concerne l'administration de la bande. En les privant de leur droit de voter et de participer à l'administration de leur bande, le par. 77(1) perpétue le désavantage historique vécu par les membres hors réserve des bandes indiennes. La privation complète de ce droit a pour effet de les traiter comme des individus moins dignes de reconnaissance et n'ayant pas droit aux mêmes avantages et ce, non pas parce que leur situation justifie ce traitement, mais uniquement parce qu'ils vivent à l'extérieur de la réserve. Le paragraphe 77(1) touche à l'identité culturelle des Autochtones hors réserve par l'effet de stéréotypes. Cette situation soulève l'application de l'aspect dignité de l'analyse fondée sur l'art. 15 et entraîne le déni du droit à l'égalité réelle. À la troisième étape de l'analyse établie dans l'arrêt *Law*, la conclusion qu'il y a discrimination ne dépend pas de la composition du groupe des membres hors réserve des bandes indiennes, de sa relative homogénéité ou de la discrimination particulière dont il a pu faire l'objet dans le passé. C'est la situation actuelle du groupe par rapport à celle du groupe témoin qui est pertinente.

On n'a pas démontré l'application de l'art. 25 de la *Charte*. En outre, l'atteinte n'est pas justifiée au regard de l'article premier de la *Charte*. Bien que la restriction du droit de vote prévue au par. 77(1) ait un lien rationnel avec l'objectif de la loi, qui est de donner voix au chapitre, en ce qui concerne les affaires de la réserve, seulement aux personnes les plus directement touchées par les décisions du conseil de la bande, le par. 77(1) ne porte pas le moins possible atteinte aux droits garantis par l'art. 15. Même en admettant qu'une certaine distinction puisse être justifiée pour protéger des intérêts légitimes des membres des bandes indiennes qui vivent dans les réserves, il n'a pas été démontré qu'il est nécessaire de nier complètement aux membres hors réserve de ces bandes le droit de participer aux affaires de leur bande respective par le processus démocratique des élections. À titre de réparation convenable, les mots «et réside ordinairement sur la réserve» employés au par. 77(1) de la *Loi sur les Indiens* sont déclarés incompatibles avec le par. 15(1) de la *Charte*, mais la prise d'effet de cette déclaration d'invalidité est suspendue pour 18 mois. Aucune exemption constitutionnelle n'est

process that will balance the rights of off-reserve and on-reserve band members.

Per L'Heureux-Dubé, Gonthier, Iacobucci and Binnie JJ.: The framework for a s. 15(1) analysis was set out in *Law*. At all three stages, the focus of the inquiry is purposive and contextual. A court considering a discrimination claim must examine the legislative, historical, and social context of the distinction, the reality and experiences of the individuals affected by it, and the purposes of s. 15(1). In this case, s. 77(1) infringes the right to equality without discrimination of the off-reserve members of bands affected by it.

The first stage of the s. 15(1) inquiry is satisfied. Section 77(1) of the *Indian Act* draws a distinction between band members who live on-reserve and those who live off-reserve, by excluding the latter from the definition of "elector" within the band. This constitutes differential treatment.

The second stage of inquiry is also met. The differential treatment is based on the status of holding membership in an *Indian Act* band, but living off that band's reserve. The fundamental consideration at the second stage, if the ground is not enumerated or already recognized as analogous, is whether recognition of the basis of differential treatment as an analogous ground would further the purposes of s. 15(1). The analysis at the analogous grounds stage involves considering whether differential treatment of those defined by that characteristic or combination of traits has the potential to violate human dignity in the sense underlying s. 15(1). Various contextual factors may demonstrate discriminatory potential. If the indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area. The second stage must be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect, and to reflect changing

accordée à la bande de Batchewana pendant la durée de la suspension de la prise d'effet, parce que, eu égard aux circonstances particulières du présent cas, il semble préférable d'élaborer un système électoral qui mettra en équilibre les droits des membres vivant hors des réserves et ceux des membres qui y résident.

Les juges L'Heureux-Dubé, Gonthier, Iacobucci et Binnie: Le cadre de l'analyse fondée sur le par. 15(1) a été élaboré dans *Law*. À chacune des trois étapes, l'examen est axé sur l'objet et sur le contexte. Le tribunal qui est saisi d'une allégation de discrimination doit examiner le contexte législatif, historique et social de la distinction en cause, la réalité et l'expérience vécues par les personnes touchées par cette distinction, ainsi que les objets du par. 15(1). Dans la présente affaire, le par. 77(1) porte atteinte au droit à l'égalité, sans discrimination, des membres hors réserve des bandes visées par cette disposition.

La première étape de l'analyse fondée sur le par. 15(1) est franchie. Le paragraphe 77(1) de la *Loi sur les Indiens* établit une distinction entre les membres des bandes qui vivent dans les réserves et ceux qui vivent en dehors de celles-ci, en excluant ces derniers de la définition d'«électeur» pour les élections de la bande. Cette distinction constitue une différence de traitement.

La deuxième étape de l'analyse est également franchie. La différence de traitement est celle à laquelle sont soumises les personnes qui ont la qualité de membres d'une bande au sens de la *Loi sur les Indiens*, mais qui vivent en dehors de la réserve de cette bande. Si l'on n'est pas en présence d'un motif énuméré ou d'un motif analogue déjà reconnu, la considération fondamentale à la deuxième étape est la question de savoir si la reconnaissance du fondement de la différence de traitement comme motif analogue favoriserait la réalisation des objets du par. 15(1). Dans le cadre de l'analyse à l'étape des motifs analogues, il faut se demander si la différence de traitement à laquelle sont soumises les personnes définies par la caractéristique ou combinaison de caractéristiques est susceptible de porter atteinte au droit à la dignité humaine qui sous-tend le par. 15(1). Divers facteurs contextuels sont susceptibles de démontrer l'existence d'une source de discrimination potentielle. Si certains indices de l'existence d'un motif analogue ne sont pas présents de façon générale, au sein d'un certain groupe de la société canadienne, ils peuvent néanmoins l'être dans un contexte social ou législatif différent, à l'intérieur d'un groupe différent de la société canadienne, ou dans une région donnée. La deuxième étape doit être suffisamment souple pour tenir compte des stéréotypes, des préjugés et des dénis de la dignité humaine

social phenomena or new or different forms of stereotyping or prejudice.

Off-reserve band member status should be recognized as an analogous ground. From the perspective of off-reserve band members, the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental. Also critical is the fact that band members living off-reserve have generally experienced disadvantage and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act*'s rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost.

At the third stage, the appropriate focus is on how the particular differential treatment impacts upon the people affected by it. The perspective that must be adopted is subjective and objective. All band members affected by this legislation, whether on-reserve or off-reserve, have been affected by the legacy of stereotyping and prejudice against Aboriginal peoples. When analysing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. Thus, in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men.

A contextual view of the people affected and the differential treatment in question leads to the conclusion that this legislative distinction conflicts with the

et de l'égalité de valeur des individus dont peuvent être victimes de certaines façons des groupes précis, ainsi que du fait que des caractéristiques personnelles peuvent se chevaucher ou s'entrecroiser, et pour refléter soit l'évolution des phénomènes sociaux soit l'apparition de nouveaux stéréotypes ou préjugés ou la manifestation, sous des formes différentes, de ceux qui existent déjà.

La qualité de membre hors réserve d'une bande indienne devrait être reconnue comme un motif analogue. Du point de vue des membres hors réserve des bandes indiennes, la décision de vivre dans la réserve ou à l'extérieur de celle-ci, si ce choix leur est ouvert, est importante pour leur identité et leur personnalité et revêt donc un caractère fondamental. Constitue également un facteur crucial, le fait que les membres hors réserve des bandes indiennes ont généralement souffert de désavantages et de préjugés, et qu'ils font partie d'une «minorité discrète et isolée», définie par la race et le lieu de résidence. En outre, en raison du manque de débouchés et de logements qui sévit dans de nombreuses réserves et du fait que, auparavant, la *Loi sur les Indiens* retirait à diverses catégories de membres la qualité de membre d'une bande indienne, les personnes qui vivent à l'extérieur de la réserve n'ont bien souvent pas eu le choix à cet égard ou, si elles l'ont eu, elles n'ont pris leur décision qu'à contrecœur ou qu'à un prix très élevé sur le plan personnel.

À la troisième étape, il convient de mettre l'accent sur l'effet qu'a la différence de traitement particulière sur les personnes touchées. Il faut adopter un point de vue subjectif et objectif. Tous les membres de la bande touchés par cette mesure législative, qu'ils résident ou non dans les réserves, subissent les effets de l'héritage de stéréotypes et préjugés visant les peuples autochtones. Dans l'analyse d'une demande mettant en cause des intérêts potentiellement opposés de groupes minoritaires, il faut être particulièrement sensible à leurs réalités et à leurs expériences, ainsi qu'à leurs valeurs, à leur histoire et à leur identité. Ainsi, en ce qui concerne les droits à l'égalité qui touchent les peuples et les communautés autochtones, il faut évaluer la mesure législative contestée en accordant une attention spéciale aux droits des peuples autochtones, à la protection des droits ancestraux ou issus de traités garantis par la Constitution, et en faisant montre de respect et de considération à l'égard de la culture de tous les autochtones — hommes et femmes — et de leur attachement à cette culture.

L'analyse contextuelle des personnes touchées et de la différence de traitement en question amène à conclure que la distinction établie par la loi est incompatible avec

purposes of s. 15(1). Band members living off-reserve form part of a "discrete and insular minority", defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in Canadian and Aboriginal society. They experience stereotyping and disadvantage in particular ways compared to those living on-reserve. Aboriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race, are particularly affected by differential treatment of off-reserve band members.

Second, the differential treatment does not correspond with the needs, characteristics or circumstances of the claimants in a manner which respects and values their dignity and difference. The powers conferred by the *Indian Act* to the band council affect interests and needs that are shared by band members living on and off the reserve.

Third, the interests affected are fundamental, and have important societal significance from the perspective of those affected. The functions and powers of the band council affect their financial interests, the ability to return and live on the reserve, services that may be important to them, and their cultural interests. The interests affected are also significant because of the ways in which, in the past, ties between band members and the band or reserve have been involuntarily or reluctantly severed. Those affected or their parents may have left the reserve for many reasons that do not signal a lack of interest in the reserve given historical circumstances such as an often inadequate land base, a serious lack of economic opportunities and housing, and the operation of past Indian status and band membership rules imposed by Parliament. This history helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members, especially for those who are now living away from the reserve, in part, because of these policies. This analysis does not suggest that any distinction between on-reserve and off-reserve band members would conflict with the purposes of s. 15(1). The principles of substantive equality do not require that non-residents have identical voting rights to residents, but rather a system that gives non-residents

les objectifs du par. 15(1). Les membres hors réserve des bandes indiennes font partie d'une «minorité discrète et isolée», qui est définie tant par sa race que par son lieu de résidence, qui est vulnérable et qui, à l'occasion, ne s'est pas vu accorder l'égalité de respect ou de considération par le gouvernement ou par d'autres personnes au sein des sociétés canadienne et autochtone. Ils font l'objet de stéréotypes et souffrent de désavantages particuliers comparativement aux membres habitant les réserves. Les femmes autochtones, que l'on peut dire doublement défavorisées en raison de leur sexe et de leur race, sont particulièrement touchées par la différence de traitement visant les membres hors réserve des bandes indiennes.

Deuxièmement, la différence de traitement ne correspond ni aux besoins, ni aux caractéristiques ni à la situation des demandeurs d'une manière qui respecte et valorise leur dignité et leur différence. Les pouvoirs conférés par la *Loi sur les Indiens* aux conseils de bande ont une incidence sur des droits et des besoins que partagent les membres qui habitent les réserves et ceux qui vivent à l'extérieur de celles-ci.

Troisièmement, les droits touchés sont fondamentaux et, du point de vue des personnes touchées, ils revêtent de l'importance sur le plan social. Les fonctions et pouvoirs du conseil de bande ont une incidence sur leurs droits économiques, leur capacité de revenir vivre dans la réserve, des services qui peuvent être importants pour eux, et leurs droits culturels. Les droits touchés sont également importants en raison des diverses façons par lesquelles les liens qui unissaient des membres d'une bande à celle-ci ou à la réserve ont, volontairement ou à contrecœur, été rompus dans le passé. Il est possible que les personnes touchées ou leurs parents aient quitté la réserve pour des raisons qui ne témoignent pas d'un manque d'intérêt envers la réserve, compte tenu des diverses circonstances historiques, telles des assises territoriales souvent insuffisantes, de graves pénuries de logement et de possibilités de développement économique et l'application des anciennes règles imposées par le Parlement qui régissaient le statut Indien et l'appartenance aux bandes. Cet historique aide à démontrer pourquoi le droit d'éprouver et de maintenir un sentiment d'appartenance à leur bande, libre de tout obstacle imposé par le Parlement, est particulièrement important pour tous les membres des bandes, spécialement pour ceux qui, aujourd'hui, vivent en dehors des réserves, en partie à cause de ces politiques. Cette analyse n'indique pas que toute distinction entre les membres hors réserve des bandes indiennes et les membres habitant les réserves serait incompatible avec les objectifs visés par le par. 15(1). Les principes de l'égalité réelle ne

meaningful and effective participation in the voting regime of the band.

The infringement of s. 15(1) is not justified under s. 1 of the *Charter*. The objective of the restriction of voting rights to band members ordinarily resident on the reserve is to ensure that those with the most immediate and direct connection with the reserve have a special ability to control its future. This objective is pressing and substantial but the restriction fails to meet the proportionality test. While restricting the vote to those living on the reserve is rationally connected to Parliament's objective, a complete exclusion of non-residents from the right to vote, does not constitute a minimal impairment of these rights. The appellants have not shown why other solutions that would not violate s. 15(1) could not accomplish the objective.

In determining the appropriate remedy, the Court must be guided by the principles of respect for the purposes and values of the *Charter*, and respect for the role of the legislature. The finding of invalidity relates to the legislation as it applies to all bands, and, in principle, there is no reason that the remedy should be confined to the Batchewana Band. The fact that other bands may be able to demonstrate an Aboriginal right to control voting does not justify confining the remedy to the Batchewana Band. The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors governing the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur. Constitutional remedies should encourage the government to take into account the interests, and views, of minorities. The appropriate remedy is a declaration that the words "and is ordinarily resident on the reserve" in s. 77(1) are invalid. The effect of this declaration should be suspended for 18 months to give Parliament the time necessary to carry out extensive consultations and respond to the needs of the different groups affected. While, in general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of the ruling, even if the effect of the declaration is suspended, this is one of the exceptional cases where immediate relief should not be given to those who brought the action. If Parliament chooses either not to act, or to change the legislation to conform with this ruling, the respondents will receive a remedy after the period of suspension expires or when the new legislation comes

demandent pas que les non-résidents jouissent exactement des mêmes droits de vote que les résidents, mais plutôt un système qui accorderait aux non-résidents une participation concrète et efficace au régime électoral de la bande.

L'atteinte au par. 15(1) n'est pas justifiée au regard de l'article premier de la *Charte*. L'objectif recherché par la restriction du droit de vote aux membres des bandes qui résident ordinairement dans la réserve est de faire en sorte que ceux qui possèdent les liens les plus directs et les plus immédiats avec la réserve soient habilités de façon particulière à décider de son avenir. Il s'agit d'un objectif urgent et réel, mais la restriction ne respecte pas le critère de la proportionnalité. Bien que la restriction du droit de vote aux résidents de la réserve ait un lien rationnel avec l'objectif du Parlement, le fait de priver complètement les non-résidents de leur droit de vote ne constitue pas une atteinte minimale à ces droits. Les appelantes n'ont pas établi en quoi d'autres solutions qui n'auraient pas pour effet de porter atteinte au par. 15(1) ne permettraient pas de réaliser cet objectif.

Dans la détermination de la réparation convenable, la Cour doit suivre le principe du respect des objectifs visés par la *Charte* et des valeurs qu'elle exprime, ainsi que le principe du respect du rôle du législateur. La conclusion d'invalidité vise la mesure législative dans son application à toutes les bandes, et il n'y a en principe aucune raison de limiter la réparation à la bande de Batchewana. Le fait que d'autres bandes pourraient être en mesure de démontrer l'existence d'un droit ancestral les habilitant à décider de leur procédure de scrutin ne justifie pas de limiter l'application de la réparation à la bande de Batchewana. Le principe de la démocratie sous-tend la Constitution et la *Charte*, et il est l'un des facteurs importants guidant les tribunaux dans l'exercice de leur pouvoir discrétionnaire de réparation. Il encourage l'élaboration de réparations permettant ce processus démocratique de consultation et de dialogue. Les réparations constitutionnelles doivent encourager le gouvernement à tenir compte de l'opinion des minorités et de leurs intérêts. La réparation convenable consiste à déclarer invalides les mots «et réside ordinairement sur la réserve» au par. 77(1). L'effet de cette déclaration devrait être suspendu pour 18 mois pour donner au Parlement le temps nécessaire pour tenir de vastes consultations et répondre aux besoins des différents groupes touchés. Bien que, en général, les plaideurs qui ont présenté une contestation fondée sur la *Charte* doivent profiter des avantages immédiats de la décision, même si la prise d'effet de la déclaration est suspendue, la présente affaire est l'un de ces cas exceptionnels où une réparation immédiate ne devrait pas être accordée à ceux qui

into effect. In this case, there are strong administrative reasons not to grant immediate relief to the members of the Batchewana Band.

Section 25 of the *Charter* is triggered when Aboriginal or treaty rights under s. 35 of the *Constitution Act, 1982* are in question, or when the relief requested under a *Charter* challenge could abrogate or derogate from "other rights or freedoms that pertain to the aboriginal peoples of Canada". This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the "other rights or freedoms" included in s. 25. Because it has not been shown that s. 25 of the *Charter* applies to this case, and argument on this question was extremely limited, it would be inappropriate to articulate a general approach to s. 25.

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By L'Heureux-Dubé J.

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Benner v. Canada (Secretary of State)*, [1997] 3 S.C.R. 389; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *M. v. H.*, [1999] 2 S.C.R. 3; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877;

ont intenté l'action. Si le Parlement décide de ne pas agir ou encore de modifier la loi pour se conformer à la présente décision, les intimés obtiendront une réparation après l'expiration du délai de suspension ou lorsque les nouvelles mesures législatives entreront en vigueur. Il existe en l'espèce de solides raisons administratives justifiant de ne pas accorder de réparation immédiate aux membres de la bande de Batchewana.

L'article 25 de la *Charte* s'applique lorsque des droits ancestraux ou issus de traités garantis par l'art. 35 de la *Loi constitutionnelle de 1982* sont en litige, ou quand la réparation demandée dans le cadre d'une contestation fondée sur la *Charte* pourrait porter atteinte à d'«autres» droits ou libertés des peuples autochtones du Canada. Ce passage montre que les droits visés à l'art. 25 sont plus étendus que ceux visés à l'art. 35, et qu'il peut s'agir de droits d'origine législative. Cependant, le seul fait qu'une mesure législative concerne les autochtones ne la fait pas entrer dans le champ d'application des «autres» droits ou libertés visés à l'art. 25. Étant donné qu'on n'a pas fait la preuve que l'art. 25 de la *Charte* s'applique à la présente affaire, et que l'argumentation sur cette question a été extrêmement limitée, il ne conviendrait pas d'énoncer une approche générale à l'égard de l'art. 25.

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Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated November 1998, release 5).

APPEAL from a judgment of the Federal Court of Appeal, [1997] 1 F.C. 689 (*sub nom. Batchewana Indian Band (Non-resident members v. Batchewana Indian Band*), 206 N.R. 85, 142 D.L.R. (4th) 122, [1997] 3 C.N.L.R. 21, [1996] F.C.J. No. 1486 (QL), affirming a judgment of the Federal Court, Trial Division, [1994] 1 F.C. 394, 67 F.T.R. 81, 107 D.L.R. (4th) 582, 18 C.R.R. (2d) 354, [1993] F.C.J. No. 896 (QL), but modifying the remedy granted. Appeal dismissed but remedy modified.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1997] 1 C.F. 689 (*sub nom. Bande indienne de Batchewana (membres non résidents) c. Bande indienne de Batchewana*), 206 N.R. 85, 142 D.L.R. (4th) 122, [1997] 3 C.N.L.R. 21, [1996] A.C.F. nº 1486 (QL), qui a confirmé une décision de la Cour fédérale, Section de première instance, [1994] 1 C.F. 394, 67 F.T.R. 81, 107 D.L.R. (4th) 582, 18 C.R.R. (2d) 354, [1993] A.C.F. nº 896 (QL), mais modifié la réparation accordée. Pourvoi rejeté mais réparation modifiée.

John B. Edmond, for the appellant Her Majesty the Queen.

John B. Edmond, pour l'appelante Sa Majesté la Reine.

William B. Henderson and *Derek T. Ground*, for the appellant the Batchewana Indian Band.

William B. Henderson et *Derek T. Ground*, pour l'appelante la bande indienne de Batchewana.

Gary E. Corbière and *Michael Feindel*, for the respondents.

Gary E. Corbière et *Michael Feindel*, pour les intimés.

Kent Roach and *Kimberly R. Murray*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Mervin C. Phillips and *Robert A. Milen*, for the intervener the Congress of Aboriginal Peoples.

Philip P. Healey, *Martin J. Henderson* and *Catherine M. Twinn*, for the intervener the Lesser Slave Lake Indian Regional Council.

Mary Eberts and *Lucy McSweeney*, for the intervener the Native Women's Association of Canada.

Sharon D. McIvor and *Teressa Nahanee*, for the intervener the United Native Nations Society of British Columbia.

The judgment of Lamer C.J. and Cory, McLachlin, Major and Bastarache JJ. was delivered by

MCLACHLIN AND BASTARACHE JJ. — We have read the reasons for judgment of Justice L'Heureux-Dubé. We believe that this case can be resolved on simpler grounds. We will therefore briefly outline the reasoning upon which we base our own decision.

L'Heureux-Dubé J. has set out in detail the facts in this case as well as a description of its judicial history. We adopt this factual background.

The narrow issue raised in this appeal is whether the exclusion of off-reserve members of an Indian band from the right to vote in band elections pursuant to s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, is inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*. There is no need for us to describe the steps applicable to a s. 15(1) analysis. They have been affirmed with great precision by Iacobucci J. in *Law v. Canada (Minister*

Kent Roach et *Kimberly R. Murray*, pour l'intervenant Aboriginal Legal Services of Toronto Inc.

Mervin C. Phillips et *Robert A. Milen*, pour l'intervenant le Congrès des peuples autochtones.

Philip P. Healey, *Martin J. Henderson* et *Catherine M. Twinn*, pour l'intervenant Lesser Slave Lake Indian Regional Council.

Mary Eberts et *Lucy McSweeney*, pour l'intervenante l'Association des femmes autochtones du Canada.

Sharon D. McIvor et *Teressa Nahanee*, pour l'intervenante United Native Nations Society of British Columbia.

Version française du jugement du juge en chef Lamer et des juges Cory, McLachlin, Major et Bastarache rendu par

LES JUGES MCLACHLIN ET BASTARACHE — Nous avons lu les motifs du jugement du juge L'Heureux-Dubé. Nous estimons que le présent pourvoi peut être tranché sur le fondement de motifs beaucoup plus limités. Nous allons donc présenter brièvement le raisonnement sur lequel nous appuyons notre décision. 1

Le juge L'Heureux-Dubé a exposé en détail les faits de la présente affaire ainsi que l'historique des procédures. Nous faisons nôtre cet exposé factuel. 2

La question étroite que soulève le présent pourvoi est celle de savoir si le fait de dénier aux membres des bandes indiennes résidant hors des réserves le droit de voter aux élections des bandes conformément au par. 77(1) de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, est incompatible avec le par. 15(1) de la *Charte canadienne des droits et libertés*. Il n'est pas nécessaire que nous décrivions les étapes de l'analyse fondée sur l'art. 15. Elles ont été énoncées avec beaucoup de précision par le juge Iacobucci dans *Law c.* 3

of Employment and Immigration), [1999] 1 S.C.R. 497.

4 The first step is to determine whether the impugned law makes a distinction that denies equal benefit or imposes an unequal burden. The *Indian Act*'s exclusion of off-reserve band members from voting privileges on band governance satisfies this requirement.

5 The next step is to determine whether the distinction is discriminatory. The first inquiry is whether the distinction is made on the basis of an enumerated ground or a ground analogous to it. The answer to this question will be found in considering the general purpose of s. 15(1), i.e. to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration.

6 We agree with L'Heureux-Dubé J. that Aboriginality-residence (off-reserve band member status) constitutes a ground of discrimination analogous to the enumerated grounds. However, we wish to comment on two matters: (1) the suggestion by some that the same ground may or may not be analogous depending on the circumstances; and (2) the criteria that identify an analogous ground.

7 The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. Since the enumerated grounds are only indicators of suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory; if this were otherwise, it

Canada (Ministre de l'Emploi et de l'Immigration), [1999] 1 R.C.S. 497.

La première étape consiste à déterminer si le texte de loi contesté établit une distinction qui dénie l'égalité de bénéfice de la loi ou impose un fardeau inégal. Le fait que la *Loi sur les Indiens* dénie aux membres hors réserve des bandes indiennes le droit de voter à l'égard de l'administration de leur bande respective respecte cette exigence.

L'étape suivante consiste à déterminer si la distinction est discriminatoire. La première question à laquelle il faut répondre est celle de savoir si la distinction contestée est fondée sur un motif énuméré ou analogue. Pour répondre à cette question, il faut tenir compte de l'objectif général du par. 15(1), qui est, d'une part, d'empêcher que l'on porte atteinte à la dignité humaine en imposant à des individus un désavantage fondé sur des stéréotypes et des préjugés sociaux, et, d'autre part, de contribuer à l'établissement d'une société où tous les individus sont jugés dignes de respect et de considération.

Nous sommes d'accord avec le juge L'Heureux-Dubé pour dire que l'autochtonité-lieu de résidence (la qualité de membre hors réserve d'une bande indienne) est un motif de discrimination analogue aux motifs énumérés. Toutefois, nous désirons faire des commentaires sur deux points: (1) la suggestion faite par certains qu'un même motif peut, selon les circonstances, être analogue ou non; (2) les critères d'identification des motifs analogues.

Les motifs énumérés sont des indicateurs législatifs de l'existence de motifs suspects, associés à des processus décisionnels discriminatoires et fondés sur des stéréotypes. Ils sont l'expression, dans la loi, d'une caractéristique générale, et non une conclusion, fondée sur le contexte et les faits pertinents, relativement à l'existence ou à l'absence de discrimination dans une affaire donnée. En tant que tels, les motifs énumérés doivent être distingués d'une conclusion portant qu'il y a discrimination dans une affaire donnée. Puisque les motifs énumérés ne constituent que des indicateurs

would be unnecessary to proceed to the separate examination of discrimination at the third stage of our analysis discussed in *Law*, *supra*, *per* Iacobucci J.

The same applies to the grounds recognized by the courts as "analogous" to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.

We therefore disagree with the view that a marker of discrimination can change from case to case, depending on the government action challenged. It seems to us that it is not the ground that varies from case to case, but the determination of whether a distinction on the basis of a constitutionally cognizable ground is discriminatory. Sex will always be a ground, although sex-based legislative distinctions may not always be discriminatory. To be sure, *R. v. Turpin*, [1989] 1 S.C.R. 1296, suggested that residence might be an analogous ground in certain contexts. But in view of the synthesis of previous cases suggested in *Law*, *supra*, it is more likely that today the same result, dismissal of the claim, would be achieved either by finding

de l'existence de motifs de distinction suspects, il s'ensuit que les décisions fondées sur ces motifs ne sont pas toujours discriminatoires; s'il en était autrement, il serait inutile de procéder à l'examen distinct de la discrimination à la troisième étape de l'analyse exposée par notre Cour dans l'arrêt *Law*, précité, motifs du juge Iacobucci.

8 La même observation s'applique à l'égard des motifs qui ont été reconnus par notre Cour comme «analogues» à ceux énumérés à l'art. 15. Affirmer qu'un motif de distinction est un motif analogue ne fait qu'indiquer qu'un certain processus décisionnel est suspect parce qu'il aboutit souvent à la discrimination et au déni du droit à l'égalité réelle. Tout comme les distinctions fondées sur des motifs énumérés, celles qui reposent sur des motifs analogues peuvent fort bien ne pas être discriminatoires. Toutefois, cela ne veut pas dire pour autant que ces motifs ne sont pas analogues ou qu'ils ne le sont que dans certaines circonstances. De la même manière que nous ne disons pas d'un motif énuméré qu'il existe dans une situation et non dans une autre, nous ne devrions pas dire d'un motif analogue qu'il existe dans certaines circonstances et non dans d'autres. Les motifs énumérés et les motifs analogues constituent des indicateurs permanents de l'existence d'un processus décisionnel suspect ou de discrimination potentielle. La variable est la réponse à la question de savoir s'ils sont source de discrimination dans les circonstances particulières d'une affaire donnée.

9 En conséquence, nous ne partageons pas l'opinion selon laquelle un motif donné peut constituer un indicateur de discrimination dans une affaire mais ne pas l'être dans une autre, selon la mesure gouvernementale qui est contestée. Il nous semble que ce n'est pas le motif en tant que tel qui varie d'une affaire à l'autre, mais plutôt la réponse à la question de savoir si une distinction fondée sur un motif susceptible de reconnaissance sur le plan constitutionnel est discriminatoire. Le sexe sera toujours un motif, même si les distinctions fondées sur ce motif dans les lois ne sont pas toujours discriminatoires. Certes, il a été suggéré dans l'arrêt *R. c. Turpin*, [1989] 1 R.C.S. 1296, que le lieu de résidence pourrait constituer un motif analogue

no analogous ground or no discrimination in fact going to essential human dignity.

dans certains cas. Toutefois, à la lumière de la synthèse de la jurisprudence proposée dans l'arrêt *Law*, précité, il est vraisemblable qu'on arriverait aujourd'hui au même résultat — le rejet de la demande — en concluant soit à l'absence de motif analogue, soit à l'absence de discrimination portant atteinte dans les faits à la dignité humaine essentielle.

10 If it is the intention of L'Heureux-Dubé J.'s reasons to affirm contextual dependency of the enumerated and analogous grounds, we must respectfully disagree. If "Aboriginality-residence" is to be an analogous ground (and we agree with L'Heureux-Dubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme. This established, the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case.

Si les motifs du juge L'Heureux-Dubé visent à faire dépendre du contexte l'existence même des motifs énumérés et des motifs analogues, nous devons, avec égards, exprimer notre désaccord. Si le motif de l'«autochtonité-lieu de résidence» doit constituer un motif analogue (et nous convenons avec le juge L'Heureux-Dubé que ce devrait être le cas), il doit alors constituer un indicateur permanent de discrimination législative potentielle, que la contestation vise un crédit d'impôt gouvernemental, un droit de vote ou un régime de pension. Ceci étant établi, nous passons maintenant à la troisième étape de l'analyse, soit la question de savoir si, de par son objet ou ses effets, la distinction est source de discrimination à la lumière des faits de l'espèce.

11 Maintaining the distinction in *Law*, *supra*, between the enumerated or analogous ground analysis and the third-stage contextual discrimination analysis, offers several advantages. Both stages are concerned with discrimination and the violation of the presumption of the equal dignity and worth of every human being. But they approach it from different perspectives. The analogous grounds serve as jurisprudential markers for suspect distinctions. They function conceptually to identify the sorts of claims that properly fall under s. 15. By screening out other cases, they avoid trivializing the s. 15 equality guarantee and promote the efficient use of judicial resources. And they permit the development over time of a conceptual jurisprudence of the sorts of distinctions that fall under the s. 15 guarantee, without foreclosing new cases of discrimination. A distinction on an enumerated or analogous ground established, the contextual and fact-specific inquiry proceeds to

Il y a plusieurs avantages à maintenir la distinction qui a été établie dans l'arrêt *Law*, précité, entre l'analyse relative à l'existence d'un motif énuméré ou analogue et la troisième étape, savoir l'analyse de la présence de discrimination eu égard au contexte. Ces deux étapes concernent la discrimination et la violation de la présomption d'égalité de dignité et de valeur de chaque être humain, qu'elles abordent toutefois à partir de points de vue différents. Les motifs analogues servent d'indicateurs jurisprudentiels de l'existence de distinctions suspectes. Ils permettent d'identifier, sur le plan conceptuel, le genre de demandes visées par l'art. 15. En écartant les autres affaires, ils évitent la banalisation de la garantie d'égalité énoncée à l'art. 15 et ils contribuent à l'utilisation efficiente des ressources des tribunaux. Ils permettent aussi l'élaboration, au fil du temps, d'une jurisprudence qui conceptualise les types de distinctions relevant de la garantie de l'art. 15, sans faire obstacle à la reconnaissance de nouveaux cas de discrimination. Une fois établie la présence d'une distinction

whether the distinction amounts to discrimination in the context of the particular case.

Our second concern relates to the manner in which a new analogous ground may be identified. In our view, conflation of the second and third stages of the *Law* framework is to be avoided. To be sure, *Law* is meant to provide a set of guidelines and not a formalistic straitjacket, but the second and third stages are unquestionably distinct: the former asks whether the distinction is on the basis of an enumerated or analogous ground, the latter whether that distinction on the facts of the case affronts s. 15. Affirmative answers to both inquiries are a precondition to establishing a constitutional claim.

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

fondée sur un motif énuméré ou analogue, le tribunal amorce l'examen du contexte et des faits propres à l'affaire dont il est saisi pour déterminer si la distinction constitue de la discrimination dans ce cas particulier.

12 Notre deuxième préoccupation concerne la manière d'identifier les nouveaux motifs analogues. À notre avis, il faut éviter de fusionner les deuxième et troisième étapes du cadre établi dans *Law*. Certes, cet arrêt vise à établir un ensemble de lignes directrices, et non un carcan formaliste, mais il n'en demeure pas moins que la deuxième et la troisième étape sont incontestablement distinctes: à la deuxième étape, le tribunal détermine si la distinction est fondée sur un motif énuméré ou analogue, alors qu'à la troisième il se demande si, à la lumière des faits de l'affaire, cette distinction contrevient à l'art. 15. Une réponse affirmative à ces deux questions est un préalable à l'établissement du bien-fondé d'une demande sur le plan constitutionnel.

13 En conséquence, quels sont les critères qui permettent de qualifier d'analogue un motif de distinction? La réponse est évidente, il s'agit de chercher des motifs de distinction analogues ou semblables aux motifs énumérés à l'art. 15 — la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. Il nous semble que le point commun entre ces motifs est le fait qu'ils sont souvent à la base de décisions stéréotypées, fondées non pas sur le mérite de l'individu mais plutôt sur une caractéristique personnelle qui est soit immuable, soit modifiable uniquement à un prix inacceptable du point de vue de l'identité personnelle. Ce fait tend à indiquer que l'objet de l'identification de motifs analogues à la deuxième étape de l'analyse établie dans *Law* est de découvrir des motifs fondés sur des caractéristiques qu'il nous est impossible de changer ou que le gouvernement ne peut légitimement s'attendre que nous changions pour avoir droit à l'égalité de traitement garantie par la loi. Autrement dit, l'art. 15 vise le déni du droit à l'égalité de traitement pour des motifs qui sont immuables dans les faits, par exemple la race, ou qui sont considérés immuables, par exemple la

historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

14 L'Heureux-Dubé J. ultimately concludes that "Aboriginality-residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is an analogous ground. We agree. L'Heureux-Dubé J.'s discussion makes clear that the distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all.

15 Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender.

religion. D'autres facteurs, que la jurisprudence a rattachés aux motifs énumérés et analogues, tel le fait que la décision produise des effets préjudiciables à une minorité discrète et isolée ou à un groupe qui a historiquement fait l'objet de discrimination, peuvent être considérés comme émanant du concept central que sont les caractéristiques personnelles immuables ou considérées immuables, caractéristiques qui ont trop souvent servi d'ersatz illégitimes et avilissants de décisions fondées sur le mérite des individus.

Le juge L'Heureux-Dubé conclut, en dernière analyse, que le facteur de l'«autochtonité-lieu de résidence» constitue un motif analogue lorsqu'il se rapporte à la question de savoir si un membre d'une bande autochtone vit dans la réserve ou en dehors de celle-ci. Nous sommes d'accord avec cette conclusion. Il ressort clairement des propos du juge L'Heureux-Dubé que la distinction se rapporte à une caractéristique personnelle essentielle de l'identité personnelle des membres des bandes indiennes, caractéristique qui est considérée immuable au même titre que la religion ou la citoyenneté. Les membres hors réserve d'une bande autochtone ne peuvent devenir des membres habitant la réserve qu'à un prix considérable, si tant est qu'ils le peuvent.

Deux brefs commentaires s'imposent au sujet de ce nouveau motif analogue. Premièrement, il ne faut pas confondre qualité de membre hors réserve et lieu de résidence. Les décisions que sont appelés à prendre les Canadiens en général relativement à leur «lieu de résidence» ne sauraient être comparées aux décisions lourdes de conséquences que prennent les membres des bandes autochtones lorsqu'ils choisissent de vivre dans les réserves ou à l'extérieur de celles-ci, à supposer que ce choix soit possible. La réalité de ces personnes est unique et complexe. Par conséquent le fait de conclure, sur le plan des principes généraux, que le lieu de résidence est un motif analogue n'établit rien de nouveau. Deuxièmement, nous soulignons que le motif analogue que constitue la qualité de membre hors réserve ou l'autochtonité-lieu de résidence ne s'applique qu'à un groupe au sein de la population canadienne, tandis que l'art. 15 vise

"Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

l'ensemble de la population. Nous sommes toutefois d'avis que cela n'empêche pas ce motif d'être considéré comme un motif analogue à ceux énumérés à l'art. 15. Le fait que ce motif soit limité démographiquement n'est pas différent, par exemple, des distinctions qui sont motivées par la grossesse et qui, bien qu'elles constituent une forme différente de discrimination fondée sur le sexe, sont néanmoins fondamentalement liées à ce motif. Il peut se révéler nécessaire de reconnaître des motifs analogues «inclus» afin de pouvoir examiner utilement la discrimination à l'intérieur d'un même groupe.

Having concluded that the distinction made by the impugned law is made on an analogous ground, we come to the final step of the s. 15(1) analysis: whether the distinction at issue in this case in fact constitutes discrimination. In plain words, does the distinction undermine the presumption upon which the guarantee of equality is based — that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?

16 Après avoir conclu que la distinction établie par le texte de loi contesté repose sur un motif analogue, nous arrivons à la dernière étape de l'analyse fondée sur le par. 15(1): la question de savoir si la distinction en cause dans le présent cas constitue, dans les faits, de la discrimination. Autrement dit, la distinction mine-t-elle la présomption sur laquelle est fondée la garantie d'égalité — savoir que tous les individus sont réputés égaux, indépendamment du groupe auquel ils appartiennent?

Applying the applicable *Law* factors to this case — pre-existing disadvantage, correspondence and importance of the affected interest — we conclude that the answer to this question is yes. The impugned distinction perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance. Off-reserve band members have important interests in band governance which the distinction denies. They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve. The importance of the interest

17 Appliquant les facteurs énoncés dans *Law* qui sont pertinents en l'espèce — la pré-existence d'un désavantage ainsi que la correspondance du droit touché et son importance —, nous concluons que la réponse à cette question est affirmative. La distinction reprochée perpétue le désavantage historique vécu par les membres hors réserve des bandes indiennes en les privant de leur droit de voter et de participer à l'administration de leur bande. Ces personnes ont des intérêts importants à faire valoir en ce qui concerne l'administration de la bande, ce que la distinction les empêche de faire. Ils sont copropriétaires de l'actif de la bande. Qu'ils y vivent ou non, la réserve est leur territoire et celui de leurs enfants. En tant que membres de la bande ils sont représentés par le conseil de la bande auprès de la communauté en général, tant au sein des organisations autochtones que dans le cadre des négociations avec le gouvernement. Bien qu'il existe des sujets d'intérêt purement local qui ne touchent pas aussi directement les intérêts des membres hors réserve des bandes indiennes, la privation complète de leur droit de voter et de partici-

affected is underlined by the findings of the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1, *Looking Forward, Looking Back*, at pp. 137-91. The Royal Commission writes in vol. 4, *Perspectives and Realities*, at p. 521:

> Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.

And at p. 525:

> Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable. . . . Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

18 Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves. This engages the dignity aspect of

per à l'administration de leur bande a pour effet de les traiter comme des individus moins dignes de reconnaissance et n'ayant pas droit aux mêmes avantages et ce, non pas parce que leur situation justifie ce traitement, mais uniquement parce qu'ils vivent à l'extérieur de la réserve. L'importance du droit touché ressort des conclusions de la Commission royale sur les peuples autochtones, *Rapport de la Commission royale sur les peuples autochtones* (1996), vol. 1, *Un passé, un avenir*, aux pp. 147 à 206. La Commission royale écrit ceci dans le vol. 4, *Perspectives et réalités*, à la p. 586:

> Tout au long des audiences, les autochtones ont rappelé à la Commission qu'il est essentiel pour eux de préserver et d'enrichir leur identité culturelle quand ils vivent en milieu urbain. L'identité autochtone est l'essence de l'existence des peuples autochtones. La préservation de cette identité est donc un objectif fondamental et valorisant pour les autochtones citadins.

Et elle ajoute ce qui suit, aux pp. 589 et 590:

> De plus, les autochtones citadins associent l'identité culturelle à la notion d'assise territoriale ou de territoire ancestral. Pour nombre d'entre eux, ces deux concepts sont indissociables. [. . .] Il est important pour les autochtones citadins de pouvoir s'identifier à un lieu ancestral, en raison des rituels, des cérémonies et des traditions qui y sont associés, des gens qui y vivent, du sentiment d'appartenance, du lien avec une communauté ancestrale et de la possibilité d'accéder à la famille, à la communauté et aux anciens.

Compte tenu de tout ce qui précède, il est clair que la privation du droit de vote découlant du par. 77(1) est discriminatoire. Cette privation refuse aux membres hors réserve des bandes indiennes, sur le fondement arbitraire d'une caractéristique personnelle, le droit de participer pleinement à l'administration de leur bande respective. Elle touche à l'identité culturelle des Autochtones hors réserve par l'effet de stéréotypes. Elle présume que les Autochtones hors réserve ne sont pas intéressés à participer concrètement à la vie de leur bande ou à préserver leur identité culturelle, et qu'ils ne sont donc pas des membres de leur bande aussi méritants que les autres. L'effet, comme le message, est clair: les membres hors réserve des bandes indiennes ne sont pas aussi méritants que

the s. 15 analysis and results in the denial of substantive equality.

The conclusion that discrimination exists at the third stage of the *Law* test does not depend on the composition of the off-reserve band members group, its relative homogeneity or the particular historical discrimination it may have suffered. It is the present situation of the group relative to that of the comparator group, on-reserve band members, that is relevant. All parties have accepted that the off-reserve group comprises persons who have chosen to live off-reserve freely, persons who have been forced to leave the reserve reluctantly because of economic and social considerations, persons who have at some point been expelled then restored to band membership through Bill C-31 (*An Act to amend the Indian Act*, S.C. 1985, c. 27), and descendants of these people. It is accepted that off-reserve band members are the object of discrimination and constitute an underprivileged group. It is also accepted that many off-reserve band members were expelled from the reserves because of policies and legal provisions which were changed by Bill C-31 and can be said to have suffered double discrimination. But Aboriginals living on reserves are subject to the same discrimination. Some were affected by Bill C-31. Some left the reserve and returned. The relevant social facts in this case are those that relate to off-reserve band members as opposed to on-reserve band members. Even if all band members living off-reserve had voluntarily chosen this way of life and were not subject to discrimination in the broader Canadian society, they would still have the same cause of action. They would still suffer a detriment by being denied full participation in the affairs of the bands to which they would continue to belong while the band councils are able to affect their interests, in particular by making decisions with respect to the surrender of lands, the allocation of land to band members, the raising of funds and making of expenditures for the benefit of all band members. The effect of the legislation is to force band members to choose between living on the reserve and exercising their political rights, or

les membres qui vivent dans les réserves. Cette situation soulève l'application de l'aspect dignité de l'analyse fondée sur l'art. 15 et entraîne le déni du droit à l'égalité réelle.

19 À la troisième étape de l'analyse établie dans l'arrêt *Law*, la conclusion qu'il y a discrimination ne dépend pas de la composition du groupe des membres hors réserve des bandes indiennes, de sa relative homogénéité ou de la discrimination particulière dont il a pu faire l'objet dans le passé. C'est la situation actuelle du groupe par rapport à celle du groupe témoin qui est pertinente. Toutes les parties ont accepté que le groupe des membres hors réserve comprend des personnes qui ont librement choisi de vivre hors des réserves, des personnes qui ont dû à contrecœur les quitter pour des raisons socioéconomiques, d'autres qui, après avoir été expulsées de leur bande, ont été rétablies dans leur droit d'en être membres par le projet de loi C-31 (*Loi modifiant la Loi sur les Indiens*, S.C. 1985, ch. 27), ainsi que des descendants de ces personnes. Il est admis que les membres hors réserve des bandes indiennes sont victimes de discrimination et constituent un groupe défavorisé. Il est également admis que bien des personnes faisant partie de ce groupe ont été expulsées des réserves en raison de politiques et de dispositions législatives qui ont été modifiées par le projet de loi C-31, et qu'il est possible d'affirmer qu'elles ont été doublement victimes de discrimination. Toutefois, les Autochtones habitant les réserves sont victimes de la même discrimination. Certains ont subi les effets du projet de loi C-31. Certains ont quitté la réserve puis y sont revenus. Les faits sociaux pertinents en l'espèce sont ceux qui se rapportent aux membres hors réserve des bandes indiennes plutôt qu'aux membres de ces bandes qui habitent les réserves. Néanmoins, même si tous les membres hors réserve des bandes indiennes avaient volontairement choisi ce mode de vie et n'étaient pas victimes de discrimination dans la société canadienne en général, leur droit d'action resterait néanmoins intact. Ils continueraient d'être défavorisés du fait qu'on leur nie la possibilité de participer pleinement aux affaires de la bande à laquelle ils ne cessent d'appartenir, alors que le conseil de cette bande est en mesure d'exercer de

living off-reserve and renouncing the exercise of their political rights. The political rights in question are related to the race of the individuals affected, and to their cultural identity. As mentioned earlier, the differential treatment resulting from the legislation is discriminatory because it implies that off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society.

l'influence sur leurs intérêts, particulièrement en prenant des décisions concernant la cession des terres de la réserve ou leur répartition entre les membres de la bande, la levée de fonds et l'engagement de dépenses au profit de l'ensemble des membres de la bande. Le texte de loi en cause a pour effet de forcer les membres à choisir entre deux partis: vivre dans la réserve et exercer leurs droits politiques, ou vivre hors de la réserve et renoncer à exercer ces droits. Les droits politiques en question sont liés à la race des individus concernés ainsi qu'à leur identité culturelle. Comme il a été indiqué plus tôt, la différence de traitement résultant du texte de loi est discriminatoire parce qu'elle implique que les membres hors réserve des bandes indiennes sont des membres de rang inférieur de leur bande respective ou des personnes qui ont choisi de s'assimiler à la société majoritaire.

20 We have been asked to consider the possible application of s. 25 of the *Charter*. This section provides that rights accorded in the *Charter* must not be construed as abrogating or derogating from the rights of Aboriginals. We agree with L'Heureux-Dubé J. that given the limited argument on this issue, it would be inappropriate to articulate general principles pertaining to s. 25 in this case. Suffice it to say that a case for its application has not been made out here.

On nous a demandé d'examiner l'application possible de l'art. 25 de la *Charte*. Cet article dispose que les droits et libertés garantis par la *Charte* ne portent pas atteinte aux autres droits des Autochtones. Nous sommes d'accord avec le juge L'Heureux-Dubé pour affirmer que, compte tenu de l'argumentation limitée qui a été présentée sur ce point, il ne conviendrait pas d'énoncer, en l'espèce, des principes généraux relativement à l'art. 25. Qu'il suffise de mentionner qu'on n'a pas démontré son application dans le présent cas.

21 Having found that s. 77(1) is discriminatory, we must address the s. 1 argument of the appellants. The applicable test was recently described by Iacobucci J. in *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 182. We are satisfied that the restriction on voting is rationally connected to the aim of the legislation, which is to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council. It is admitted that although all band members are subject to some decisions of the band council, most decisions would only impact on members living on the reserve. The restriction of s. 15 rights is however not justified under the second branch of the s. 1 test; it has not been demonstrated that s. 77(1) of the *Indian Act* impairs the s. 15 rights

Ayant conclu au caractère discriminatoire du par. 77(1), nous devons maintenant examiner l'argument des appelantes fondé sur l'article premier. Le critère applicable a récemment été décrit par le juge Iacobucci dans l'arrêt *Egan c. Canada*, [1995] 2 R.C.S. 513, au par. 182. Nous sommes convaincus que la restriction du droit de vote a un lien rationnel avec l'objectif de la loi, qui est de donner voix au chapitre, en ce qui concerne les affaires de la réserve, seulement aux personnes les plus directement touchées par les décisions du conseil de la bande. Il est admis que, bien que tous les membres de la bande soient assujettis à certaines décisions du conseil de la bande, la plupart de ces décisions n'ont d'incidence que sur les membres vivant dans la réserve. La restriction des droits garantis par

minimally. Even if it is accepted that some distinction may be justified in order to protect legitimate interests of band members living on the reserve, it has not been demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through the democratic process of elections is necessary. Some parties and interveners have mentioned the possibility of a two-tiered council, of reserved seats for off-reserve members of the band, of double-majority votes on some issues. The appellants argue that there are important difficulties and costs involved in maintaining an electoral list of off-reserve band members and in setting up a system of governance balancing the rights of on-reserve and off-reserve band members. But they present no evidence of efforts deployed or schemes considered and costed, and no argument or authority in support of the conclusion that costs and administrative convenience could justify a complete denial of the constitutional right. Under these circumstances, we must conclude that the violation has not been shown to be demonstrably justified.

l'art. 15 n'est cependant pas justifiée suivant le deuxième volet du critère fondé sur l'article premier; il n'a pas été démontré que le par. 77(1) de la *Loi sur les Indiens* porte le moins possible atteinte aux droits garantis par l'art. 15. Même en admettant qu'une certaine distinction puisse être justifiée pour protéger des intérêts légitimes des membres des bandes indiennes qui vivent dans les réserves, il n'a pas été démontré qu'il est nécessaire de nier complètement aux membres hors réserve de ces bandes le droit de participer aux affaires de leur bande respective par le processus démocratique des élections. Certaines parties ainsi que des intervenants ont fait état de la possibilité d'établir des conseils à deux paliers, de réserver des sièges aux membres hors réserve des bandes ou d'instaurer des votes à double majorité sur certaines questions. Les appelantes soutiennent que le maintien d'une liste électorale sur laquelle seraient inscrits les membres hors réserve des bandes indiennes et l'établissement d'un système d'administration permettant de mettre en équilibre les droits des membres des bandes qui habitent les réserves et ceux des membres hors réserve impliquent des coûts et des difficultés considérables. Toutefois, elles ne présentent pas d'élément de preuve quant aux efforts qui auraient été déployés ou aux mécanismes qui auraient été envisagés et à leurs coûts, ni d'arguments ou de précédents au soutien de la conclusion que le déni complet du droit constitutionnel pourrait être justifié par de tels coûts et des inconvénients d'ordre administratif. Dans les circonstances, nous devons conclure qu'il n'a pas été démontré que l'atteinte peut être justifiée.

22 With regard to remedy, the Court of Appeal was of the view that it would be preferable to grant the Batchewana Band a permanent constitutional exemption rather than to declare s. 77(1) of the *Indian Act* to be unconstitutional and without effect generally. With respect, we must disagree. The remedy of constitutional exemption has been recognized in a very limited way in this Court, to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended; see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 715-17; *Rodriguez v. British*

22 Pour ce qui est de la réparation, la Cour d'appel a dit être d'avis qu'il était préférable, en l'espèce, d'accorder une exemption constitutionnelle permanente à la bande de Batchewana plutôt que de déclarer le par. 77(1) de la *Loi sur les Indiens* inconstitutionnel et inopérant de façon générale. Avec égards, nous devons exprimer notre désaccord avec cette solution. L'exemption constitutionnelle a été reconnue, mais de façon très limitée par notre Cour, comme une mesure de réparation destinée à protéger les intérêts d'une partie qui a réussi à faire déclarer inconstitutionnelle une disposition législative, lorsque la prise d'effet de la déclaration

Columbia (Attorney General), [1993] 3 S.C.R. 519, at p. 577. We do not think this is a case where a possible expansion of the constitutional exemption remedy should be considered. There is no evidence of special circumstances upon which this possibility might be raised. The evidence before the Court is that there are off-reserve members of most if not all Indian bands in Canada that are affected by s. 77(1) of the *Indian Act*, and no evidence of other rights that may be relevant in examining the effect of s. 77(1) with regard to any band other than the Batchewana Band. If another band could establish an Aboriginal right to restrict voting, as suggested by the Court of Appeal, that right would simply have precedence over the terms of the *Indian Act*; this is not a reason to restrict the declaration of invalidity to the Batchewana Band.

d'invalidité a été suspendue; voir *Schachter c. Canada*, [1992] 2 R.C.S. 679, aux pp. 715 et 717; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, à la p. 577. Nous ne croyons pas être en présence d'un cas où l'élargissement de la portée de cette réparation devrait être envisagé. Il n'y a aucune preuve de l'existence de circonstances spéciales permettant d'envisager cette possibilité. Il ressort de la preuve soumise à notre Cour que la plupart, voire la totalité des bandes au Canada comptent des membres hors réserve qui sont touchés par le par. 77(1) de la *Loi sur les Indiens*. Par ailleurs, il n'y a aucune preuve de l'existence d'autres droits susceptibles d'être pertinents dans l'examen de l'effet du par. 77(1) sur quelque autre bande que celle de Batchewana. Si une autre bande pouvait établir l'existence d'un droit ancestral l'autorisant à restreindre le droit de vote, comme l'a laissé entendre la Cour d'appel, ce droit aurait tout simplement préséance sur les dispositions de la *Loi sur les Indiens*; ce n'est pas une raison pour restreindre l'application de la déclaration d'invalidité à la bande de Batchewana.

23 Where there is inconsistency between the *Charter* and a legislative provision, s. 52 of the *Constitution Act, 1982* provides that the provision shall be rendered void to the extent of the inconsistency. We would declare the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* to be inconsistent with s. 15(1) but suspend the implementation of this declaration for 18 months. We would not grant a constitutional exemption to the Batchewana Band during the period of suspension, as would normally be done according to the rule in *Schachter*. The reason for this is that in the particular circumstances of this case, it would appear to be preferable to develop an electoral process that will balance the rights of off-reserve and on-reserve band members. We have not overlooked the possibility that legislative inaction may create new problems. Such claims will fall to be dealt with on their merits should they arise.

En cas d'incompatibilité entre la *Charte* et une disposition législative, l'art. 52 de la *Loi constitutionnelle de 1982* a pour effet de rendre cette disposition inopérante. Nous sommes donc d'avis de déclarer les mots «et réside ordinairement sur la réserve» employés au par. 77(1) de la *Loi sur les Indiens* incompatibles avec le par. 15(1), et de suspendre pour 18 mois la prise d'effet de cette déclaration. Nous ne sommes pas d'avis d'accorder une exemption constitutionnelle à la bande de Batchewana pendant la durée de la suspension de la prise d'effet, contrairement à ce qui est normalement le cas suivant la règle établie dans *Schachter*. La raison de cette décision est que, eu égard aux circonstances particulières du présent cas, il semble préférable d'élaborer un système électoral qui mettra en équilibre les droits des membres vivant hors des réserves et ceux des membres qui y résident. Nous avons tenu compte de la possibilité que l'inaction du législateur puisse créer de nouveaux problèmes. En cas de litiges de cette nature, ils seront tranchés à la lumière des faits qui leur sont propres.

We would therefore dismiss the appeal and modify the remedy by striking out the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* and suspending the implementation of the declaration of invalidity for 18 months, with costs to the respondents. We would answer the restated constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?

Yes, in their general application.

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

The reasons of L'Heureux-Dubé, Gonthier, Iacobucci and Binnie JJ. were delivered by

L'HEUREUX-DUBÉ J. — Section 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, defines voter eligibility in bands whose election regime is governed by the Act's provisions. The section requires band members to be at least 18 years old, and "ordinarily resident on the reserve" to be entitled to vote. This appeal requires a determination of whether the residence requirement violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*, and, if so, whether the legislation is justified under s. 1 of the *Charter*. The appeal also requires the Court to consider whether the legislation violates s. 15 in relation only to the Batchewana Band, or whether the violation occurs generally, as well as the appropriate remedy, if any, for the violation.

En conséquence, nous sommes d'avis de rejeter le pourvoi et de modifier la réparation en supprimant les mots «et réside ordinairement sur la réserve» employés au par. 77(1) de la *Loi sur les Indiens* et en suspendant la prise d'effet de la déclaration d'invalidité pour 18 mois, avec dépens en faveur des intimés. Nous répondrions de la manière suivante aux questions constitutionnelles reformulées: 24

1. Les mots «et réside ordinairement sur la réserve» figurant au par. 77(1) de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, contreviennent-ils au par. 15(1) de la *Charte canadienne des droits et libertés*, soit de façon générale, soit uniquement en ce qui concerne les membres de la bande Indienne de Batchewana?

Oui, dans leur application générale.

2. Si la réponse à la question 1 est affirmative, le par. 77(1) de la *Loi sur les Indiens* est-il une limite raisonnable dont la justification peut se démontrer en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

Non.

Version française des motifs des juges L'Heureux-Dubé, Gonthier, Iacobucci et Binnie rendus par

LE JUGE L'HEUREUX-DUBÉ — Le paragraphe 77(1) de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, fixe les conditions d'exercice du droit de vote pour les bandes dont le régime électoral est régi par les dispositions de la loi. Aux termes de ce paragraphe, a qualité pour voter tout membre de la bande qui est âgé d'au moins 18 ans et «réside ordinairement sur la réserve». Le présent pourvoi nous invite à décider si la condition relative au lieu de résidence contrevient au par. 15(1) de la *Charte canadienne des droits et libertés* et, dans l'affirmative, si la disposition législative en litige est justifiée au regard de l'article premier de la *Charte*. La Cour doit aussi déterminer si cette disposition viole l'art. 15 uniquement en ce qui a trait à la bande de Batchewana ou si l'atteinte a une portée générale, et fixer, s'il y a lieu, la réparation qui convient. 25

I. Factual Background

26 The chiefs and councils of *Indian Act* bands, pursuant to the definition of "council of the band" in s. 2(1), are chosen following the band's custom, or, if an order in council has been made under s. 74(1), by the procedures set out in the Act, including s. 77(1). The trial judge found that the policy of the Department of Indian and Northern Affairs Canada is that a band will not be deleted from the order in council placing it under the election procedures of the *Indian Act* unless the band council and the current "electors" so approve, either through a plebiscite or at a public meeting. Certain other conditions must also be met. The most recent order in council, the *Indian Bands Council Elections Order*, SOR/97-138, which came into effect on March 4, 1997, provides that 288 bands select their leadership in accordance with the *Indian Act*. This number represents just under half of the *Indian Act* bands in Canada.

27 The respondents are members of the Batchewana Indian Band, which has three reserves near the city of Sault Ste. Marie, Ontario: the Rankin, Goulais Bay, and Obadjiwan reserves. The Batchewana Band is included in the 1997 order in council, its councillors are not chosen in electoral sections, and voter eligibility for its elections is therefore governed by s. 77(1) of the *Indian Act*. The respondent John Corbiere resides on the Rankin Reserve, while the other three respondents are members of the Batchewana Band who do not live on any of the reserves. They take this action on their own behalf and on behalf of all non-resident members of the band. Of the 1,426 members of the band who were registered in 1991, 958 members, or 67.2 percent, lived off-reserve. The Batchewana Band's history, like that of many First Nations, involved the loss of most of its traditional land base. Prior to 1850, the Batchewana and other bands of the Ojibway occupied large areas of land along the eastern and northern shores of Lake Huron, the northern shore of Lake Superior, and

I. Le contexte factuel

Conformément à la définition de «conseil de la bande» au par. 2(1), les chefs et conseils des bandes auxquelles s'applique la *Loi sur les Indiens* sont choisis selon la coutume de la bande ou, si un arrêté a été pris en vertu du par. 74(1), selon les procédures prévues par la loi, notamment le par. 77(1). Le juge de première instance a conclu que, suivant la politique du ministère des Affaires Indiennes et du Nord canadien, une bande n'est retranchée de l'arrêté qui l'assujettit aux procédures électorales prévues par la *Loi sur les Indiens* que si le conseil de la bande et les «électeurs» inscrits approuvent une telle décision soit par plébiscite soit au cours d'une assemblée publique. Certaines autres conditions doivent également être respectées. Le plus récent arrêté, l'*Arrêté sur l'élection du conseil de bandes indiennes*, DORS/97-138, entré en vigueur le 4 mars 1997, indique que 288 bandes choisissent leurs dirigeants conformément à la *Loi sur les Indiens*. Ce nombre représente un peu moins de la moitié des bandes auxquelles s'applique la *Loi sur les Indiens* au Canada.

Les intimés sont membres de la bande Indienne de Batchewana, qui compte trois réserves près de la ville de Sault Ste. Marie, en Ontario: les réserves de Rankin, de Goulais Bay et d'Obadjiwan. Comme la bande de Batchewana est mentionnée dans l'*Arrêté* de 1997 et que ses conseillers ne sont pas élus par sections électorales, l'admissibilité à voter aux élections de la bande est donc régie par le par. 77(1) de la *Loi sur les Indiens*. L'intimé John Corbiere réside dans la réserve de Rankin, tandis que les trois autres intimés sont des membres de la bande de Batchewana qui ne vivent dans aucune des réserves. Ils ont intenté la présente action en leur nom et au nom de tous les membres non résidents de la bande. Des 1 426 membres inscrits de la bande en 1991, 958 membres — soit 67,2 p. 100 — résidaient à l'extérieur des réserves. Tout comme celle de bon nombre d'autres premières nations, l'histoire de la bande de Batchewana a été marquée par la perte de la majeure partie de son assise territoriale traditionnelle. Avant 1850, la

various areas inland. In 1850, as part of the Robinson-Huron Treaty, this land was surrendered to the Crown and the Batchewana obtained a reserve of 246 square miles. In 1859, the band surrendered all of this reserve through the Pennefather treaty, leaving it only with Whitefish Island, a small island in the St. Marys River. Under this treaty, the band's members were promised that the band would be given land on the reserve of the Garden River Band near Sault Ste. Marie. This promise was never fulfilled. For 20 years, therefore, the band owned only approximately 15 acres of land.

bande de Batchewana et d'autres bandes d'Ojibway occupaient de vastes territoires sur les rives est et nord du lac Huron et sur la rive nord du lac Supérieur, ainsi que divers territoires à l'intérieur des terres. En 1850, dans le cadre du traité Robinson-Huron, ce territoire a été cédé à la Couronne et la bande de Batchewana a obtenu une réserve de 246 milles carrés. En 1859, par le traité Pennefather, la bande a cédé la totalité de cette réserve, se retrouvant avec seulement l'île Whitefish, une petite île de la rivière St. Marys. Dans ce traité, on promettait aux membres de la bande qu'on donnerait à celle-ci des terres dans la réserve de la bande de Garden River près de Sault Ste. Marie. Cette promesse n'a jamais été tenue. Pendant 20 ans, donc, la bande n'a possédé qu'environ 15 acres de terres.

After 1879, the band began to re-acquire land. In that year, the band council purchased what is now the Goulais Bay Reserve north of Sault Ste. Marie, and its size was increased by a donation from the Roman Catholic Church in 1885. When Whitefish Island was expropriated by three railway companies in 1900 and 1902, the Goulais Bay Reserve became the band's only land. Until the 1960s or early 1970s, therefore, most band members lived on the Garden River Reserve belonging to another band. In the 1940s, the band council, made up of and elected by non-residents, assembled land which became the Rankin Reserve in 1952. The main portion of this land is surrounded by the city of Sault Ste. Marie, and portions of it also border the St. Marys River and the Garden River Reserve. The third reserve, the Obadjiwan Reserve, which became part of the Batchewana Band's land base in 1962, is quite small and, like the Goulais Bay Reserve, is located in a rural area north of Sault Ste. Marie. The largest percentage of those who live on one of the band's reserves live on the Rankin Reserve.

28 Après 1879, la bande a commencé à acquérir de nouvelles terres. Cette année-là, le conseil de bande a acheté ce qui allait devenir la réserve de Goulais Bay au nord de Sault Ste. Marie. La superficie de cette réserve s'est accrue à la faveur d'une donation de l'Église catholique romaine en 1885. Quand l'île Whitefish a été expropriée par trois sociétés ferroviaires en 1900 et en 1902, la réserve de Goulais Bay est devenue la seule assise territoriale de la bande. Par conséquent, jusqu'aux années 1960 ou au début des années 1970, la plupart des membres de la bande ont vécu dans la réserve de Garden River, qui appartenait à une autre bande. Au cours des années 1940, le conseil de bande, qui était formé de non-résidents élus par des non-résidents, a réuni des terres qui sont devenues la réserve de Rankin en 1952. La majeure partie de cette réserve est entourée par la ville de Sault Ste. Marie, et certaines de ses parties longent également la rivière St. Marys et la réserve de Garden River. La troisième réserve, la réserve d'Obadjiwan, qui est venue compléter l'assise territoriale de la bande de Batchewana en 1962, a une très petite superficie et, tout comme la réserve de Goulais Bay, se trouve en zone rurale au nord de Sault Ste. Marie. La réserve de Rankin est celle qui compte le plus de résidents.

Residence on the reserve was required, by law, for band members to be eligible to vote for band

29 Depuis l'*Acte de l'avancement des Sauvages, 1884*, S.C. 1884, ch. 28, art. 5, les membres des

councils, beginning with *The Indian Advancement Act, 1884*, S.C. 1884, c. 28, s. 5. This requirement was also contained in *The Indian Advancement Act*, R.S.C. 1886, c. 44, s. 5(1), the *Indian Act*, R.S.C. 1906, c. 81, s. 172(*b*), and the *Indian Act*, R.S.C. 1927, c. 98, s. 163(*a*). In addition, band members were required to be over 21 and male. To vote on the surrender or release of land, historically, the requirement was not as strict, requiring, for example, residence "on or near" the lands in question (*An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, S.C. 1868, c. 42, s. 8(1)) and later, requiring voters on these questions to be resident "on or near" and "interested in" the reserve (*Indian Act*, R.S.C. 1927, c. 98, s. 51(2)). Voter eligibility provisions similar to the present ones, though they provided for a minimum age of 21 years, were introduced in *The Indian Act*, S.C. 1951, c. 29, ss. 2(1)(*e*) and 76(1). From the first election in 1902 until 1962, the residency requirement was not enforced in Batchewana Band elections. Since that time, only band members living on one of the three reserves have been allowed to vote.

bandes Indiennes sont tenus par la loi de résider dans la réserve pour être admis à voter à l'élection du conseil de bande. Cette exigence figurait également dans l'*Acte de l'avancement des Sauvages*, S.R.C. 1886, ch. 44, par. 5(1), dans la *Loi des Sauvages*, S.R.C. 1906, ch. 81, al. 172(*b*), et dans la *Loi des Indiens*, S.R.C. 1927, ch. 98, al. 163*a*). En outre, seuls les membres de sexe masculin de la bande âgés de 21 ans révolus avaient droit de vote. Historiquement, pour voter sur la cession ou la rétrocession de terres, l'exigence n'était pas aussi stricte, puisqu'il fallait, par exemple, résider «sur les terres en question ou dans les environs» (*Acte pourvoyant à l'organisation du Département du Secrétaire d'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance*, S.C. 1868, ch. 42, par. 8(1)), et, plus tard, il fallait résider «dans ou près la réserve» ou «y avoir un intérêt» (*Loi des Indiens*, S.R.C. 1927, ch. 98, par. 51(2)). La *Loi sur les Indiens*, S.C. 1951, ch. 29, al. 2(1)*e*) et par. 76(1), a introduit, en matière d'admissibilité à voter, des dispositions semblables à celles qui sont présentement en vigueur, si ce n'est qu'elles fixaient à 21 ans l'âge minimum pour voter. Depuis la toute première élection en 1902, et ce jusqu'en 1962, la condition relative au lieu de résidence n'a pas été appliquée dans le cadre des élections de la bande de Batchewana. Depuis cette date, toutefois, seuls les membres de la bande qui vivent dans l'une des trois réserves sont autorisés à voter.

30 The number of Batchewana Band members has risen dramatically since 1985, and at the same time the percentage of band members living on the reserves has dramatically fallen. In 1985, 71.1 percent of the 543 registered members of the band lived on-reserve. In 1991, only 32.8 percent of the 1,426 registered members lived on the reserves. The parties agree that this trend is continuing. This dramatic increase in the number of off-reserve members occurred largely because of the passage of *An Act to amend the Indian Act*, S.C. 1985, c. 27 ("Bill C-31"), by Parliament. This legislation restored Indian status to most of those who had lost this status because of the operation of certain sections of the *Indian Act*, as well as to the descendants of such people. Prior to this legisla-

Le nombre de membres de la bande de Batchewana a augmenté de façon spectaculaire depuis 1985, et cette augmentation a été accompagnée d'une chute tout aussi abrupte du pourcentage des membres de la bande vivant dans les réserves. En 1985, 71,1 p. 100 des 543 membres inscrits de la bande vivaient dans les réserves. En 1991, seulement 32,8 p. 100 des 1 426 membres inscrits habitaient les réserves. Les parties s'entendent pour dire que cette tendance se poursuit. Cette augmentation spectaculaire du nombre de membres hors réserve est largement attribuable à l'adoption par le Parlement de la *Loi modifiant la Loi sur les Indiens*, S.C. 1985, ch. 27 (le «projet de loi C-31»). Cette loi a rétabli dans leur statut d'Indien la plupart des personnes qui l'avaient perdu par

tion, women with Indian status who married non-Indian men lost their status, and their children did not get status, though men who married non-Indian women, and their children, maintained Indian status. Registered Indians who voluntarily "enfranchised" also lost Indian status. For the Batchewana Band, approximately 85 percent of the growth in band membership consisted of people who were reinstated to Indian status and band membership because of Bill C-31. Similar trends may be seen in many other bands.

l'effet de certaines dispositions de la *Loi sur les Indiens*, ainsi que les descendants de ces personnes. Avant l'adoption de cette loi, les femmes Indiennes qui épousaient des hommes non Indiens perdaient leur statut et leurs enfants ne pouvaient pas l'obtenir, alors que les hommes qui mariaient des femmes non Indiennes et les enfants de ces unions le conservaient. Les Indiens inscrits qui choisissaient l'«émancipation» perdaient aussi leur statut. Dans le cas de la bande de Batchewana, environ 85 p. 100 des nouveaux membres sont des personnes qui, grâce au projet de loi C-31, ont été rétablies dans leur statut d'Indien et leur droit d'appartenir à la bande. Cette tendance peut être observée dans bon nombre d'autres bandes.

II. Relevant Constitutional, Statutory, and Regulatory Provisions

II. Les dispositions constitutionnelles, législatives et réglementaires pertinentes

Canadian Charter of Rights and Freedoms

Charte canadienne des droits et libertés

31

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

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.

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.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment:

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur les revendications territoriales ou ceux susceptibles d'être ainsi acquis.

Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Loi constitutionnelle de 1982

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, «peuples autochtones du Canada» s'entend notamment des Indiens, des Inuit et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Indian Act, R.S.C., 1985, c. I-5

2. (1) In this Act,

"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

"council of the band" means

(*a*) in the case of a band to which section 74 applies, the council established pursuant to that section,

(*b*) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

"elector" means a person who

(*a*) is registered on a Band List,

(*b*) is of the full age of eighteen years, and

Loi sur les Indiens, L.R.C. (1985), ch. I-5

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

«bande» Groupe d'Indiens, selon le cas:

a) à l'usage et au profit communs desquels des terres appartenant à Sa Majesté ont été mises de côté avant ou après le 4 septembre 1951;

b) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent;

c) que le gouverneur en conseil a déclaré être une bande pour l'application de la présente loi.

«conseil de la bande»

a) Dans le cas d'une bande à laquelle s'applique l'article 74, le conseil constitué conformément à cet article;

b) dans le cas d'une bande à laquelle l'article 74 n'est pas applicable, le conseil choisi selon la coutume de la bande ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de celle-ci.

«électeur» Personne qui remplit les conditions suivantes:

a) être inscrit sur une liste de bande;

b) avoir dix-huit ans;

(*c*) is not disqualified from voting at band elections;

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

39. (1) An absolute surrender or a designation is void unless

(*a*) it is made to Her Majesty;

(*b*) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or

(iii) by a referendum as provided in the regulations; and

(*c*) it is accepted by the Governor in Council.

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(*b*) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

(*c*) to construct and maintain outer boundary fences on reserves;

(*d*) to purchase land for use by the band as a reserve or as an addition to a reserve;

(*e*) to purchase for the band the interest of a member of the band in lands on a reserve;

(*f*) to purchase livestock and farm implements, farm equipment or machinery for the band;

(*g*) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

c) ne pas avoir perdu son droit de vote aux élections de la bande.

20. (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.

38. (1) Une bande peut céder à titre absolu à Sa Majesté, avec ou sans conditions, tous ses droits, et ceux de ses membres, portant sur tout ou partie d'une réserve.

39. (1) Une cession à titre absolu ou une désignation n'est valide que si les conditions suivantes sont réunies:

a) elle est faite à Sa Majesté;

b) elle est sanctionnée par une majorité des électeurs de la bande:

(i) soit à une assemblée générale de la bande convoquée par son conseil,

(ii) soit à une assemblée spéciale de la bande convoquée par le ministre en vue d'examiner une proposition de cession à titre absolu ou de désignation,

(iii) soit au moyen d'un référendum comme le prévoient les règlements;

c) elle est acceptée par le gouverneur en conseil.

64. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande:

a) pour distribuer *per capita* aux membres de la bande un montant maximal de cinquante pour cent des sommes d'argent au compte en capital de la bande, provenant de la vente de terres cédées;

b) pour construire et entretenir des routes, ponts, fossés et cours d'eau dans des réserves ou sur des terres cédées;

c) pour construire et entretenir des clôtures de délimitation extérieure sur les réserves;

d) pour acheter des terrains que la bande emploiera comme réserve ou comme addition à une réserve;

e) pour acheter pour la bande les droits d'un membre de la bande sur des terrains sur une réserve;

f) pour acheter des animaux, des instruments ou de l'outillage de ferme ou des machines pour la bande;

g) pour établir et entretenir dans une réserve ou à l'égard d'une réserve les améliorations ou ouvrages permanents qui, de l'avis du ministre, seront d'une valeur permanente pour la bande ou constitueront un placement en capital;

(*h*) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(*i*) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(*j*) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

66. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

74. (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

75. (1) No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.

(2) No person may be a candidate for election as chief or councillor unless his nomination is moved and seconded by persons who are themselves eligible to be nominated.

77. (1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting

h) pour consentir aux membres de la bande, en vue de favoriser son bien-être, des prêts n'excédant pas la moitié de la valeur globale des éléments suivants:

(i) les biens meubles appartenant à l'emprunteur,

(ii) la terre concernant laquelle il détient ou a le droit de recevoir un certificat de possession,

et percevoir des intérêts et recevoir des gages à cet égard;

i) pour subvenir aux frais nécessairement accessoires à la gestion de terres situées sur une réserve, de terres cédées et de tout bien appartenant à la bande;

j) pour construire des maisons destinées aux membres de la bande, pour consentir des prêts aux membres de la bande aux fins de construction, avec ou sans garantie, et pour prévoir la garantie des prêts consentis aux membres de la bande en vue de la construction;

k) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

66. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et ordonner la dépense de sommes d'argent du compte de revenu à toute fin qui, d'après lui, favorisera le progrès général et le bien-être de la bande ou d'un de ses membres.

69. (1) Le gouverneur en conseil peut, par décret, permettre à une bande de contrôler, administrer et dépenser la totalité ou une partie de l'argent de son compte de revenu; il peut aussi modifier ou révoquer un tel décret.

74. (1) Lorsqu'il le juge utile à la bonne administration d'une bande, le ministre peut déclarer par arrêté qu'à compter d'un jour qu'il désigne le conseil d'une bande, comprenant un chef et des conseillers, sera constitué au moyen d'élections tenues selon la présente loi.

75. (1) Seul un électeur résidant dans une section électorale peut être présenté au poste de conseiller pour représenter cette section au conseil de la bande.

(2) Nul ne peut être candidat à une élection au poste de chef ou de conseiller d'une bande, à moins que sa candidature ne soit proposée et appuyée par des personnes habiles elles-mêmes à être présentées.

77. (1) Un membre d'une bande, qui a au moins dix-huit ans et réside ordinairement sur la réserve, a qualité pour voter en faveur d'une personne présentée comme candidat au poste de chef de la bande et, lorsque la

purposes consists of one section, to vote for persons nominated as councillors.

(2) A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section.

81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:

(*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

(*b*) the regulation of traffic;

(*c*) the observance of law and order;

(*d*) the prevention of disorderly conduct and nuisances;

(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

(*f*) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;

(*g*) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;

(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(*j*) the destruction and control of noxious weeds;

(*k*) the regulation of bee-keeping and poultry raising;

réserve, aux fins d'élection, ne comprend qu'une section électorale, pour voter en faveur de personnes présentées aux postes de conseillers.

(2) Un membre d'une bande, qui a dix-huit ans et réside ordinairement dans une section électorale établie aux fins d'élection, a qualité pour voter en faveur d'une personne présentée au poste de conseiller pour représenter cette section.

81. (1) Le conseil d'une bande peut prendre des règlements administratifs, non incompatibles avec la présente loi ou avec un règlement pris par le gouverneur en conseil ou par le ministre, pour l'une ou l'ensemble des fins suivantes:

a) l'adoption de mesures relatives à la santé des habitants de la réserve et les précautions à prendre contre la propagation des maladies contagieuses et infectieuses;

b) la réglementation de la circulation;

c) l'observation de la loi et le maintien de l'ordre;

d) la répression de l'inconduite et des incommodités;

e) la protection et les précautions à prendre contre les empiétements des bestiaux et autres animaux domestiques, l'établissement de fourrières, la nomination de gardes-fourrières, la réglementation de leurs fonctions et la constitution de droits et redevances pour leurs services;

f) l'établissement et l'entretien de cours d'eau, routes, ponts, fossés, clôtures et autres ouvrages locaux;

g) la division de la réserve ou d'une de ses parties en zones, et l'interdiction de construire ou d'entretenir une catégorie de bâtiments ou d'exercer une catégorie d'entreprises, de métiers ou de professions dans une telle zone;

h) la réglementation de la construction, de la réparation et de l'usage des bâtiments, qu'ils appartiennent à la bande ou à des membres de la bande pris individuellement;

i) l'arpentage des terres de la réserve et leur répartition entre les membres de la bande, et l'établissement d'un registre de certificats de possession et de certificats d'occupation concernant les attributions, et la mise à part de terres de la réserve pour usage commun, si l'autorisation à cet égard a été accordée aux termes de l'article 60;

j) la destruction et le contrôle des herbes nuisibles;

k) la réglementation de l'apiculture et de l'aviculture;

(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(*m*) the control or prohibition of public games, sports, races, athletic contests and other amusements;

(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(*p*) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

(*p*.1) the residence of band members and other persons on the reserve;

(*p*.2) to provide for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(*p*.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

(*p*.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(*r*) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(*a*) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the

l) l'établissement de puits, citernes et réservoirs publics et autres services d'eau du même genre, ainsi que la réglementation de leur usage;

m) la réglementation ou l'interdiction de jeux, sports, courses et concours athlétiques d'ordre public et autres amusements du même genre;

n) la réglementation de la conduite et des opérations des marchands ambulants, colporteurs ou autres personnes qui pénètrent dans la réserve pour acheter ou vendre des produits ou marchandises, ou en faire un autre commerce;

o) la conservation, la protection et la régie des animaux à fourrure, du poisson et du gibier de toute sorte dans la réserve;

p) l'expulsion et la punition des personnes qui pénètrent sans droit ni autorisation dans la réserve ou la fréquentent pour des fins interdites;

p.1) la résidence des membres de la bande ou des autres personnes sur la réserve;

p.2) l'adoption de mesures relatives aux droits des conjoints ou des enfants qui résident avec des membres de la bande dans une réserve pour toute matière au sujet de laquelle le conseil peut établir des règlements administratifs à l'égard des membres de la bande;

p.3) l'autorisation du ministre à effectuer des paiements sur des sommes d'argent au compte de capital ou des sommes d'argent de revenu aux personnes dont les noms ont été retranchés de la liste de la bande;

p.4) la mise en vigueur des paragraphes 10(3) ou 64.1(2) à l'égard de la bande;

q) toute question qui découle de l'exercice des pouvoirs prévus par le présent article, ou qui y est accessoire;

r) l'imposition, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de mille dollars et d'un emprisonnement maximal de trente jours, ou de l'une de ces peines, pour violation d'un règlement administratif pris aux termes du présent article.

83. (1) Sans préjudice des pouvoirs que confère l'article 81, le conseil de la bande peut, sous réserve de l'approbation du ministre, prendre des règlements administratifs dans les domaines suivants:

a) sous réserve des paragraphes (2) et (3), l'imposition de taxes à des fins locales, sur les immeubles

reserve, including rights to occupy, possess or use land in the reserve;

(*a.*1) the licensing of businesses, callings, trades and occupations;

(*b*) the appropriation and expenditure of moneys of the band to defray band expenses;

(*c*) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (*a*);

(*d*) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (*a*);

(*e*) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;

(*e.*1) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest;

(*f*) the raising of money from band members to support band projects; and

(*g*) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

(2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.

85.1 (1) Subject to subsection (2), the council of a band may make by-laws

(*a*) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band;

(*b*) prohibiting any person from being intoxicated on the reserve;

(*c*) prohibiting any person from having intoxicants in his possession on the reserve; and

(*d*) providing for exceptions to any of the prohibitions established pursuant to paragraph (*b*) or (*c*).

situés dans la réserve, ainsi que sur les droits sur ceux-ci, et notamment sur les droits d'occupation, de possession et d'usage;

*a.*1) la délivrance de permis, de licences ou d'agréments aux entreprises, professions, métiers et occupations;

b) l'affectation et le déboursement de l'argent de la bande pour couvrir les dépenses de cette dernière;

c) la nomination de fonctionnaires chargés de diriger les affaires du conseil, en établissant leurs fonctions et prévoyant leur rétribution sur les fonds prélevés en vertu de l'alinéa *a*);

d) le versement d'une rémunération, pour le montant que le ministre peut approuver, aux chefs et conseillers, sur les fonds prélevés en vertu de l'alinéa *a*);

e) les mesures d'exécution forcée visant le recouvrement de tout montant qui peut être perçu en application du présent article, arrérages et intérêts compris;

*e.*1) l'imposition, pour non-paiement de tout montant qui peut être perçu en application du présent article, d'intérêts et la fixation, par tarif ou autrement, de ces intérêts;

f) la réunion de fonds provenant des membres de la bande et destinés à supporter des entreprises de la bande;

g) toute question qui découle de l'exercice des pouvoirs prévus par le présent article, ou qui y est accessoire.

(2) Toute dépense à faire sur les fonds prélevés en application du paragraphe (1) doit l'être sous l'autorité d'un règlement administratif pris par le conseil de la bande.

85.1 (1) Sous réserve du paragraphe (2), le conseil d'une bande peut prendre des règlements administratifs en vue:

a) d'interdire la vente, le troc, la fourniture ou la fabrication de boissons alcoolisées sur la réserve de la bande;

b) d'interdire à toute personne d'être en état d'ivresse sur la réserve;

c) d'interdire à toute personne d'avoir en sa possession des boissons alcoolisées sur la réserve;

d) de prévoir des exceptions aux interdictions visées aux alinéas *b*) ou *c*).

Rules of the Supreme Court of Canada, SOR/83-74

32. (1) Within 60 days after the filing of a notice of appeal, a party to an appeal who intends to raise a constitutional question shall apply to the Chief Justice or a judge to have the constitutional question stated, where the appeal raises a question of

(*a*) the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of regulations made thereunder;

(*b*) the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of regulations made thereunder; or

(*c*) the constitutional validity or the constitutional applicability of a common law rule.

. . .

(4) The Chief Justice or a judge may state the question and direct service of the question on the Attorney General of Canada and the attorneys general of all the provinces and the ministers of justice of the governments of the territories within the time fixed by the Chief Justice or judge, together with notice that any of them who intends to intervene, whether or not the attorney general or minister of justice wishes to be heard, shall, within a time fixed in the notice that is not less than four weeks after the date of the notice, file a notice of intervention in Form C and serve that notice upon the parties.

Règles de la Cour suprême du Canada, DORS/83-74

32. (1) Dans les 60 jours suivant le dépôt de l'avis d'appel, la partie qui entend soulever une question constitutionnelle doit s'adresser au Juge en chef, ou à un autre juge, pour que soit formulée la question constitutionnelle lorsque:

a) la validité ou l'applicabilité constitutionnelle d'une loi fédérale ou d'une loi provinciale ou de l'un de leurs règlements d'application est contestée;

b) le caractère inopérant d'une loi fédérale ou d'une loi provinciale ou de l'un de leurs règlements d'application est plaidé.

c) la validité ou l'applicabilité constitutionnelle d'une règle de common law est contestée.

. . .

(4) Le Juge en chef, ou un autre juge, peut formuler la question et en ordonner la signification, dans le délai qu'il fixe, au procureur général du Canada, aux procureurs généraux de toutes les provinces et aux ministres de la Justice des gouvernements des territoires, avec avis que ceux qui veulent intervenir — qu'ils aient ou non l'intention de plaider — doivent déposer dans le délai précisé dans l'avis, non inférieur à quatre semaines suivant la date de l'avis, un avis d'intervention conforme à la formule C et signifier cet avis aux parties.

III. Judgments

A. *Federal Court — Trial Division*, [1994] 1 F.C. 394

32 The only defendant represented at trial was Her Majesty the Queen: the Batchewana Band took no part in the trial. Strayer J. (as he then was) reviewed the history of the Batchewana Band's land holdings, and the structure of the *Indian Act* provisions setting out a band council's powers. He then considered the test for s. 15(1) set out by this Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. He held that the denial of the vote to non-residents of the Batchewana Band had a negative impact on those not ordinarily resident on the reserve. He noted the historical difficulties of the band in maintaining an

III. Les jugements antérieurs

A. *Cour fédérale — Section de première instance*, [1994] 1 C.F. 394

Le seul défendeur représenté au procès était Sa Majesté la Reine; la bande de Batchewana n'a pas participé au procès. Le juge Strayer (maintenant juge de la Cour d'appel fédérale) a fait l'historique de l'assise territoriale de la bande de Batchewana et analysé l'organisation des dispositions de la *Loi sur les Indiens* énonçant les pouvoirs des conseils de bande. Il a ensuite examiné le test établi par notre Cour à l'égard du par. 15(1) dans l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143. Il a conclu que le refus d'accorder le droit de vote aux membres non résidents de la bande de Batchewana avait des

adequate land base, and therefore the inability of many of those who wished to live on the reserve to do so. He also noted that many of the band members who live off-reserve were restored to band membership because of Bill C-31. He emphasized that such people were mostly women, or the children of women who had been denied Indian status for marrying non-Indian men, and that others had lost their status for race-based reasons, having decided to enfranchise and exercise the full rights of a Canadian citizen. Strayer J. concluded that those not ordinarily resident on the Batchewana reserves therefore fell under an analogous ground.

répercussions négatives sur ceux qui ne résident pas ordinairement dans la réserve. Il a souligné les difficultés que la bande avait éprouvées dans le passé pour maintenir une assise territoriale suffisante et, de ce fait, l'impossibilité pour bon nombre de ceux qui voulaient vivre dans la réserve de s'y installer. Il a également fait remarquer que de nombreux membres de la bande vivant hors des réserves avaient recouvré leur droit d'appartenir à la bande grâce au projet de loi C-31. Il a souligné que ces personnes étaient surtout des femmes ou des enfants de femmes qui avaient perdu leur statut d'Indienne parce qu'elles avaient épousé des hommes non Indiens, ou encore des personnes qui avaient perdu leur statut pour des raisons fondées sur la race, parce qu'elles avaient décidé de s'émanciper et d'exercer leurs pleins droits de citoyens canadiens. Le juge Strayer a conclu que les personnes ne résidant pas ordinairement dans les réserves de la bande de Batchewana étaient visées par un motif analogue.

He then examined the nature and purpose of the legislation, and held that he was required to determine whether it made distinctions based on irrelevant personal differences. He observed that certain of the powers of the band council relate purely to the administration of the reserve: for example, those powers enumerated in s. 81(1) of the *Indian Act*. He held that the evidence showed that most of the operational funding provided by the government and spent by the band council relates to local purposes, although he acknowledged that in certain aspects the disbursement of these funds affects non-residents. He found that for the powers of the band council that relate to the governance of the territory of the reserve, residency is an appropriate way to determine the right to vote.

33 Il a ensuite examiné la nature et l'objectif de la mesure législative en cause et statué qu'il devait décider si celle-ci créait des distinctions fondées sur des caractéristiques personnelles non pertinentes. Il a souligné que certains des pouvoirs dont le conseil de bande est investi, par exemple ceux énumérés au par. 81(1) de la *Loi sur les Indiens*, se rapportent uniquement à l'administration de la réserve. Il a conclu qu'il ressortait de la preuve que la plus grande partie du budget de fonctionnement accordé par le gouvernement à la bande et dépensé par cette dernière est affectée à des objets locaux, reconnaissant toutefois que certaines de ces dépenses ont des répercussions sur les membres non résidents. En ce qui concerne les pouvoirs du conseil de bande se rapportant à l'administration du territoire de la réserve, il a conclu que l'application de la condition relative au lieu de résidence est une façon appropriée de déterminer qui a le droit de voter.

He noted, however, that the voting restrictions in s. 77(1) also affect other decisions that do not relate only to the interests of reserve residents, but rather to the use and disposition of communal property. He held that for such matters, residency

34 Il a toutefois fait remarquer que les restrictions au droit de vote prévues par le par. 77(1) touchent également d'autres décisions, qui ne concernent pas uniquement les intérêts des résidents de la réserve, par exemple celles portant sur l'usage et

is an irrelevant personal characteristic. He identified three provisions, in particular, where all band members' interests are implicated and which are affected by s. 77(1): votes to surrender reserve lands under s. 39(1)(*b*), and the powers of the band council under ss. 64(1) and 66(1). In short, Strayer J. concluded that as it related to the disposition of reserve lands or Indian monies held for the band as a whole, the definition in s. 77(1) violated s. 15(1), but for functions relating solely to governance of the reserve territory, s. 15(1) was not violated.

l'aliénation des biens de la communauté. Il a estimé que, pour ce qui est de ces questions, le lieu de résidence est une caractéristique personnelle non pertinente. Il a mentionné trois dispositions en particulier qui ont des répercussions sur les intérêts de l'ensemble des membres de la bande et qui sont touchées par l'application du par. 77(1): les votes sur la cession de terres de la réserve tenus en application de l'al. 39(1)(*b*), et les pouvoirs conférés au conseil de bande par les par. 64(1) et 66(1). Bref, le juge Strayer a conclu que, dans la mesure où elle concerne la façon de disposer des terres de la réserve ou de sommes d'argent des Indiens détenues au profit de l'ensemble de la bande, la définition donnée au par. 77(1) porte atteinte au par. 15(1), mais que, relativement aux fonctions se rapportant uniquement à l'administration du territoire de la réserve, il n'y avait pas de violation du par. 15(1).

35 Strayer J. then turned to justification under s. 1. He held that for the functions affecting all band members, there was no appropriate justification advanced as to why only certain band members should have control over the property belonging to all band members. He found that, given his finding that s. 15(1) was infringed, it was not necessary to consider the respondents' claim under s. 2(*d*), freedom of association.

Le juge Strayer a ensuite abordé la question de la justification au regard de l'article premier. Il a estimé que, en ce qui a trait aux fonctions touchant l'ensemble des membres de la bande, aucune justification appropriée n'avait été présentée afin d'expliquer pourquoi seuls certains membres de la bande devraient jouir d'un droit de regard sur les biens qui appartiennent à l'ensemble des membres. Il a statué que, comme il avait conclu à la violation du par. 15(1), il n'était pas nécessaire d'examiner l'argument des intimés fondé sur l'al. 2*d*), la liberté d'association.

36 Strayer J. issued a declaration that s. 77(1) violates s. 15(1) of the *Charter*, "insofar as it has the effect of preventing members of the Batchewana Indian Band who are not ordinarily resident on any of that band's reserves from participating in the giving or refusal of assent of the band pursuant to paragraph 39(1)(b) of that Act or from being represented by persons for whom they have an opportunity to vote in the giving of consent on behalf of the band to the expenditure of Indian moneys under subsections 64(1) and 66(1) of the *Indian Act*", and suspended the order until July 1, 1994. In his reasons, he noted that the declaration was confined to the Batchewana Band because the pleadings and the evidence related only to that band. He

Le juge Strayer a prononcé un jugement déclaratoire portant que le par. 77(1) contrevient au par. 15(1) de la *Charte*, «dans la mesure où il a pour effet d'empêcher les membres de la bande Indienne de Batchewana qui ne résident pas ordinairement sur l'une des réserves de la bande de participer à l'octroi ou au refus de la sanction de la bande exigée à l'alinéa 39(1)*b*) de la Loi, ou d'être représentés par ceux pour qui ils ont l'occasion de voter lorsqu'est donné au nom de la bande le consentement à la dépense de l'argent des Indiens sous le régime des paragraphes 64(1) et 66(1) de la *Loi sur les Indiens*», et il a suspendu la prise d'effet de l'ordonnance jusqu'au 1er juillet 1994. Dans ses motifs, il a souligné que l'application du jugement

also noted that though he had described the effects of the legislation which were impermissible, the declaration was for the invalidity of s. 77(1) in its entirety.

déclaratoire se limitait à la bande de Batchewana, étant donné que les actes de procédure et la preuve présentés ne concernaient que celle-ci. Il a aussi indiqué que, bien qu'il ait décrit les effets de la mesure législative qui étaient inacceptables, la déclaration d'invalidité visait le par. 77(1) dans sa totalité.

B. *Federal Court of Appeal*, [1997] 1 F.C. 689

B. *Cour d'appel fédérale*, [1997] 1 C.F. 689

The judgment of the Court of Appeal panel consisting of Stone, Linden, and McDonald JJ.A. was delivered by the court. The court first considered arguments of the intervener the Lesser Slave Lake Indian Regional Council that the right to control a band's own membership and the incidents of that membership, including voting rights, constituted an Aboriginal right guaranteed by s. 35 of the *Constitution Act, 1982*. The court noted that under the test for Aboriginal rights as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, this determination depends on the particular Aboriginal community claiming the right, and also requires evidence that a practice was integral to the distinctive culture of the Aboriginal community before the time of contact with Europeans. The court found that there was no evidence in the record that would demonstrate that the Batchewana Band had a s. 35 Aboriginal right to exclude certain members from voting, since elections for the band had only been held since 1902. The court then addressed the possibility that s. 25 of the *Charter* might affect the s. 15 analysis. It held that since no s. 35 right was involved, and since the *Indian Act* system of elections could not be considered one of the "other rights or freedoms that pertain to the aboriginal peoples of Canada", s. 25 was not triggered.

37 Le jugement des membres de la Cour d'appel fédérale qui ont entendu l'affaire, en l'occurrence les juges Stone, Linden et McDonald, a été rendu par la cour. Celle-ci a d'abord étudié les arguments de l'intervenant Lesser Slave Lake Indian Regional Council selon lesquels le droit de la bande de décider qui peut être membre et profiter des avantages se rattachant à cette qualité, notamment le droit de vote, est un droit ancestral garanti par l'art. 35 de la *Loi constitutionnelle de 1982*. La Cour d'appel fédérale a souligné que, selon le critère applicable à l'égard des droits ancestraux énoncé dans *R. c. Van der Peet*, [1996] 2 R.C.S. 507, l'existence d'un tel droit dépend de la communauté autochtone qui revendique le droit et exige la preuve qu'une pratique faisait partie intégrante de la culture distinctive de cette communauté avant le contact avec les Européens. La cour a jugé qu'il n'y avait au dossier aucun élément de preuve démontrant que la bande de Batchewana possédait le droit ancestral, au sens de l'art. 35, de refuser le droit de vote à certains de ses membres, puisqu'elle ne tenait des élections que depuis 1902. La cour a ensuite examiné la possibilité que l'art. 25 de la *Charte* puisse jouer un rôle dans l'analyse fondée sur l'art. 15. Elle a statué que, comme aucun droit garanti par l'art. 35 n'était en cause et que le régime électoral établi par la *Loi sur les Indiens* ne pouvait pas être considéré comme l'un des «autres» droits ou libertés des peuples autochtones du Canada, l'art. 25 ne s'appliquait pas.

The court then turned to the analysis under s. 15(1). It held that the denial of the vote to off-reserve band members constituted a denial of a benefit, since the right to vote is central to having a voice in the democratic governance of the band of which they are members. The court stated that the benefit which was denied related not only to the

38 La cour a ensuite entrepris l'analyse fondée sur le par. 15(1). Elle a jugé que le refus d'accorder le droit de vote aux membres hors réserve constituait le déni d'un avantage, parce que ce droit est un élément central de la capacité de participer au gouvernement démocratique de la bande à laquelle ils appartiennent. La cour a indiqué que l'avantage

powers specified in Strayer J.'s judgment, but also to the other powers of the band council: to make by-laws under s. 81(1) of the *Indian Act*. It noted that many of the council's s. 81(1) powers could affect both on-reserve and off-reserve band members.

ainsi refusé se rapportait non seulement aux pouvoirs spécifiés dans le jugement du juge Strayer, mais également aux autres pouvoirs du conseil de bande découlant du pouvoir de faire des règlements administratifs en vertu du par. 81(1) de la *Loi sur les Indiens*. Elle a souligné que bon nombre des pouvoirs conférés au conseil par le par. 81(1) pouvaient avoir des répercussions tant sur les membres de la bande habitant les réserves que sur ceux vivant hors réserve.

39 The court examined whether the denial of this benefit was discriminatory. It began with an examination of whether non-residency on a reserve could constitute an analogous ground. The court noted that the question of whether an analogous ground exists is a contextual one, which must be determined by examining whether distinctions on that ground could affect the human dignity of the claimant. It held that a stereotype had been attached to those living off-reserve, since many had characterized them as being unworthy of trust in using their electoral power for the benefit of the band. The court emphasized that many in this group had suffered from historical disadvantage, because large numbers of them were deprived of band membership because of discriminatory legislation that was later remedied by Bill C-31. Finally, it held that off-reserve band members are generally politically powerless. Based on these factors, it determined that an analogous ground was at issue. The court also concluded that the distinction was discriminatory, since it engaged the purpose of s. 15(1). It stressed that the distinction was discriminatory in relation to all powers of the band, not only those not related to the governance of the reserve territory.

La cour a examiné la question de savoir si le déni de cet avantage était discriminatoire. Elle s'est d'abord demandée si la non-résidence dans une réserve constituait un motif analogue. Elle a fait remarquer que l'existence d'un motif analogue est une question contextuelle, qu'il faut trancher en se demandant si les distinctions fondées sur ce motif peuvent porter atteinte à la dignité de la personne qui invoque la *Charte*. La cour a jugé qu'un stéréotype avait été attribué aux personnes vivant hors réserve, car bien des gens considéraient qu'on ne pouvait leur faire confiance pour utiliser leur pouvoir électoral dans l'intérêt de la bande. La cour a souligné que de nombreuses personnes appartenant à ce groupe avaient souffert d'un désavantage historique, étant donné que bon nombre d'entre elles avaient été exclues de la bande en raison de dispositions législatives discriminatoires auxquelles le projet de loi C-31 a remédié. Finalement, elle a jugé que les membres hors réserve de la bande sont généralement sans pouvoir politique. À la lumière de ces facteurs, elle a conclu à l'existence d'un motif analogue. La cour a également conclu que la distinction était discriminatoire puisqu'elle contrevenait à l'objectif du par. 15(1). Elle a précisé que la distinction était discriminatoire relativement à l'ensemble des pouvoirs de la bande, et non seulement à l'égard de ceux qui ne se rapportent pas à l'administration du territoire de la réserve.

40 The court held that the legislation was not justified under s. 1. It concluded that the goal of the legislation is "to establish a voting regime in which all those who are affected by the outcome of the vote are entitled to participate" (para. 59). The court decided that there was no rational connection

La Cour d'appel fédérale a statué que la disposition législative en cause n'était pas justifiée au regard de l'article premier. Elle a conclu que la disposition avait pour objectif «d'instaurer un régime électoral auquel tous ceux qui sont touchés par l'issue du scrutin ont le droit de participer»

between the legislation and this objective, since non-resident members are bound by the decisions of the chief and council, in relation to all the council's powers.

The court determined that the appropriate remedy in this case was a constitutional exemption. It held that this was appropriate "[i]n the unusual and special circumstances of this case" (para. 76). This order was warranted, the court decided, because other bands might be able to demonstrate an Aboriginal right under s. 35 to exclude non-residents from voting. If a s. 35 Aboriginal right were demonstrated, the court suggested, the interaction of s. 25 with s. 15(1) would mean that the analysis would proceed differently. It also noted that in the context of other bands, more justificatory evidence under s. 1 might be presented. Concluding that Aboriginal rights should be determined on a case-by-case basis, it found that the exemption should be granted under the court's powers under s. 24(1) of the *Charter*. The court determined that the declaration of invalidity would not be suspended.

By order of Stone J.A., the judgment of the Court of Appeal was stayed pending a decision by this Court on leave to appeal: (1996), 206 N.R. 122. By order of Gonthier J. on November 24, 1998, a further stay was granted until judgment was rendered by this Court.

IV. Issues

Two constitutional questions have been stated in this appeal:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms* with respect only to members of the Batchewana Indian Band?

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* a reasonable limit on the

(par. 59). La cour a décidé qu'il n'y avait pas de lien rationnel entre la disposition et cet objectif, puisque les membres non résidents sont liés par les décisions du chef et du conseil, et ce relativement à tous les pouvoirs du conseil.

41 La Cour d'appel fédérale a jugé que la réparation convenable était une exemption constitutionnelle, «[c]ompte tenu des circonstances inusitées et spéciales de la présente affaire» (par. 76). Cette ordonnance était justifiée, selon la cour, parce que d'autres bandes pourraient réussir à établir l'existence d'un droit ancestral visé à l'art. 35 leur permettant d'interdire aux membres non résidents de voter. Si l'existence d'un droit ancestral visé à l'art. 35 était établie, d'indiquer la cour, l'interaction de l'art. 25 et du par. 15(1) aurait pour effet de modifier l'analyse. Elle a aussi fait remarquer que, dans le contexte d'autres bandes, une preuve plus abondante tendant à justifier la restriction au regard de l'article premier pourrait être présentée. Concluant que les droits ancestraux doivent faire l'objet d'une évaluation au cas par cas, elle a statué qu'il y avait lieu d'accorder l'exemption en vertu des pouvoirs que lui confère le par. 24(1) de la *Charte*. La cour a décidé de ne pas suspendre la prise d'effet de la déclaration d'invalidité.

42 Sur ordonnance du juge Stone, il a été sursis à l'exécution du jugement de la Cour d'appel en attendant la décision de notre Cour sur la demande d'autorisation de pourvoi: (1996), 206 N.R. 122. Sur ordonnance du juge Gonthier datée du 24 novembre 1998, un sursis supplémentaire a été accordé jusqu'à ce que notre Cour statue sur l'affaire.

IV. Les questions en litige

43 Deux questions constitutionnelles ont été formulées dans le présent pourvoi:

1. Les mots «et réside ordinairement sur la réserve» figurant au par. 77(1) de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, contreviennent-ils au par. 15(1) de la *Charte canadienne des droits et libertés*, mais uniquement en ce qui concerne les membres de la bande Indienne de Batchewana?

2. Si la réponse à la question 1 est affirmative, le par. 77(1) de la *Loi sur les Indiens* restreint-il dans

rights of members of the Batchewana Indian Band, and so not inconsistent with the *Constitution Act, 1982*?

44 Five principal issues must be determined:

(1) the approach to be taken to the s. 15 analysis in this case, given that the legislation was alleged to violate the *Charter* only in the circumstances of the Batchewana Band;

(2) the effect of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982* on the s. 15(1) analysis in this case;

(3) whether the impugned legislation violates s. 15(1);

(4) if s. 15(1) is infringed, whether it is justified under s. 1 of the *Charter*;

(5) if necessary, the appropriate remedy.

V. Analysis

A. *Should the Section 15 Analysis Focus Only on the Batchewana Band?*

45 A preliminary question is whether the s. 15(1) analysis should focus on the Batchewana Band in particular, or on the legislation as it applies in general, to all bands affected by s. 77(1). At trial, the focus was on the particular situation of the Batchewana Band, since the respondents asked only for a constitutional exemption applying to their band.

46 However, examining only the circumstances of the Batchewana Band in the s. 15(1) analysis would be to presume that the appropriate remedy is a constitutional exemption. As the guardians of the rights in the *Charter*, it is courts' duty to ensure that a remedy is given that is commensurate with the extent of the violation that has been found, and

des limites raisonnables les droits des membres de la bande Indienne de Batchewana, de telle façon qu'il n'est pas incompatible avec la *Loi constitutionnelle de 1982*?

Cinq questions principales doivent être tranchées:

(1) Quelle approche doit-être suivie dans l'analyse fondée sur l'art. 15 en l'espèce, étant donné que l'on plaide que la disposition législative contestée ne viole la *Charte* que dans les circonstances propres à la bande de Batchewana?

(2) Quel est l'effet de l'art. 25 de la *Charte* et de l'art. 35 de la *Loi constitutionnelle de 1982* sur l'analyse fondée sur le par. 15(1) dans la présente affaire?

(3) La disposition législative contestée viole-t-elle le par. 15(1)?

(4) S'il y a violation du par. 15(1), cette violation est-elle justifiée au regard de l'article premier de la *Charte*?

(5) Au besoin, quelle est la réparation convenable?

V. L'analyse

A. *L'analyse fondée sur l'art. 15 devrait-elle porter uniquement sur la situation de la bande de Batchewana?*

La question préliminaire suivante se pose: L'analyse fondée sur le par. 15(1) devrait-elle porter sur la situation de la bande de Batchewana en particulier, ou sur la disposition législative dans son application générale, c'est-à-dire à toutes les bandes visées par le par. 77(1)? En première instance, l'analyse s'est attachée à la situation particulière de la bande de Batchewana, puisque les intimés sollicitaient une exemption constitutionnelle s'appliquant uniquement à leur bande.

Toutefois, le fait de limiter l'examen à la situation de la bande de Batchewana dans le cadre de l'analyse fondée sur le par. 15(1) reviendrait à présumer que la réparation convenable est l'exemption constitutionnelle. En leur qualité de gardiens des droits garantis par la *Charte*, les tribunaux ont l'obligation de veiller à ce que la réparation

to determine the appropriate remedy. Before considering any question of constitutional exemption, therefore, the general application of the legislation, and the available evidence relating to that general application, should be examined. Only if there is no evidence of general invalidity will it be necessary to consider the specific circumstances of the Batchewana Band and, therefore, the doctrine of constitutional exemption.

accordée soit proportionnée à l'atteinte constatée, et de déterminer la réparation convenable. Par conséquent, avant d'aborder la question de l'exemption constitutionnelle, il faut examiner l'application générale de la disposition législative en cause, ainsi que la preuve disponible à cet égard. Ce n'est qu'en l'absence de preuve d'invalidité générale qu'il sera nécessaire de prendre en considération la situation particulière de la bande de Batchewana et, par conséquent, la doctrine de l'exemption constitutionnelle.

The appellants argue that such an analysis would be improper because of the manner in which this case was presented at trial, which addressed specifically the circumstances of the Batchewana Band. However, the plaintiffs' statement of claim, in its allegations relating to the equality claim, alleged discrimination on the face of the legislation, and did not relate this only to the particular context of the Batchewana Band. Therefore, discrimination in s. 77(1) as it applies generally has been at issue since the beginning of these proceedings. Issues surrounding the question of the constitutionality of the legislation as it applies generally have been addressed by the parties and by the interveners in their submissions before this Court, and a general analysis was conducted by the Court of Appeal in its decision. Therefore, an analysis of the constitutionality of the law in its general application will not take any parties by surprise.

47 Les appelantes soutiennent qu'il serait inopportun de faire une telle analyse en raison de la manière dont la présente affaire a été plaidée en première instance, où l'on s'est attaché spécifiquement à la situation de la bande de Batchewana. Toutefois, parmi les allégations contenues dans leur déclaration concernant les droits à l'égalité, les demandeurs ont plaidé la discrimination ressortant du texte de loi lui-même et ils n'ont pas rattaché cette prétention à la situation particulière de la bande de Batchewana. Par conséquent, la question de la discrimination découlant de l'application générale du par. 77(1) est en litige depuis le tout début de la présente affaire. Les parties et les intervenants ont traité des aspects connexes de la question de la constitutionnalité du texte de loi dans son application générale dans les mémoires qu'ils ont présentés à notre Cour, et la Cour d'appel a procédé à une analyse générale dans sa décision. En conséquence, les parties ne seront pas prises au dépourvu par l'analyse de la constitutionnalité de la loi dans son application générale.

The constitutional questions, as formulated, address only the situation of the members of the Batchewana Band. It must therefore be determined whether considering the application of the legislation in a general sense and the possibility of a remedy other than constitutional exemption is foreclosed by the formulation of the constitutional questions. When the constitutional validity or applicability of legislation is challenged, a constitutional question must be stated by the Chief Justice or a judge of this Court, pursuant to Rule 32(1) of the *Rules of the Supreme Court of Canada*, SOR/83-74, though the parties are "generally left

48 Les questions constitutionnelles, telles qu'elles ont été formulées, ne visent que la situation des membres de la bande de Batchewana. Il faut donc se demander si la formulation des questions constitutionnelles fait obstacle à l'examen de l'application de la mesure législative en général et à la possibilité d'une réparation différente de l'exemption constitutionnelle. En cas de contestation de la validité ou de l'applicabilité constitutionnelle d'une mesure législative, une question constitutionnelle doit être formulée par le Juge en chef ou un autre juge de notre Cour, conformément au par. 32(1) des *Règles de la Cour suprême du Canada*,

wide latitude" in formulating the questions which will be stated: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71. However, this Court has held that it is not bound by the precise wording of the constitutional question. For example, in *Bisaillon* at p. 72, this Court reworded one of the stated constitutional questions to make it more narrow. In *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, the parties were unable to agree on the provisions implicated by a constitutional challenge and therefore all of the affected provisions were not included in the constitutional questions. In its formal judgment, reported at [1997] 3 S.C.R. 389, the Court subsequently made an order affecting the constitutional applicability of several sections of the challenged legislation not included in the constitutional question as stated.

DORS/83-74, quoiqu'«[u]ne grande latitude [soit] généralement laissée» aux parties dans la formulation des questions constitutionnelles: *Bisaillon c. Keable*, [1983] 2 R.C.S. 60, à la p. 71. Toutefois, notre Cour a statué qu'elle n'est pas liée par le texte précis d'une question constitutionnelle. Par exemple, dans l'arrêt *Bisaillon*, à la p. 72, la Cour a reformulé une des questions constitutionnelles pour en restreindre la portée. Dans l'arrêt *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358, comme les parties étaient incapables de s'entendre sur l'identité des dispositions visées par le litige constitutionnel, les diverses dispositions en cause n'avaient pas toutes été mentionnées dans les questions constitutionnelles. Dans son jugement formel, publié à [1997] 3 R.C.S. 389, la Cour a rendu subséquemment une ordonnance concernant l'applicabilité de plusieurs dispositions des textes de loi contestés qui n'avaient pas été mentionnées dans les questions constitutionnelles formulées.

49 In B. A. Crane and H. S. Brown, *Supreme Court of Canada Practice 1998* (1997), at p. 225, the authors note that the purpose of stating constitutional questions is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are made aware of constitutional challenges as required by Rule 32(4), so that they may decide whether or not to exercise their right to intervene. I agree with this characterization of the purpose of the provision, and would add that it also constitutes a signal to the parties and other potential interveners about the constitutional issues being addressed. In my opinion, the jurisdiction of the Court to restate constitutional questions, or make a declaration of invalidity broader than that contained within them, is appropriately exercised when doing so does not, in substance, deprive attorneys general of their right to notice of the fact that the constitutionality of a given legislative provision is at issue in this Court, or deprive those who have a stake in the outcome of the opportunity to argue the substantive issues relating to this question.

Dans B. A. Crane et H. S. Brown, *Supreme Court of Canada Practice 1998* (1997), à la p. 225, les auteurs soulignent que la formulation de questions constitutionnelles a pour objet de faire en sorte que le procureur général du Canada, les procureurs généraux des provinces et les ministres de la justice des gouvernements des territoires soient avisés, comme l'exige le par. 32(4) des Règles, de l'existence d'un litige constitutionnel, de façon à pouvoir décider s'ils vont exercer ou non leur droit d'intervenir. Je souscris à cette description de l'objet de cette disposition, et j'ajouterais qu'elle constitue également un moyen de signaler aux parties et à d'éventuels intervenants les questions constitutionnelles qui seront examinées. À mon avis, la Cour exerce de façon appropriée son pouvoir de reformuler des questions constitutionnelles ou de prononcer une déclaration d'invalidité de portée plus large que celle demandée dans les questions lorsque, ce faisant, elle ne prive pas les procureurs généraux de leur droit d'être avisés du fait que la constitutionnalité d'une disposition législative donnée est contestée devant notre Cour, et elle ne prive pas ceux qui sont concernés par l'issue du litige de la possibilité de se faire entendre sur les questions de fond se rapportant à cette question.

Here, the constitutional question that was served on the appropriate parties pursuant to Rule 32, though it did contain the words "with respect only to members of the Batchewana Indian Band", constituted notice to all attorneys general that the constitutional validity of the residency requirement for voting contained in the *Indian Act* was at issue. The remedy preferred by the federal Crown in this case, if there is to be one, is for a general declaration to be made rather than a constitutional exemption, and this was argued in its factum and oral argument. As emphasized above, the issues relating to the general application of s. 77(1) were argued and discussed before us and in the Federal Court of Appeal by the parties and by interveners. Despite the wording of the question, it was clear that this Court, when analysing the situation of the Batchewana Band, might set down principles that would apply to other bands. I do not believe, therefore, that any substantive prejudice has been caused to attorneys general or anyone else by the wording of the question, or that they would reasonably have made a different decision about exercising their right to intervene. In the circumstances, therefore, I will restate the constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

B. *Sections 25 and 35*

The effects of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*, are raised by the intervener the Lesser Slave Lake Indian Regional Council (the "Council"), but this issue was not addressed by either of the appellants or by the

En l'espèce, la question constitutionnelle qui a été signifiée aux parties visées, conformément à l'art. 32 de Règles, quoique comportant les mots «mais uniquement en ce qui concerne les membres de la bande Indienne de Batchewana», constituait un avis à tous les procureurs généraux que la validité constitutionnelle de la condition relative au lieu de résidence prévue par la *Loi sur les Indiens* pour l'exercice du droit de vote était en litige. La réparation que préconise le gouvernement fédéral en l'espèce, si une réparation doit être accordée, est une déclaration générale plutôt qu'une exemption constitutionnelle, et il a fait état de cette préférence tant dans son mémoire que dans ses plaidoiries. Comme je l'ai souligné plus tôt, les divers aspects de la question de l'application générale du par. 77(1) ont été plaidés et débattus devant nous et devant la Cour d'appel fédérale par les parties et les intervenants. Malgré le texte de la question, il était évident que notre Cour, dans l'analyse de la situation de la bande de Batchewana, pourrait établir des principes qui s'appliqueraient à d'autres bandes. Par conséquent, je ne crois pas que les procureurs généraux ou quelque autre intéressé aient subi un préjudice concret en raison du texte de la question, ou qu'ils auraient raisonnablement pris une décision différente en ce qui concerne leur droit d'intervenir. Dans les circonstances, je reformule donc ainsi les questions constitutionnelles:

1. Les mots «et réside ordinairement sur la réserve» figurant au par. 77(1) de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, contreviennent-ils au par. 15(1) de la *Charte canadienne des droits et libertés*, soit de façon générale, soit uniquement en ce qui concerne les membres de la bande Indienne de Batchewana?

2. Si la réponse à la question 1 est affirmative, le par. 77(1) de la *Loi sur les Indiens* est-il une limite raisonnable dont la justification peut se démontrer conformément à l'article premier de la *Charte canadienne des droits et libertés*?

B. *Les articles 25 et 35*

La question des effets des art. 25 de la *Charte* et 35 de la *Loi constitutionnelle de 1982* a été soulevée par l'intervenant Lesser Slave Lake Indian Regional Council (le «Conseil»), mais n'a pas été abordée par les appelantes ni par les intimés. Le

respondents. The Council argues that the restriction of voting rights to those who are ordinarily resident on the reserve constitutes a codification of Aboriginal or treaty rights under s. 35, or falls under the "other rights or freedoms" protected under s. 25, and that, therefore, s. 25 requires that s. 15 be interpreted so as not to abrogate or derogate from those rights in any way. It suggests that for this reason the impugned provisions are shielded from review. In contrast, the intervener the Native Women's Association of Canada argues that s. 25 guides the interpretation of other *Charter* rights so that the rights of Aboriginal peoples cannot be challenged by non-Aboriginal people, but it does not shield Aboriginal rights from challenge by members of the Aboriginal community.

Conseil soutient que la restriction du droit de vote aux personnes qui résident ordinairement dans la réserve constitue la codification d'un droit — ancestral ou issus de traité — visé à l'art. 35 ou d'«autres» droits ou libertés protégés par l'art. 25, et que, par conséquent, l'art. 25 interdit toute interprétation de l'art. 15 qui entraînerait une atteinte à ces droits. Le Conseil prétend que, pour cette raison, les dispositions attaquées sont soustraites à l'examen. Par contraste, l'intervenante l'Association des femmes autochtones du Canada plaide que l'art. 25 sert de guide dans l'interprétation des autres droits garantis par la *Charte*, de façon à ce que les droits des peuples autochtones ne puissent être contestés par des non-autochtones, ce qui ne les met toutefois pas à l'abri de contestations par des membres de la communauté autochtone.

52 The arguments of the Council do not, in my opinion, indicate that the relief requested by the respondents could "abrogate or derogate" from the rights included in s. 25. Section 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when the relief requested under a *Charter* challenge could abrogate or derogate from "other rights or freedoms that pertain to the aboriginal peoples of Canada". This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the "other rights or freedoms" included in s. 25. The Council argues that s. 77(1) protects or recognizes rights guaranteed by s. 35 including Aboriginal title, treaty rights, and Aboriginal rights of self-government. It also alleges that s. 77(1) is a statutory right that protects bands' self-determination and self-government. The Council's arguments relating to s. 25 rest, in large part, on the assertion that Bill C-31 violates Aboriginal and treaty rights, a matter which is not before this Court and in relation to which no evidence has been presented. In my opinion,

Les arguments du Conseil n'indiquent pas, à mon avis, que la réparation sollicitée par les intimés pourrait «porter atteinte» aux droits visés à l'art. 25. Cet article s'applique lorsque des droits ancestraux ou issus de traités garantis par l'art. 35 sont en litige, ou quand la réparation demandée dans le cadre d'une contestation fondée sur la *Charte* pourrait porter atteinte à d'«autres» droits ou libertés des peuples autochtones du Canada. Ce passage montre que les droits visés à l'art. 25 sont plus étendus que ceux visés à l'art. 35, et qu'il peut s'agir de droits d'origine législative. Cependant, le seul fait qu'une mesure législative concerne les autochtones ne la fait pas entrer dans le champ d'application des «autres» droits ou libertés visés à l'art. 25. Le Conseil soutient que le par. 77(1) protège ou reconnaît des droits garantis par l'art. 35, notamment le titre aborigène, les droits issus de traités ainsi que les droits ancestraux à l'autonomie gouvernementale. Il affirme également que le par. 77(1) crée en faveur des bandes un droit d'origine législative à l'autodétermination et à l'autonomie gouvernementale. Les arguments du Conseil en ce qui concerne l'art. 25 reposent en grande partie sur la thèse que le projet de loi C-31 contrevient à des droits ancestraux et issus de traités, question dont notre Cour n'est pas saisie et à l'égard de laquelle aucun élément de preuve n'a été présenté. En conséquence, je suis d'avis que les observations

therefore, the submissions of the Council do not show that s. 25 is triggered in this case.

Because it has not been shown to apply, and argument on this question was extremely limited, it would be inappropriate to articulate, in this case, a general approach to s. 25. In particular, I will not decide how the words "shall not be construed so as to abrogate or derogate" affect the analysis under other *Charter* provisions when the section is triggered, or whether s. 25 "shields" the rights it includes from the application of the *Charter*. I also find it unnecessary to decide the scope of the "other rights or freedoms" protected by the section. These questions will be determined when the issues directly arise and the Court has heard full argument on them.

I emphasize, however, that as I will discuss below, the contextual approach to s. 15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history.

C. *Section 15(1) Analysis*

(1) The Section 15(1) Framework

In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, Iacobucci J. discussed the framework within which s. 15(1) analysis must be carried out. As set out in para. 88 of *Law*, an inquiry into whether legislation violates s. 15(1) involves three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the

du Conseil n'établissent pas que l'art. 25 s'applique dans la présente affaire.

53 Étant donné qu'on n'a pas fait la preuve de l'application de l'art. 25 et que l'argumentation sur cette question a été extrêmement limitée, il ne conviendrait pas d'énoncer, en l'espèce, une approche générale à l'égard de l'art. 25. En particulier, je ne me prononcerai pas sur l'incidence des mots «ne porte pas atteinte» sur l'analyse effectuée en vertu d'autres dispositions de la *Charte* lorsque l'art. 25 s'applique, ou sur la question de savoir si cet article «protège» les droits qu'il vise contre l'application de la *Charte*. J'estime également qu'il n'est pas nécessaire de statuer sur la portée des «autres» droits ou libertés protégés par cet article. Ces questions seront tranchées lorsqu'elles seront directement soulevées et que notre Cour aura eu l'avantage d'arguments exhaustifs à leur sujet.

54 Toutefois, je dois souligner, et c'est une question dont je vais traiter plus loin, que l'approche contextuelle applicable à l'égard de l'art. 15 commande que l'analyse du caractère égalitaire des dispositions se rapportant aux Autochtones prenne en compte et respecte le patrimoine et la spécificité autochtones, ainsi que la reconnaissance des droits ancestraux et issus de traités, et mette l'accent sur l'importance qu'ont pour les Canadiens d'origine autochtone, leurs valeurs et leur histoire.

C. *L'analyse fondée sur le par. 15(1)*

(1) Le cadre de l'analyse fondée sur le par. 15(1)

55 Dans l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, le juge Iacobucci a examiné le cadre de l'analyse fondée sur le par. 15(1). Comme on le précise au par. 88 de l'arrêt *Law*, pour déterminer si une loi contrevient au par. 15(1), il faut répondre à trois questions:

(A) La loi contestée: a) établit-elle une distinction formelle entre le demandeur et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles, ou b) omet-elle de tenir compte de la situation défavorisée dans laquelle le demandeur se trouve déjà dans la société canadienne, créant ainsi

claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

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

56 At all three of these stages, it must be recognized that the focus of the inquiry is purposive and contextual (see, e.g., *Law*, *supra*, at para. 41). A court considering a discrimination claim must examine the legislative, historical, and social context of the distinction, the reality and experiences of the individuals affected by it, and the purposes of s. 15(1).

(2) First Stage: Differential Treatment

57 The first stage of inquiry is easily satisfied in the present case. Section 77(1) of the *Indian Act* draws a distinction between band members who live on-reserve and those who live off-reserve, by excluding the latter from the definition of "elector" within the band. This constitutes differential treatment.

(3) Second Stage: Analogous Grounds

58 The differential treatment in this case is based on the status of holding membership in an *Indian Act* band, but living off that band's reserve. This combination of traits does not fall under one of the enumerated or already recognized analogous grounds. The fundamental consideration at the second stage, if the ground is not enumerated or already recognized as analogous, is whether

une différence de traitement réelle entre celui-ci et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles?

(B) Le demandeur fait-il l'objet d'une différence de traitement fondée sur un ou plusieurs des motifs énumérés ou des motifs analogues?

et

(C) La différence de traitement est-elle discriminatoire en ce qu'elle impose un fardeau au demandeur ou le prive d'un avantage d'une manière qui dénote une application stéréotypée de présumées caractéristiques personnelles ou de groupe ou qui a par ailleurs pour effet de perpétuer ou de promouvoir l'opinion que l'individu touché est moins capable ou est moins digne d'être reconnu ou valorisé en tant qu'être humain ou que membre de la société canadienne, qui mérite le même intérêt, le même respect et la même considération?

À chacune de ces trois étapes, l'examen est axé sur l'objet et sur le contexte (voir, par exemple, l'arrêt *Law*, précité, au par. 41). Le tribunal qui est saisi d'une allégation de discrimination doit examiner le contexte législatif, historique et social de la distinction en cause, la réalité et l'expérience vécues par les personnes touchées par cette distinction, ainsi que les objets du par. 15(1).

(2) Première étape: la différence de traitement

La première étape de l'analyse est aisément franchie en l'espèce. Le paragraphe 77(1) de la *Loi sur les Indiens* établit une distinction entre les membres des bandes qui vivent dans les réserves et ceux qui vivent en dehors de celles-ci, en excluant ces derniers de la définition d'«électeur» pour les élections de la bande. Cette distinction constitue une différence de traitement.

(3) Deuxième étape: les motifs analogues

En l'espèce, la différence de traitement est celle à laquelle sont soumises les personnes qui ont la qualité de membres d'une bande au sens de la *Loi sur les Indiens* mais qui vivent en dehors de la réserve de cette bande. Cette combinaison de caractéristiques n'est visée par aucun motif énuméré ou motif analogue déjà reconnu. Si l'on n'est pas en présence d'un motif énuméré ou d'un motif

recognition of the basis of differential treatment as an analogous ground would further the purposes of s. 15(1): *Law*, *supra*, at para. 93. These purposes are, as stated at para. 51 of *Law*:

> [T]o prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

The analysis at the analogous grounds stage involves considering whether differential treatment of those defined by that characteristic or combination of traits has the potential to violate human dignity in the sense underlying s. 15(1): *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 171, *per* Cory J. In *Law*, the concept of human dignity as it relates to s. 15(1) was described by Iacobucci J., at para. 53, as follows:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological empowerment and integrity. Human dignity is harmed by unfair treatment premised on personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.

The analogous grounds inquiry, like the other two stages of analysis, must be undertaken in a purposive and contextual manner: *Law*, *supra*, at para. 41. The "nature and situation of the individ-

analogue déjà reconnu, la considération fondamentale à la deuxième étape est la question de savoir si la reconnaissance du fondement de la différence de traitement comme motif analogue favoriserait la réalisation des objets du par. 15(1): *Law*, précité, au par. 93. Ces objets, tels que formulés dans l'arrêt *Law*, précité, au par. 51, se lisent:

> [E]mpêcher toute atteinte à la dignité et à la liberté humaines essentielles par l'imposition de désavantages, de stéréotypes et de préjugés politiques ou sociaux, et [. . .] favoriser l'existence d'une société où tous sont reconnus par la loi comme des êtres humains égaux ou comme des membres égaux de la société canadienne, tous aussi capables, et méritant le même intérêt, le même respect, et la même considération.

Dans le cadre de l'analyse à l'étape des motifs analogues, il faut se demander si la différence de traitement à laquelle sont soumises les personnes définies par cette caractéristique ou combinaison de caractéristiques est susceptible de porter atteinte au droit à la dignité humaine qui sous-tend le par. 15(1): *Egan c. Canada*, [1995] 2 R.C.S. 513, au par. 171, motifs du juge Cory. Dans l'arrêt *Law*, le juge Iacobucci a décrit ainsi, au par. 53, le concept de dignité humaine en regard du par. 15(1):

> La dignité humaine signifie qu'une personne ou un groupe ressent du respect et de l'estime de soi. Elle relève de l'intégrité physique et psychologique et de la prise en main personnelle. La dignité humaine est bafouée par le traitement injuste fondé sur des caractéristiques ou la situation personnelles qui n'ont rien à voir avec les besoins, les capacités ou les mérites de la personne. Elle est rehaussée par des lois qui sont sensibles aux besoins, aux capacités et aux mérites de différentes personnes et qui tiennent compte du contexte sous-jacent à leurs différences. La dignité humaine est bafouée lorsque des personnes et des groupes sont marginalisés, mis de côté et dévalorisés, et elle est rehaussée lorsque les lois reconnaissent le rôle à part entière joué par tous dans la société canadienne. Au sens de la garantie d'égalité, la dignité humaine n'a rien à voir avec le statut ou la position d'une personne dans la société en soi, mais elle a plutôt trait à la façon dont il est raisonnable qu'une personne se sente face à une loi donnée.

Tout comme aux deux autres étapes de l'analyse, l'examen prévu à l'étape des motifs analogues doit être fait en fonction de l'objet et du contexte: *Law*, précité, au par. 41. Il faut également considérer la

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ual or group at issue, and the social, political and legal history of Canadian society's treatment of that group" must be considered: *Law*, *supra*, at para. 93. As stated by Wilson J. in *Andrews*, *supra*, at p. 152, cited with approval in *Law* at para. 29, the determination of whether a ground qualifies as analogous under s. 15(1):

> . . . is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

60 Various contextual factors have been recognized in the case law that may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential. An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground: *Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 148; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 90. It is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked: *Andrews*, *supra*, at p. 152; *Law*, *supra*, at para. 29. Another indicator is whether the ground is included in federal and provincial human rights codes: *Miron*, *supra*, at para. 148. Other criteria, of course, may also be considered in subsequent cases, and none of the above indicators are necessary for the recognition

«nature et [. . .] la situation de la personne ou du groupe en cause et [l]es antécédents sociaux, politiques et juridiques du traitement réservé à ce groupe dans la société canadienne»: *Law*, précité, au par. 93. Comme l'a affirmé le juge Wilson dans l'arrêt *Andrews*, précité, à la p. 152, propos cités avec approbation dans l'arrêt *Law*, au par. 29, la conclusion qu'un motif peut être qualifié d'analogue pour l'application du par. 15(1):

> . . . ne peut pas être tirée seulement dans le contexte de la loi qui est contestée mais plutôt en fonction de la place occupée par le groupe dans les contextes social, politique et juridique de notre société. Bien que les législatures doivent inévitablement établir des distinctions entre les gouvernés, ces distinctions ne devraient pas causer des désavantages à certains groupes ou individus, ni renforcer les désavantages dont ils sont victimes, en les privant des droits consentis librement aux autres.

Les tribunaux ont reconnu divers facteurs contextuels susceptibles d'aider à déterminer si la caractéristique ou la combinaison de caractéristiques qui définit les demandeurs pourrait être source de discrimination. L'existence d'un motif analogue peut ressortir de la nature fondamentale de la caractéristique en cause, en d'autres mots: Est-ce que, considérée du point de vue d'une personne raisonnable dans la situation du demandeur, cette caractéristique est importante pour leur identité, leur personnalité ou leur sentiment d'appartenance. Le fait qu'une caractéristique soit immuable, difficile à changer ou modifiable uniquement à un prix personnel inacceptable peut également entraîner sa reconnaissance comme motif analogue: *Miron c. Trudel*, [1995] 2 R.C.S. 418, au par. 148; *Vriend c. Alberta*, [1998] 1 R.C.S. 493, au par. 90. Un autre élément central de l'analyse est la question de savoir si les personnes définies par la caractéristique sont dépourvues de pouvoir politique, défavorisées ou susceptibles de le devenir ou de voir leurs intérêts négligés: *Andrews*, précité, à la p. 152; *Law*, précité, au par. 29. Un indice supplémentaire est le fait que le motif soit inclus ou non dans les lois fédérales et provinciales sur les droits et libertés de la personne: *Miron*, précité, au par. 148. De plus, d'autres critères pourront évidemment être pris en considération dans des affaires subséquentes, et aucun des indices

of an analogous ground or combination of grounds: *Miron*, *supra*, at para. 149.

susmentionnés n'est nécessaire à la reconnaissance d'un motif analogue ou d'une combinaison de motifs analogues: *Miron*, précité, au par. 149.

I should also note that if indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area, to give only a few examples. Here, to illustrate, the nature of the decisions band members make about whether to live on or off a reserve are different from those made by many other Canadians in relation to their place of residence. So are other factors related to the analogous grounds analysis that still affect them. The second stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice. As this Court unanimously held in *Law*, *supra*, at para. 73: "The possibility of new forms of discrimination denying essential human worth cannot be foreclosed".

61 Je dois également souligner que, si certains indices de l'existence d'un motif analogue ne sont pas présents de façon générale, au sein d'un certain groupe de la société canadienne, ils peuvent néanmoins l'être dans un contexte social ou législatif différent, à l'intérieur d'un groupe différent de la société canadienne, ou dans une région donnée, pour ne donner que quelques exemples. Pour illustrer ce point en l'espèce, mentionnons le fait que la nature des décisions que prennent les membres des bandes indiennes lorsqu'ils se demandent s'ils vont vivre ou non dans la réserve diffère de celles que prennent bon nombre de Canadiens relativement au choix de leur lieu de résidence. Il en va de même pour d'autres facteurs relatifs à l'analyse des motifs analogues qui continuent d'avoir une incidence sur les membres des bandes indiennes. La deuxième étape doit alors être suffisamment souple pour tenir compte des stéréotypes, des préjugés et des dénis de dignité humaine et d'égalité de valeur des individus dont peuvent être victimes de certaines façons des groupes précis, ainsi que du fait que des caractéristiques personnelles peuvent se chevaucher ou s'entrecroiser (par exemple, en l'espèce, la race, la qualité de membre d'une bande indienne et le lieu de résidence), et pour refléter soit l'évolution des phénomènes sociaux soit l'apparition de nouveaux stéréotypes ou préjugés ou la manifestation, sous des formes différentes, de ceux qui existent déjà. Ainsi que l'a statué à l'unanimité notre Cour dans l'arrêt *Law*, précité, au par. 73: «On ne peut éliminer à l'avance la possibilité que de nouvelles formes de discrimination viennent nier la valeur essentielle de l'être humain».

Here, several factors lead to the conclusion that recognizing off-reserve band member status as an analogous ground would accord with the purposes of s. 15(1). From the perspective of off-reserve band members, the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental. It involves choosing

62 Dans le présent cas, plusieurs facteurs amènent à conclure que la reconnaissance, comme motif analogue, de la qualité de membre hors réserve d'une bande Indienne serait compatible avec les objets du par. 15(1). Du point de vue des membres hors réserve des bandes Indiennes, la décision de vivre dans la réserve ou à l'extérieur de celle-ci, si ce choix leur est ouvert, est importante pour leur

whether to live with other members of the band to which they belong, or apart from them. It relates to a community and land that have particular social and cultural significance to many or most band members. Also critical is the fact that as discussed below during the third stage of analysis, band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act*'s rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost. For these reasons, the second stage of analysis has been satisfied, and "off-reserve band member status" is an analogous ground. It will hereafter be recognized as an analogous ground in any future case involving this combination of traits. I note that in making this determination, I make no findings about "residence" as an analogous ground in contexts other than as it affects band members who do not live on the reserve of the band to which they belong.

identité et leur personnalité et revêt donc un caractère fondamental. Cette décision les oblige à choisir entre vivre avec les autres membres de la bande à laquelle ils appartiennent ou vivre à l'écart de ceux-ci. Elle se rattache à une communauté et à un territoire qui ont une importance sociale et culturelle significative pour plusieurs ou la plupart des membres de la bande. Constitue également un facteur crucial, le fait que, comme nous le verrons ci-après au cours de la troisième étape de l'analyse, les membres hors réserve des bandes indiennes ont généralement souffert de désavantages, stéréotypes et préjugés, et font partie d'une «minorité discrète et isolée», définie par la race et le lieu de résidence. En outre, en raison du manque de débouchés et de logements qui sévit dans de nombreuses réserves et du fait que, auparavant, la *Loi sur les Indiens* retirait à diverses catégories de membres la qualité de membre d'une bande indienne, les personnes qui vivent à l'extérieur de la réserve n'ont bien souvent pas eu le choix à cet égard ou, si elles l'ont eu, elles n'ont pris leur décision qu'à contrecœur ou qu'à un prix très élevé sur le plan personnel. Pour ces raisons, la seconde étape de l'analyse est satisfaite, et la «qualité de membre hors réserve d'une bande indienne» est un motif analogue. Elle sera par conséquent reconnue comme telle dans toute affaire ultérieure mettant en cause cette combinaison de caractéristiques. Je tiens à souligner qu'en statuant ainsi je ne tire aucune conclusion relativement à la possibilité que le «lieu de résidence» constitue un motif analogue dans des contextes autres que ceux où il a une incidence sur les membres d'une bande indienne qui n'habitent pas la réserve de la bande à laquelle ils appartiennent.

(4) Third Stage of Analysis

63 At the third stage, the appropriate focus is on how, in the context of the legislation and Canadian society, the particular differential treatment impacts upon the people affected by it. This requires examining whether the legislation conflicts with the purposes of s. 15(1): to recognize all individuals and groups as equally deserving, worthy, and valuable, to remedy stereotyping, disadvantage and prejudice, and to ensure that all are treated as equally important members of Canadian

(4) La troisième étape de l'analyse

À la troisième étape, il convient de mettre l'accent sur l'effet qu'a la différence de traitement particulière sur les personnes touchées, dans le contexte de la mesure législative contestée et de la société canadienne. À cette fin, il faut se demander si la mesure législative contestée est incompatible avec les objectifs du par. 15(1) qui sont: reconnaître que les divers groupes et individus sont tous aussi méritants, dignes de reconnaissance et valables les uns que les autres; remédier aux

society. Determining whether legislation violates these purposes requires examining the legislation in the context in which it applies, with attention to the interests it affects, and the situation and history in Canadian society of those who are treated differentially by it. It must be examined how "a person legitimately feels when confronted with a particular law": *Law*, *supra*, at para. 53.

stéréotypes, désavantages et préjudices; et faire en sorte que chacun soit traité comme un membre de la société canadienne aussi important que tous les autres. Pour déterminer si une disposition législative porte atteinte à ces objectifs, il faut l'examiner à l'intérieur du contexte dans lequel elle s'applique, en s'attachant aux droits qu'elle touche ainsi qu'à la situation et à l'histoire, dans la société canadienne, de ceux qu'elle traite d'une façon différente. Il faut s'interroger sur la façon dont «il est raisonnable qu'une personne se sente face à une loi donnée»: *Law*, précité, au par. 53.

The perspective that must be adopted in making this determination is subjective and objective: *Law*, *supra*, at paras. 59-61; *Egan*, *supra*, at para. 56, *per* L'Heureux-Dubé J. It must be considered whether a reasonable person possessed of similar traits to the claimant would find that the legislation imposes a burden or withholds a benefit from him or her

64 Il faut, dans le cadre de cet examen, adopter un point de vue à la fois subjectif et objectif: *Law*, précité, aux par. 59 à 61; *Egan*, précité, au par. 56, motifs du juge L'Heureux-Dubé. Il faut se demander si une personne raisonnable, possédant les mêmes caractéristiques que le demandeur, estimerait que la mesure législative en cause lui impose un fardeau ou la prive d'un avantage

> in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration. . . .
>
> (*Law*, *supra*, at para. 88.)

> d'une manière qui dénote une application stéréotypée de présumées caractéristiques personnelles ou de groupe ou qui a par ailleurs pour effet de perpétuer ou de promouvoir l'opinion que l'individu touché est moins capable ou moins digne d'être reconnu ou valorisé en tant qu'être humain ou que membre de la société canadienne, qui mérite le même intérêt, le même respect et la même considération. . .
>
> (*Law*, précité, au par. 88.)

The analysis of discriminatory impact must be conducted with a careful eye to the context of who is affected by the legislation and how it affects them.

L'analyse de l'effet discriminatoire doit être effectuée en accordant une attention particulière au contexte des personnes touchées par la loi en cause et à la façon dont celle-ci a une incidence sur ces personnes.

I would emphasize that the "reasonable person" considered by the subjective-objective perspective understands and recognizes not only the circumstances of those like him or her, but also appreciates the situation of others. Therefore, when legislation impacts on various groups, particularly if those groups are disadvantaged, the subjective-objective perspective will take into account the particular experiences and needs of all of those groups.

65 Je tiens à souligner que la «personne raisonnable» prise en considération dans cette analyse subjective-objective comprend et admet non seulement la situation des personnes qui sont comme elle, mais elle est également sensible à la situation d'autrui. Par conséquent, dans les cas où une mesure législative produit des effets sur divers groupes, spécialement si ces groupes sont défavorisés, cette analyse subjective-objective tiendra compte des expériences et besoins particuliers de chacun de ces groupes.

66 Before turning to the specific contextual factors enumerated by Iacobucci J. in *Law*, it is worth mentioning one additional factor important to the particular circumstances of this appeal. Section 77(1) implicates, in a direct way that does not affect other Canadians, the interests of two groups who have generally experienced "pre-existing disadvantage, vulnerability, stereotyping, or prejudice": *Law*, *supra*, at para. 63. All band members affected by this legislation, whether on-reserve or off-reserve, have been affected by the legacy of stereotyping and prejudice against Aboriginal peoples.

Avant d'aborder les facteurs contextuels énumérés par le juge Iacobucci dans l'arrêt *Law*, il convient de mentionner un autre facteur important dans le cadre du présent pourvoi. Le paragraphe 77(1) met en cause, directement et d'une manière qui ne touche pas les autres Canadiens, les intérêts de deux groupes qui ont, de façon générale, souffert de «la préexistence d'un désavantage, de vulnérabilité, de stéréotypes ou de préjugés»: *Law*, précité, au par. 63. Tous les membres de la bande touchés par cette mesure législative, qu'ils résident ou non dans les réserves, subissent les effets de l'héritage de stéréotypes et préjugés visant les peuples autochtones.

67 When analysing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. This is inherent in the nature of a subjective-objective analysis, since a court is required to consider the perspective of someone possessed of similar characteristics to the claimant. Thus, in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, the history of Aboriginal people in Canada, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men. It must also always be remembered that s. 15(1) provides for the "unremitting protection" of the right to equality, in whatever context the analysis takes place, whether there is one disadvantaged or minority group affected or more than one: see *Andrews*, *supra*, at p. 175; *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1326. In addition, it must be recalled that all the circumstances must always be evaluated from the perspective of a person with similar characteristics to the claimant, fully informed of the circumstances.

Dans l'analyse d'une demande mettant en cause des intérêts potentiellement opposés de groupes minoritaires, il faut être particulièrement sensible à leurs réalités et à leurs expériences, ainsi qu'à leurs valeurs, à leur histoire et à leur identité. Il s'agit d'une démarche inhérente à l'analyse subjective-objective, puisque le tribunal doit prendre en considération le point de vue d'une personne possédant les mêmes caractéristiques que le demandeur. Ainsi, en ce qui concerne les droits à l'égalité qui touchent les peuples et les communautés autochtones, il faut évaluer la mesure législative contestée en accordant une attention spéciale aux droits des peuples autochtones, à la protection des droits ancestraux ou issus de traités garantis par la Constitution ainsi qu'à l'histoire des autochtones au Canada, et en faisant montre de respect et de considération à l'égard de la culture de tous les autochtones — hommes et femmes — et de leur attachement à cette culture. Il faut toujours garder à l'esprit que le par. 15(1) assure la «protection constante» du droit à l'égalité, quel que soit le contexte dans lequel l'analyse a lieu, et qu'il y ait un ou plusieurs groupes défavorisés ou minoritaires qui soient touchés: voir *Andrews*, précité, à la p. 175; *R. c. Turpin*, [1989] 1 R.C.S. 1296, à la p. 1326. De plus, il convient de rappeler que, dans tous les cas, il faut évaluer l'ensemble des circonstances du point de vue d'une personne qui possède les mêmes caractéristiques que le demandeur et qui est bien informée de ces circonstances.

I am aware, of course, that issues have been raised about the constitutionality of distinctions created by the *Indian Act* between band members and non-band members within the Aboriginal community. One such issue was dealt with in Bill C-31, discussed below. While the discussion of context which follows necessarily touches on the experiences of Aboriginal peoples generally, the decision in this case relates only to the constitutionality of the voting distinctions made within bands themselves by s. 77(1) of the *Indian Act.*

Since equality is a comparative concept, the analysis must consider the person relative to whom the claimant is being treated differentially: *Law*, *supra*, at para. 56. I accept the claimants' argument that the comparison here is between band members living on- and off-reserve, since these are the two groups whom the legislation treats differentially on its face. This denies the benefit of voting for band leadership to members of bands affected by s. 77(1) who do not live on a reserve. Because of the groups involved, the Court must also be attentive to the fact that there may be unique disadvantages or circumstances facing on-reserve band members. However, no evidence has been presented that would suggest that the legislation, in purpose or effect, ameliorates the position of band members living on-reserve, and therefore I find it unnecessary to consider the third contextual factor outlined in *Law*. I turn now to the particular contextual factors outlined in *Law* which may indicate that the legislation conflicts with the purposes of s. 15(1).

(a) *Disadvantage, Vulnerability, Stereotyping, and Prejudice*

Groups or individuals who are generally subject to unfair treatment in society because of their characteristics or circumstances are already demeaned

68 Je suis consciente, évidemment, que certaines questions ont été soulevées relativement à la constitutionnalité des distinctions créées par la *Loi sur les Indiens* entre les membres et les non-membres d'une bande au sein de la communauté autochtone. Une de ces questions a été réglée dans le projet de loi C-31, qui est examiné plus loin. Bien que, dans l'examen du contexte dont je discute plus loin, il soit nécessairement question des expériences des peuples autochtones en général, la décision dans la présente affaire ne porte que sur la constitutionnalité des distinctions relatives à l'exercice du droit de vote qui sont établies au sein des bandes elles-mêmes par le par. 77(1) de la *Loi sur les Indiens.*

69 Étant donné que l'égalité est un concept relatif, il faut, dans l'analyse, prendre en considération la personne par rapport à laquelle le demandeur est traité différemment: *Law*, précité, au par. 56. J'accepte l'argument des demandeurs selon lequel la comparaison se fait, en l'espèce, entre les membres habitant les réserves et les membres vivant hors de celles-ci, puisqu'il s'agit des deux groupes qui sont traités différemment par le texte même de la disposition législative. Cette situation a pour effet de dénier aux membres n'habitant pas les réserves le bénéfice du droit de voter à l'élection des dirigeants de bandes visées au par. 77(1). En raison de l'identité des groupes concernés, la Cour doit, en outre, être attentive à la possibilité qu'il existe des désavantages ou circonstances qui soient propres aux membres habitant les réserves. Toutefois, il n'y a aucune preuve de nature à suggérer que, par son objet ou ses effets, la mesure législative contestée améliore la situation des membres des bandes habitant les réserves. J'estime donc qu'il n'est pas nécessaire d'examiner le troisième facteur contextuel énoncé dans l'arrêt *Law*. Je vais maintenant discuter des facteurs contextuels particuliers énoncés dans l'arrêt *Law* qui pourraient indiquer que la disposition législative contestée est incompatible avec les objets du par. 15(1).

a) *Désavantage, vulnérabilité, stéréotypes et préjugés*

70 Les groupes ou personnes qui font généralement l'objet d'un traitement injuste dans la société du fait de leurs caractéristiques ou de leur situation

in dignity, and further differential treatment of them is more likely to have a discriminatory impact, since it often perpetuates or increases that disadvantage: *Law*, *supra*, at para. 63. Pre-existing disadvantage, stereotyping, and vulnerability are important to the analysis in this case in three particular ways.

71 First, band members living off-reserve form part of a "discrete and insular minority", defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society. Decision makers have not always considered the perspectives and needs of Aboriginal people living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots. As noted by the Royal Commission on Aboriginal Peoples,

> [b]efore the Commission began its work, however, little attention had been given to identifying and meeting the needs, interests and aspirations of urban Aboriginal people. Little thought had been given to improving their circumstances, even though their lives were often desperate, and relations between Aboriginal people and the remainder of the urban population were fragile, if not hostile.
>
> The information and policy vacuum can be traced at least in part to long-standing ideas in non-Aboriginal culture about where Aboriginal people 'belong'.

(*Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 4, *Perspectives and Realities*, at p. 519.)

Similarly, there exist general stereotypes in society relating to off-reserve band members. People have often been only seen as "truly Aboriginal" if they live on reserves. The Royal Commission wrote:

souffrent déjà dans leur dignité, et le fait de se voir infliger une différence de traitement additionnelle risque davantage d'avoir sur eux un effet discriminatoire, puisqu'elle aura souvent pour effet de perpétuer ou d'accentuer ce désavantage: *Law*, précité, au par. 63. La préexistence d'un désavantage, d'un stéréotype et de vulnérabilité est un facteur important dans l'analyse, et ce pour trois raisons particulières.

Premièrement, les membres hors réserve des bandes indiennes font partie d'une «minorité discrète et isolée», qui est définie tant par sa race que par son lieu de résidence, qui est vulnérable et qui, à l'occasion ne s'est pas vu accorder l'égalité de respect ou de considération par le gouvernement ou par d'autres personnes au sein des sociétés canadienne et autochtone. Les décideurs ne tiennent pas toujours compte des points de vue et des besoins des autochtones qui vivent à l'extérieur des réserves, particulièrement en ce qui concerne leur identité autochtone et leur désir de maintenir des liens avec leur patrimoine et leurs racines culturelles. Comme l'a souligné la Commission royale sur les peuples autochtones:

> Toutefois, avant que la Commission n'entreprenne ses travaux, peu d'efforts avaient été faits pour cerner et satisfaire les besoins, les intérêts et les aspirations véritables des autochtones citadins. Même si ceux-ci étaient souvent en proie au désespoir et entretenaient avec le reste des citadins des rapports fragiles, voire hostiles, c'est à peine si l'on s'était efforcé d'améliorer leurs conditions de vie.
>
> L'absence de stratégie et de recherche à leur égard peut être attribuée, du moins en partie, aux idées enracinées dans la culture non autochtone en ce qui concerne le milieu où les autochtones devraient vivre.

(*Rapport de la Commission royale sur les peuples autochtones* (1996), vol. 4, *Perspectives et réalités*, à la p. 583.)

De même, il existe, dans la société, des stéréotypes généraux relativement aux membres hors réserve des bandes indiennes. Souvent, seules les personnes vivant dans les réserves sont considérées comme les «vrais autochtones». La Commission a écrit ceci:

MANY CANADIANS THINK of Aboriginal people as living on reserves or at least in rural areas. This perception is deeply rooted and persistently reinforced. . . .

. . . There is a history in Canada of putting Aboriginal people 'in their place' on reserves and in rural communities. Aboriginal cultures and mores have been perceived as incompatible with the demands of industrialized urban society. This leads all too easily to the assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed — that they must assimilate into this other world. The corollary is that once Aboriginal people migrate to urban areas, their identity as Aboriginal people becomes irrelevant.

(*Perspectives and Realities*, *supra*, at p. 519.)

BON NOMBRE DE CANADIENS pensent que les autochtones vivent exclusivement dans une réserve ou, à la rigueur, dans une région rurale. Cette perception bien ancrée est constamment renforcée . . .

. . . Ainsi, le Canada a traditionnellement parqué les autochtones dans des réserves et des collectivités rurales. Les non-autochtones perçoivent les mœurs et les cultures autochtones comme étant incompatibles avec les exigences de la société urbaine industrialisée. C'est ce qui pousse trop facilement les gens à croire que les autochtones citadins doivent renier leur culture et leur patrimoine — s'assimiler, somme toute — s'ils veulent réussir leur insertion dans cet autre monde. Le corollaire de ce point de vue est que les autochtones perdent leur spécificité culturelle dès que s'amorce leur migration vers la ville.

(*Perspectives et réalités*, *op. cit.*, aux pp. 583 et 584.)

Second, off-reserve band members experience particular disadvantages compared to those living on-reserve because of their separation from the reserve. They are apart from communities to which many feel connection, and have experienced racism, culture shock, and difficulty maintaining their identity in particular and serious ways because of this fact. Third, it should be noted that the context is one in which, due to various factors, Aboriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society.

72 Deuxièmement, parce qu'ils vivent à l'écart des réserves, les membres hors réserve des bandes indiennes souffrent de désavantages particuliers comparativement aux membres qui y résident. Ils vivent à l'écart de communautés à l'égard desquelles bon nombre d'entre eux éprouvent un sentiment d'attachement, et, en raison de ce fait, ils souffrent du racisme, du choc des cultures en plus d'éprouver de la difficulté à conserver certains aspects importants de leur identité. Troisièmement, il convient de signaler que nous sommes en présence d'un contexte où, pour divers facteurs, les femmes autochtones, que l'on peut dire doublement défavorisées en raison de leur sexe et de leur race, font partie des personnes particulièrement touchées par les mesures législatives se rapportant aux membres hors réserve des bandes indiennes, de par leur histoire et leur situation dans les sociétés canadienne et autochtone.

(b) *Relationship Between the Basis of the Differential Treatment and the Claimant's Characteristics or Circumstances*

b) *Le rapport entre le fondement de la différence de traitement et les caractéristiques ou la situation du demandeur*

The second factor set out by Iacobucci J. examines the relationship between the basis on which the differential treatment occurs and the characteristics of the claimant and others, with the goal of recognizing the human dignity and right to full participation in society of all of them. Some dis-

73 Dans le cadre du deuxième facteur énoncé par le juge Iacobucci, on examine le rapport entre le fondement de la différence de traitement et les caractéristiques du demandeur et d'autres personnes, afin que leur soient reconnus et la dignité humaine et le droit de participer pleinement à la société.

tinctions may correspond to the needs, capacities, or circumstances of a group in a manner that does not affect their human dignity or that of others, viewed from a subjective-objective perspective (*Law*, *supra*, at paras. 69-71).

74 In the case at bar, considering this factor involves examining the legislative context surrounding the distinction at issue. The voting rights at issue affect other sections of the legislation; it must be determined how the functions of electors and powers of the band council chosen by them relate to the needs, circumstances, and human dignity of the band members included and excluded by the voting scheme. In my opinion, if the powers of electors or the chief and council they vote for affect issues that are purely local, and do not affect the interests of off-reserve band members, the differential treatment between band members contained in s. 77(1) cannot be considered to violate the right to substantive equality of the off-reserve members. Such differential treatment would relate to the different positions and needs of the two groups and could not be said, in my opinion, to stereotype off-reserve members or suggest they are less deserving, worthy, or important band members from the perspective of someone affected by them. However, if the powers of the electors and the band council affect the interests and needs of both groups, this will be an indicator that the differential treatment is more likely to be discriminatory.

75 The band council chosen by the electors has by-law making powers under s. 81(1), which include the regulation of traffic on the reserve, control over the observance of law and order, and other such powers. Strayer J., the trial judge, found that these powers are mostly of a local nature, related to the governance of the reserve itself, and he suggested that they primarily affect residents. I would agree, in general, with this characterization, and I would

Certaines distinctions peuvent correspondre aux besoins, aux capacités ou à la situation d'un groupe d'une manière qui n'a pas, d'un point de vue subjectif-objectif, d'incidence sur la dignité humaine des membres de ce groupe ou sur celle d'autres personnes (*Law*, précité, aux par. 69 à 71).

En l'espèce, la prise en compte de ce facteur exige l'examen du contexte législatif de la distinction en litige. Les droits de vote en cause ont une incidence sur d'autres dispositions de la loi; il faut déterminer quel est le lien entre, d'une part, le rôle des électeurs et les pouvoirs du conseil de bande qu'ils choisissent, et, d'autre part, les besoins, la situation et la dignité humaine des membres des bandes qui sont admis à participer au scrutin et de ceux qui en sont exclus. À mon avis, si les pouvoirs des électeurs ou ceux du chef et du conseil qu'ils élisent portent sur des questions de nature purement locale, qui n'ont pas d'incidence sur les droits des membres hors réserve de la bande, l'on ne peut pas considérer que la différence de traitement entre les membres des bandes établie par le par. 77(1) porte atteinte au droit à l'égalité réelle des membres hors réserve. Cette différence de traitement serait liée à la situation et aux besoins différents des deux groupes, et il ne serait pas possible, à mon avis, d'affirmer qu'elle attribue un stéréotype aux membres hors réserve ou suggère qu'ils ne sont pas, du point de vue d'une personne touchée par ces pouvoirs, des membres de la bande aussi méritants, dignes de reconnaissance ou importants que les autres. Cependant, si les pouvoirs des électeurs et du conseil de bande ont une incidence sur les droits et besoins des deux groupes, il s'agira d'un indice que la différence de traitement est plus susceptible d'être discriminatoire.

Le conseil de bande choisi par les électeurs a le pouvoir, en vertu du par. 81(1), de faire des règlements administratifs sur divers sujets, notamment la réglementation de la circulation dans la réserve, l'observation de la loi et le maintien de l'ordre. Le juge Strayer, qui a entendu l'affaire en première instance, a conclu que ces pouvoirs sont pour la plupart de nature locale et concernent l'administration de la réserve elle-même, et il a indiqué qu'ils

add to the list of provisions affecting primarily local functions the powers contained in s. 85.1. However, I would note that several paragraphs of s. 81(1) affect in a particular way all band members, irrespective of residence on the reserve. Section 81(1)(*i*) allows the band council to allot land on the reserve, where this authority has been given by the Governor in Council. Sections 81(1)(*p*) and 81(1)(*p.*1) allow by-laws relating to residence and trespass on the reserve, which may affect the ability of non-residents to use the facilities and land on the reserve, and return to live there. The ability to live on the reserve, or to participate in activities on reserve lands if they desire, has been shown to be important to non-residents, and these functions of the band council affect their circumstances and needs directly and in a fundamental way: see *Perspectives and Realities*, *supra*, at p. 49.

touchent principalement les résidents. Je souscris de façon générale à cette qualification, et j'ajouterais à la liste des dispositions qui concernent principalement des fonctions locales les pouvoirs prévus à l'art. 85.1. Je ferais, toutefois, remarquer que plusieurs alinéas du par. 81(1) touchent d'une manière particulière l'ensemble des membres de la bande, qu'ils résident ou non dans la réserve. L'alinéa 81(1)*i*) permet au conseil de bande de répartir les terres de la réserve entre les membres de la bande, s'il a été autorisé à le faire par le gouverneur en conseil. Les alinéas 81(1)*p*) et 81(1)*p*.1) autorisent la passation de règlements administratifs concernant la résidence et l'entrée sans droit ni autorisation dans la réserve, sujets qui peuvent avoir une incidence sur la capacité des non-résidents d'utiliser les terres de la réserve et les installations s'y trouvant, ainsi que de revenir vivre dans la réserve. Il a été démontré que la capacité d'habiter dans la réserve ou de participer à des activités sur les terres de la réserve est importante pour les non-résidents qui désirent le faire, et les fonctions susmentionnées du conseil de bande influent directement et d'une manière fondamentale sur la situation et les besoins de ces personnes: voir *Perspectives et réalités*, *op. cit.*, à la p. 55.

Section 83 gives the council power to make money by-laws, which include taxation of land on the reserve, licensing of businesses, appropriation of moneys to defray band expenses, and payment of remuneration to chiefs and councillors. These powers, in my opinion, are a mixture of functions that affect residents on the reserve only, and also all members of the band. While the taxation of land and businesses on the reserve and the licensing of businesses are primarily local functions, appropriation of money for various band purposes and the amounts to be paid to chiefs and councillors are matters in which all band members have an interest. In addition, under s. 83(1)(*f*), the band may make by-laws relating to "the raising of money from band members to support band

76 L'article 83 donne au conseil le pouvoir de faire des règlements administratifs sur des questions pécuniaires, notamment l'imposition de taxes sur les immeubles situés dans la réserve, la délivrance de permis aux entreprises, l'affectation de sommes d'argent pour couvrir les dépenses de la bande et le versement d'une rémunération aux chefs et aux conseillers. À mon avis, ces pouvoirs sont un mélange de fonctions qui touchent soit uniquement les résidents de la réserve, soit tous les membres de la bande. Quoique l'imposition de taxes sur les immeubles et les entreprises situés dans la réserve et la délivrance de permis aux entreprises soient principalement des fonctions de nature locale, l'affectation de sommes d'argent à diverses fins poursuivies par la bande et la détermination de la rémunération à verser aux chefs et aux conseillers sont des questions qui intéressent tous les membres de la bande. En outre, en vertu de l'al. 83(1)*f*), la bande peut faire des règlements administratifs concernant «la réunion de fonds provenant des

projects" which may have the potential to affect all band members.

77 Although the band council's powers under ss. 81(1) and 83(1) are similar, in many ways, to those of a municipality, the exclusion of non-residents from voting rights affects other powers of the band council that relate to the needs of all members of the band, whether or not they are ordinarily resident on the reserve. Section 64(1) allows the expenditure by the Minister, with the band council's consent, of the band's capital moneys for various purposes, including distributions per capita to members of the band, and construction of new housing. The band's capital moneys come from the sale of surrendered lands or capital assets of the band (s. 62), assets that belong, collectively, to all members of the band. As found by Strayer J., all band members have important interests in these expenditures. Similarly, under s. 66(1), the Minister, with the approval of the band council, can make orders appropriating the band council's revenue moneys; the band council may be authorized to do so under s. 69. Expenditures by the band council may include matters like education, creation of new housing, creation of facilities on reserves, and other matters that may affect off-reserve band members' economic interest in its assets and the infrastructure that will be available to help them return to the reserve if they wish. Finally, s. 39(1)(*b*) requires the consent of a majority of "electors" of the band for the surrender of band lands. The definition of "elector" in s. 2(1) excludes band members who are disqualified from voting in band elections, so the wording of s. 77(1) excludes off-reserve members from voting on the question of whether the lands they own in common will be surrendered.

membres de la bande et destinés à supporter des entreprises de la bande» qui sont susceptibles de toucher tous les membres de la bande.

Bien que les pouvoirs dont dispose le conseil de bande en vertu des par. 81(1) et 83(1) soient à plusieurs égards semblables à ceux d'une municipalité, le fait de priver les non-résidents du droit de vote a une incidence sur d'autres pouvoirs du conseil de bande se rapportant aux besoins de l'ensemble des membres de la bande, qu'ils résident ou non ordinairement dans la réserve. En vertu du par. 64(1), le ministre peut, avec le consentement du conseil de bande, prescrire la dépense de sommes d'argent au compte en capital de la bande à diverses fins, notamment pour distribuer per capita certaines sommes aux membres de la bande et pour construire de nouvelles habitations. Les sommes constituant le compte en capital de la bande proviennent de la vente de terres cédées ou de biens de capital de la bande (art. 62), biens qui appartiennent, collectivement, à tous les membres de la bande. Comme a conclu le juge Strayer, les membres de la bande ont tous d'importants intérêts dans ces dépenses. De même, en vertu du par. 66(1), le ministre peut, avec le consentement du conseil de bande, ordonner l'affectation à certaines fins de sommes d'argent du compte de revenus; pour sa part, le conseil de bande peut, en vertu de l'art. 69, être autorisé à exercer ce pouvoir. Le conseil de bande peut consacrer des dépenses à des fins telles que l'éducation, la construction de nouvelles habitations, l'établissement d'installations dans les réserves, ainsi qu'à d'autres fins susceptibles d'avoir une incidence sur l'intérêt économique qu'ont les membres hors réserve dans les biens et l'infrastructure de la réserve qui seront disponibles pour faciliter leur retour dans celle-ci s'ils le désirent. Finalement, l'al. 39(1)*b*) exige l'assentiment d'une majorité des électeurs de la bande pour la cession de terres de la bande. Étant donné que la définition d'«électeur» au par. 2(1) exclut les membres de la bande qui ont perdu leur droit de vote aux élections de la bande, le texte du par. 77(1) a pour effet de nier aux membres hors réserve le droit de voter sur la cession des terres qui leur appartiennent en commun avec les autres membres.

The wording of s. 77(1), therefore, gives off-reserve band members no voice in electing a band council that, among other functions, spends moneys derived from land owned by all members, and money provided to the band council by the government to be spent on all band members. The band council also determines who can live on the reserve and what new housing will be built. The legislation denies those in the position of the claimants a vote in decisions about whether the reserve land owned by all members of the band will be surrendered. In addition, members who live in the vicinity of the reserve, as shown by the evidence of several of the plaintiffs in this case, may take advantage of services controlled by the band council such as schools or recreational facilities. Moreover, as a practical matter, representation of Aboriginal peoples in processes such as land claims and self-government negotiations often takes place through the structure of *Indian Act* bands. The need for and interest in this representation is shared by all band members, whether they live on- or off-reserve. Therefore, although in some ways, voting for the band council and chief relates to functions affecting reserve members much more directly than others, in other ways it affects all band members. Since interests are affected that are unrelated to the basis upon which the differential treatment is made (off-reserve residence status), considering the principle of respect for human dignity and substantive equality, this is an important indicator that the differential treatment is discriminatory.

78 Par conséquent, le texte du par. 77(1) ne donne pas aux membres hors réserve des bandes indiennes voix au chapitre dans l'élection du conseil de bande, organe qui, entre autres fonctions, dépense des sommes tirées de terres appartenant à l'ensemble des membres ainsi que des sommes qui lui sont attribuées par le gouvernement et qui doivent être employées au profit de tous les membres de la bande. Le conseil de bande décide également qui peut habiter dans la réserve et quelles nouvelles habitations seront construites. Le texte de loi prive les personnes dans la situation des demandeurs du droit de voter sur la cession de terres de la réserve qui appartiennent à l'ensemble des membres de la bande. De plus, comme l'atteste le témoignage de plusieurs des demandeurs en l'espèce, les membres qui vivent à proximité de la réserve peuvent se prévaloir des services relevant de l'autorité du conseil de bande, par exemple les installations scolaires et récréatives. Qui plus est, en pratique, la représentation des Autochtones dans des processus comme les négociations relatives aux revendications territoriales et à l'autonomie gouvernementale est souvent déterminée suivant le régime des bandes visées par la *Loi sur les Indiens*. Tous les membres, qu'ils vivent ou non dans la réserve, ont, en matière de représentation, un besoin et un intérêt communs. Par conséquent, bien que, sous certains rapports, le droit de vote à l'élection du conseil de bande et du chef se rapporte à des fonctions touchant beaucoup plus directement les membres qui habitent la réserve que les autres, sous d'autres rapports ce droit touche tous les membres de la bande. Le fait que certains droits qui ne sont pas liés au fondement de la différence de traitement (la qualité de membre vivant hors réserve) soient touchés, est un indice important du caractère discriminatoire de la différence de traitement, eu égard au principe du respect de la dignité humaine et du droit à l'égalité réelle.

(c) *Nature of the Affected Interest*

c) *La nature du droit touché*

The fourth contextual factor which was described by Iacobucci J. in *Law*, *supra*, at paras. 74-75, and which is of particular importance in this case, is the nature of the affected interest. In general, the more important and significant the

79 Le quatrième facteur contextuel décrit par le juge Iacobucci dans l'arrêt *Law*, précité, aux par. 74 et 75, et qui est particulièrement important en l'espèce, est la nature du droit touché. En général, plus le droit touché est important et a une

interest affected, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction within the meaning of s. 15(1).

80 Several social and legislative facts are important to analysing this contextual factor. The first is the important financial interest that non-residents have in the affairs of the band. As I outlined in the previous section, the band council must give consent for expenditures of the band's capital and revenue moneys. The band's electors also control decisions about the surrender of band lands which are owned collectively by all band members. Second, the band council controls the allotment of land and by-laws relating to trespass and residence, which affect in important ways the ability to return and live on the reserve. Third, the council makes decisions about the availability of services that may be important to non-residents, particularly those who may live near the reserve. Also important is the role of band leadership in the work of the Assembly of First Nations and other Aboriginal organizations at the regional, national and international levels. All these factors show that the functions and powers of the band council have important significance for the lives of off-reserve band members. Denying them voting rights when band leadership is chosen through a system of democracy affects significant interests they have in band governance.

81 The importance many band members place on maintaining a connection to their cultural roots is also particularly significant. Maintaining one's cultural identity will mean different things to different off-reserve band members, but to many it will entail an identification of interests with their band. When band leadership is chosen through a democratic system, one of the most powerful

portée considérable, plus la différence de traitement s'y rapportant est susceptible de constituer une distinction discriminatoire au sens du par. 15(1).

Plusieurs réalités sociales et législatives sont importantes dans l'analyse de ce facteur contextuel. La première est l'intérêt économique important qu'ont les non-résidents dans les affaires de la bande. Comme je l'ai expliqué précédemment, le conseil de bande doit donner son consentement aux dépenses encourues à même les sommes d'argent au compte en capital et au compte de revenu de la bande. Ce sont également les électeurs de la bande qui prennent les décisions relatives à la cession des terres de la bande, terres qui appartiennent collectivement à tous les membres de la bande. Deuxièmement, le conseil de bande a autorité sur la répartition des terres, et il peut faire des règlements régissant la résidence et l'entrée sans droit ni autorisation dans la réserve, sujets qui influent de façon importante sur la capacité de revenir vivre dans la réserve. Troisièmement, le conseil prend, à l'égard des services offerts à la communauté, des décisions qui peuvent être importantes pour les non-résidents, particulièrement ceux qui vivent à proximité de la réserve. Un autre fait important est le rôle que jouent les dirigeants de la bande dans les travaux de l'Assemblée des Premières Nations et d'autres organismes autochtones aux niveaux régional, national et international. Tous ces facteurs démontrent que les fonctions et pouvoirs du conseil de bande revêtent une importance considérable dans la vie des membres vivant hors réserve des bandes indiennes. Nier à ces personnes le droit de voter lorsque les dirigeants de la bande sont choisis par un mécanisme démocratique a une incidence sur les intérêts importants qu'ils ont dans l'administration des affaires de la bande.

L'importance que bon nombre de membres des bandes accordent au maintien de liens avec leurs racines culturelles est aussi un facteur particulièrement significatif. Le maintien d'une identité culturelle peut signifier pour les membres hors réserve d'une bande différentes choses d'un individu à l'autre, toutefois, pour plusieurs d'entre eux cela peut se traduire par l'identification aux intérêts de

expressions of identification with that band is through the exercise of voting. When certain band members are not given any say in that system, the denial of that voice affects their belonging and connection to the band of which they are members.

leur bande. Lorsque les dirigeants de la bande sont choisis par un mécanisme démocratique, l'exercice du droit de vote constitue l'un des moyens d'expression les plus forts de ce sentiment d'identification. Lorsqu'on refuse à certains membres de la bande le droit de s'exprimer dans le cadre de ce mécanisme, le déni de cette voix au chapitre a des répercussions sur leur sentiment d'appartenance et d'attachement à la bande dont ils sont membres.

Moreover, the band council has the power to affect directly the cultural interests of those off-reserve band members who identify with their band and reserve. The Royal Commission on Aboriginal Peoples stated that sources of traditional Aboriginal culture include "contact with the land, elders, Aboriginal languages and spiritual ceremonies" (*Perspectives and Realities*, *supra*, at p. 522). As outlined in the previous section, the band council has many powers affecting access to the reserve, management of the reserve lands, and the expenditure of money for the welfare of the band. Furthermore, the "electors" of the band can vote on the surrender of band lands. The band council therefore has considerable power to safeguard, develop and promote the sources of traditional Aboriginal culture and to affect the access of off-reserve band members to these sources.

82 De plus, les conseils de bande ont le pouvoir d'influencer directement les droits culturels des membres hors réserve qui s'identifient à leur bande et à leur réserve. La Commission royale sur les peuples autochtones a affirmé que constituent des sources de la culture autochtone traditionnelle «le contact avec la terre, les anciens, les langues autochtones et les cérémonies spirituelles» (*Perspectives et réalités*, *op. cit.*, à la p. 586). Comme je l'ai souligné au chapitre précédent, les conseils de bande possèdent de nombreux pouvoirs ayant une incidence sur l'accès à la réserve, la gestion des terres de la réserve et la dépense de fonds pour le bien-être de la bande. En outre, les «électeurs» de la bande peuvent voter relativement à la cession des terres de la bande. Les conseils de bande disposent donc de pouvoirs considérables pour sauvegarder, mettre en valeur et promouvoir les sources de la culture autochtone traditionnelle et pour influencer l'accès à ces sources par les membres hors réserve des bandes indiennes.

Historical circumstances that have had and continue to have repercussions for the members of this group add to the reasons why the interest affected by this legislation is of important societal significance for those in the position of the claimants. Indeed, the creation of the group of off-reserve Aboriginal people can be seen as a consequence, in part, of historic policies toward Aboriginal peoples. The Royal Commission on Aboriginal Peoples describes the relationship between the federal government and Aboriginal peoples during the period from the early 1800s to 1969 as one of "displacement and assimilation" (*Report of the Royal*

83 Les circonstances historiques qui ont eu et continuent à avoir des répercussions sur les membres de ce groupe sont d'autres raisons expliquant pourquoi le droit touché par cette mesure législative a une portée sociétale importante pour les personnes dans la situation des demandeurs. En effet, l'émergence du groupe des autochtones hors réserve peut être perçue, en partie, comme une conséquence de politiques historiques appliquées à l'égard des autochtones. La Commission royale sur les peuples autochtones a employé les mots «déracinement et assimilation» pour décrire les relations entre le gouvernement fédéral et les peuples autochtones durant la période du début des années 1800 jusqu'à 1969 (*Rapport de la Commission royale sur les*

Commission on Aboriginal Peoples, vol. 1, *Looking Forward, Looking Back*, at pp. 137-91).

84 Maintaining a connection with the band of which they are members is of particular importance to those in the position of the claimants because they often live apart from reserves due to factors that are likely largely beyond their control. Lack of land, what are often scarce job opportunities on reserves, and the need to go far from the community for schooling, are among the reasons that members left the reserve in the past, and continue to leave. There are also particular issues affecting Aboriginal women's migration: *Perspectives and Realities*, *supra*, at pp. 573-76. The fact that those affected or their ancestors may well have had no choice but to leave the reserve signals that the interest in keeping a connection with the band of which they are members is particularly important to them because the separation from other members of the band and the reserve may well have been undesired or unchosen.

85 A considerable number of the band members who live off-reserve recently gained or regained this status under Bill C-31. This legislation modified sections of the *Indian Act* that denied Indian status to various categories of band members, though not all those who were restored to status became members of a band. It is, therefore, helpful to examine the history of the legislation that removed Indian status from them or from their ancestors. I must emphasize that this discussion is in no way related to the constitutionality of Bill C-31, in general or in the context of particular bands. Rather, I refer to it for the purpose of examining the context underlying the current legislative distinction and showing why the interest affected is an important one for band members.

86 Many of those affected are women, and the descendants of women, who lost their Indian status because they married men who did not have Indian

peuples autochtones, vol. 1, *Un passé, un avenir*, aux pp. 147 à 206).

Le maintien de liens avec la bande dont elles sont membres revêt une importance particulière pour les personnes dans la situation des demandeurs, car si elles n'habitent pas les réserves c'est souvent pour des raisons largement indépendantes de leur volonté. Le manque de terres, le fait qu'il y ait souvent très peu de possibilités d'emploi dans les réserves et la nécessité de s'éloigner de la communauté pour s'instruire comptent parmi les raisons pour lesquelles les membres des bandes ont quitté les réserves dans le passé et continuent de le faire aujourd'hui. Il y a aussi certaines considérations qui touchent particulièrement la migration des femmes autochtones: *Perspectives et réalités*, *op. cit.*, aux pp. 644 à 650. Le fait que les personnes touchées ou leurs ancêtres aient fort bien pu n'avoir d'autre choix que de quitter la réserve indique que le maintien de liens avec la bande dont ils sont membres est un droit important pour eux puisque le fait d'être séparés de la réserve et des autres membres de la bande peut bien ne pas avoir été désiré ou choisi.

Un nombre considérable de membres hors réserve des bandes indiennes ont récemment obtenu ou retrouvé leur statut de membre en vertu du projet de loi C-31. Cette loi a modifié les articles de la *Loi sur les Indiens* qui privaient du statut d'Indien diverses catégories de membres des bandes, bien que ce ne soit pas tous ceux qui ont retrouvé leur statut qui soient devenus membres d'une bande. Il est donc utile d'examiner l'historique des dispositions qui ont retiré le statut à ces personnes ou à leurs ancêtres. Je tiens cependant à souligner que l'examen de ces dispositions ne se rattache d'aucune façon à la constitutionnalité du projet de loi C-31 en général ou dans le contexte de certaines bandes en particulier. Je réfère plutôt à cet historique afin d'examiner le contexte qui sous-tend la distinction établie par la loi actuelle et de démontrer pourquoi le droit touché est important pour les membres des bandes.

Bon nombre des personnes touchées sont des femmes ainsi que les descendants de ces femmes qui ont perdu leur statut d'Indiennes parce qu'elles

status (see Indian and Northern Affairs Canada, *Impacts of the 1985 Amendments to the Indian Act (Bill C-31)*: *Summary Report* (1990)). Aboriginal women who married outside their band became members of their husband's band. See, for example, *The Indian Act*, S.C. 1951, c. 29, ss. 12 and 14, now repealed. Legislation depriving Aboriginal women of Indian status has a long history. The involuntary loss of status by Aboriginal women and children began in Upper and Lower Canada with the passage of *An Act to encourage the gradual Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26. A woman whose husband "enfranchised" had her status removed along with his. This legislation introduced patriarchal concepts into many Aboriginal societies which did not exist before: see Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, *The Justice System and Aboriginal People*, at pp. 476-79. As the Royal Commission on Aboriginal Peoples stated in *Perspectives and Realities*, *supra*, at p. 26:

> In the pre-Confederation period, concepts were introduced that were foreign to Aboriginal communities and that, wittingly or unwittingly, undermined Aboriginal cultural values. In many cases, the legislation displaced the natural, community-based and self-identification approach to determining membership — which included descent, marriage, residency, adoption and simple voluntary association with a particular group — and thus disrupted complex and interrelated social, economic and kinship structures. Patrilineal descent of the type embodied in the *Gradual Civilization Act*, for example, was the least common principle of descent in Aboriginal societies, but through these laws, it became predominant. From this perspective, the *Gradual Civilization Act* was an exercise in government control in deciding who was and was not an Indian.

ont épousé des hommes qui n'avaient pas ce statut (voir Affaires Indiennes et du Nord canadien, *Répercussions des modifications apportées à la Loi sur les Indiens en 1985 (Projet de loi C-31): Rapport sommaire* (1990)). Les femmes autochtones qui épousaient un membre d'une autre bande devenaient membres de cette bande. Voir, par exemple, la *Loi sur les Indiens*, S.C. 1951, ch. 29, art. 12 et 14, maintenant abrogés. Les mesures législatives dépouillant les femmes autochtones de leur statut d'Indiennes ont une longue histoire. La perte involontaire de ce statut par les femmes et les enfants autochtones a débuté au Haut-Canada et au Bas-Canada par suite de l'adoption de l'*Acte pour encourager la Civilisation graduelle des Tribus Sauvages en cette Province, et pour amender les Lois relatives aux Sauvages*, S. Prov. C. 1857, 20 Vict., ch. 26. La femme dont le mari s'était «émancipé» perdait son statut en même temps que lui. Cette loi a introduit dans de nombreuses sociétés autochtones des concepts patriarcaux qui leur étaient jusque-là étrangers: voir Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, *The Justice System and Aboriginal People*, aux pp. 476 à 479. Dans *Perspectives et réalités*, *op. cit.*, à la p. 28, la Commission royale sur les peuples autochtones a affirmé ceci:

> Durant la période antérieure à la Confédération, des notions pourtant étrangères aux collectivités autochtones et qui, délibérément ou non, sapaient leurs valeurs culturelles ont été adoptées. Dans bien des cas, les textes de loi ont supprimé les modes d'établissement de l'appartenance, des modes naturels, communautaires et fondés sur l'auto-identification dont les critères comprenaient la filiation, le mariage, le domicile, l'adoption et l'association volontaire simple à un groupe particulier. Ce faisant, ils ont perturbé des structures sociales, économiques et familiales complexes et interdépendantes. Ainsi, la filiation patrilinéaire du genre mentionné dans l'*Acte pour encourager la Civilisation graduelle* était la forme la moins répandue de filiation dans les sociétés autochtones. Par l'effet de ces lois, la filiation patrilinéaire est devenue le mode prédominant de transmission. Considéré sous cet angle, l'*Acte pour encourager la Civilisation graduelle* constituait une tentative de l'État pour déterminer qui était ou n'était pas Indien.

This continued in the *Gradual Enfranchisement Act*, S.C. 1869, c. 6. This legislation, for the first time, instituted the policy that women who married men without Indian status lost their own status, and their children would not receive status. The rationale for these policies, given at the time, focussed on concerns about control over reserve lands, and the need to prevent non-Indian men from gaining access to them (*Perspectives and Realities*, *supra*, at p. 27). These policies were continued and expanded upon with the passage of the *Indian Act* in 1876, and amendments to it in subsequent years, particularly a major revision that took place in 1951.

Cette tendance s'est poursuivie par l'adoption de l'*Acte pourvoyant à l'émancipation graduelle des Sauvages*, S.C. 1869, ch. 6. C'est cette loi qui, pour la première fois, a établi la politique suivant laquelle les femmes indiennes qui épousaient un homme n'ayant pas le statut d'Indien perdaient leur statut et leurs enfants n'y avaient pas droit. Les raisons invoquées à l'époque pour justifier ces politiques étaient principalement des préoccupations concernant le contrôle des terres des réserves et la nécessité d'empêcher les hommes non indiens de s'y établir (*Perspectives et réalités*, *op. cit.*, à la p. 29). Ces politiques ont été maintenues et élargies par l'adoption de l'*Acte des Sauvages* en 1876, et les modifications qui y ont été apportées subséquemment, en particulier par suite de la révision majeure de cette loi en 1951.

87 The 1951 legislation was challenged under the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. III), in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349. The majority of this Court, using an approach to equality that was later rejected in *Andrews*, *supra*, held that the provisions did not violate the right to equality in the *Canadian Bill of Rights* and that even if they did, they could not be struck down as inconsistent with it.

La loi de 1951 a été contestée en vertu de la *Déclaration canadienne des droits*, S.C. 1960, ch. 44 (reproduite dans L.R.C. (1985), app. III), dans l'arrêt *Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349. Adoptant en matière d'égalité une approche qui a par la suite été rejetée dans l'arrêt *Andrews*, précité, notre Cour à la majorité a jugé que les dispositions contestées ne portaient pas atteinte au droit à l'égalité garanti par la *Déclaration canadienne des droits* et que, même si c'était le cas, elles ne pouvaient pas être déclarées inopérantes pour cause d'incompatibilité avec ce droit.

88 These were not the only people who lost their status. The enfranchisement provisions of the *Indian Act* were designed to encourage Aboriginal people to renounce their heritage and identity, and to force them to do so if they wished to take a full part in Canadian society. In order to vote or hold Canadian citizenship, status Indians had to "voluntarily" enfranchise. They were then given a portion of the former reserve land in fee simple, and they lost their Indian status. At various times in history, status Indians who received higher education, or became doctors, lawyers, or ministers were automatically enfranchised. Those who wanted to be soldiers in the military during the two World Wars were required to enfranchise themselves and their whole families, and those who left the country for

Ces personnes n'ont pas été les seules à perdre leur statut. Les dispositions de la *Loi sur les Indiens* relatives à l'émancipation étaient conçues pour encourager les autochtones à renoncer à leur patrimoine et à leur identité, ainsi que pour les contraindre à le faire s'ils désiraient participer pleinement à la société canadienne. Pour pouvoir voter ou obtenir la citoyenneté canadienne, les Indiens inscrits devaient s'émanciper «volontairement». Ils se voyaient alors attribuer en fief simple une partie des anciennes terres de réserve, et ils perdaient leur statut d'Indien. À diverses périodes de l'histoire, les Indiens inscrits qui avaient poursuivi des études supérieures ou étaient devenus médecins, avocats ou ministres du culte étaient émancipés automatiquement. Ceux qui voulaient s'enrôler durant les

more than five years without permission also lost Indian status. (See L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (1996), at pp. 23-30.)

deux Guerres mondiales devaient s'émanciper avec toute leur famille, et ceux qui s'absentaient du pays pendant plus de cinq ans sans permission perdaient eux aussi leur statut d'Indien. (Voir L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (1996), aux pp. 23 à 30.)

This history shows that Aboriginal policy, in the past, often led to the denial of status and the severing of connections between band members and the band. It helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members, and especially for those who constitute a significant portion of the group affected, who have been directly affected by these policies and are now living away from reserves, in part, because of them.

89 Ce rappel historique montre que la politique appliquée à l'égard des autochtones dans le passé a souvent eu pour effet de les priver de leur statut et de rompre les liens qui rattachaient les membres d'une bande à celle-ci. Cet historique aide à démontrer pourquoi le droit d'éprouver et de maintenir un sentiment d'appartenance à leur bande, libre de tout obstacle imposé par le Parlement, est particulièrement important pour tous les membres des bandes, spécialement pour ceux qui constituent une partie considérable du groupe concerné, qui ont été directement touchés par ces politiques et qui, aujourd'hui, vivent en dehors des réserves, en partie à cause des politiques en question.

All these facts emphasize the importance, for band members living off-reserve, of having their voices included when band leadership is chosen through a process of common suffrage as set out in this legislation. They show why the interest in s. 77(1) is a fundamental one, and why the denial of voting rights in this context has serious consequences from the perspective of those affected. They show why there is not only economic, but also important societal significance to the interests affected by the differential treatment contained in s. 77(1): *Law*, *supra*, at para. 74.

90 Tous ces faits font ressortir l'importance, pour les membres hors réserve des bandes indiennes, d'avoir voix au chapitre lorsque les dirigeants de la bande sont choisis par la procédure de scrutin ordinaire prévue par le texte de loi en cause. Ils montrent pourquoi le droit visé au par. 77(1) est un droit fondamental, et pourquoi le déni du droit de vote dans ce contexte a des conséquences sérieuses du point de vue des personnes touchées. Ces faits montrent en quoi les droits touchés par la différence de traitement établie au par. 77(1) revêtent de l'importance non seulement sur le plan économique, mais également sur le plan social: *Law*, précité, au par. 74.

(d) *Conclusions on the Third Stage of Analysis*

d) *Les conclusions au terme de la troisième étape de l'analyse*

In summary, therefore, a contextual view of the people affected and the differential treatment in question leads to the conclusion that this legislative distinction conflicts with the purposes of s. 15(1). The people affected by this distinction, in general, are vulnerable and disadvantaged. They experience stereotyping and disadvantage as Aboriginal people and band members living away

91 En résumé donc, l'analyse contextuelle des personnes touchées et de la différence de traitement en question amène à conclure que la distinction établie par la loi est incompatible avec les objectifs du par. 15(1). Les personnes touchées par cette distinction sont, en général, vulnérables et défavorisées. Elles font l'objet de stéréotypes et souffrent de désavantages à la fois comme Autochtones et

from reserves. They form part of a "discrete and insular minority" defined by race and residence, and it is more likely that further disadvantage will have a discriminatory impact upon them. Second, the distinction in question does not correspond with the characteristics or circumstances of the claimants and on-reserve band members in a manner which "respects and values their dignity and difference": *Law*, *supra*, at para. 28. The powers of the band council affect cultural, political, and financial interests and needs that are shared by band members living on and off the reserve. Third, the nature of the interests affected is fundamental. Given the form of representative democracy provided for in the *Indian Act*, failure to give any voice in that process to certain members of the band affects an important attribute of membership, and places a barrier between them and a community which has particular importance to them. The council and electors also make decisions about important financial, cultural, and political interests of the members that have important significance within the band and Canadian society. Finally, the interest affected is also significant because of the ways in which, in the past, ties between band members and the band or reserve have been involuntarily or reluctantly severed. Those affected or their parents may have left the reserve for many reasons that do not signal a lack of interest in the reserve given the various historical circumstances surrounding reserve communities in Canada such as an often inadequate land base, a serious lack of economic opportunities and housing, and the operation of past Indian status and band membership rules imposed by Parliament.

comme membres hors réserve des bandes indiennes. Elles font partie d'une «minorité discrète et isolée» qui est définie par la race et le lieu de résidence, et il est vraisemblable que l'imposition de désavantages additionnels aura sur elles un effet discriminatoire. Deuxièmement, la distinction en question ne correspond ni aux caractéristiques ni à la situation des demandeurs et des membres hors réserve des bandes indiennes d'une manière qui «respecte et valorise leur dignité et leur différence»: *Law*, précité, au par. 28. Les pouvoirs des conseils de bande ont une incidence sur des droits et besoins économiques, culturels et politiques que partagent les membres qui habitent les réserves et ceux qui vivent à l'extérieur de celles-ci. Troisièmement, la nature des droits touchés est fondamentale. Compte tenu de la forme de démocratie représentative prévue par la *Loi sur les Indiens*, le fait de ne pas donner à certains membres de la bande la possibilité de s'exprimer dans le cadre de ce processus a des conséquences sur un attribut important de l'appartenance à la bande, et crée un obstacle entre ces personnes et une communauté qui a une importance particulière pour celles-ci. Le conseil et les électeurs prennent également des décisions touchant des droits économiques, culturels et politiques qui sont importants pour les membres et qui ont une portée considérable au sein de la bande et de la société canadienne. Enfin, le droit touché est également important en raison des diverses façons par lesquelles les liens qui unissaient des membres d'une bande à celle-ci ou à la réserve ont, volontairement ou à contrecœur, été rompus dans le passé. Il est possible que les personnes touchées ou leurs parents aient quitté la réserve pour des raisons qui ne témoignent pas d'un manque d'intérêt envers la réserve, compte tenu des diverses circonstances qui, historiquement, ont caractérisé la vie des communautés habitant les réserves au Canada, telles que des assises territoriales souvent insuffisantes, de graves pénuries de logement et de possibilités de développement économique et l'application des anciennes règles imposées par le Parlement qui régissaient le statut Indien et l'appartenance aux bandes.

92 In the context of this vulnerable group, and these important interests, this distinction reinforces

Dans le contexte de ce groupe vulnérable et compte tenu de ces droits importants, cette

the stereotype that band members who do not live on reserves are "less Aboriginal", and less valuable members of their bands than those who do. A reasonable person in the position of the claimants, fully apprised of the context, would see the differential treatment contained in s. 77(1) as suggesting that off-reserve band members are less worthy or valuable as band members and members of Canadian society, and giving them less concern, respect and consideration than band members living on reserves. Based upon this finding of discriminatory impact, the third stage of analysis, the identification of discrimination based on a violation of substantive equality and human dignity in the circumstances of this case, has been satisfied.

The factors discussed above outline the context surrounding the differential treatment contained in s. 77(1) of the *Indian Act*. This case involves people who have generally experienced significant historical disadvantage, and interests that are particularly important to those affected by the legislation. Taken together, they lead to a finding that from a subjective-objective perspective, the differential treatment in question violates off-reserve band members' equality rights. Yet neither of these factors should be seen as essential to my conclusions. I would also note that my discussion of the general history of off-reserve band members does not suggest that the conclusion that this legislation violates s. 15(1) would not apply to a band affected by s. 77(1) whose off-reserve members had a different composition or history from that of the general population of off-reserve band members in Canada. Every case of alleged discrimination, of course, must be considered in its own legislative and social context to determine whether it violates the constitutional rights of those affected, but in this case, both the general disadvantage and vulnerability of those affected, and the importance to

distinction renforce le stéréotype selon lequel les membres des bandes indiennes qui n'habitent pas les réserves sont des personnes «moins autochtones» que celles qui y vivent, et qu'elles ne sont pas des membres aussi valables de leur bande respective que les habitants de la réserve. Une personne raisonnable, placée dans la situation des demandeurs et bien informée du contexte, considérerait que la différence de traitement prévue au par. 77(1) tend à indiquer que les membres hors réserve des bandes indiennes ne sont pas des personnes aussi valables ou dignes de reconnaissance en tant que membres d'une bande et membres de la société canadienne que ne le sont les membres habitant les réserves, et qu'elle leur accorde moins d'intérêt, de respect et de considération qu'à ces derniers. Suivant cette conclusion qui reconnaît l'existence d'un effet discriminatoire, il a été satisfait à la troisième étape de l'analyse, c'est-à-dire la détermination de l'existence, dans les circonstances de l'espèce, de discrimination fondée sur une violation de la dignité humaine et du droit à l'égalité réelle.

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Les facteurs examinés précédemment délimitent le contexte de la différence de traitement prévue au par. 77(1) de la *Loi sur les Indiens*. L'affaire dont nous sommes saisis porte sur des personnes qui ont généralement souffert d'importants désavantages historiques, et sur des droits particulièrement importants pour les personnes touchées par la disposition législative contestée. Tous ces facteurs réunis amènent à conclure que, d'un point de vue subjectif-objectif, cette différence de traitement porte atteinte aux droits à l'égalité des membres hors réserve des bandes indiennes. Toutefois, aucun de ces facteurs ne devrait être considéré essentiel à mes conclusions. Je souligne également que l'examen que j'ai fait de l'histoire générale de la situation des membres hors réserve ne tend pas à indiquer que la conclusion — que la disposition législative contestée contrevient au par. 15(1) — ne s'appliquerait pas dans le cas d'une bande visée par le par. 77(1) dont le groupe des membres hors réserve serait, par sa composition ou son histoire, différent de la population générale des membres hors réserve des bandes indiennes au Canada. Chaque allégation de discrimination doit, évidem-

all band members of the affected interests are compelling factors in my conclusions at the third stage of analysis.

ment, être examinée à la lumière du contexte social et législatif qui lui est propre afin de déterminer s'il y a atteinte aux droits constitutionnels des personnes touchées. Cependant, en l'espèce, tant le désavantage général et la vulnérabilité des personnes concernées, que l'importance pour les membres des bandes des droits touchés sont des facteurs décisifs dans mes conclusions à la troisième étape de l'analyse.

94 The above analysis also does not suggest that any distinction between on-reserve and off-reserve band members would be stereotypical, interfere with off-reserve members' dignity, or conflict with the purposes of s. 15(1). There are clearly important differences between on-reserve and off-reserve band members, which Parliament could legitimately recognize. Taking into account, recognizing, and affirming differences between groups in a manner that respects and values their dignity and difference are not only legitimate, but necessary considerations in ensuring that substantive equality is present in Canadian society. The current powers of the band council, as discussed earlier, include some powers that are purely local, affecting matters such as taxation on the reserve, the regulation of traffic, etc. In addition, those living on the reserve have a special interest in many decisions made by the band council. For example, if the reserve is surrendered, they must leave their homes, and this affects them in a direct way it does not affect non-residents. Though non-residents may have an important interest in using them, educational or recreational services on the reserve are more likely to serve residents, particularly if the reserve is isolated or the non-residents live far from it. Many other examples can be imagined.

L'analyse qui précède n'indique pas non plus que toute distinction entre les membres hors réserve des bandes indiennes et les membres habitant les réserves constituerait un stéréotype, porterait atteinte à la dignité des membres hors réserve ou serait incompatible avec les objectifs visés par le par. 15(1). Il existe clairement entre les membres des bandes vivant hors réserve et ceux qui habitent les réserves des différences importantes que le Parlement pourrait légitimement reconnaître. La prise en compte, la reconnaissance et la confirmation des différences qui existent entre divers groupes d'une manière qui respecte et valorise leur dignité et leur différence sont des considérations non seulement légitimes mais également nécessaires afin de garantir l'égalité réelle des droits dans la société canadienne. Les pouvoirs dont sont actuellement investis les conseils de bande comprennent, comme on l'a vu précédemment, certains pouvoirs de nature purement locale concernant des questions telles que l'imposition de taxes et la réglementation de la circulation dans la réserve. De plus, les personnes vivant dans une réserve ont un intérêt particulier dans bien des décisions prises par le conseil de leur bande. Par exemple, si la réserve est cédée, ils doivent quitter leur domicile, situation qui a sur eux une incidence qu'elle n'a pas sur les non-résidents. Bien que les non-résidents puissent avoir un intérêt important à se prévaloir des services scolaires et récréatifs offerts dans la réserve, il y a plus de chance que ceux-ci servent les résidents, en particulier si la réserve est isolée ou si les non-résidents habitent loin de celle-ci. Il est possible d'imaginer bon nombre d'autres exemples.

95 Recognizing non-residents' right to substantive equality in accordance with the principle of respect

Pour que soit reconnu le droit des non-résidents à l'égalité réelle conformément au principe du

for human dignity, therefore, does not require that non-residents have identical voting rights to residents. Rather, what is necessary is a system that recognizes non-residents' important place in the band community. It is possible to think of many ways this might be done, while recognizing, respecting, and valuing the different positions, needs, and interests of on-reserve and off-reserve band members. One might be to divide the "local" functions which relate purely to residents from those that affect all band members and have different voting regimes for these functions. A requirement of a double majority, or a right of veto for each group might also respect the full participation and belonging of non-residents. There might be special seats on a band council for non-residents, which give them meaningful, but not identical, rights of participation. The solution may be found in the customary practices of Aboriginal bands. There may be a separate solution for each band. Many other possibilities can be imagined, which would respect non-residents' rights to meaningful and effective participation in the voting regime of the community, but would also recognize the somewhat different interests of residents and non-residents. However, without violating s. 15(1), the voting regime cannot, as it presently does, completely deny non-resident band members participation in the electoral system of representation. Nor can that participation be minimal, insignificant, or merely token.

respect de la dignité humaine, il n'est donc pas indispensable que ces personnes jouissent exactement des mêmes droits de vote que les résidents. Ce qu'il faut, c'est plutôt un système qui tienne compte de la place importante des non-résidents au sein de la bande. Il est possible d'imaginer plusieurs moyens d'établir un tel système, tout en reconnaissant, respectant et valorisant les différences qui caractérisent la situation, les besoins et les intérêts des membres vivant hors des réserves et de ceux qui y résident. Une solution pourrait être de séparer les fonctions «locales» qui concernent purement les résidents de celles qui touchent l'ensemble des membres de la bande, et d'accorder des droits de vote différents à l'égard de ces diverses fonctions. Le fait d'exiger une double majorité ou d'accorder un droit de veto à chaque groupe pourrait également être un autre moyen de respecter pleinement le droit d'appartenance et de pleine participation des non-résidents. Des sièges au conseil pourraient être réservés aux non-résidents, ce qui leur assurerait un droit de participation concret mais non identique. La solution réside peut-être dans les coutumes des bandes autochtones. Elle pourrait différer d'une bande à l'autre. Il est possible d'imaginer bien d'autres solutions qui respecteraient le droit des non-résidents de participer concrètement et efficacement au régime électoral de la communauté, tout en reconnaissant les intérêts quelque peu différents de ceux-ci et des résidents. Toutefois, le régime de droit de vote ne peut pas, comme il le fait maintenant, nier complètement aux membres non-résidents des bandes indiennes le droit de participer au système électoral de représentation sans entraîner la violation du par. 15(1). Cette participation ne saurait non plus être minimale, insignifiante ou uniquement symbolique.

Therefore, I conclude that the present wording of s. 77(1) violates the right to equality without discrimination of the off-reserve members of bands affected by it. This finding is a general one, and is in no way related to the specific situation of the Batchewana Band. Since the provision has been found to be discriminatory as it applies to all bands

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Par conséquent, je conclus que le libellé actuel du par. 77(1) porte atteinte au droit à l'égalité, sans discrimination, des membres hors réserve des bandes visées par cette disposition. Cette conclusion a une portée générale et ne se rapporte aucunement à la situation particulière de la bande de Batchewana. Comme la disposition a été jugée discriminatoire dans son application générale à l'ensemble des bandes qu'elle vise, il n'est pas

affected by it, there is no need to consider the specific circumstances of the Batchewana Band.

D. *Section 1*

97 This Court's approach to s. 1 of the *Charter* was set out by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103. It was refined and summarized by Iacobucci J. in *Egan*, *supra*, at para. 182:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable. [Emphasis added.]

This articulation of the proper approach was endorsed in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 84, in *Vriend*, *supra*, at para. 108, and in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 76, *per* Iacobucci J.

98 Throughout the s. 1 analysis, it must be remembered that it is the right to substantive equality and the accompanying violation of human dignity that has been infringed when a violation of s. 15(1) has been found. Even when the interests of various disadvantaged groups are affected, s. 15(1) mandates that government decisions must be made in a manner that respects the dignity of all of them, recognizing all as equally capable, deserving, and worthy of recognition. The fact that various minorities or vulnerable groups may have competing interests cannot alone constitute a justification for treating any of them in a substantively unequal manner, nor can it relieve the government of its

D. *L'article premier*

L'approche de notre Cour à l'égard de l'article premier de la *Charte* a été énoncée par le juge en chef Dickson dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Cette approche a été précisée et résumée par le juge Iacobucci dans l'arrêt *Egan*, précité, au par. 182:

> L'atteinte à une garantie constitutionnelle sera validée à deux conditions. Dans un premier temps, l'objectif de la loi doit se rapporter à des préoccupations urgentes et réelles. Dans un deuxième temps, le moyen utilisé pour atteindre l'objectif législatif doit être raisonnable et doit pouvoir se justifier dans une société libre et démocratique. Cette seconde condition appelle trois critères: (1) la violation des droits doit avoir un lien rationnel avec l'objectif législatif; (2) la disposition contestée doit porter le moins possible atteinte au droit garanti par la *Charte*, et (3) il doit y avoir proportionnalité entre l'effet de la mesure et son objectif de sorte que l'atteinte au droit garanti ne l'emporte pas sur la réalisation de l'objectif législatif. Dans le contexte de l'article premier, il incombe toujours au gouvernement de prouver selon la prépondérance des probabilités que la violation peut se justifier. [Je souligne.]

Cette formulation de l'approche appropriée a été approuvée dans les arrêts *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, au par. 84; dans *Vriend*, précité, au par. 108; et dans *M. c. H.*, [1999] 2 R.C.S. 3, au par. 76, motifs du juge Iacobucci.

Tout au long de l'analyse fondée sur l'article premier, il faut se rappeler que, lorsqu'un tribunal conclut à la violation du par. 15(1) et à la violation de la dignité humaine qui s'ensuit, c'est au droit à l'égalité réelle qu'il a été porté atteinte. Même lorsque les intérêts de différents groupes défavorisés sont touchés, le par. 15(1) exige que les décisions du gouvernement soient prises de manière à respecter la dignité de chacun de ces groupes en tenant compte du fait qu'ils sont tous également capables, méritants et dignes de reconnaissance. Le fait que diverses minorités ou différents groupes vulnérables puissent avoir des intérêts opposés ne peut à lui seul justifier de traiter l'un ou l'autre

burden to justify a violation of a *Charter* right on a balance of probabilities: see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 88, *per* Bastarache J.

d'une façon inégale dans les faits, ni dégager le gouvernement de son obligation de justifier la violation d'un droit reconnu par la *Charte* selon la prépondérance des probabilités: voir *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877, au par. 88, motifs du juge Bastarache.

The first task is to determine the objective of the impugned law and whether it is pressing and substantial. In *Vriend*, *supra*, Iacobucci J. discussed the proper characterization of the objective of the impugned legislation, at paras. 110 and 111:

99 La première tâche consiste donc à dégager l'objectif du texte de loi contesté et à déterminer s'il est urgent et réel. Dans l'arrêt *Vriend*, précité, le juge Iacobucci a expliqué la façon de qualifier l'objectif du texte de loi contesté, aux par. 110 et 111:

> Section 1 of the *Charter* states that it is the limits on *Charter* rights and freedoms that must be demonstrably justified in a free and democratic society. It follows that under the first part of the *Oakes* test, the analysis must focus upon the objective of the impugned limitation, or in this case, the omission. . . .
>
> However, in my opinion, the objective of the omission cannot be fully understood in isolation. It seems to me that some consideration must also be given to both the purposes of the Act as a whole and the specific impugned provisions so as to give the objective of the omission the context that is necessary for a more complete understanding of its operation in the broader scheme of the legislation. [Emphasis in original.]

> L'article premier de la *Charte* dispose que ce sont les restrictions apportées aux droits et libertés qui y sont garantis dont la justification doit pouvoir se démontrer dans le cadre d'une société libre et démocratique. Il s'ensuit que suivant la première partie du critère de l'arrêt *Oakes*, l'analyse doit être axée sur l'objectif de la restriction contestée ou, en l'occurrence, de l'omission . . .
>
> À mon avis, toutefois, on ne peut appréhender pleinement l'objectif visé par l'omission si on l'analyse isolément. Il me semble qu'il faut prendre également en considération tant les objets de la Loi dans son ensemble que les dispositions particulières contestées, de façon à situer l'objectif de l'omission dans un contexte permettant d'en mieux saisir le sens eu égard à l'économie générale de la loi. [Souligné dans l'original.]

Therefore, it is the objective of the restriction of voting rights to band members ordinarily resident on the reserve that must be considered in this case, although this must be considered along with the purpose of the *Indian Act* as a whole for a complete understanding of the broader scheme of the legislation. It must be remembered that in the case of equality rights, the legislative objective must be sufficiently pressing and substantial to justify a law that has been found to violate the essential human dignity and freedom of those possessed of similar characteristics to the claimants. In this case, Parliament's objective is properly classified as ensuring that those with the most immediate and direct connection with the reserve have a special ability to control its future. This objective, in my opinion, is pressing and substantial. It accords with *Charter* values, by recognizing the important

100 Par conséquent, c'est l'objectif de la restriction du droit de vote aux membres qui résident ordinairement dans la réserve qui doit être examiné en l'espèce, quoique cette restriction doive être considérée en tenant compte de l'objectif de la *Loi sur les Indiens* dans son ensemble, afin de bien saisir le cadre général dans lequel s'inscrit la mesure législative. Il ne faut pas oublier que, dans le cas des droits à l'égalité, l'objectif de la disposition législative contestée doit être suffisamment urgent et réel pour justifier une règle de droit qui porte atteinte à la dignité humaine et à la liberté fondamentales de personnes dotées de caractéristiques semblables à celles des demandeurs. En l'espèce, l'objectif du législateur peut, à juste titre, être décrit comme étant de faire en sorte que ceux qui possèdent les liens les plus directs et les plus immédiats avec la réserve soient habilités de façon

dignity and autonomy interest in one's home and livelihood, and the connection band members feel to their land. Through this provision, Parliament is also moderating the interests of groups with different and possibly conflicting interests.

101 Turning to the proportionality analysis, restricting the vote to those living on the reserve is rationally connected to Parliament's objective. Although both band members living on- and off-reserve have interests in many of the functions determined by voting rights, those living on the reserve do have a more direct interest in many of the band council's functions. In terms of the "local" functions of the band council, they are the only people with an interest. In relation to functions that affect the future of the land or the building of facilities on the reserve, on-reserve band members, in general, have a more direct interest in the decisions of the band council. Decisions about reserve lands affect their current living space, and a decision to surrender the reserve would mean that they would be forced to move from their homes and, in many cases, from their source of earning a livelihood. This statement is not meant to suggest that non-residents would be more likely to surrender the reserve or to make decisions that are not in the interest of the band as a whole, but rather to recognize that those who live on the reserve have particular interests in the land, given current circumstances.

102 By ensuring that only those who live on the reserve can vote in relation to all of the band council's functions, s. 77(1) gives them control over the future directions that the band will take, and over decisions about the reserve land on which they live. Excluding non-residents from voting is connected to the objective because, by denying all

particulière à décider de son avenir. Il s'agit, à mon avis, d'un objectif urgent et réel. Il est compatible avec les valeurs qui sous-tendent la *Charte* puisqu'il reconnaît, d'une part, l'importance que revêt pour un individu son foyer et son gagne-pain du point de vue de son droit à la dignité et à l'autonomie, et, d'autre part, l'attachement des membres de la bande à leur territoire. Cette disposition permet également au Parlement de concilier les intérêts différents et possiblement opposés de divers groupes.

Pour ce qui est du critère de la proportionnalité, la restriction du droit de vote aux résidents de la réserve a un lien rationnel avec l'objectif du Parlement. Bien que les membres des bandes habitant les réserves et ceux qui vivent hors de celles-ci soient touchés par bon nombre des fonctions caractérisées par le droit de vote, ceux qui habitent les réserves ont effectivement un intérêt plus direct dans bien des fonctions du conseil de bande. En ce qui a trait aux fonctions «locales» du conseil de bande, ils sont les seuls à avoir un intérêt. Quant aux fonctions influant sur l'avenir des terres de la réserve ou la construction d'installations dans la réserve, les membres qui résident dans celle-ci ont, en général, un intérêt plus direct et immédiat dans les décisions du conseil de bande. Les décisions concernant les terres de la réserve touchent de façon immédiate le lieu où ils vivent, et la décision de céder la réserve entraînerait pour eux l'obligation de quitter leur domicile et, dans bien des cas, d'abandonner leur gagne-pain. Cette constatation ne saurait suggérer que les non-résidents seraient plus enclins à céder la réserve ou à prendre des décisions qui ne seraient pas dans l'intérêt de l'ensemble de la bande, mais elle reconnaît plutôt que, dans les circonstances actuelles, ceux qui vivent dans la réserve ont des intérêts particuliers dans les terres qui la composent.

En faisant en sorte que seules les personnes vivant dans les réserves puissent voter relativement à toutes les fonctions du conseil de bande, le par. 77(1) leur accorde un droit de regard sur les orientations futures de la bande et sur les décisions concernant les terres de la réserve qu'ils habitent. L'exclusion des non-résidents du régime de droit

others a vote, the legislation ensures that those with the most direct and immediate interest, residents, maintain voting control over the decisions that will affect the future of the reserve.

de vote est liée à l'objectif parce que, en privant toutes ces personnes du droit de vote, la loi garantit que ceux qui ont l'intérêt le plus direct et le plus immédiat, en l'occurrence les résidents, conservent, par l'exercice du droit de vote, le pouvoir sur les décisions intéressant l'avenir de la réserve.

However, those seeking to uphold this law have not demonstrated that a complete exclusion of non-residents from the right to vote, which violates their equality rights, constitutes a minimal impairment of these rights. Indeed, they have not shown that any infringement of the respondents' equality rights is necessary to achieve this purpose. As I outlined earlier, the guarantee of equality does not require that on- and off-reserve band members be treated the same, and respecting the rights of dignity and belonging of off-reserve band members need not mean ignoring the particular interest of residents in decisions affecting the reserve. I discussed several possible solutions above, which would respect the dignity of off-reserve band members, but would not stereotype them or otherwise violate their right to substantive equality. The appellants have not shown why solutions like special majorities, representative band councils not based directly on population, dividing the local functions from the broader powers of the band council, or other solutions that would not have the effect of suggesting off-reserve band members are less worthy of concern, respect, and consideration could not accomplish this objective.

103 Toutefois, ceux qui demandent le maintien de cette disposition législative n'ont pas démontré que le fait de priver complètement les non-résidents de leur droit de vote, mesure qui contrevient à leurs droits à l'égalité, porte le moins possible atteinte à ces droits. De fait, ils n'ont pas prouvé qu'il soit nécessaire de porter atteinte de quelque manière que ce soit aux droits à l'égalité pour réaliser cet objectif. Comme je l'ai expliqué auparavant, la garantie d'égalité ne commande pas que les membres habitant la réserve et les membres vivant hors réserve soient traités de la même façon, et le respect du droit des membres hors réserve d'appartenir à la bande et de leur droit à la dignité n'a pas à se traduire par l'absence de prise en compte de l'intérêt particulier des résidents dans les décisions touchant la réserve. J'ai fait état précédemment de plusieurs solutions possibles, qui respecteraient la dignité des membres hors réserve sans leur attribuer de stéréotypes ou porter atteinte de quelque autre manière à leur droit à l'égalité réelle. Les appelantes n'ont pas établi en quoi des solutions comme les majorités qualifiées, les conseils de bande dont la composition ne refléterait pas directement la population de la réserve, la dissociation des fonctions locales du conseil de bande de ses pouvoirs plus généraux ou d'autres solutions qui n'auraient pas pour effet de suggérer que les membres de la bande vivant hors réserve sont moins dignes d'intérêt, de respect et de considération, ne permettraient pas de réaliser cet objectif.

The appellant Her Majesty the Queen suggests that the current model meets the criterion of minimal impairment because of the administrative difficulties and costs involved in setting up, for example, a two-tiered council where one tier would deal with local issues and the other with issues affecting all band members, or in maintaining a voter's list and conducting elections where the electorate may be widely dispersed. Even

104 L'appelante Sa Majesté la Reine prétend que le régime existant respecte le critère de l'atteinte minimale en raison des difficultés administratives et des coûts qu'entraîneraient, par exemple, la mise sur pied d'un conseil à deux paliers, dont l'un aurait compétence sur les questions locales et l'autre sur celles touchant l'ensemble des membres de la bande, ou encore l'établissement et le maintien d'une liste électorale et la tenue d'élections

assuming that such costs could legitimately constitute a s. 1 justification, these arguments are unconvincing. It must be remembered that the burden of justifying limitations on constitutional rights is upon the government. The government has presented no evidence to show that a system that would respect equality rights is particularly expensive or difficult to implement. Rather, there are many possible solutions that would not be difficult to administer, but would require a creative design of an electoral system that would balance the rights involved. Change to any administrative scheme so it accords with equality rights will always entail financial costs and administrative inconvenience. The refusal to come up with new, different, or creative ways of designing such a system, and to find cost-effective ways to respect equality rights cannot constitute a minimal impairment of these rights. Though the government argues that these costs should not be imposed on small communities such as the Batchewana Band, the possible failure, in the future, of the government to provide Aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights cannot justify a violation of constitutional rights in its legislation.

lorsque l'électorat est très dispersé. À supposer même que de tels coûts puissent légitimement constituer une justification au regard de l'article premier, ces arguments ne sont pas convaincants. Il faut se rappeler que c'est au gouvernement qu'incombe le fardeau de justifier les restrictions apportées aux droits garantis par la Constitution. Or, le gouvernement n'a présenté aucune preuve tendant à montrer qu'un système respectant les droits à l'égalité serait particulièrement coûteux ou difficile d'application. Au contraire, il existe plusieurs solutions possibles qui ne comporteraient pas de difficultés d'administration, mais exigeraient évidemment un effort de créativité afin de concevoir un système électoral mettant en équilibre les droits en cause. La modification de tout régime administratif afin qu'il respecte les droits à l'égalité entraîne immanquablement des coûts et des inconvénients d'ordre administratif. Le refus de trouver des moyens nouveaux, différents ou inventifs de mettre en place un tel système, ainsi que des solutions rentables pour respecter les droits à l'égalité ne saurait constituer une atteinte minimale à ces droits. Bien que le gouvernement soutienne qu'il ne faille pas imposer de tels coûts à de petites communautés telle la bande de Batchewana, la possibilité que, dans l'avenir, il ne mette pas à la disposition des communautés autochtones les ressources additionnelles nécessaires pour mettre en place un régime qui garantirait le respect des droits à l'égalité, ne saurait justifier la violation de droits constitutionnels dans une disposition législative relevant de son autorité.

105 Since this legislation does not minimally impair the respondents' equality rights, I agree with Strayer J. and the Court of Appeal that it is not justified under s. 1 of the *Charter*.

Puisque la disposition législative contestée ne porte pas atteinte le moins possible aux droits à l'égalité des intimés, je souscris à la conclusion du juge Strayer et de la Cour d'appel fédérale qu'elle n'est pas justifiée au regard de l'article premier de la *Charte*.

E. *Remedy*

E. *La réparation*

106 I turn now to the question of the appropriate remedy. The remedial question raises four issues:

(1) whether the appropriate remedy is one that should apply to the Batchewana Band, or to

Je passe maintenant à la question de la réparation convenable. Celle-ci soulève quatre sous-questions:

(1) Est-ce que la réparation convenable est une réparation qui devrait s'appliquer à la bande de

the section in its general application across Canada;

(2) whether the appropriate declaration is one of invalidity or "reading in";

(3) whether the declaration should be suspended for a period of time, and, if so, for how long;

(4) if there is a suspension of the declaration, whether the Batchewana Band will be exempted from this suspension.

Batchewana ou viser la disposition en cause dans son application générale à l'ensemble du Canada?

(2) La réparation convenable est-elle une déclaration d'invalidité ou l'application d'une interprétation large?

(3) Est-ce qu'il y a lieu de suspendre la prise d'effet de la déclaration pour un certain temps, et, si oui, pendant combien de temps?

(4) Est-ce que, en cas de suspension de la prise d'effet de la déclaration, la bande de Batchewana sera exemptée de cette suspension?

Both courts below confined their remedy to the Batchewana Band. Strayer J.'s order applied only to the Batchewana Band, and specified that s. 77(1) was unconstitutional only in its effects on certain of the provisions of the *Indian Act*. The Court of Appeal granted a constitutional exemption from the application of the words "and is ordinarily resident on the reserve" in s. 77(1), for all purposes, to the Batchewana Band. This remedy was granted under s. 24(1) of the *Charter*. The reasons for each of these decisions were different. Strayer J. confined his declaration to the Batchewana Band because the pleadings and evidence related only to that band. The Court of Appeal, in contrast, held that a constitutional exemption was the appropriate remedy, because other bands might be able to demonstrate the existence of an Aboriginal right to control their own voting procedures under s. 35 of the *Constitution Act, 1982*, which would, in the case of those bands, make s. 77(1) a valid codification of Aboriginal rights.

107 Les jugements antérieurs ont limité la portée de la réparation à la bande de Batchewana. L'ordonnance du juge Strayer ne visait que la bande de Batchewana et spécifiait que le par. 77(1) était inconstitutionnel uniquement de par ses effets sur certaines dispositions de la *Loi sur les Indiens*. La Cour d'appel fédérale a accordé à la bande de Batchewana une exemption constitutionnelle, à tous égards, en ce qui a trait à l'application des mots «et réside ordinairement sur la réserve» figurant au par. 77(1). Cette réparation a été accordée en vertu du par. 24(1) de la *Charte*. Chacune de ces décisions reposait sur des motifs différents. Le juge Strayer a limité sa déclaration d'invalidité à la bande de Batchewana parce que les actes de procédure et la preuve ne visaient que cette bande. Par contraste, la Cour d'appel fédérale a statué qu'une exemption constitutionnelle était la réparation convenable, car d'autres bandes pourraient être en mesure de démontrer l'existence d'un droit ancestral — visé à l'art. 35 de la *Loi constitutionnelle de 1982* — les habilitant à décider de leur propre procédure de scrutin, ce qui, dans le cas de ces bandes, ferait du par. 77(1) une codification valide de droits ancestraux.

There have been various positions taken before this Court as to the appropriate remedy. The respondents support the constitutional exemption granted by the Court of Appeal, and in the alternative, they ask that the offending words in s. 77(1) be declared invalid, that the effect of the declaration be suspended for two years, and that the

108 Diverses thèses ont été avancées devant notre Cour en ce qui concerne la réparation convenable. Les intimés plaident le bien-fondé de l'exemption constitutionnelle accordée par la Cour d'appel fédérale et, subsidiairement, ils demandent que le passage attentatoire du par. 77(1) soit déclaré inopérant, que la prise d'effet de cette déclaration soit

Batchewana Band be granted an exemption from the suspension of the declaration. Most interveners who support the position of the respondents argue that the appropriate remedy is a general declaration of invalidity, suspended for a period of time, and an exemption from the suspension for the Batchewana Band.

suspendue pendant deux ans et que la bande de Batchewana soit exemptée de la suspension de la prise d'effet de la déclaration. La plupart des intervenants qui appuient la thèse des intimés affirment que la réparation convenable est une déclaration générale d'invalidité, dont la prise d'effet serait suspendue pendant un certain temps et qui serait assortie d'une exemption de la suspension en faveur de la bande de Batchewana.

109 The appellant Her Majesty the Queen argues that if relief is to be given, the proper remedy is a general declaration of invalidity, together with a suspension of the effect of the declaration for a period of time, rather than a constitutional exemption. The Batchewana Band, too, argues that a constitutional exemption is inappropriate in this case. If the legislation is found to be unconstitutional, the band argues, the appropriate remedy is to make an "interim ruling" that the legislation is unconstitutional. The band asks that the Court make no order in relation to the validity of the legislation at this time, but rather declare the legislation unconstitutional, and order the band, in conjunction with its on- and off-reserve members and with the Minister, to develop its own customary voting rules that would respect the principles of the *Charter*. It argues that at the end of a reporting period, if the legislation has not been changed in the appropriate way, the Court should then make a formal order. In the alternative, it suggests, a suspended declaration of invalidity is appropriate. Finally, the intervener the Lesser Slave Lake Indian Regional Council argues for a remedy confined to this band, but suggests that if a general declaration of invalidity is made, its effect should be suspended for a period of time, and the government should be ordered to re-negotiate, in good faith, existing treaties with Aboriginal people in order to give them more land and resources to deal with the increase in membership caused by Bill C-31.

L'appelante Sa Majesté la Reine soutient que, s'il y a lieu d'accorder une réparation, celle-ci devrait être une déclaration générale d'invalidité assortie d'une suspension de sa prise d'effet pendant un certain temps, plutôt qu'une exemption constitutionnelle. La bande de Batchewana affirme, elle aussi, qu'une exemption constitutionnelle n'est pas la réparation convenable en l'espèce. Si la disposition législative est jugée inconstitutionnelle, soutient la bande, la réparation convenable consiste à rendre une [TRADUCTION] «décision intérimaire» portant qu'elle est inconstitutionnelle. La bande demande à notre Cour de ne pas rendre d'ordonnance quant à la validité de la disposition législative pour l'instant, mais plutôt de déclarer celle-ci inconstitutionnelle et d'ordonner à la bande d'établir, de concert avec ses membres résidents, ses membres hors réserve et le ministre, ses propres règles relatives au droit de vote fondées sur la coutume et conformes aux principes de la *Charte*. Elle prétend que si, à l'expiration du délai qui serait imparti pour faire rapport, la loi n'avait pas été modifiée de la manière appropriée, la Cour devrait alors rendre une ordonnance formelle. Subsidiairement, elle suggère qu'une déclaration d'invalidité dont la prise d'effet serait suspendue constituerait une réparation convenable. Finalement, l'intervenant Lesser Slave Indian Regional Council sollicite une réparation limitée à cette bande, mais indique que, si une déclaration générale d'invalidité était prononcée, sa prise d'effet devrait être suspendue pendant un certain temps, et qu'il devrait être ordonné au gouvernement de renégocier de bonne foi les traités existants avec les peuples autochtones afin de leur attribuer plus de terres et de ressources afin qu'ils puissent faire face à l'augmentation du nombre de leurs membres causée par le projet de loi C-31.

In determining the appropriate remedy, the Court must be guided by the principles of respect for the purposes and values of the *Charter*, and respect for the role of the legislature: *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 700-701; *Vriend*, *supra*, at para. 148. The first principle was well expressed by Sopinka J. in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104:

> In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.

The first question is whether the appropriate remedy is a constitutional exemption, or one that applies in general. The finding of invalidity above relates not only to the Batchewana Band, but to the legislation in general as it applies to all bands. Therefore, in principle there is no reason that the remedy should be confined to the circumstances of the Batchewana Band. A remedy should normally be as extensive as the violation of equality rights which has been found. The constitutional exemption may apply when it has not been proven that legislation is unconstitutional in general, but that it is unconstitutional in its application to a small subsection of those to whom the legislation applies: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 783; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 629; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 572-73, *per* Lamer C.J., dissenting. This is not the case here.

However, the Court of Appeal held that it would be appropriate to grant a constitutional exemption, since other bands may be able to demonstrate an Aboriginal right to exclude non-residents from decision making, which would affect the analysis of the constitutionality of this provision. With all

110 Dans la détermination de la réparation convenable, la Cour doit suivre le principe du respect des objectifs visés par la *Charte* et des valeurs qu'elle exprime, ainsi que le principe du respect du rôle du législateur: *Schachter c. Canada*, [1992] 2 R.C.S. 679, aux pp. 700 et 701; *Vriend*, précité, au par. 148. Le juge Sopinka a bien exprimé le premier principe dans l'arrêt *Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69, à la p. 104:

> Dans le choix d'une réparation convenable en vertu de la *Charte*, la cour doit veiller avant tout à faire appliquer les mesures les plus propres à assurer la protection des valeurs exprimées dans la *Charte* et à accorder aux victimes d'une atteinte à leurs droits la réparation qui permet le mieux d'atteindre cet objectif. Voilà ce qui découle du rôle de la cour comme gardienne des droits et libertés consacrés dans la loi suprême du Canada.

111 La première question consiste à se demander si la réparation convenable est une exemption constitutionnelle ou une réparation d'application générale. La conclusion d'invalidité tirée précédemment vise non seulement la bande de Batchewana mais la mesure législative en général dans son application à toutes les bandes. En conséquence, il n'y a en principe aucune raison de limiter la réparation à la situation de la bande de Batchewana. La portée de la réparation doit normalement être de la même étendue que la violation des droits à l'égalité à laquelle le tribunal a conclu. L'exemption constitutionnelle peut s'appliquer dans les cas où il n'a pas été prouvé que la mesure législative est inconstitutionnelle de façon générale, mais qu'elle l'est dans son application à un petit groupe parmi les personnes auxquelles elle s'applique: *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, à la p. 783; *R. c. Seaboyer*, [1991] 2 R.C.S. 577, à la p. 629; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, aux pp. 572 et 573, motifs du juge en chef Lamer, dissident. Ce n'est pas le cas en l'espèce.

112 Toutefois, la Cour d'appel fédérale a décidé qu'il serait opportun d'accorder une exemption constitutionnelle, puisque d'autres bandes pourraient être en mesure de démontrer l'existence d'un droit ancestral les autorisant à exclure les non-résidents du processus décisionnel, ce qui

due respect, a constitutional exemption is not an appropriate remedy in this case. If certain bands can demonstrate an Aboriginal or treaty right to restrict non-residents from voting, this in no way affects the constitutionality of the impugned section of the *Indian Act*. It is the order in council made pursuant to s. 74(1), bringing the band within the application of the *Indian Act*'s electoral rules, which would have to be challenged under such a claim. In analysing such a case, it would have to be determined whether an Aboriginal right had been proven, whether the legislation as it then stands infringes that right, and whether that infringement is justified: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Van der Peet*, *supra*. A court would also be required to examine how s. 25 of the *Charter* functions when Aboriginal rights are challenged, and how it interacts with other interpretive provisions of the *Charter*.

influencerait l'analyse de la constitutionnalité de cette disposition. Avec égards, l'exemption constitutionnelle n'est pas la réparation convenable en l'espèce. Si certaines bandes peuvent démontrer l'existence d'un droit ancestral ou issu de traité leur permettant de priver les non-résidents du droit de vote, cela n'a aucune incidence sur la constitutionnalité du paragraphe contesté de la *Loi sur les Indiens*. Dans le cadre d'une telle demande, c'est alors l'arrêté pris en application du par. 74(1) et ayant pour effet d'assujettir la bande concernée aux règles électorales de la *Loi sur les Indiens* qui devrait être contesté. Dans l'analyse d'un tel cas, il faudrait déterminer si l'existence d'un droit ancestral a été prouvée, si la mesure législative en vigueur à ce moment-là porte atteinte à ce droit et si cette atteinte est justifiée: voir *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Van der Peet*, précité. Le tribunal saisi de la demande devrait également déterminer de quelle façon l'art. 25 de la *Charte* agit lorsque des droits ancestraux sont contestés et de quelle façon il interagit avec les autres dispositions interprétatives de la *Charte*.

113 Nor would such a remedy be the order most respectful of the equality rights of off-reserve band members. If a constitutional exemption were granted, this would place a heavy burden on off-reserve band members, since it would require those in each band to take legal action to put forward their claim. Equality within bands does not require such a heavy burden on claimants. In addition, establishing as a principle that where s. 35 Aboriginal rights might be involved, equality rights must be determined on a band-by-band basis would make the equality rights of Aboriginal people much harder to uphold than those of others, in certain cases. For these reasons, the appropriate remedy is one that applies to the legislation in general, under s. 52(1) of the *Constitution Act, 1982*, and not one confined to the Batchewana Band.

Une telle réparation ne serait pas non plus une décision respectant le plus les droits à l'égalité des membres hors réserve des bandes indiennes. Si une exemption constitutionnelle était accordée, elle imposerait un lourd fardeau à ces membres, puisqu'elle obligerait les membres non résidents de chaque bande à engager une action en justice pour faire valoir leur prétention. L'égalité au sein des bandes ne commande pas qu'un fardeau aussi lourd soit imposé aux demandeurs. En outre, poser le principe selon lequel, lorsqu'il est possible que des droits ancestraux visés à l'art. 35 soient en cause, il faille statuer sur les droits à l'égalité pour chaque bande, les droits à l'égalité des Autochtones seraient alors, dans certains cas, beaucoup plus difficiles à faire respecter que ceux des autres. Pour ces motifs, la réparation convenable est une réparation qui s'applique à la mesure législative en général, en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*, et non seulement à la bande de Batchewana.

114 The next issue is what form the general remedy will take. The nature of the violation of equality

Il faut maintenant décider de la forme que prendra cette réparation générale. La nature de

rights that has been found in this case is different than any that this Court has addressed before. It has been found that, though it would be legitimate for Parliament to create different voting rights for reserve residents and people living off-reserve, in a manner that recognizes non-residents' place in the community, it is not legitimate for Parliament to completely exclude them from voting rights. This is also a situation where the primary effects of this decision will not be felt by the government, but by the bands themselves. In respecting the role of Parliament, these factors should be critical.

l'atteinte aux droits à l'égalité qui a été constatée en l'espèce est différente de toutes celles qu'a examinées notre Cour jusqu'à maintenant. Il a été jugé que, bien qu'il soit légitime pour le Parlement de créer des droits de vote différents pour les membres qui résident dans les réserves et pour ceux qui vivent en dehors de celles-ci, d'une manière qui reconnaisse la place de ces derniers dans la communauté, il n'est pas légitime pour le Parlement de les priver complètement du droit de vote. Il s'agit également d'une situation où les effets premiers de cette décision ne seront pas ressentis par le gouvernement, mais par les bandes elles-mêmes. Ces facteurs sont cruciaux pour décider du respect à accorder au rôle du législateur.

In my opinion, it would be inappropriate for this Court to "read in" to the *Indian Act* voting rights for non-residents so that they would be voters for certain purposes but not others. This would involve considerable detailed changes to the legislative scheme. Designing such a detailed scheme, and choosing among various possible options, is not an appropriate role for the Court in this case (see *M. v. H.*, *supra*, at para. 142, *per* Iacobucci J.).

115 À mon avis, il ne conviendrait pas que notre Cour donne à la *Loi sur les Indiens* une «interprétation large», qui aurait pour effet d'accorder aux non-résidents un droit de vote les habilitant à se prononcer sur certaines questions mais non sur d'autres. Une telle décision impliquerait des modifications considérables et détaillées au régime établi par la loi. Élaborer un régime aussi détaillé et choisir parmi plusieurs options ne sont pas des rôles appropriés pour notre Cour en l'espèce (voir *M. c. H.*, précité, au par. 142, motifs du juge Iacobucci).

There are a number of ways this legislation may be changed so that it respects the equality rights of non-resident band members. Because the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it. The link between public discussion and consultation and the principles of democracy was recently reiterated by this Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 68: "a functioning democracy requires a continuous process of discussion". The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur. In P. W. Hogg and A. A. Bushell, "The *Charter* Dialogue Between Courts and Legisla-

116 Il existe plusieurs façons de modifier la mesure législative en cause pour qu'elle respecte les droits à l'égalité des membres non résidents des bandes Indiennes. Parce que les membres des bandes sont les plus directement touchés par le régime, la meilleure réparation sera celle qui encouragera le Parlement à consulter les Autochtones concernés ainsi qu'à recueillir leur opinion, et qui lui permettra de le faire. Le lien entre la discussion publique, la consultation et les principes de la démocratie a été réaffirmé récemment par notre Cour dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, au par. 68: «le bon fonctionnement d'une démocratie exige un processus permanent de discussion». Le principe de la démocratie sous-tend la Constitution et la *Charte*, et il est l'un des facteurs importants guidant les tribunaux dans l'exercice de leur pouvoir discrétionnaire de réparation. Il encourage l'élaboration de réparations

tures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997), 35 *Osgoode Hall L.J.* 75, the authors characterize judicial review under the *Charter* as a "dialogue" between courts and legislatures. The remedies granted under the *Charter* should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation. In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process. As Iacobucci J. observed in *Vriend*, *supra*, at para. 176:

> [T]he concept of democracy means more than majority rule as Dickson C.J. so ably reminded us in *Oakes*, *supra*. In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make.

117 Constitutional remedies should encourage the government to take into account the interests, and views, of minorities. In this way, the principle of democracy that was recognized as an underlying principle of the Constitution in *Reference re Secession of Quebec*, *supra*, and was emphasized as an important remedial consideration in *Schachter*, *supra*, and *Vriend*, *supra*, will best be given expression.

118 The above principles suggest, in my view, that the appropriate remedy is a declaration that the words "and is ordinarily resident on the reserve" in s. 77(1) are invalid, and that the effect of this declaration of invalidity be suspended for 18 months. The suspension is longer than the period that would normally be allotted in order to give legislators the time necessary to carry out extensive consultations and respond to the needs of the different groups affected. It will also allow Parliament, if it wishes, to modify s. 77(2) at the same time, which contains the same residency requirement for bands

permettant ce processus démocratique de consultation et de dialogue. Dans P. W. Hogg et A. A. Bushell, «The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)» (1997), 35 *Osgoode Hall L.J.* 75, les auteurs qualifient le contrôle judiciaire au regard de la *Charte* de [TRADUCTION] «dialogue» entre les tribunaux et le législateur. Les réparations accordées en vertu de la *Charte* doivent, dans les cas qui s'y prêtent, encourager et faciliter la participation à ce dialogue des groupes qui sont touchés de façon particulière par la loi en cause. Pour décider de la réparation convenable, le tribunal doit prendre en compte l'effet de son ordonnance sur le processus démocratique, pris au sens large, et encourager ce processus. Comme a fait observer le juge Iacobucci dans l'arrêt *Vriend*, précité, au par. 176:

> [L]a notion de démocratie ne se limite pas à la règle de la majorité, ainsi que nous l'a si bien rappelé le juge en chef Dickson dans l'arrêt *Oakes*, précité. À mon avis, la démocratie suppose que le législateur tienne compte des intérêts de la majorité comme de ceux des minorités, car ses décisions toucheront tout le monde.

Les réparations constitutionnelles doivent encourager le gouvernement à tenir compte de l'opinion des minorités et de leurs intérêts. C'est ainsi que sera le mieux affirmé le principe de la démocratie, qui a été reconnu comme principe sous-jacent de la Constitution dans le *Renvoi relatif à la sécession du Québec*, précité, et dont on a souligné l'importance en tant que considération en matière de réparation dans les arrêts *Schachter* et *Vriend*, précités.

À mon avis, les principes susmentionnés tendent à indiquer que la réparation convenable consiste à déclarer invalides les mots «et réside ordinairement sur la réserve» au par. 77(1) et à suspendre pour 18 mois l'effet de cette déclaration d'invalidité. Cette période de suspension des effets est plus longue que celle qui serait normalement accordée, ce afin de donner au législateur le temps nécessaire pour tenir de vastes consultations et répondre aux besoins des différents groupes touchés. Cette mesure permettra également au Parlement, s'il le désire, de modifier par la même occasion le

whose councillors are elected in electoral sections, and which, given the values espoused in this decision, will also require revision to conform with s. 15(1). Severing the offending words from the rest of the statute will ensure that, should Parliament choose not to act, all non-residents will be included as voters under s. 77(1), but the nature of band governance and the requirements for voting will otherwise remain the same.

par. 77(2) qui établit la même obligation de résidence dans le cadre des élections des bandes dont les conseillers sont élus par sections électorales, et qui, compte tenu des valeurs exprimées dans la présente décision, devra également être révisé pour assurer sa conformité avec le par. 15(1). La dissociation des mots attentatoires du reste de la loi permettra de faire en sorte que, au cas où le Parlement choisirait de ne pas agir, tous les non-résidents soient comptés parmi les électeurs pour l'application du par. 77(1), mais que la nature du régime d'administration des affaires des bandes et les conditions d'exercice du droit de vote restent par ailleurs inchangées.

I recognize that suspending the effect of the declaration, combined with the extension of the suspension for such a long period is, in the words of the Chief Justice in *Schachter*, *supra*, at p. 716, "a serious matter from the point of view of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation". However, this best embodies the principles of respect for *Charter* rights and respect for democracy that should guide remedial considerations. Should Parliament decide to change the scheme, it will have an extended period of time in which to consult with those affected by the legislation and balance the affected interests in a manner that respects Aboriginal rights and all band members' equality interests. Should Parliament not change the scheme, off-reserve band members will gain voting rights within the existing scheme.

119 Je reconnais que la suspension de la prise d'effet de la déclaration pour une période aussi longue constitue, suivant les termes utilisés par le Juge en chef dans l'arrêt *Schachter*, précité, à la p. 716, «une question sérieuse du point de vue de l'application de la *Charte*, car on se trouve alors à permettre que se perpétue pendant un certain temps une situation qui a été jugée contraire aux principes consacrés dans la *Charte*». Toutefois, il s'agit de la réparation qui incarne le mieux le principe du respect des droits garantis par la *Charte* et celui du respect de la démocratie qui doivent guider le choix de la réparation. Si le Parlement décidait de modifier le régime, il disposera d'un délai convenable pour consulter les personnes touchées par la loi et pour concilier les intérêts en cause d'une manière qui respecte les droits ancestraux ainsi que les droits à la dignité et à l'égalité de l'ensemble des membres des bandes. Si le Parlement décidait de ne pas modifier le régime, les membres vivant hors réserve des bandes Indiennes obtiendront alors le droit de voter dans le cadre du régime actuel.

I also recognize that some may see the section, with the words "and is ordinarily residence on the reserve" no longer included, as possibly giving rise to other constitutional issues. In ordering this remedy, the Court does not foreclose the possibility that, if Parliament does not act to change the legislation, s. 77(1) or related sections of the *Indian Act*

120 Je reconnais également que certains considéreront peut-être que, une fois amputé des mots «et réside ordinairement sur la réserve», l'article en cause pourrait soulever d'autres questions constitutionnelles. En ordonnant cette réparation, la Cour n'écarte pas la possibilité que, dans l'éventualité où le Parlement ne modifie pas la loi, le par. 77(1) ou d'autres dispositions connexes de la *Loi sur les Indiens* puissent être contestés en vertu de la

may be the subject of a constitutional challenge by on-reserve band members or others.

121 This suspension of the effect of the declaration, along with the extended period of suspension, is ordered to enable Parliament to consult with the affected groups, and to redesign the voting provisions of the *Indian Act* in a nuanced way that respects equality rights and all affected interests, should it so choose. However, should decisions be made during that period without non-residents' involvement that directly affect their interests and which directly prejudice them, it may be that the decisions themselves could be challenged as violations of non-residents' equality rights. The suspension of the effect of the declaration, in other words, is not a suspension of non-residents' equality rights. Decisions must still be made with respect for those rights.

122 The final determination is whether the Batchewana Band will be exempted from the suspension of the effect of the declaration. In general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of the ruling, even if the effect of the declaration is suspended: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 20. In my opinion, however, this is one of the exceptional cases where immediate relief should not be given to those who brought the action.

123 Professor Roach in *Constitutional Remedies in Canada* (loose-leaf), at pp. 14-85 and 14-86, has identified two possible reasons for which, in general, the claimant in a particular case may have the right to an exemption from the suspension of the effect of the declaration of invalidity, and therefore an immediate remedy:

> Corrective justice would suggest that the successful applicant has a right to remedy while regulatory or

Constitution par des membres des bandes indiennes habitant les réserves ou par d'autres personnes.

Cette suspension de la prise d'effet de la déclaration pour une durée prolongée est ordonnée afin de donner au Parlement la possibilité de consulter les groupes touchés et de réviser les dispositions de la *Loi sur les Indiens* relatives au droit de vote en y apportant les nuances propres à assurer le respect des droits à l'égalité et de tous les intérêts en cause, s'il choisit d'agir ainsi. Toutefois, il convient également de souligner que si, durant cette période, il était pris, sans la participation des membres non résidents, des décisions touchant directement leurs intérêts et leur causant directement préjudice, les décisions elles-mêmes pourraient bien être attaquées pour le motif qu'elles contreviennent aux droits à l'égalité des non-résidents. En d'autres mots, la suspension de la prise d'effet de la déclaration n'est pas une suspension des droits à l'égalité des membres non résidents. Les décisions doivent continuer d'être prises dans le respect de ces droits.

Il ne reste plus qu'à décider s'il y a lieu d'exempter la bande de Batchewana de la suspension de la prise d'effet de la déclaration. En général, les plaideurs qui ont présenté une contestation fondée sur la *Charte* doivent profiter des avantages immédiats de la décision, même si la prise d'effet de la déclaration est suspendue: voir le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1998] 1 R.C.S. 3, au par. 20. À mon avis, cependant, la présente affaire est l'un de ces cas exceptionnels où une réparation immédiate ne devrait pas être accordée à ceux qui ont intenté l'action.

Dans *Constitutional Remedies in Canada* (feuilles mobiles), aux pp. 14-85 et 14-86, le professeur Roach a fait état de deux raisons possibles pour lesquelles, en général, le demandeur dans une affaire donnée devrait être exempté de la suspension de la prise d'effet de la déclaration d'invalidité et avoir droit à une réparation immédiate:

> [TRADUCTION] Suivant la justice «corrective» le demandeur qui a gain de cause aurait droit à une réparation,

public law approaches would only be concerned with giving the applicants enough incentive to bring their case to court.

However, I do not believe that either of these considerations applies in the case at bar. What is at issue in this Court is not a remedy affecting band councils elected under the previous regime, but rather a declaration that will have the effect of changing future election rules. If Parliament chooses either not to act, or to change the legislation to conform with this ruling, the respondents will receive a remedy after the period of suspension expires or when the new legislation comes into effect. This both gives them a personal remedy, and gives applicants in analogous situations an incentive to bring their case forward.

Unlike in other cases where this Court has granted an exemption from the suspension, there are strong administrative reasons not to grant immediate relief to the members of the Batchewana Band. If an exemption from the suspension is given, the Batchewana Band will have to adapt to the inclusion of all non-residents as voters within the existing scheme in the short term. This will require some administrative adjustment. If Parliament then decides to amend the legislation, the Batchewana Band and its members will be required to adapt to a third voting system in a short period of time. This would be inappropriate, and inconsistent with the principles underlying constitutional remedies.

Since writing these reasons, I have had the advantage of reading the opinion of my colleagues McLachlin and Bastarache JJ. To the extent that their reasons suggest a departure from the approach to defining analogous grounds taken in *Andrews*, *Turpin*, *Egan*, *Miron*, and *Law*, I must respectfully disagree with their analysis. However, this being said, in my view there is no substantive

alors que l'approche suivie en droit public ou en droit d'origine réglementaire se limite à donner aux demandeurs une raison suffisante pour les inciter à s'adresser aux tribunaux.

Toutefois, je ne crois pas que l'une ou l'autre de ces considérations s'applique en l'espèce. Ce qui est en cause devant notre Cour, ce n'est pas une réparation visant les conseils de bande élus sous le régime précédent, mais bien une déclaration qui aura pour effet de changer les règles applicables aux élections futures. Si le Parlement décide de ne pas agir ou encore de modifier la loi pour se conformer à la présente décision, les intimés obtiendront une réparation après l'expiration du délai de suspension ou lorsque les nouvelles mesures législatives entreront en vigueur. La solution retenue a pour effet d'accorder aux intimés une réparation personnelle et de servir d'encouragement à d'éventuels demandeurs se trouvant dans une situation analogue pour qu'ils prennent action à leur tour.

124 Contrairement aux autres affaires dans lesquelles notre Cour a accordé une exemption de la suspension, il existe en l'espèce de solides raisons administratives justifiant de ne pas accorder de réparation immédiate aux membres de la bande de Batchewana. Si une exemption de la suspension était accordée, la bande de Batchewana devrait s'adapter à des modifications immédiates au régime actuel, ce qui nécessiterait des ajustements administratifs. Par la suite, la bande de Batchewana et ses membres devraient vraisemblablement s'adapter à un troisième régime électoral à l'intérieur d'une courte période. Une telle situation serait inopportune et incompatible avec les principes qui sous-tendent les réparations constitutionnelles.

125 Depuis la rédaction des présents motifs, j'ai pris connaissance de l'opinion de mes collègues les juges McLachlin et Bastarache. Dans la mesure où leurs motifs suggèrent de déroger à l'approche qui a été appliquée dans les arrêts *Andrews*, *Turpin*, *Egan*, *Miron* et *Law* en ce qui concerne la définition des motifs analogues, je dois, avec égards, exprimer mon désaccord avec leur analyse. Toutefois, cela étant dit, je suis d'avis qu'il n'y a pas de différence substantielle entre nos motifs respectifs

difference in our respective reasons in the approach to the case at bar.

VI. Disposition

126 Therefore, I would dismiss the appeal, but modify the remedy designed by the Federal Court of Appeal. I would declare invalid the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* and suspend the effect of this declaration for 18 months. I would award costs to the respondents. I would answer the restated constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?

Yes, in their general application.

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

Appeal dismissed with costs but remedy modified.

Solicitor for the appellant Her Majesty the Queen: George Thomson, Ottawa.

Solicitor for the appellant the Batchewana Indian Band: William B. Henderson, Toronto.

Solicitor for the respondents: Gary E. Corbière, Garden River, Ontario.

Solicitors for the intervener Aboriginal Legal Services of Toronto Inc.: Kent Roach and Kimberly R. Murray, Toronto.

Solicitors for the intervener the Congress of Aboriginal Peoples: Phillips & Milen, Regina.

au regard de l'approche applicable au présent pourvoi.

VI. Le dispositif

Pour ces motifs, je rejetterais le pourvoi, mais je modifierais la réparation ordonnée par la Cour d'appel fédérale. Je déclarerais invalides les mots «et réside ordinairement sur la réserve» figurant au par. 77(1) de la *Loi sur les Indiens* et je suspendrais pour 18 mois la prise d'effet de cette déclaration, avec dépens en faveur des intimés. Je répondrais de la manière suivante aux questions constitutionnelles reformulées:

1. Les mots «et réside ordinairement sur la réserve» figurant au par. 77(1) de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, contreviennent-ils au par. 15(1) de la *Charte canadienne des droits et libertés*, soit de façon générale, soit uniquement en ce qui concerne les membres de la bande Indienne de Batchewana?

Oui, dans leur application générale.

2. Si la réponse à la question 1 est affirmative, le par. 77(1) de la *Loi sur les Indiens* est-il une limite raisonnable dont la justification peut se démontrer en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

Non.

Pourvoi rejeté avec dépens mais réparation modifiée.

Procureur de l'appelante Sa Majesté la Reine: George Thomson, Ottawa.

Procureur de l'appelante la bande Indienne de Batchewana: William B. Henderson, Toronto.

Procureur des intimés: Gary E. Corbière, Garden River (Ontario).

Procureurs de l'intervenant Aboriginal Legal Services of Toronto Inc.: Kent Roach et Kimberly R. Murray, Toronto.

Procureurs de l'intervenant le Congrès des peuples autochtones: Phillips & Milen, Regina.

Solicitor for the intervener the Lesser Slave Lake Indian Regional Council: Catherine M. Twinn, Slave Lake, Alberta.

Solicitors for the intervener the Native Women's Association of Canada: Eberts Symes Street & Corbett, Toronto.

Solicitors for the intervener the United Native Nations Society of British Columbia: McIvor Nahanee Law Office, Merritt, British Columbia.

Procureur de l'intervenant Lesser Slave Lake Indian Regional Council: Catherine M. Twinn, Slave Lake (Alberta).

Procureurs de l'intervenante l'Association des femmes autochtones du Canada: Eberts Symes Street & Corbett, Toronto.

Procureurs de l'intervenant United Native Nations Society of British Columbia: McIvor Nahanee Law Office, Merritt (Colombie-Britannique).

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education),* 2016 BCSC 1764

Date: 20160926
Docket: S103975
Registry: Vancouver

Between:

Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, Annette Azar-Diehl, Stéphane Perron and Marie-Nicole Dubois

Plaintiffs

And

Her Majesty the Queen in right of the Province of British Columbia, and the Minister of Education of the Province of British Columbia

Defendants

And

Conseil-scolaire francophone de la Colombie-Britannique

Third Party

- and -

Docket: S103455
Registry: Vancouver

Between:

L'Association des parents de l'école Rose Des-Vents and Joseph Pagé in his name and in the name of all citizens of Canada residing west of Main Street in the City of Vancouver whose first language learned and still understood is French, or who have received their primary school instruction in Canada in French, or of whom any child has received or is receiving primary or secondary school instruction in French in Canada

Petitioners

And

Conseil scolaire francophone de la Colombie-Britannique, The Minister of Education of British Columbia, and The Attorney General of British Columbia

Respondents

Before: The Honourable Madam Justice Russell

Reasons for Judgment

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Counsel for the Petitioners:	N.M. Rouleau
Place and Dates of Trial:	Vancouver, B.C. December 2-6; 9-13, 2013 January 20-24, 2014 February 3-7; 11-14; 17-21, 2013 March 3-7; 10-14; 17-21; 24-28, 2014 April 7-11; 14-17; 28-30, 2014 May 1-2; 5-9; 26-30, 2014 June 9-13; 16-20; 23-27, 2014 September 2-5; 8-12, 15-19; 29-30, 2014 October 1-3; 6-10; 27-31, 2014 December 8; 15-19, 2014 January 19; 22-23; 26-30, 2015 February 10-13; 16-20; 23-27, 2015 March 9-13; 16-20; 23-27; 2015 April 7-10; 13-17; 20-24, 2015 May 4-8; 25-29, 2015 June 8-12;15-19; 22-25, 2015 July 2-3, 2015 August 10-14; 17-21, 2015 November 23-27; 30, 2015 December 1-4; 7-11; 14-18;December 29-30, 2015 February 22-26; 29, 2016
Place and Date of Judgment:	Vancouver, B.C. September 26, 2016

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I. SUMMARY

[1] The plaintiffs bring this claim pursuant to s. 23 of the *Canadian Charter of Rights and Freedoms*, which guarantees minority language education to certain categories of Francophones where the numbers so warrant.

[2] Here, I will summarize, in brief, my conclusions concerning the plaintiffs' most important arguments. To the extent any of my conclusions in this summary differ from the conclusions in the balance of the decision, the conclusions elsewhere in the decision take precedence.

[3] I find that s. 166.25(9) of the *School Act*, R.S.B.C. 1996, c. 412 which restricts admission to CSF schools to s. 23 rightsholders and the children of non-citizens who would otherwise be rightsholders is not contrary to s. 23 of the *Charter*. That questions was decided in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General),* 2015 SCC 25, and I am bound by that decision.

[4] The plaintiffs claim that they are entitled to three types of discrete resources and facilities: increased funding pursuant to the Annual Facilities Grant, increased funding for transportation and space for early childhood education.

[5] The plaintiffs have not shown that the CSF is disadvantaged by the way in which the Annual Facilities Grant is calculated. However, I find that the Province breached s. 23 by failing to apply the AFG Rural Factor to the CSF in 2008/09, 2009/10 and 2010/11. The Ministry treated the CSF differently from majority boards despite recognizing that it might not be appropriate to do so. However, I find that breach is reasonably justified in a free and democratic society.

[6] I conclude that the CSF's transportation system was chronically underfunded pursuant to the Supplement for Transportation and Housing while that funding was frozen between 2002/03 and 2011/12. As a result, the Province failed to provide the CSF with sufficient public funds for its minority language educational facilities. To restore the CSF to the position it would have been in but for the breach, I consider than an award of *Charter* damages amounting to $6 million is appropriate.

The current transportation funding supplement, the Student Location Factor and Supplemental Student Location Factor, appropriately compensate the CSF for its transportation services when part of the 15% Francophone Supplement is included in the CSF's transportation allotment.

[7] I find that the right to minority language educational facilities in s. 23 does not guarantee the CSF space for early childhood programming in all of its schools. Section 23 requires the Province to ensure baseline educational services are provided to preserve and promote minority language education. Due to the structure of the education system in British Columbia, those services do not include early childhood education. However, where the minority has a right to equivalent facilities and comparator schools offer early childhood services, the presence or absence of early childhood services will inform the analysis of whether rightsholders are receiving appropriate facilities.

[8] The majority of this decision addresses the plaintiffs' claims for new or improved school facilities in 17 communities and claim for a new school board office.

[9] I find that rightsholders in the following communities are receiving appropriate facilities in light of the number of children that would avail themselves of a programme in the best possible circumstances: Whistler (elementary education), Nelson, Richmond, Southeast Vancouver, Nanaimo, Kelowna and Chilliwack. I likewise deny the plaintiffs' claim for a new school board office for the CSF.

[10] With connection to other communities, I find that although educational facilities are substandard, the rights breach is justified as a reasonable limit in a free and democratic society: Pemberton and Victoria. With respect to Mission, I assume without deciding the facilities are substandard, and conclude the limit is justified.

[11] In a few communities, minority language educational facilities are non-existent or substandard, but the defendants are not responsible. This is the case with respect to: Whistler (secondary instruction), Squamish, Northeast Vancouver

and Burnaby. I cannot say whether the breaches in any of those communities are justified.

[12] In four communities, the minority does not have adequate facilities, the defendants are responsible and the breach is not justified.

[13] In Sechelt, Penticton and Abbotsford, rightsholders do not have access to appropriate minority language educational facilities, contrary to s. 23 of the *Charter*. With respect to Abbotsford, the Province's failure to fund any new projects to construct new spaces for students between 2005 and 2011 materially contributed to the right breach. The lack of funding and the defendants' policy of ranking the linguistic minority's capital project proposals against the projects proposed by majority school boards with more resources materially contributed to the rights breaches. None of those breaches is justified in a free and democratic society.

[14] In Vancouver (West), the school afforded to the minority is substandard compared to those afforded to the majority, contrary to s. 23 of the *Charter*. The defendants' policy requiring school boards to identify sites materially contributed to the situation. The policy is not a reasonable limit in a free and democratic society regarding the CSF's circumstances in Vancouver (West).

[15] I provide a more detailed summary of my reasons and findings for each Community Claim at the conclusion of the chapter associated with each community.

[16] The plaintiffs also challenge several aspects of the Province's capital funding system for education as it applies to the CSF.

[17] I find that the fact that the CSF holds some of its educational facilities by way of lease is not presumptively contrary to s. 23 of the *Charter*. However, two aspects of the Ministry's capital funding system concerning the CSF's leases are contrary to s. 23 of the *Charter*: the Ministry's policy requiring the CSF to negotiate leases without Ministry assistance, and the Ministry's policy freezing the CSF's lease funding at 2013/14 levels. Those policies fall short of the Province's duty to ensure

that minority language education is provided where the numbers so warrant. They are not reasonably justified in a free and democratic society.

[18] I find the Ministry's policy of not funding school expansion between 2005 and 2011 and evaluating the CSF's need for capital projects against those of majority school boards with more capital to devote to projects likewise fails to ensure that minority language educational facilities are provided where the numbers so warrant. Those policies are not reasonable limits in a free and democratic society.

[19] The Province's system for prioritizing projects to improve building condition based on a building's economic life rather than building functionality is not ideally suited to ensuring the CSF's facilities meet the standard of majority schools where the numbers so warrant. However, in my view, that breach of s. 23 is justified.

[20] With respect to the Ministry's policies concerning the CSF's acquisitions of surplus schools from majority school boards, I find that the Ministry's policies concerning the disposal of surplus properties, compensation to majority school boards, and the separation of approvals for school acquisition projects from building improvement projects are all consistent with s. 23. None of those policies deprives rightsholders of appropriate facilities or trenches on the minority's right to management and control. They are therefore within the Province's jurisdiction to make.

[21] The only real issue with respect to the system for site and school acquisitions for the CSF is that the Ministry's policies require the CSF to identify school sites for acquisition without Ministry assistance. The policy and practice prevent rightsholders from attaining the types of minority language educational facilities to which they are entitled, and are therefore outside the Province's jurisdiction and contrary to s. 23. They are not justified as a reasonable limit.

[22] There is insufficient evidence to persuade me that the Province's framework for community planning disadvantages the CSF. If the plaintiffs want to challenge

municipalities' official community plans, they ought to do so in the appropriate forum, by way of judicial review.

[23] In my view, the preponderance of the administrative requirements of the Ministry's capital funding system are all valid as they apply to the CSF. Neither the requirement that districts prioritize their projects, nor the PIR requirement, nor the Area Standards, breaches s. 23. They do not infringe on the CSF's right to management and control, and have not caused rightsholders to fail to receive what they are entitled to given their numbers. However, the Ministry's approach to enrolment projections has failed to provide the CSF with substantively equivalent minority language educational facilities in the form of enrolment projections. That breach is not a reasonably justified limit.

[24] With respect to most rights breaches, I find that declarations are the most appropriate remedy. Where the Province's laws and policies materially contributed to a rights breach, I declare them to be contrary to s. 23 and/or make a declaration delineating what rightsholders are entitled to. Where the CSF is responsible, I make a declaration affirming the CSF's jurisdiction to remedy the situation. However, to ensure those remedies are effective, I make two further orders in support of the CSF.

[25] The Ministry must craft a rolling Capital Envelope specific to the CSF. Creating that type of an envelope will ensure funding is available for the CSF, and give it some flexibility to acquire sites when opportunities arise. It will ensure the CSF does not compete against majority school boards for capital projects. It would also allow an avenue for the Ministry to continue to exercise its legitimate role in ensuring that projects are justified. The Ministry cannot claim a lack of funds for the CSF's projects as an excuse given that it has chosen to devote funds to other priorities since 2005.

[26] Additionally, in light of Ministry officials' failure to assist the CSF to identify and negotiate the transfer of school sites in recent years, I order the defendants to craft a policy or enact legislation to either resolve or ensure the Ministry's active

participation in the resolution of disputes between the CSF and majority school boards, and issues concerning the CSF's need for school sites. The Ministry's enactment of the *Education Mediation Regulation* and failure to use it do not absolve it of its duty to assist the CSF to secure appropriate space where the numbers so warrant.

II. INTRODUCTION

A. The Nature of the Claim

[27] The plaintiffs in this action are parents who have the right for their children to receive minority language education. They are joined by the Conseil Scolaire Francophone de la Colombie Britannique ("CSF"), British Columbia's sole Francophone school board, and the Fédération des parents francophones de la Colombie-Britannique ("FCFCB"), a non-profit organization representing the interests of Francophone parents. Together, they urge the Court to conclude that the defendants the Queen in Right of British Columbia (the "Province") and Minister of Education (the "Minister" or "Ministry") have failed to provide British Columbia's Francophone linguistic minority the resources and facilities that are mandated by s. 23 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*].

[28] Section 23 of the *Charter* provides:

> 23. (1) Citizens of Canada
>
> > (*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
> >
> > (*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
>
> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

[6752] Some of those were ones that were contemplated and discussed in the meetings in 2008 and 2009: opportunities to acquire a school in Abbotsford, for example. While a full acquisition project is not currently justified, it will likely be justified within 10 or so years. There also appears to be an opportunity for the CSF to acquire Kilgour Elementary in Richmond. I find that all parties agree that Kilgour Elementary represents the best long-term solution to the CSF's needs in Richmond.

3. Conclusion

[6753] The plaintiffs draw a comparison between the situation in this case and the facts in *Dufferin Peel.* In *Dufferin Peel*, the government delayed funding admittedly needed minority language educational facilities to pursue a deficit elimination strategy. As I explain in Chapter VI, The Respective Roles of the Province and the CSF, the court concluded that the delay was contrary to s. 23.

[6754] The plaintiffs say that, like the Ontario school construction moratorium at issue in *Dufferin Peel*, the Province's decision not to fund the CSF by way of a long-term envelope was a case of the Province deferring its constitutional obligations in favour of cost-cutting measures. They urge that in this case, as in *Dufferin-Peel*, it is not open to the Province to decide cost savings should take precedence over s. 23.

[6755] I agree. Since 2005, the Ministry has not funded few new Expansion Projects. It has chosen to devote funding to matters other than its constitutional obligations. It has never gone forward to request a Capital Envelope prioritizing the CSF's needs. Further, when funding was available in 2005, CSF projects were passed over in favour of projects where majority school boards could contribute Local or Reserve Capital-- something the CSF has less ability to do. This has stalled the CSF's progress expanding minority language education where it is warranted. It has remained stalled even though the Ministry has recognized since 2008 that there would be some benefit to funding the CSF's capital needs independently from the majority for at least some period of time.

B. A Capital Envelope for the CSF

[6756] I take it that since 2008, all parties have agreed that there would be some benefit to developing a long-term Capital Envelope for the CSF. Creating that type of an envelope would give the CSF some flexibility to acquire sites when opportunities arise. It would ensure that the CSF does not compete against majority school boards for capital projects. It would also allow an avenue for the Ministry to continue to exercise its legitimate role ensuring that projects are justified.

[6757] As I explain in Chapter X, Remedies, s. 24(1) of the *Charter* allows courts a wide, unfettered scope for crafting remedies to respond to *Charter* breaches: *Ward* at paras. 18-19. The remedy must be appropriate and just. First, it must meaningfully vindicate the rights and freedoms of the claimants, and address the circumstances in which the right was infringed or denied. Second, it must apply means that are legitimate within the framework of our constitutional democracy, respecting the separation of functions between the legislature, executive and the judiciary. Third, the remedy should invoke the functions and powers of a court; the remedy should be a judicial one. Fourth, the remedy should be fair as against the party that it is made. Finally, it should be allowed to develop novel and creative features to be flexible and responsive to the needs of a given case: *Doucet-Boudreau* at paras. 54-59.

[6758] It is my view that ordering the Province to craft an envelope to respond to the CSF's needs meets the requirements set out in *Doucet-Boudreau*.

[6759] Ordering the Province to establish such an envelope provides a way of ensuring that the declarations I issue in connection with the Community Claims are meaningfully vindicated. The primary impediment to the CSF expanding its programmes to realize the objectives of s. 23 is a lack of funding, and the fact that the CSF must compete for capital projects. The Ministry has failed to devote sufficient funding to the CSF's capital needs for many years. Ordering the Province to craft a Capital Envelope will ensure that there is a source of funding available to respond to the CSF's capital needs.

[6760] It also respects the role of the executive and the legislature, as well as the proper role of the CSF and the Court. With a long-term Capital Envelope, the Ministry's usual capital planning requirements like the requirements for prioritization, PIRs, and proper enrolment projections would still be adhered to. The CSF would not be given a "blank cheque" as it would with a trust remedy. It would also leave it in the hands of the CSF to decide which of its projects are most important, and which rights breaches should be addressed most urgently, thus respecting the CSF's important role with respect to management and control of matters going to the minority's language and culture. It is a remedy that leaves it to Province and the CSF to work out the detailed arrangements concerning how capital projects should progress. As the Court observed in *Association des Parents- SCC*, it falls outside the court's expertise to participate deeply in operational questions; those issues are better resolved between the Ministry and the CSF (at para. 67).

[6761] I also consider this to be a judicial remedy. It is a way to provide the CSF with compensation, similar to the types of awards courts make in civil cases. Further, courts are not strangers to issuing orders in the nature of *mandamus* requiring government actors to exercise certain powers. As I see it, I am requiring the Province to exercise its legal powers in a way that courts frequently do following a judicial review.

[6762] I acknowledge that this is an exceptional remedy, and extends slightly beyond what is typically contemplated with an order in the nature of *mandamus*. However, in light of the special circumstances and the need to creatively respond to the CSF's needs, I find that this is an appropriate circumstance to exercise some creativity and flexibility in crafting a remedy.

[6763] As a result, I order as follows:

a) The Province must exercise its legal powers to create a long-term, rolling Capital Envelope to provide the CSF with secure funding to address its need for capital projects across the Province.

[6764] The CSF must comply with the administrative requirements for accessing funds from its Capital Envelope: it must prioritize its projects, support them with feasibility work and proper projections, and build schools that adhere to the Area Standards except to the extent that the Ministry and the CSF agree that allowances should be made to account for the CSF's unique needs.

[6765] I will not go further to delineate how much funding should be devoted to the CSF's projects or what projects must be funded using the Capital Envelope. The CSF's needs are malleable. It has the jurisdiction to create many new programmes, and it is impossible to know at this point where the need will be greatest and where opportunities will arise. It is within the CSF's jurisdiction to make those decisions. The evidence falls short of proving how expensive sites and new schools will be. The Ministry and the CSF will need to work together to ensure that the Capital Envelope addresses as many of the CSF's needs as possible.

XLIII. DUTY TO ASSIST THE CSF AND THE *EDUCATION MEDIATION* REGULATION

[6766] The third and final issue at the source of many of the CSF's claims is the Ministry's policies requiring the CSF to identify and negotiate with respect to sites for sale and lease without Ministry assistance. That problem raises the question whether the Province met its duty to assist the CSF by enacting the *Education Mediation Regulation*. Indeed, the defendants plead the *Education Mediation Regulation* as a defence to the entirety of the plaintiffs' claim. If the enactment of the *Education Mediation Regulation* did not meet that duty, then the question becomes what more the government should be required to do to assist the CSF, and what remedy is appropriate to achieve that objective.

[6767] Below, I outline the history of the *Education Mediation Regulation*, which has its roots in *Vickers #1* and *Vickers #2*. Then, I turn to the plaintiffs' argument that the *Education Mediation Regulation* is ineffective and therefore falls short of meeting the defendants' obligations, before addressing what more the defendants should be required to do to assist the CSF.

Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey and Congress of Aboriginal Peoples *Appellants/Respondents on cross-appeal*

v.

Her Majesty The Queen as represented by the Minister of Indian Affairs and Northern Development and Attorney General of Canada *Respondents/Appellants on cross-appeal*

and

Attorney General for Saskatchewan, Attorney General of Alberta, Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Native Council of Prince Edward Island, Metis Settlements General Council, Te'mexw Treaty Association, Métis Federation of Canada, Aseniwuche Winewak Nation of Canada, Chiefs of Ontario, Gift Lake Métis Settlement, Native Alliance of Quebec, Assembly of First Nations and Métis National Council *Interveners*

Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey et Congrès des peuples autochtones *Appelants/Intimés au pourvoi incident*

c.

Sa Majesté la Reine représentée par le ministre des Affaires indiennes et du Nord canadien et procureur général du Canada *Intimés/Appelants au pourvoi incident*

et

Procureur général de la Saskatchewan, procureur général de l'Alberta, Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Native Council of Prince Edward Island, Metis Settlements General Council, Te'mexw Treaty Association, Fédération Métisse du Canada, Aseniwuche Winewak Nation of Canada, Chiefs of Ontario, Gift Lake Métis Settlement, Alliance autochtone du Québec, Assemblée des Premières Nations et Ralliement national des Métis *Intervenants*

Indexed as: Daniels *v.* Canada (Indian Affairs and Northern Development)

2016 SCC 12

File No.: 35945.

2015: October 8; 2016: April 14.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Aboriginal law — Métis — Non-status Indians — Whether declaration should be issued

Répertorié : Daniels *c.* Canada (Affaires indiennes et du Nord canadien)

2016 CSC 12

N° du greffe : 35945.

2015 : 8 octobre; 2016 : 14 avril.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Droit des Autochtones — Métis — Indiens non inscrits — Y a-t-il lieu de rendre un

that Métis and non-status Indians are "Indians" under s. 91(24) of Constitution Act, 1867 — Whether declaration would have practical utility — Whether, for purposes of s. 91(24), Métis should be restricted to definitional criteria set out in R. v. Powley, [2003] 2 S.C.R. 207 — Constitution Act, 1867, s. 91(24) — Constitution Act, 1982, s. 35.

Three declarations are sought in this case: (1) that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*; (2) that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and (3) that Métis and non-status Indians have the right to be consulted and negotiated with.

The trial judge's conclusion was that "Indians" under s. 91(24) is a broad term referring to all Indigenous peoples in Canada. He declined, however, to grant the second and third declarations. The Federal Court of Appeal accepted that "Indians" in s. 91(24) included all Indigenous peoples generally. It upheld the first declaration, but narrowed its scope to exclude non-status Indians and include only those Métis who satisfied the three criteria from *R. v. Powley*, [2003] 2 S.C.R. 207. It also declined to grant the second and third declarations. The appellants sought to restore the first declaration as granted by the trial judge, and asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the declarations should be granted. It conceded that non-status Indians are "Indians" under s. 91(24).

Held: The first declaration should be granted: Métis and non-status Indians are "Indians" under s. 91(24). The appeal should therefore be allowed in part. The Federal Court of Appeal's conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria, should be set aside, and the trial judge's decision restored. The trial judge's and Federal Court of Appeal's decision not to grant the second and third declarations should be upheld. The cross-appeal should be dismissed.

jugement déclaratoire selon lequel les Métis et les Indiens non inscrits sont des « Indiens » visés à l'art. 91(24) de la Loi constitutionnelle de 1867? — Un jugement déclaratoire aurait-il une utilité pratique? — Y a-t-il lieu, pour l'application de l'art. 91(24), de restreindre la portée du terme « Métis » aux critères définitoires énoncés dans l'arrêt R. c. Powley, [2003] 2 R.C.S. 207? — Loi constitutionnelle de 1867, art. 91(24) — Loi constitutionnelle de 1982, art. 35.

Trois jugements déclaratoires sont demandés en l'espèce, lesquels portent respectivement : (1) que les Métis et les Indiens non inscrits sont des « Indiens » visés au par. 91(24) de la *Loi constitutionnelle de 1867*; (2) que la Couronne fédérale a une obligation de fiduciaire envers les Métis et les Indiens non inscrits; (3) que les Métis et les Indiens non inscrits ont droit à la tenue de consultations et de négociations.

Le juge de première instance a estimé que le mot « Indiens » au par. 91(24) est un terme général faisant référence à tous les peuples autochtones canadiens. Il a toutefois refusé de rendre les deuxième et troisième jugements déclaratoires demandés. La Cour d'appel fédérale a reconnu que le terme « Indiens » au par. 91(24) visait tous les peuples autochtones en général. Elle a confirmé le premier jugement déclaratoire, mais elle a restreint sa portée afin d'exclure les Indiens non inscrits et d'inclure seulement les Métis qui répondent aux trois critères énoncés dans l'arrêt *R. c. Powley*, [2003] 2 R.C.S. 207. Elle a également refusé de prononcer les deuxième et troisième jugements déclaratoires demandés. Devant la Cour, les appelants ont sollicité le rétablissement du premier jugement déclaratoire tel qu'il a été rendu par le juge de première instance, et ont demandé que soient prononcés les deuxième et troisième jugements déclaratoires. La Couronne a interjeté un pourvoi incident, dans lequel elle fait valoir qu'aucun des jugements déclaratoires ne devrait être accordé. Elle a concédé que les Indiens non inscrits sont des « Indiens » visés au par. 91(24).

Arrêt : Le premier jugement déclaratoire est accordé : les Métis et les Indiens non inscrits sont des « Indiens » visés au par. 91(24). Le pourvoi est donc accueilli en partie. La conclusion de la Cour d'appel fédérale selon laquelle le premier jugement déclaratoire devrait exclure les Indiens non inscrits ou ne s'appliquer qu'aux Métis qui satisfont aux critères énoncés dans l'arrêt *Powley* est annulée, et la décision du juge de première instance est rétablie. La décision du juge de première instance et de la Cour d'appel fédérale de ne pas rendre les deuxième et troisième jugements déclaratoires demandés est confirmée. Le pourvoi incident est rejeté.

A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties. The first declaration, whether non-status Indians and Métis are "Indians" under s. 91(24), would have enormous practical utility for these two groups who have found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution. A declaration would guarantee both certainty and accountability. Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences. While finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, it has the undeniably salutary benefit of ending a jurisdictional tug-of-war.

Un jugement déclaratoire ne peut être rendu que s'il a une utilité pratique, c'est-à-dire s'il règle un « litige actuel » entre les parties. Le premier jugement déclaratoire demandé, à savoir que les Indiens non inscrits et les Métis sont des « Indiens » visés au par. 91(24), aurait une utilité pratique considérable pour ces deux groupes, lesquels ont dû compter davantage sur une forme de « Noblesse oblige » que sur le respect des obligations imposées par la Constitution. Un jugement déclaratoire garantirait à la fois certitude et responsabilité. Le gouvernement fédéral et les gouvernements provinciaux ont tour à tour nié avoir le pouvoir de légiférer à l'égard des Indiens non inscrits et des Métis. Ces collectivités autochtones se retrouvent donc dans une sorte de désert juridique sur le plan de la compétence législative, situation qui a des conséquences défavorables importantes et évidentes. Bien que le fait de conclure que les Métis et les Indiens non inscrits sont des « Indiens » visés au par. 91(24) ne crée aucune obligation de légiférer, une telle conclusion a indéniablement l'effet bénéfique de mettre fin au bras de fer sur la question de la compétence législative.

There is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples. "Indians" has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. Before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. Historically, the purpose of s. 91(24) in relation to the broader goals of Confederation also indicates that since 1867, "Indians" meant all Aboriginal peoples, including Métis.

Il n'est pas nécessaire d'identifier les collectivités d'ascendance mixte formées de Métis et celles formées d'Indiens non inscrits. Tous ces groupes sont des « Indiens » visés au par. 91(24), puisqu'ils sont tous des peuples autochtones. Le mot « Indiens » a longtemps été utilisé comme terme générique désignant tous les peuples autochtones, y compris les collectivités d'ascendance mixte comme les Métis. Avant et après la Confédération, le gouvernement a fréquemment qualifié d'Indiens les peuples autochtones ayant des origines mixtes européennes et autochtones. Historiquement, considéré dans la perspective des objectifs plus généraux de la Confédération, l'objet du par. 91(24) indique également que, depuis 1867, le mot « Indiens » s'entend de tous les peuples autochtones, y compris les Métis.

As well, the federal government has at times assumed that it could legislate over Métis as "Indians", and included them in other exercises of federal authority over "Indians", such as sending many Métis to Indian Residential Schools — a historical wrong for which the federal government has since apologized. Moreover, while it does not define the scope of s. 91(24), s. 35 of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court has noted that ss. 35 and 91(24) should be read together. "Indians" in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term "aboriginal peoples of

D'ailleurs, le gouvernement fédéral a parfois considéré qu'il pouvait légiférer sur les Métis en tant qu'« Indiens », et les a inclus dans l'exercice de sa compétence sur les « Indiens », par exemple en envoyant de nombreux Métis dans des pensionnats indiens, un tort du passé pour lequel il a depuis présenté ses excuses. De plus, bien qu'il ne définisse pas la portée du par. 91(24), l'art. 35 de la *Loi constitutionnelle de 1982* énonce que les Indiens, les Inuit et les Métis sont des peuples autochtones pour l'application de la Constitution. La Cour a souligné que l'art. 35 et le par. 91(24) doivent être interprétés conjointement. Le terme « Indiens » a donc deux sens en contexte constitutionnel : un sens large, au par. 91(24), qui inclut tant les Métis que les Inuit et que l'on peut assimiler à celui

Canada" used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. It would be constitutionally anomalous for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24).

The jurisprudence also supports the conclusion that Métis are "Indians" under s. 91(24). It demonstrates that intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24). The fact that a group is a distinct people with a unique identity and history whose members self-identify as separate from Indians, is not a bar to inclusion within s. 91(24). Determining whether particular individuals or communities are non-status Indians or Métis and therefore "Indians" under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future.

As to whether, for purposes of s. 91(24), Métis should be restricted to the three definitional criteria set out in *Powley* in accordance with the decision of the Federal Court of Appeal, or whether the membership base should be broader, there is no principled reason for presumptively and arbitrarily excluding certain Métis from Parliament's protective authority on the basis of the third criterion, a "community acceptance" test. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights. Section 91(24) serves a very different constitutional purpose.

The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, as well as the *Report of the Royal Commission on Aboriginal Peoples* and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal.

The historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis. The first declaration should accordingly be granted.

de l'expression « peuples autochtones du Canada » employée à l'art. 35; et un sens plus restreint, qui distingue les bandes indiennes des autres peuples autochtones. Il serait anormal d'un point de vue constitutionnel que les Métis constituent le seul peuple autochtone à être reconnu et inclus à l'art. 35, tout en étant par ailleurs exclu du champ d'application du par. 91(24).

La jurisprudence permet également de conclure que les Métis sont des « Indiens » visés au par. 91(24). Elle montre que les mariages entre Indiens et non-Indiens et l'ascendance mixte n'empêchent pas l'inclusion d'un groupe dans le champ d'application du par. 91(24). Le caractère distinct d'un groupe qui forme un peuple ayant une identité et une histoire uniques et dont les membres s'identifient comme un groupe distinct des Indiens ne fait pas obstacle à l'inclusion dans le champ d'application du par. 91(24). La question de savoir si des personnes données sont des Indiens non inscrits ou des Métis, et donc des « Indiens » visés au par. 91(24), — ou encore si une collectivité en particulier est formée de telles personnes — est une question de fait qui devra être décidée au cas par cas dans le futur.

Relativement à la question de savoir s'il y a lieu, pour l'application du par. 91(24), de restreindre la portée du terme « Métis » aux trois critères définitoires énoncés dans l'arrêt *Powley*, conformément à la décision de la Cour d'appel fédérale, ou s'il faut plutôt élargir les critères d'appartenance, il n'existe aucune raison logique justifiant de priver présomptivement et arbitrairement certains Métis de la protection qu'offre le pouvoir de légiférer du Parlement sur la base du troisième critère, soit celui requérant leur « acceptation par la collectivité ». Les critères de l'arrêt *Powley* ont été établis spécialement pour l'application de l'art. 35, lequel a pour objet de protéger des droits collectifs historiques. Le paragraphe 91(24) vise pour sa part un objectif constitutionnel très différent.

Les modifications constitutionnelles, les excuses pour les torts du passé, la reconnaissance grandissante du fait que les peuples autochtones et non autochtones sont des partenaires dans la Confédération, de même que le *Rapport de la Commission royale sur les peuples autochtones* et le *Rapport final de la Commission de vérité et réconciliation du Canada* indiquent tous qu'une réconciliation avec *l'ensemble* des peuples autochtones du Canada est l'objectif du Parlement.

Les contextes historique, philosophique et linguistique établissent que les « Indiens » visés au par. 91(24) englobent *tous* les peuples autochtones, y compris les Indiens non inscrits et les Métis. Il y a donc lieu d'accorder le premier jugement déclaratoire demandé.

Federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. As this Court has recognized, courts should favour, where possible, the operation of statutes enacted by both levels of government.

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Canadian Bill of Rights, S.C. 1960, c. 44.
Canadian Charter of Rights and Freedoms, s. 15.
Constitution Act, 1867, s. 91(24).
Constitution Act, 1982, ss. 35, 37, 37.1.

Le fait que le gouvernement fédéral ait compétence à l'égard des Métis et des Indiens non inscrits ne signifie pas que toute mesure législative provinciale les concernant est intrinsèquement *ultra vires*. Comme l'a reconnu notre Cour, il importe que les tribunaux privilégient, dans la mesure du possible, l'application des lois édictées par les deux ordres de gouvernement.

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Joseph Eliot Magnet, *Andrew K. Lokan* and *Lindsay Scott*, for the appellants/respondents on cross-appeal.

Mark R. Kindrachuk, *Q.C.*, *Christopher M. Rupar* and *Shauna K. Bedingfield*, for the respondents/appellants on cross-appeal.

P. Mitch McAdam, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

Angela Edgington and *Neil Dobson*, for the intervener the Attorney General of Alberta.

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Joseph Eliot Magnet, *Andrew K. Lokan* et *Lindsay Scott*, pour les appelants/intimés au pourvoi incident.

Mark R. Kindrachuk, *c.r.*, *Christopher M. Rupar* et *Shauna K. Bedingfield*, pour les intimés/appelants au pourvoi incident.

P. Mitch McAdam, *c.r.*, pour l'intervenant le procureur général de la Saskatchewan.

Angela Edgington et *Neil Dobson*, pour l'intervenant le procureur général de l'Alberta.

Written submissions only by *D. Bruce Clarke*, *Q.C.*, for the interveners the Native Council of Nova Scotia, the New Brunswick Aboriginal Peoples Council and the Native Council of Prince Edward Island.

Garry Appelt and *Keltie Lambert*, for the intervener the Metis Settlements General Council.

Written submissions only by *Robert J. M. Janes* and *Elin R. S. Sigurdson*, for the intervener the Te'mexw Treaty Association.

Christopher G. Devlin, *John Gailus* and *Cynthia Westaway*, for the intervener the Métis Federation of Canada.

Karey M. Brooks and *Claire Truesdale*, for the intervener the Aseniwuche Winewak Nation of Canada.

Scott Robertson, for the intervener the Chiefs of Ontario.

Paul Seaman and *Maxime Faille*, for the intervener the Gift Lake Métis Settlement.

Marc Watters and *Lina Beaulieu*, for the intervener the Native Alliance of Quebec.

Guy Régimbald and *Jaimie Lickers*, for the intervener the Assembly of First Nations.

Jason T. Madden, *Clément Chartier*, *Q.C.*, *Kathy Hodgson-Smith* and *Marc Leclair*, for the intervener the Métis National Council.

The judgment of the Court was delivered by

[1] Abella J. — As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust. This case represents another chapter in the

Argumentation écrite seulement par *D. Bruce Clarke*, *c.r.*, pour les intervenants Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council et Native Council of Prince Edward Island.

Garry Appelt et *Keltie Lambert*, pour l'intervenant Metis Settlements General Council.

Argumentation écrite seulement par *Robert J. M. Janes* et *Elin R. S. Sigurdson*, pour l'intervenante Te'mexw Treaty Association.

Christopher G. Devlin, *John Gailus* et *Cynthia Westaway*, pour l'intervenante la Fédération Métisse du Canada.

Karey M. Brooks et *Claire Truesdale*, pour l'intervenante Aseniwuche Winewak Nation of Canada.

Scott Robertson, pour l'intervenant Chiefs of Ontario.

Paul Seaman et *Maxime Faille*, pour l'intervenant Gift Lake Métis Settlement.

Marc Watters et *Lina Beaulieu*, pour l'intervenante l'Alliance autochtone du Québec.

Guy Régimbald et *Jaimie Lickers*, pour l'intervenante l'Assemblée des Premières Nations.

Jason T. Madden, *Clément Chartier*, *c.r.*, *Kathy Hodgson-Smith* et *Marc Leclair*, pour l'intervenant le Ralliement national des Métis.

Version française du jugement de la Cour rendu par

[1] La juge Abella — À mesure que le rideau continue de se lever sur l'histoire des relations entre le Canada et ses peuples autochtones, de plus en plus d'iniquités se font jour et des réparations sont instamment réclamées. Bon nombre de ces révélations ont donné lieu à des politiques et à des mesures législatives prises de bonne foi, mais la liste

pursuit of reconciliation and redress in that relationship.

Background

[2] Three declarations were sought by the plaintiffs when this litigation was launched in 1999:

1. That Métis and non-status Indians are "Indians" under s. 91(24);

2. That the federal Crown owes a fiduciary duty to Métis and non-status Indians; and

3. That Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.

[3] Section 91(24) of the *Constitution Act, 1867* states that

> **91.** . . . it is hereby declared that . . . the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated . . .
>
> . . .
>
> 24. Indians, and Lands reserved for the Indians.

[4] The trial judge, Phelan J., made a number of key factual findings in his thoughtful and thorough reasons.[1] As early as 1818, the government used "Indian" as a general term to refer to communities of mixed Aboriginal and European background. The federal government considered Métis to be "Indians" in various treaties and pre-Confederation statutes, and considered Métis to be "Indians" under s. 91(24) in various statutes and policy initiatives spanning from Confederation to modern day. Moreover, the

[1] [2013] 2 F.C.R. 268.

des désavantages pour les peuples autochtones demeure obstinément longue. Le présent pourvoi représente un autre chapitre dans la quête de réconciliation et de réparation à l'égard de ces relations.

Contexte

[2] Lorsque la présente poursuite a été intentée en 1999, les demandeurs ont sollicité trois jugements déclaratoires portant respectivement :

1. que les Métis et les Indiens non inscrits sont des « Indiens » visés au par. 91(24);

2. que la Couronne fédérale a une obligation de fiduciaire envers les Métis et les Indiens non inscrits;

3. que les Métis et les Indiens non inscrits ont droit à ce que le gouvernement fédéral les consulte et négocie avec eux de bonne foi sur une base collective, par l'entremise de représentants de leur choix, relativement à l'ensemble de leurs droits, intérêts et besoins en tant que peuples autochtones.

[3] Le paragraphe 91(24) de la *Loi constitutionnelle de 1867* est rédigé en ces termes :

> **91.** . . . il est par la présente déclaré que [. . .] l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés . . .
>
> . . .
>
> 24. Les Indiens et les terres réservées pour les Indiens.

[4] Le juge de première instance, le juge Phelan, a tiré un certain nombre de conclusions de fait cruciales dans des motifs étoffés et mûrement réfléchis[1]. Déjà en 1818, le gouvernement utilisait le mot « Indien » comme terme générique pour désigner les collectivités d'ascendance mixte autochtone et européenne. En effet, le gouvernement fédéral a considéré les Métis comme des « Indiens » dans divers traités et textes de loi antérieurs à la Confédération, et comme des « Indiens » visés au par. 91(24) dans

[1] [2013] 2 R.C.F. 268.

purpose of s. 91(24) was closely related to the expansionist goals of Confederation. The historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation. Building a national railway was a key component of this plan.

[5] Accordingly, the purposes of s. 91(24) were "to control Native people and communities where necessary to facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain . . . [and] eventually to civilize and assimilate Native people": para. 353. Since much of the North-Western Territory was occupied by Métis, only a definition of "Indians" in s. 91(24) that included "a broad range of people sharing a Native hereditary base" (para. 566) would give Parliament the necessary authority to pursue its agenda.

[6] His conclusion was that in its historical, philosophical, and linguistic contexts, "Indians" under s. 91(24) is a broad term referring to all Indigenous peoples in Canada, including non-status Indians and Métis.

[7] He found that since neither the federal nor provincial governments acknowledged that they had jurisdiction over Métis and non-status Indians, the declaration would alleviate the constitutional uncertainty and the resulting denial of material benefits. There was therefore practical utility to the first declaration being granted, namely, that Métis and non-status Indians are included in what is meant by "Indians" in s. 91(24). He did not restrict the definition of either group.

[8] He declined, however, to grant the second and third declarations on the grounds that they were vague and redundant. It was already well established in Canadian law that the federal government

diverses lois et politiques depuis la Confédération jusqu'à aujourd'hui. De plus, l'objet du par. 91(24) était étroitement lié aux objectifs d'expansion territoriale de la Confédération. La preuve historique et législative démontre que l'expansion du pays vers l'Ouest était l'un des principaux objectifs de la Confédération. La construction d'un chemin de fer national était une composante essentielle de ce plan.

[5] L'objet du par. 91(24) consistait donc à « exercer, au besoin, un contrôle sur les peuples et les collectivités autochtones, pour faciliter le développement du Dominion », à « honorer les obligations à l'égard des Autochtones que le Dominion avait héritées de la Grande-Bretagne », et, « ultérieurement, [à] civiliser et [à] assimiler les Autochtones » (par. 353). Comme une grande partie des terres du Territoire du Nord-Ouest étaient occupées par les Métis, seule une définition du mot « Indiens » utilisé au par. 91(24) qui englobait « un grand éventail de gens ayant en commun leur ascendance autochtone » (par. 566) conférerait au Parlement le pouvoir nécessaire pour poursuivre ses objectifs.

[6] Le juge de première instance a estimé que, dans ses contextes historique, philosophique et linguistique, le mot « Indiens » au par. 91(24) est un terme général faisant référence à tous les peuples autochtones canadiens, y compris les Indiens non inscrits et les Métis.

[7] Il a conclu que, comme ni le gouvernement fédéral ni les gouvernements provinciaux n'ont reconnu avoir compétence à l'égard des Métis et des Indiens non inscrits, le premier jugement déclaratoire demandé atténuerait l'incertitude constitutionnelle et le déni d'avantages matériels qui résulte de cette situation. Le fait de rendre ce premier jugement déclaratoire, à savoir que les Métis et les Indiens non inscrits peuvent être considérés comme des « Indiens » visés au par. 91(24), présentait donc une utilité pratique. Il n'a pas restreint la définition de l'un ou l'autre groupe.

[8] Le juge de première instance a toutefois refusé de rendre les deuxième et troisième jugements déclaratoires demandés au motif qu'ils seraient vagues et redondants. Il est déjà bien établi en droit canadien

was in a fiduciary relationship with Canada's Aboriginal peoples and that the federal government had a duty to consult and negotiate with them when their rights were engaged. Restating this in declarations would be of no practical utility.

[9] The Federal Court of Appeal accepted the trial judge's findings of fact, including that "Indians" in s. 91(24) included all Indigenous peoples generally. It therefore upheld the trial judge's decision to grant the first declaration, but narrowed its scope to exclude non-status Indians and include only those Métis who satisfied the three criteria from *R. v. Powley*, [2003] 2 S.C.R. 207. While it was of the view that non-status Indians were clearly "Indians", setting this out in a declaration would be redundant and of no practical usefulness. For the same reasons as the trial judge, it declined to grant the second and third declarations.

[10] Before this Court, the appellants sought to restore the first declaration as granted by the trial judge, not as restricted by the Federal Court of Appeal. In addition, they asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the declarations should be granted. For the following reasons, I agree generally with the trial judge.

Analysis

[11] This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44. The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be

qu'il existe une relation de nature fiduciaire entre les peuples autochtones du Canada et le gouvernement fédéral, et que ce dernier a le devoir de les consulter et de négocier avec eux lorsque leurs droits sont en jeu. Le réaffirmer dans des jugements déclaratoires n'aurait aucune utilité pratique.

[9] La Cour d'appel fédérale a accepté les conclusions de fait du juge de première instance, et notamment que le terme « Indiens » au par. 91(24) visait tous les peuples autochtones en général. Elle a en conséquence confirmé la décision de ce dernier de rendre le premier jugement déclaratoire, mais elle a restreint la portée de ce jugement afin d'exclure les Indiens non inscrits et d'inclure seulement les Métis qui répondent aux trois critères énoncés dans l'arrêt *R. c. Powley*, [2003] 2 R.C.S. 207. Bien que d'avis que les Indiens non inscrits constituent clairement des « Indiens », la Cour d'appel fédérale a conclu qu'il serait redondant et dénué d'utilité pratique de le réaffirmer dans un jugement déclaratoire. Pour les mêmes motifs que ceux du juge de première instance, elle a refusé de prononcer les deuxième et troisième jugements déclaratoires demandés.

[10] Devant notre Cour, les appelants sollicitent le rétablissement du premier jugement déclaratoire tel qu'il a été rendu par le juge de première instance, et non tel qu'il a été restreint par la Cour d'appel fédérale. De plus, ils demandent que soient prononcés les deuxième et troisième jugements déclaratoires. La Couronne a interjeté un pourvoi incident, dans lequel elle fait valoir qu'aucun des jugements déclaratoires ne devrait être accordé. Pour les motifs qui suivent, je partage de façon générale le point de vue du juge de première instance.

Analyse

[11] Dans le plus récent des arrêts sur le sujet, *Canada (Premier ministre) c. Khadr*, [2010] 1 R.C.S. 44, notre Cour a reformulé le critère permettant de déterminer si un jugement déclaratoire devrait être rendu. La partie qui demande réparation doit établir que le tribunal a compétence pour entendre le litige, que la question en cause est réelle et non pas simplement théorique et que la partie qui soulève la

granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[12] The first disputed issue in this case is whether the declarations would have practical utility. There can be no doubt, in my respectful view, that granting the first declaration meets this threshold. Delineating and assigning constitutional authority between the federal and provincial governments will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution.

[13] Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one.

[14] This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences, as was recognized by Phelan J.:

> One of the results of the positions taken by the federal and provincial governments and the "political football — buck passing" practices is that financially [Métis and non-status Indians] have been deprived of significant funding for their affairs. . . .

question a véritablement intérêt à ce qu'elle soit résolue. Un jugement déclaratoire ne peut être rendu que s'il a une utilité pratique, c'est-à-dire s'il règle un « litige actuel » entre les parties (voir également *Solosky c. La Reine*, [1980] 1 R.C.S. 821; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342).

[12] La première question litigieuse en l'espèce consiste à se demander si les jugements déclaratoires demandés auraient une utilité pratique. À mon humble avis, il ne fait aucun doute que le premier jugement sollicité satisfait à ce critère. La délinéation des pouvoirs constitutionnels et leur attribution au gouvernement fédéral ou aux gouvernements provinciaux présenteront une utilité pratique considérable pour ces deux groupes qui, jusqu'à maintenant, ont dû compter davantage sur une forme de « Noblesse oblige » que sur le respect des obligations imposées par la Constitution.

[13] Le gouvernement fédéral et les gouvernements provinciaux ont tour à tour nié avoir le pouvoir de légiférer à l'égard des Indiens non inscrits et des Métis. Comme l'a conclu le juge de première instance, quand les Métis et les Indiens non inscrits demandent au gouvernement fédéral d'assumer compétence législative à leur égard, celui-ci tend généralement à répondre que le par. 91(24) l'empêche de le faire. Et lorsque ces groupes s'adressent aux gouvernements provinciaux, ces derniers leur opposent souvent un refus au motif que la question relève du champ de compétence fédéral.

[14] Ces collectivités autochtones se retrouvent donc dans une sorte de désert juridique sur le plan de la compétence législative, situation qui, comme l'a reconnu le juge Phelan, a des conséquences défavorables importantes et évidentes :

> L'une des conséquences des positions adoptées par le gouvernement fédéral et les gouvernements des provinces, ainsi que des jeux de « ballons politiques » et de « renvoi de balle », était que les [Métis et les Indiens non inscrits] avaient été privés d'une quantité importante d'aide financière pour leurs problèmes. . .

. . . the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]. They are deprived of programs, services and intangible benefits recognized by all governments as needed. [paras. 107-8]

See also *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at para. 70.

[15] With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo. The Crown's argument, however, was that since a finding of jurisdiction under s. 91(24) does not create a duty to legislate, it is inappropriate to answer a jurisdictional question in a legislative vacuum. It is true that finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, but it has the undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress. The existence of a legislative vacuum is self-evidently a reflection of the fact that neither level of government has acknowledged constitutional responsibility. A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a long-standing jurisdictional dispute.

[16] We are left then to determine whether Métis and non-status Indians are in fact included in the scope of s. 91(24).

[17] There is no consensus on who is considered Métis or a non-status Indian, nor need there be. Cultural and ethnic labels do not lend themselves to neat boundaries. 'Métis' can refer to the historic Métis community in Manitoba's Red River Settlement or it can be used as a general term for anyone with mixed

. . . les querelles politiques et de principes entre le gouvernement fédéral et les gouvernements provinciaux ont causé des dommages collatéraux à un grand nombre de [Métis et d'Indiens non inscrits]. Ces derniers sont privés de programmes, de services et d'avantages non tangibles que tous les gouvernements reconnaissent comme étant nécessaires. [par. 107-108]

Voir aussi *Lovelace c. Ontario*, [2000] 1 R.C.S. 950, par. 70.

[15] Les gouvernements fédéral et provinciaux refusant tous deux de reconnaître compétence à leur égard, les Métis et les Indiens non inscrits n'ont personne qu'ils peuvent tenir responsable de ce statu quo inopportun. La Couronne prétend toutefois que, comme le fait de conclure qu'elle a compétence en vertu du par. 91(24) ne créerait aucune obligation de légiférer, il n'y a pas lieu de répondre à la question de la compétence dans un contexte de vide législatif. Il est vrai que le fait de conclure que les Métis et les Indiens non inscrits sont des « Indiens » visés au par. 91(24) ne crée aucune obligation de légiférer, mais une telle conclusion a pour effet bénéfique indéniable de mettre fin au bras de fer que se livrent les gouvernements fédéral et provinciaux sur la question de la compétence législative, où ces groupes en sont réduits à se demander vers qui se tourner pour obtenir une réparation gouvernementale. L'existence d'un vide législatif reflète manifestement le fait qu'aucun ordre de gouvernement n'a reconnu sa responsabilité sur le plan constitutionnel. Un jugement déclaratoire garantirait à la fois la certitude et la responsabilité à cet égard, et satisferait ainsi facilement au seuil jurisprudentiel applicable, soit le fait de présenter l'utilité pratique tangible de régler un conflit de compétence de longue date.

[16] Il nous reste donc à déterminer si les Métis et les Indiens non inscrits sont effectivement inclus dans le champ d'application du par. 91(24).

[17] Il n'existe aucun consensus sur la question de savoir qui est considéré comme un Métis ou un Indien non inscrit, et un tel consensus n'est d'ailleurs pas nécessaire. Les étiquettes culturelles et ethniques ne permettent pas d'établir des limites définies. Le mot « Métis » peut renvoyer à la collectivité métisse

European and Aboriginal heritage. Some mixed-ancestry communities identify as Métis, others as Indian:

> There is no one exclusive Metis People in Canada, anymore than there is no one exclusive Indian people in Canada. The Metis of eastern Canada and northern Canada are as distinct from Red River Metis as any two peoples can be. . . . As early as 1650, a distinct Metis community developed in LeHeve [*sic*], Nova Scotia, separate from Acadians and Micmac Indians. All Metis are aboriginal people. All have Indian ancestry.

(R. E. Gaffney, G. P. Gould and A. J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (1984), at p. 62, quoted in Catherine Bell, "Who Are The Metis People in Section 35(2)?" (1991), 29 *Alta. L. Rev.* 351, at p. 356.)

[18] The definitional contours of 'non-status Indian' are also imprecise. Status Indians are those who are recognized by the federal government as registered under the *Indian Act*, R.S.C. 1985, c. I-5. Non-status Indians, on the other hand, can refer to Indians who no longer have status under the *Indian Act*, or to members of mixed communities who have never been recognized as Indians by the federal government. Some closely identify with their Indian heritage, while others feel that the term Métis is more reflective of their mixed origins.

[19] These definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24). I agree with the trial judge and Federal Court of Appeal that the historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis.

historique de la colonie de la rivière Rouge au Manitoba, ou encore être utilisé comme terme générique pour désigner quiconque possède des origines mixtes européennes et autochtones. Certaines collectivités d'ascendance mixte se considèrent comme des Métis, d'autres comme des Indiens :

> [TRADUCTION] Il n'y a pas qu'un seul peuple métis au Canada, pas plus qu'il n'y a qu'un seul peuple indien au Canada. Les Métis de l'est et du nord du Canada sont aussi distincts des Métis de la rivière Rouge que deux peuples, quels qu'ils soient, peuvent l'être. [. . .] Dès 1650, une collectivité métisse distincte s'est constituée à LeHeve [*sic*], en Nouvelle-Écosse, laquelle se distingue des Acadiens et des Indiens micmacs. Tous les Métis sont des Autochtones. Ils possèdent tous des origines indiennes.

(R. E. Gaffney, G. P. Gould et A. J. Semple, *Broken Promises : The Aboriginal Constitutional Conferences* (1984), p. 62, cité dans Catherine Bell, « Who Are The Metis People in Section 35(2)? » (1991), 29 *Alta. L. Rev.* 351, p. 356.)

[18] Les contours de la définition du terme « Indien non inscrit » sont également imprécis. Les Indiens inscrits sont ceux que le gouvernement fédéral reconnaît comme étant inscrits en vertu de la *Loi sur les Indiens*, L.R.C. 1985, c. I-5. En revanche, les Indiens non inscrits peuvent désigner soit les Indiens qui n'ont plus le statut d'Indiens visés par la *Loi sur les Indiens*, soit les membres de collectivités d'ascendance mixte que le gouvernement fédéral n'a jamais reconnus comme Indiens. Certaines personnes s'identifient étroitement à leurs origines indiennes, alors que d'autres estiment que le mot Métis reflète davantage leurs origines mixtes.

[19] Ces ambiguïtés d'ordre définitionnel n'empêchent pas de décider si les deux groupes, peu importe la façon dont on les définit, sont visés par le par. 91(24). À l'instar du juge de première instance et de la Cour d'appel fédérale, je suis d'avis que les contextes historique, philosophique et linguistique établissent que les « Indiens » visés au par. 91(24) englobent *tous* les peuples autochtones, y compris les Indiens non inscrits et les Métis.

[20] To begin, it is unnecessary to explore the question of non-status Indians in a full and separate analysis because the Crown conceded in oral argument, properly in my view, that they are recognized as "Indians" under s. 91(24), a concession that reflects the fact that the federal government has used its authority under s. 91(24) in the past to legislate over non-status Indians as "Indians".[2] While a concession is not necessarily determinative, it does not, on the other hand, make the granting of a declaration redundant, as the Crown suggests. Non-status Indians have been a part of this litigation since it started in 1999. Earlier in these proceedings, the Crown took the position that non-status Indians did *not* fall within federal jurisdiction under s. 91(24). As the intervener Aseniwuche Winewak Nation of Canada submitted in oral argument, excluding non-status Indians from the first declaration would send them "[b]ack to the drawing board". To avoid uncertainty in the future, therefore, there is demonstrable utility in a declaration that confirms their inclusion.

[20] Tout d'abord, la situation des Indiens non inscrits ne requiert pas une analyse complète et distincte, car la Couronne a concédé à l'audience — à juste titre selon moi — que ceux-ci sont reconnus comme des « Indiens » visés au par. 91(24), une concession qui reflète le fait que le gouvernement fédéral a, dans le passé, exercé les pouvoirs que lui confère le par. 91(24) pour légiférer sur les Indiens non inscrits comme s'ils étaient des « Indiens »[2]. Bien qu'une telle concession ne soit pas nécessairement déterminante, elle n'a pas pour effet de rendre un jugement déclaratoire redondant, contrairement à ce que soutient la Couronne. Les Indiens non inscrits sont parties au présent litige depuis qu'il a été intenté en 1999. Plus tôt dans l'instance, la Couronne a prétendu que ceux-ci *ne* relevaient *pas* de la compétence fédérale suivant le par. 91(24). Comme l'intervenante l'Aseniwuche Winewak Nation of Canada l'a fait valoir dans sa plaidoirie, le fait d'exclure les Indiens non inscrits du premier jugement déclaratoire aurait pour effet de les ramener [TRADUCTION] « [à] la case départ ». Pour éviter toute incertitude dans le futur, le fait de rendre un jugement déclaratoire confirmant leur inclusion dans le champ d'application du mot « Indiens » présente donc une utilité démontrable.

[21] We are left then to consider primarily whether the Métis are included.

[21] Il nous reste donc essentiellement à nous demander si les Métis sont eux aussi inclus.

[22] The prevailing view is that Métis are "Indians" under s. 91(24). Prof. Hogg, for example, sees the word "Indians" under s. 91(24) as having a wide compass, likely including the Métis:

[22] Selon le point de vue dominant, les Métis sont des « Indiens » visés au par. 91(24). Le professeur Hogg, par exemple, estime que le mot « Indiens » utilisé au par. 91(24) a une portée très englobante, qui inclut vraisemblablement les Métis :

> The Métis people, who originated in the west from intermarriage between French Canadian men and Indian women during the fur trade period, received "half-breed" land grants in lieu of any right to live on reserves, and

> [TRADUCTION] Les Métis, personnes nées dans l'Ouest de mariages entre des hommes canadiens-français et des femmes indiennes à l'époque du commerce des fourrures, ont reçu des concessions de terres de « Sang-Mêlés »,

[2] When Newfoundland and Labrador joined Confederation in 1949, for example, they brought with them many Aboriginal peoples who were obviously not — and had never been — registered under the federal *Indian Act* and were therefore non-status Indians. The federal government nonetheless assumed jurisdiction over them and many were incorporated into the *Indian Act* in 1984 and 2008.

[2] À titre d'exemple, en se joignant à la Confédération en 1949, la province de Terre-Neuve-et-Labrador a fait entrer avec elle bon nombre de peuples autochtones qui n'étaient évidemment pas — et n'avaient jamais été — inscrits en vertu de la *Loi sur les Indiens* fédérale, et constituaient par conséquent des Indiens non inscrits. Le gouvernement fédéral a néanmoins assumé compétence à leur égard et bon nombre d'entre eux ont été intégrés dans la *Loi sur les Indiens* en 1984 et en 2008.

were accordingly excluded from the charter group from whom Indian status devolved. However, they are probably "Indians" within the meaning of s. 91(24).

(Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 28-4)

See also Joseph Eliot Magnet, "Who are the Aboriginal People of Canada?", in Dwight A. Dorey and Joseph Eliot Magnet, eds., *Aboriginal Rights Litigation* (2003), 23, at p. 44; Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867" (1978-79), 43 *Sask. L. Rev.* 37; Mark Stevenson, "Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis" (2002), 1 *Indigenous L.J.* 237; Noel Lyon, "Constitutional Issues in Native Law", in Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (rev. 1st ed. 1989), 408, at p. 430.

[23] In fact, "Indians" has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. The term was created by European settlers and applied to Canada's Aboriginal peoples without making any distinction between them. As author Thomas King explains in *The Inconvenient Indian*:[3]

> No one really believed that there was only one Indian. No one ever said there was only one Indian. But as North America began to experiment with its "Indian programs," it did so with a "one size fits all" mindset. Rather than see tribes as an arrangement of separate nation states in the style of the Old World, North America imagined that Indians were basically the same. [p. 83]

[24] Before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. Métis were considered "Indians" for pre-Confederation treaties such as the Robinson Treaties

[3] *The Inconvenient Indian: A Curious Account of Native People in North America* (2013), winner of the 2014 RBC Taylor Prize.

au lieu du droit de vivre dans des réserves, et ils ont par conséquent été exclus du groupe duquel découlait le statut d'Indien. Cependant, ils sont probablement des Indiens visés au par. 91(24).

(Peter W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), p. 28-4)

Voir également Joseph Eliot Magnet, « Who are the Aboriginal People of Canada? », dans Dwight A. Dorey et Joseph Eliot Magnet, dir., *Aboriginal Rights Litigation* (2003), 23, p. 44; Clem Chartier, « "Indian" : An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867 » (1978-79), 43 *Sask. L. Rev.* 37; Mark Stevenson, « Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis » (2002), 1 *Indigenous L.J.* 237; Noel Lyon, « Constitutional Issues in Native Law », dans Bradford W. Morse, dir., *Aboriginal Peoples and the Law : Indian, Metis and Inuit Rights in Canada* (1re éd. rév. 1989), 408, p. 430.

[23] En fait, le mot « Indiens » a longtemps été utilisé comme terme générique désignant tous les peuples autochtones, y compris les collectivités d'ascendance mixte comme les Métis. Le terme a été créé par les colons européens et appliqué aux peuples autochtones du Canada sans qu'aucune distinction ne soit faite entre eux. Comme l'explique l'auteur Thomas King dans *L'Indien malcommode*[3] :

> Personne ne pensait vraiment qu'il n'existait qu'un seul Indien. Personne n'a jamais dit qu'il n'y avait qu'un seul Indien. Mais dès que l'Amérique du Nord s'est mise à échafauder ses « programmes indiens », elle a procédé dans un esprit de standardisation. Au lieu de voir les tribus comme des États-nations distincts comme on en trouvait dans le Vieux Monde, l'Amérique du Nord s'est imaginé que les Indiens étaient essentiellement tous pareils. [p. 101]

[24] Avant et après la Confédération, le gouvernement a fréquemment qualifié d'Indiens les peuples autochtones ayant des origines mixtes européennes et autochtones. Les Métis ont été considérés comme des « Indiens » dans des traités antérieurs

[3] *L'Indien malcommode : Un portrait inattendu des Autochtones d'Amérique du Nord*, qui a valu à son auteur le prix Taylor RBC 2014 (traduit de l'anglais par Daniel Poliquin (2014)).

of 1850. Many post-Confederation statutes considered Métis to be "Indians", including the 1868 statute entitled *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42.

[25] Historically, the purpose of s. 91(24) in relation to the broader goals of Confederation also indicates that since 1867, "Indians" meant all Aboriginal peoples, including Métis. The trial judge found that expanding British North America across Rupert's Land and the North-West Territories was a major goal of Confederation and that building a national railway was a key component of this plan. At the time, that land was occupied by a large and diverse Aboriginal population, including many Métis. A good relationship with all Aboriginal groups was required to realize the goal of building "the railway and other measures which the federal government would have to take." With jurisdiction over Aboriginal peoples, the new federal government could "protect the railway from attack" and ensure that they did not resist settlement or interfere with construction of the railway. Only by having authority over *all* Aboriginal peoples could the westward expansion of the Dominion be facilitated.

[26] The work of Prof. John Borrows supports this theory:

> The Métis Nation was . . . crucial in ushering western and northern Canada into Confederation and in increasing the wealth of the Canadian nation by opening up the prairies to agriculture and settlement. These developments could not have occurred without Métis intercession and legal presence.

(*Canada's Indigenous Constitution* (2010), at pp. 87-88)

à la Confédération, comme les traités Robinson de 1850. Ils l'ont été aussi dans bon nombre de lois postérieures à la Confédération, dont celle de 1868 intitulée l'*Acte pourvoyant à l'organisation du Département du Secrétaire d'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance*, S.C. 1868, c. 42.

[25] Historiquement, considéré dans la perspective des objectifs plus généraux de la Confédération, l'objet du par. 91(24) indique également que, depuis 1867, le mot « Indiens » s'entend de tous les peuples autochtones, y compris les Métis. Le juge de première instance a conclu que l'expansion de l'Amérique du Nord britannique pour inclure la Terre de Rupert et les Territoires du Nord-Ouest était l'un des principaux objectifs de la Confédération, et que la construction d'un chemin de fer national constituait un élément clef de ce plan. À l'époque, ces territoires étaient occupés par une population autochtone vaste et diversifiée, qui comptait beaucoup de Métis. Il fallait entretenir de bonnes relations avec l'ensemble des groupes autochtones pour réaliser l'objectif relatif à la construction « du chemin de fer et [aux] autres mesures que le gouvernement fédéral devrait prendre ». En ayant compétence sur les peuples autochtones, le gouvernement du nouvel État fédéral pourrait « protége[r] le chemin de fer contre les attaques », et s'assurer que ces peuples ne résistent pas à la colonisation et n'entravent pas la construction du chemin de fer. Ce n'est qu'en ayant compétence à l'égard de *tous* les peuples autochtones que le Dominion pourrait faciliter son expansion vers l'ouest.

[26] Les écrits du professeur John Borrows appuient cette théorie :

> [TRADUCTION] La nation métisse a [. . .] joué un rôle crucial dans l'entrée de l'ouest et du nord du Canada dans la Confédération et dans l'accroissement de la richesse de la nation canadienne par l'ouverture des Prairies à l'agriculture et à la colonisation. Ces avancées n'auraient pas pu être accomplies sans l'intervention et la présence juridique des Métis.

(*Canada's Indigenous Constitution* (2010), p. 87-88)

In his view, it would have been impossible for Canada to accomplish its expansionist agenda if "Indians" under s. 91(24) did not include Métis. The threat they posed to Canada's expansion was real. On many occasions Métis "blocked surveyors from doing their work" and "prevented Canada's expansion into the region" when they were unhappy with the Canadian government: Borrows, at p. 88.

[27] In fact, contrary to its position in this case, the federal government has at times assumed that it could legislate over Métis as "Indians". The 1876 *Indian Act*[4] banned the sale of intoxicating liquor to "Indians". In 1893 the North-West Mounted Police wrote to the federal government, expressing their difficulty in distinguishing between "Half-breeds and Indians in prosecutions for giving liquor to the latter". To clarify this issue, the federal government amended the *Indian Act*[5] in 1894 to broaden the ban on the sale of intoxicating liquor to Indians or any person "who follows the Indian mode of life", which included Métis.

[28] In October 1899, Indian Affairs Minister Clifford Sifton wrote a memorandum that would become the basis of the federal government's policy regarding Métis and Indian Residential Schools for decades. He wrote that "I am decidedly of the opinion that all children, even those of mixed blood . . . should be eligible for admission to the schools": *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 3, *The Métis Experience* (2015), at p. 16. This policy was applied haphazardly. Provincial public school systems were reluctant to admit Métis students, as the provinces saw them as a federal responsibility: p. 26. Many Métis attended Residential Schools because they were the only educational option open to them.

[4] *The Indian Act, 1876*, S.C. 1876, c. 18.
[5] *An Act further to amend "The Indian Act"*, S.C. 1894, c. 32.

À son avis, il aurait été impossible pour le Canada de réaliser son projet expansionniste si les « Indiens » visés au par. 91(24) n'avaient pas inclus les Métis. La menace qu'ils représentaient pour l'expansion du Canada était réelle. À de nombreuses reprises, les Métis [TRADUCTION] « ont empêché les arpenteurs d'effectuer leur travail » et « ont contré l'expansion du Canada dans leur région » lorsqu'ils étaient insatisfaits du gouvernement canadien (Borrows, p. 88).

[27] En fait, contrairement à ce qu'il soutient en l'espèce, le gouvernement fédéral a parfois considéré qu'il pouvait légiférer sur les Métis en tant qu'« Indiens ». L'*Acte des Sauvages* de 1876[4] interdisait la vente de boissons enivrantes aux « Indiens ». En 1893, la Police à cheval du Nord-Ouest a écrit au gouvernement fédéral pour lui faire part de sa difficulté à distinguer [TRADUCTION] « les Sang-Mêlés des Indiens dans les poursuites intentées pour avoir offert de l'alcool à ces derniers ». Pour clarifier cette question, le gouvernement fédéral a modifié l'*Acte des Sauvages*[5] en 1894 en vue d'élargir la portée de l'interdiction de vendre des boissons enivrantes à toute personne « qui vit à la façon des Sauvages », ce qui comprenait les Métis.

[28] En octobre 1899, le ministre des Affaires indiennes, Clifford Sifton, a rédigé une note de service qui allait devenir le fondement de la politique du gouvernement fédéral à l'égard des Métis et des pensionnats indiens pendant des décennies. Il a écrit ce qui suit : « . . . je suis décidément d'avis que tous les enfants, même ceux d'ascendance mixte [. . .] devraient pouvoir être admis dans les écoles » (*Rapport final de la Commission de vérité et réconciliation du Canada*, vol. 3, *L'expérience métisse* (2015), p. 18). Cette politique n'a pas été appliquée de façon systématique. Les provinces étaient réticentes à admettre des élèves métis dans leur système scolaire public, car elles considéraient ceux-ci comme une responsabilité fédérale (p. 28). De nombreux Métis ont fréquenté les pensionnats, parce qu'il s'agissait des seuls endroits où ils pouvaient se faire instruire.

[4] *Acte des Sauvages, 1876*, S.C. 1876, c. 18.
[5] *Acte contenant de nouvelles modifications à l'Acte des Sauvages*, S.C. 1894, c. 32.

[29] In some cases, the federal government directly financed these projects. In the 1890s, the federal government provided funding for a reserve and industrial school at Saint-Paul-des-Métis in Alberta, run by Oblate missionaries: *The Final Report of the Truth and Reconciliation in Canada*, vol. 3, at p. 16. The reserve consisted of two townships, owned by the Crown, and included a school for teaching trades to the Métis. As long as the project lasted, it functioned equivalently to similar reserves for Indian peoples.

[30] Many Métis were also sent to Indian Residential Schools, another exercise of federal authority over "Indians", as *The Final Report of the Truth and Reconciliation Commission of Canada* documents. According to the Report, "[t]he central goal of the Canadian residential school system was to 'Christianize' and 'civilize' Aboriginal people . . . . In the government's vision, there was no place for the Métis Nation": vol. 3, at p. 3. The Report notes that

> [t]he existing records make it impossible to say how many Métis children attended residential school. But they did attend almost every residential school discussed in this report at some point. They would have undergone the same experiences — the high death rates, limited diets, crowded and unsanitary housing, harsh discipline, heavy workloads, neglect, and abuse . . . . [p. 4]

The federal government has since acknowledged and apologized for wrongs such as Indian Residential Schools.

[31] Moreover, throughout the early twentieth century, many Métis whose ancestors had taken scrip continued to live on Indian reserves and to participate in Indian treaties. In 1944, a Commission of Inquiry in Alberta was launched to investigate this issue, headed by Justice William Macdonald. He concluded that the federal government had the constitutional authority to allow these Métis to participate in treaties and recommended that the federal

[29] Dans certains cas, le gouvernement fédéral a financé directement ces projets. Dans les années 1890, le gouvernement fédéral a financé une réserve et une école de métiers de Saint-Paul-des-Métis en Alberta, école dirigée par des missionnaires oblats (*Rapport final de la Commission de vérité et réconciliation*, vol. 3, p. 18-19). La réserve consistait en deux cantons appartenant à la Couronne et comprenait une école où on enseignait divers métiers aux Métis. Pendant toute la durée du projet, le fonctionnement de la réserve était similaire à celui des réserves analogues établies pour les peuples indiens.

[30] Bon nombre de Métis ont également été envoyés dans des pensionnats indiens, une autre manifestation de l'exercice par le fédéral de sa compétence sur les « Indiens », comme le constate le *Rapport final de la Commission de vérité et réconciliation du Canada*. Selon ce rapport, « [l]e principal objectif du système des pensionnats canadiens était de "christianiser" et de "civiliser" le peuple autochtone [. . .] Du point de vue du gouvernement, il n'y a alors aucune place pour la nation métisse » (vol. 3, p. 3). On peut lire ce qui suit dans le rapport :

> Les dossiers actuels ne permettent pas de dire combien d'enfants métis ont fréquenté un pensionnat. Mais, ils ont fréquenté presque chaque pensionnat mentionné dans le présent rapport, à un certain moment, où ils auraient partagé ces expériences — taux de mortalité élevé, déficience alimentaire, logement insalubre et surpeuplé, discipline sévère, lourdes charges de travail, négligence et violence . . . [p. 5]

Le gouvernement fédéral a depuis reconnu ses torts et présenté ses excuses pour ceux-ci, par exemple en ce qui concerne les pensionnats indiens.

[31] De plus, pendant tout le début du vingtième siècle, de nombreux Métis dont les ancêtres avaient accepté un certificat de concession foncière ont continué à vivre dans des réserves indiennes et à participer aux traités indiens. En 1944, une commission d'enquête présidée par le juge William Macdonald a été mise sur pied en Alberta pour se pencher sur cette question. Le juge Macdonald a conclu que le gouvernement fédéral avait, en vertu

government take steps to clarify the status of these Métis with respect to treaties and reserves: *Report of Mr. Justice W.A. Macdonald Following an Enquiry Directed Under Section 18 of the Indian Act*, August 7, 1944 (online).

[32] Justice Macdonald noted that the federal government had been willing to recognize Métis as Indians whenever it was convenient to do so:

> It would appear that whenever it became necessary or expedient to extinguish Indian rights in any specific territory, the fact that Halfbreeds also had rights by virtue of their Indian blood was invariably recognized. . . .
>
> . . .
>
> . . . mixed blood did not necessarily establish white status, nor did it bar an individual from admission into treaty. The welfare of the individual and his own desires in the matter were given due weight, no cast-iron rule was adopted. [pp. 557-58]

In 1958, the federal government amended the *Indian Act*,[6] enacting Justice Macdonald's recommendation that Métis who had been allotted scrip but were already registered as Indians (and their descendants), remain registered under the *Indian Act*, thereby clarifying their status with respect to treaties and reserves. In so legislating, the federal government appeared to assume that it had authority over Métis under s. 91(24).

[33] Not only has the federal government legislated over Métis as "Indians", but it appears to have done so in the belief it was acting within its constitutional authority. In 1980, the Department of Indian Affairs and Northern Development wrote a document for Cabinet entitled *Natives and the Constitution*. This document clearly expressed the federal

de la Constitution, le pouvoir de permettre à ces Métis de participer aux traités et il a recommandé que celui-ci prenne des mesures pour préciser leur statut en ce qui concerne les traités et les réserves (*Report of Mr. Justice W.A. Macdonald Following an Enquiry Directed Under Section 18 of the Indian Act*, 7 août 1944 (en ligne)).

[32] Le juge Macdonald a indiqué que le gouvernement fédéral s'était montré disposé à reconnaître les Métis en tant qu'Indiens chaque fois qu'il était avantageux pour lui de le faire :

> [TRADUCTION] Il semble que, chaque fois qu'il est devenu nécessaire ou opportun d'éteindre des droits indiens sur un territoire précis, le fait que les Sang-Mêlés avaient aussi des droits en vertu de leur sang indien a toujours été reconnu. . .
>
> . . .
>
> . . . l'ascendance mixte n'établissait pas forcément le statut de Blanc, pas plus qu'elle n'empêchait une personne d'être admise dans un traité. Le bien-être de la personne et ses propres désirs à cet égard ont été dûment pris en considération; aucune règle rigide n'a été adoptée. [p. 557-558]

En 1958, le gouvernement fédéral a modifié la *Loi sur les Indiens*[6] et adopté la recommandation du juge Macdonald proposant que les Métis auxquels un certificat de concession foncière avait été attribué, mais qui étaient déjà inscrits comme Indiens (ainsi que leurs descendants), demeurent inscrits en vertu de la *Loi sur les Indiens*, mesure qui clarifiait leur statut relativement aux traités et aux réserves. En légiférant ainsi, le gouvernement fédéral semble avoir considéré qu'il avait compétence sur les Métis en vertu du par. 91(24).

[33] Non seulement le gouvernement fédéral a-t-il légiféré à l'égard des Métis comme s'ils étaient des « Indiens », mais il semble l'avoir fait en étant convaincu qu'il agissait conformément à son pouvoir constitutionnel. En 1980, le ministère des Affaires indiennes et du Nord canadien a rédigé à l'intention du Cabinet un document intitulé *Natives*

[6] *An Act to amend the Indian Act*, S.C. 1958, c. 19.

[6] *Loi modifiant la Loi sur les Indiens*, S.C. 1958, c. 19.

government's confidence that it had constitutional authority to legislate over Métis under s. 91(24):

> Métis people . . . are presently in the same legal position as other Indians who signed land cession treaties. Those Métis who have received scrip or lands are excluded from the provisions of the *Indian Act*, but are still "Indians" within the meaning of the *BNA Act*. . . .
>
> . . .
>
> Should a person possess "sufficient" racial and social characteristics to be considered a "native person", that individual will be regarded as an "Indian" . . . within the legislative jurisdiction of the federal government, regardless of the fact that he or she may be excluded from the coverage of the *Indian Act*. [p. 43]

[34] Moreover, while it does not define the scope of s. 91(24), it is worth noting that s. 35[7] of the *Constitution Act, 1982* states that Indian, Inuit, *and* Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court recently explained that the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 10. And in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, this Court noted that ss. 35 and 91(24) should be read together: p. 1109, cited in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, at para. 69.

[35] The term "Indian" or "Indians" in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes

and the Constitution. Ce document montre clairement que le gouvernement fédéral était convaincu qu'il avait le pouvoir constitutionnel de légiférer à l'égard des Métis en vertu du par. 91(24) :

> [TRADUCTION] Les Métis [. . .] sont actuellement dans la même situation juridique que les autres Indiens ayant signé des traités de cession de terres. Les Métis qui ont reçu des terres ou un certificat de concession foncière sont exclus du champ d'application des dispositions de la *Loi sur les Indiens*, mais demeurent toujours des « Indiens » visés par l'*AANB*. . .
>
> . . .
>
> Si une personne possède des caractéristiques raciales et sociales « suffisantes » pour être considérée comme une « personne autochtone », elle sera considérée comme un « Indien » [. . .] relevant de la compétence législative du gouvernement fédéral, sans égard au fait qu'elle puisse être exclue du champ d'application de la *Loi sur les Indiens*. [p. 43]

[34] De plus, bien que l'art. 35[7] de la *Loi constitutionnelle de 1982* ne définisse pas la portée du par. 91(24), il convient de noter qu'il énonce que les Indiens, les Inuit *et* les Métis sont des peuples autochtones pour l'application de la Constitution. Notre Cour a récemment expliqué que « [l]a réconciliation des Canadiens autochtones et non autochtones dans le cadre d'une relation à long terme empreinte de respect mutuel » constitue « le noble objectif » de l'art. 35 (*Beckman c. Première nation de Little Salmon/Carmacks*, [2010] 3 R.C.S. 103, par. 10). En outre, dans l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, la Cour a souligné que l'art. 35 et le par. 91(24) doivent être interprétés conjointement (p. 1109, cité dans *Manitoba Metis Federation Inc. c. Canada (Procureur général)*, [2013] 1 R.C.S. 623, par. 69).

[35] Le terme « Indien » ou « Indiens » a donc deux sens en contexte constitutionnel : un sens large, au par. 91(24), qui inclut tant les Métis

[7] **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

[7] **35.** (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

both Métis and Inuit and can be equated with the term "aboriginal peoples of Canada" used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. As will be noted later in these reasons, this Court in *Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104 ("*Re Eskimo*"), held that s. 91(24) includes the Inuit. Since the federal government concedes that s. 91(24) includes non-status Indians, it would be constitutionally anomalous, as the Crown also conceded, for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24).

[36] The *Report of the Royal Commission on Aboriginal Peoples*, released in 1996, stressed the importance of rebuilding the Crown's relationship with Aboriginal peoples in Canada, including the Métis: see vol. 3, *Gathering Strength*. The Report called on the federal government to "recognize that Métis people . . . are included in the federal responsibilities set out in section 91(24) of the *Constitution Act, 1867*": vol. 2, *Restructuring the Relationship*, at p. 66. The importance of this reconstruction was also recognized in the final report of the Truth and Reconciliation Commission of Canada: *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at p. 183; see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 1, and *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 S.C.R. 535, at para. 12.

[37] The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal.

que les Inuit et que l'on peut assimiler à celui de l'expression « peuples autochtones du Canada » employée à l'art. 35; et un sens plus restreint, qui distingue les bandes indiennes des autres peuples autochtones. Comme nous le verrons plus loin, dans l'arrêt *Reference as to whether « Indians » in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] R.C.S. 104 (« *Renvoi sur les Esquimaux* »), la Cour a conclu que le par. 91(24) vise les Inuit. Puisque le gouvernement fédéral concède que cette disposition vise les Indiens non inscrits, il serait, comme l'a également concédé la Couronne, anormal d'un point de vue constitutionnel que les Métis constituent le seul peuple autochtone à être reconnu et inclus à l'art. 35, tout en étant par ailleurs exclu du champ d'application du par. 91(24).

[36] Le *Rapport de la Commission royale sur les peuples autochtones*, publié en 1996, souligne l'importance de reconstruire la relation de la Couronne avec les peuples autochtones du Canada, notamment avec les Métis (voir le vol. 3, *Vers un ressourcement*). Le rapport incite le gouvernement fédéral à « reconnaître que les Métis [. . .] sont compris dans la sphère de compétence fédérale aux termes du paragraphe 91(24) de la *Loi constitutionnelle de 1867* » (vol. 2, *Une relation à redéfinir*, p. 74). Le rapport final de la Commission de vérité et réconciliation du Canada reconnaît aussi l'importance de cette reconstruction (*Honorer la vérité, réconcilier pour l'avenir : Sommaire du rapport final de la Commission de vérité et réconciliation du Canada* (2015), p. 193; voir aussi *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, [2005] 3 R.C.S. 388, par. 1, et *Bande indienne des Lax Kw'alaams c. Canada (Procureur général)*, [2011] 3 R.C.S. 535, par. 12).

[37] Les modifications constitutionnelles, les excuses pour les torts du passé, la reconnaissance grandissante du fait que les peuples autochtones et non autochtones sont des partenaires dans la Confédération, le *Rapport de la Commission royale sur les peuples autochtones* ainsi que le *Rapport final de la Commission de vérité et réconciliation du Canada* indiquent tous qu'une réconciliation avec *l'ensemble* des peuples autochtones du Canada est l'objectif du Parlement.

[38] The jurisprudence also supports the conclusion that Métis are "Indians" under s. 91(24). There is no case directly on point, but by identifying which groups have already been recognized as "Indians" under this head of power and by establishing principles governing who can be considered "Indians", the existing cases provide guidance.

[39] In *Re Eskimo*, this Court had to determine whether the Inuit were "Indians" under s. 91(24) of the *Constitution Act, 1867*. Relying on historical evidence to determine the meaning of "Indians" in 1867, the Court drew heavily from the 1858 *Report from the Select Committee on the Hudson's Bay Company*. Acting on behalf of the federal government, the Hudson's Bay Company had conducted a survey of Rupert's Land and the North-Western Territories in which the Inuit were classified as Indians. The Court found that while the Inuit had their own language, culture, and identities separate from that of the "Indian tribes" in other parts of the country, they were "Indians" under s. 91(24) on the basis of this survey. It follows from this case that a unique culture and history, and self-identification as a distinct group, are not bars to being included as "Indians" under s. 91(24).

[40] In *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, this Court traced the outer limits of the "Indian" power under s. 91(24). An Indian couple lived on a reserve most of the year except for a few weeks each summer during which they lived off the reserve and the husband worked on a farm. The husband died during one of the weeks he was away from the reserve. This resulted in the superintendent in charge of the Indian district (which included their reserve) being appointed as administrator of his estate, pursuant to s. 43 of the *Indian Act*.[8] His wife challenged s. 43 on the grounds that it violated the *Canadian Bill of Rights*, S.C. 1960, c. 44. While the Court held that s. 43 of the *Indian Act* did not violate the *Bill of Rights*,

[8] R.S.C. 1970, c. I-6.

[38] La jurisprudence permet également de conclure que les Métis sont des « Indiens » visés au par. 91(24). Aucune décision ne porte exactement sur cette question, mais la jurisprudence existante donne des indications à cet égard en précisant quels groupes ont déjà été reconnus en tant qu'« Indiens » au regard de ce chef de compétence, et en établissant les principes qui permettent de déterminer quelles personnes peuvent être considérées comme des « Indiens ».

[39] Dans le *Renvoi sur les Esquimaux*, la Cour devait déterminer si les Inuit étaient des « Indiens » visés au par. 91(24) de la *Loi constitutionnelle de 1867*. Se fondant sur la preuve historique pour déterminer le sens du terme « Indiens » en 1867, la Cour s'est largement inspirée du *Report from the Select Committee on the Hudson's Bay Company* de 1858. Agissant au nom du gouvernement fédéral, la Compagnie de la Baie d'Hudson avait procédé à l'arpentage de la Terre de Rupert et des Territoires du Nord-Ouest, où les Inuit étaient considérés comme des Indiens. La Cour a conclu que, même si les Inuit avaient une langue, une culture et une identité propres, distinctes de celles des « tribus indiennes » d'autres régions du pays, ils étaient des « Indiens » visés au par. 91(24) sur la base de ces travaux. Il ressort de cette affaire que le fait pour les membres d'un groupe d'avoir une culture et une histoire uniques et de s'identifier comme un groupe distinct ne s'oppose pas à leur inclusion en tant qu'« Indiens » visés au par. 91(24).

[40] Dans l'arrêt *Procureur général du Canada c. Canard*, [1976] 1 R.C.S. 170, notre Cour a tracé les limites de la compétence à l'égard des « Indiens » prévue au par. 91(24). Dans cette affaire, un couple indien habitait dans une réserve durant la majeure partie de l'année, sauf pendant quelques semaines chaque été, au cours desquelles les conjoints vivaient à l'extérieur de la réserve et l'époux travaillait dans une exploitation agricole. Celui-ci est décédé au cours d'une des semaines où il était absent de la réserve. Par suite du décès, le surintendant responsable du district indien (dont faisait partie la réserve) a été nommé administrateur de sa succession conformément à l'art. 43 de la *Loi sur les Indiens*[8]. L'épouse a contesté l'art. 43 au motif

[8] S.R.C. 1970, c. I-6.

Beetz J. concluded that in determining who are "Indians" under s. 91(24), "it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages": p. 207.

[41] These two cases left jurisprudential imprints that assist in deciding whether Métis are part of what is included in s. 91(24). As stated above, *Canard* shows that intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24). And *Re Eskimo* establishes that the fact that a group is a distinct people with a unique identity and history whose members self-identify as separate from Indians, is not a bar to inclusion within s. 91(24).

[42] There is no doubt that the Métis are a distinct people. Their distinctiveness was recognized in two recent cases from this Court — *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670, and *Manitoba Metis Federation*. The issue in *Cunningham* was whether Alberta's *Metis Settlements Act*, R.S.A. 2000, c. M-14, violated s. 15 of the *Canadian Charter of Rights and Freedoms* by terminating the membership of Métis who voluntarily registered as Indians under the *Indian Act*. The Court concluded that the *Metis Settlements Act* was justified as an ameliorative program. In commenting on the unique history of the Métis, the Court noted that they are "widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities": para. 7.

[43] And in *Manitoba Metis Federation*, this Court granted declaratory relief to the descendants of Manitoba's Red River Métis Settlement. The federal *Manitoba Act, 1870*, S.C. 1870, c. 3, promised

qu'il contrevenait à la *Déclaration canadienne des droits*, S.C. 1960, c. 44. Bien que la Cour ait statué que ce n'était pas le cas, le juge Beetz a conclu qu'« il n'apparaîtrait pas déraisonnable d'inclure le mariage et la filiation et, inévitablement, les mariages entre Indiens et non-Indiens » pour déterminer quelles personnes sont des « Indiens » visés au par. 91(24) (p. 207).

[41] Ces deux arrêts ont laissé dans la jurisprudence des empreintes qui aident à déterminer si les Métis font partie des personnes visées au par. 91(24). Comme il a été indiqué précédemment, l'arrêt *Canard* montre que les mariages entre Indiens et non-Indiens et l'ascendance mixte n'empêchent pas l'inclusion d'un groupe dans le champ d'application du par. 91(24). Et, selon le *Renvoi sur les Esquimaux*, le caractère distinct d'un groupe qui forme un peuple ayant une identité et une histoire uniques et dont les membres s'identifient comme un groupe distinct des Indiens ne fait pas obstacle à l'inclusion dans le champ d'application du par. 91(24).

[42] Il ne fait aucun doute que les Métis forment un peuple distinct. Notre Cour a reconnu leur caractère distinct dans deux affaires récentes, *Alberta (Affaires autochtones et Développement du Nord) c. Cunningham*, [2011] 2 R.C.S. 670, et *Manitoba Metis Federation*. Dans *Cunningham*, il fallait décider si la loi albertaine intitulée *Metis Settlements Act*, R.S.A. 2000, c. M-14, violait l'art. 15 de la *Charte canadienne des droits et libertés* parce qu'elle prévoit que les Métis qui s'inscrivent volontairement comme Indiens en vertu de la *Loi sur les Indiens* renoncent de ce fait à leur statut de membres d'un établissement métis. Notre Cour a conclu que la *Metis Settlements Act* était justifiée en tant que programme améliorateur. Au sujet de l'histoire unique des Métis, la Cour a fait remarquer que ces derniers sont « largement reconnus comme formant un peuple autochtone culturellement distinct et vivant dans des communautés culturellement distinctes » (par. 7).

[43] Et, dans l'arrêt *Manitoba Metis Federation*, notre Cour a rendu le jugement déclaratoire sollicité par les descendants des Métis de la colonie de la rivière Rouge du Manitoba. La *Loi de 1870 sur*

land to the children of the Métis. Errors and delays resulted in many of them receiving inadequate scrip rather than land. The Court held that Canada had a fiduciary relationship with the Métis, and that the Crown's promise to implement the land grant engaged the honour of the Crown. This created a duty of diligent implementation. In so deciding, the Court stated that the Métis of the Red River Settlement are a "distinct community": para. 91.

le Manitoba, S.C. 1870, c. 3, édictée par le Parlement fédéral, promettait des terres aux enfants des Métis. Des erreurs et des retards ont fait en sorte que bon nombre d'entre eux ont reçu des certificats de concession foncière inadéquats plutôt que des terres. La Cour a jugé que le Canada entretenait une relation de nature fiduciaire avec les Métis et que la promesse de la Couronne de mettre en œuvre les concessions de terres engageait l'honneur de celle-ci. Il s'était donc créé une obligation de diligence dans la mise en œuvre. La Cour a également affirmé que les Métis de la colonie de la rivière Rouge constituaient « une communauté distincte » (par. 91).

[44] The Crown, however, submits that including Métis as "Indians" under s. 91(24) is contrary to this Court's decision in *R. v. Blais*, [2003] 2 S.C.R. 236. With respect, I think *Blais* can be easily distinguished. The issue in *Blais* was whether a provision of Manitoba's *Natural Resources Transfer Agreement*, which allowed "Indians" to hunt out of season, included Métis. It is true that the Court concluded that "Indians" in the *Natural Resources Transfer Agreement* did not include Métis, but what was at issue was a constitutional agreement, not the Constitution. This, as this Court noted in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, is a completely different interpretive exercise:

[44] La Couronne soutient toutefois que le fait de considérer que le mot « Indiens » utilisé au par. 91(24) inclut les Métis va à l'encontre de l'arrêt *R. c. Blais*, [2003] 2 R.C.S. 236. À mon humble avis, j'estime que l'affaire *Blais* peut être facilement distinguée de celle dont nous sommes saisis. Dans ce pourvoi, il s'agissait de déterminer si une disposition de la *Convention sur le transfert des ressources naturelles* du Manitoba, qui permettait aux « Indiens » de chasser hors saison, visait également les Métis. Il est vrai que la Cour a conclu que le mot « Indiens » figurant dans cette convention n'incluait pas les Métis, mais le texte litigieux était un accord de nature constitutionnelle, et non la Constitution. Comme la Cour l'a souligné dans le *Renvoi relatif au mariage entre personnes du même sexe*, [2004] 3 R.C.S. 698, il s'agit d'un exercice d'interprétation complètement différent :

> . . . it is submitted that the intention of the framers should be determinative in interpreting the scope of the heads of power enumerated in ss. 91 and 92 given the decision in *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44. That case considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here. [para. 30]

> . . . on plaide que, selon l'arrêt *R. c. Blais*, [2003] 2 R.C.S. 236, 2003 CSC 44, l'intention des rédacteurs de la Constitution devrait être déterminante dans l'interprétation de la portée des rubriques de compétence énumérées aux art. 91 et 92. Or, cette décision portait sur l'interprétation d'une convention constitutionnelle particulière et non d'une rubrique de compétence qui doit être continuellement adaptée à de nouvelles réalités. Une distinction s'impose donc entre le présent renvoi et cette affaire, qui ne s'applique pas en l'espèce. [par. 30]

[45] While there was some overlapping evidence between *Blais* and this case, the interpretation of

[45] Quoique certains éléments de preuve présentés dans l'affaire *Blais* et dans le présent pourvoi

a different record in *Blais* directed at different issues cannot trump the extensive and significantly broader expert testimony and the findings of Phelan J. Of most significance, however, is the fact that this Court itself expressly stated in *Blais* that it was *not* deciding whether s. 91(24) included the Métis. Far from seeing *Blais* as dispositive of the constitutional scope of s. 91(24), the Court emphasized that it left "open for another day the question of whether the term 'Indians' in s. 91(24) of the *Constitution Act, 1867* includes the Métis — an issue not before us in this appeal": para. 36.

[46] A broad understanding of "Indians" under s. 91(24) as meaning 'Aboriginal peoples', resolves the definitional concerns raised by the parties in this case. Since s. 91(24) includes all Aboriginal peoples, including Métis and non-status Indians, there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples.

[47] Determining whether particular individuals or communities are non-status Indians or Métis and therefore "Indians" under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future, but it brings us to whether, for purposes of s. 91(24), Métis should be restricted to the definitional criteria set out in *Powley* in accordance with the decision of the Federal Court of Appeal, or whether, as the appellants and some of the interveners urged, the membership base should be broader.

[48] The issue in *Powley* was who is Métis under s. 35 of the *Constitution Act, 1982*. The case involved

se recoupent, l'interprétation donnée dans *Blais* sur la base d'un dossier différent portant sur des questions différentes ne saurait écarter les témoignages d'experts beaucoup plus larges et approfondis ainsi que les conclusions du juge Phelan. Le fait le plus important toutefois est que, dans *Blais*, la Cour a elle-même expressément affirmé qu'elle *ne* décidait *pas* si les Métis sont inclus dans le champ d'application du par. 91(24). Loin de considérer que cet arrêt décidait définitivement la portée constitutionnelle du par. 91(24), la Cour a souligné que « sera[it] tranchée à une autre occasion la question de savoir si le mot "Indiens" au par. 91(24) de la *Loi constitutionnelle de 1867* s'entend également des Métis — question dont nous ne sommes pas saisis dans le présent pourvoi » (par. 36).

[46] Le fait d'interpréter largement le mot « Indiens » figurant au par. 91(24) et de lui attribuer le sens de « peuples autochtones » permet de répondre aux préoccupations d'ordre définitionnel soulevées par les parties en l'espèce. En effet, comme le par. 91(24) vise tous les peuples autochtones, y compris les Métis et les Indiens non inscrits, il n'est pas nécessaire d'identifier les collectivités d'ascendance mixte formées de Métis et celles formées d'Indiens non inscrits. Tous ces groupes sont des « Indiens » visés au par. 91(24), puisqu'ils sont tous des peuples autochtones.

[47] La question de savoir si des personnes données sont des Indiens non inscrits ou des Métis, et donc des « Indiens » visés au par. 91(24), — ou encore si une collectivité en particulier est formée de telles personnes — est une question de fait qui devra être décidée au cas par cas dans le futur, mais elle nous oblige à nous demander s'il y a lieu, pour l'application du par. 91(24), de restreindre la portée du terme « Métis » aux critères définitoires énoncés dans l'arrêt *Powley*, conformément à la décision de la Cour d'appel fédérale, ou s'il faut plutôt, comme l'ont fait valoir les appelants et certains des intervenants, élargir les critères d'appartenance.

[48] Dans l'affaire *Powley*, la question en litige consistait à déterminer qui est un Métis visé à

two Métis hunters who were charged with violating the *Game and Fish Act*, R.S.O. 1990, c. G.1. They claimed that the Métis had an Aboriginal right to hunt for food under s. 35(1). The Court agreed and suggested three criteria for defining who qualifies as Métis for purposes of s. 35(1):

1. Self-identification as Métis;

2. An ancestral connection to an historic Métis community; and

3. Acceptance by the modern Métis community.

[49] The third criterion — community acceptance — raises particular concerns in the context of this case. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s. 35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.

[50] The first declaration should, accordingly, be granted as requested. Non-status Indians and Métis are "Indians" under s. 91(24) and it is the federal government to whom they can turn.

l'art. 35 de la *Loi constitutionnelle de 1982*. Dans cette affaire, deux chasseurs métis qui avaient été accusés d'avoir enfreint la *Loi sur la chasse et la pêche*, L.R.O. 1990, c. G.1, ont fait valoir que les Métis possédaient, en vertu du par. 35(1), un droit ancestral de chasser pour se nourrir. La Cour leur a donné raison et a proposé trois critères pour définir qui peut être considéré comme un Métis pour l'application du par. 35(1) :

1. l'auto-identification comme Métis;

2. l'existence de liens ancestraux avec une collectivité métisse historique;

3. l'acceptation par la collectivité métisse actuelle.

[49] Le troisième critère — l'acceptation par la collectivité — suscite des préoccupations particulières en l'espèce. Les critères de l'arrêt *Powley* ont été établis spécialement pour l'application de l'art. 35, lequel a pour objet de protéger des droits collectifs historiques (par. 13). C'est la raison pour laquelle, afin de déterminer qui est un Métis visé à l'art. 35, l'acceptation par la collectivité a été jugée constituer un préalable à la reconnaissance de tels droits. Le paragraphe 91(24) vise pour sa part un objectif constitutionnel très différent. Il concerne la relation du gouvernement fédéral avec les peuples autochtones du Canada. Il est possible que, parmi les personnes visées par cette disposition, certaines ne soient plus acceptées par leurs collectivités parce qu'elles en auraient été séparées en raison, par exemple, de politiques gouvernementales comme celle relative aux pensionnats indiens. Il n'existe aucune raison logique justifiant de priver présomptivement et arbitrairement de telles personnes de la protection qu'offre le pouvoir de légiférer du Parlement sur la base d'un critère requérant leur « acceptation par la collectivité ».

[50] Il y a donc lieu d'accorder le premier jugement déclaratoire demandé. Les Indiens non inscrits et les Métis sont des « Indiens » visés au par. 91(24), et c'est vers le gouvernement fédéral qu'ils peuvent se tourner.

[51] But federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. This Court has recognized that courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government": *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 37 (emphasis in original). Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 S.C.R. 696, at para. 3.

[52] I agree, however, with both the trial judge and the Federal Court of Appeal that neither the second nor third declaration should be granted.

[53] The second declaration sought is to recognize that the Crown owes a fiduciary duty to Métis and non-status Indians. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, accepted that Canada's Aboriginal peoples have a fiduciary relationship with the Crown and *Manitoba Metis Federation* accepted that such a relationship exists between the Crown and Métis. As a result, the declaration lacks practical utility because it is restating settled law.

[54] The third declaration sought is that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.

[55] The claim is that the First Ministers' conferences anticipated by ss. 37 and 37.1 of the *Constitution*

[51] Cependant, le fait que le gouvernement fédéral ait compétence à l'égard des Métis et des Indiens non inscrits ne signifie pas que toute mesure législative provinciale les concernant est intrinsèquement *ultra vires*. Comme l'a reconnu notre Cour, il importe que les tribunaux « privilégient, dans la mesure du possible, l'application régulière des lois édictées par *les deux* ordres de gouvernement » (*Banque canadienne de l'Ouest c. Alberta*, [2007] 2 R.C.S. 3, par. 37 (en italique dans l'original)). En outre, la Cour a précisé que la compétence fédérale sur les Indiens prévue au par. 91(24) n'empêche pas l'instauration de régimes provinciaux valides qui ne portent pas atteinte à son contenu essentiel (*NIL/TU,O Child and Family Services Society c. B.C. Government and Service Employees' Union*, [2010] 2 R.C.S. 696, par. 3).

[52] Je suis toutefois d'accord avec le juge de première instance et la Cour d'appel fédérale pour dire qu'il n'y a pas lieu de rendre les deuxième et troisième jugements déclaratoires.

[53] Le deuxième jugement déclaratoire demandé vise à faire reconnaître que la Couronne a une obligation de fiduciaire envers les Métis et les Indiens non inscrits. Dans l'arrêt *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, notre Cour a admis qu'il existe une relation de nature fiduciaire entre les peuples autochtones du Canada et la Couronne et, dans l'arrêt *Manitoba Metis Federation*, elle a reconnu l'existence d'une telle relation entre la Couronne et les Métis. Par conséquent, le jugement déclaratoire demandé n'a aucune utilité pratique, parce qu'il ne ferait que réaffirmer des principes de droit bien établis.

[54] Le troisième jugement déclaratoire sollicité porte que les Métis et les Indiens non inscrits ont droit à ce que le gouvernement fédéral les consulte et négocie avec eux de bonne foi sur une base collective, par l'entremise de représentants de leur choix, relativement à l'ensemble de leurs droits, intérêts et besoins en tant que peuples autochtones.

[55] L'argument invoqué au soutien du troisième jugement déclaratoire est que les conférences des

Act, 1982[9] did not yield the hoped-for results in identifying and defining Aboriginal rights. The subsequent lack of progress implies that the federal government has not fulfilled its constitutional obligations.

[56] However, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, and *Powley* already recognize a context-specific duty to negotiate when Aboriginal rights are engaged. Because it would be a restatement of the existing law, the third declaration too lacks practical utility.

premiers ministres prévues aux art. 37 et 37.1 de la *Loi constitutionnelle de 1982*[9] n'ont pas produit les résultats souhaités quant à la détermination et à la définition des droits ancestraux. Le peu de progrès réalisé par la suite impliquerait que le gouvernement fédéral ne s'est pas acquitté de ses obligations constitutionnelles.

[56] Toutefois, les arrêts *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, *Nation Tsilhqot'in c. Colombie-Britannique*, [2014] 2 R.C.S. 257, et *Powley* reconnaissent déjà l'existence d'une obligation de négocier lorsque des droits ancestraux sont en jeu, obligation qui est fonction du contexte particulier. Comme il réaffirmerait des principes de droit existants, le troisième jugement déclaratoire demandé n'a lui non plus aucune utilité pratique.

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[9] **37.** (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

[9] **37.** (1) Dans l'année suivant l'entrée en vigueur de la présente partie, le premier ministre du Canada convoque une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même.

(2) Sont placées à l'ordre du jour de la conférence visée au paragraphe (1) les questions constitutionnelles qui intéressent directement les peuples autochtones du Canada, notamment la détermination et la définition des droits de ces peuples à inscrire dans la Constitution du Canada. Le premier ministre du Canada invite leurs représentants à participer aux travaux relatifs à ces questions.

(3) Le premier ministre du Canada invite des représentants élus des gouvernements du territoire du Yukon et des territoires du Nord-Ouest à participer aux travaux relatifs à toute question placée à l'ordre du jour de la conférence visée au paragraphe (1) et qui, selon lui, intéresse directement le territoire du Yukon et les territoires du Nord-Ouest.

37.1 (1) En sus de la conférence convoquée en mars 1983, le premier ministre du Canada convoque au moins deux conférences constitutionnelles réunissant les premiers ministres provinciaux et lui-même, la première dans les trois ans et la seconde dans les cinq ans suivant le 17 avril 1982.

(2) Sont placées à l'ordre du jour de chacune des conférences visées au paragraphe (1) les questions constitutionnelles qui intéressent directement les peuples autochtones du Canada. Le premier ministre du Canada invite leurs représentants à participer aux travaux relatifs à ces questions.

(3) Le premier ministre du Canada invite des représentants élus des gouvernements du territoire du Yukon et des territoires du Nord-Ouest à participer aux travaux relatifs à toute question placée à l'ordre du jour des conférences visées au paragraphe (1) et qui, selon lui, intéresse directement le territoire du Yukon et les territoires du Nord-Ouest.

(4) Le présent article n'a pas pour effet de déroger au paragraphe 35(1).

[57] For the foregoing reasons, while I agree with the Federal Court of Appeal and the trial judge that the second and third declarations should not be granted, I would restore the trial judge's decision that the word "Indians" in s. 91(24) includes Métis and non-status Indians.

[58] The appeal is therefore allowed in part and the Federal Court of Appeal's conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria, is set aside. It follows that the cross-appeal is dismissed. The appellants are entitled to their costs.

Appeal allowed in part and cross-appeal dismissed, with costs.

Solicitors for the appellants/respondents on cross-appeal: University of Ottawa, Ottawa; Paliare Roland Rosenberg Rothstein, Toronto.

Solicitor for the respondents/appellants on cross-appeal: Attorney General of Canada, Saskatoon, Ottawa and Edmonton.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the interveners the Native Council of Nova Scotia, the New Brunswick Aboriginal Peoples Council and the Native Council of Prince Edward Island: Burchells, Halifax.

Solicitors for the intervener the Metis Settlements General Council: Witten, Edmonton.

Solicitors for the intervener the Te'mexw Treaty Association: JFK Law Corporation, Vancouver.

Solicitors for the intervener the Métis Federation of Canada: Devlin Gailus Westaway, Victoria.

[57] Pour les motifs qui précèdent, bien que je convienne avec la Cour d'appel fédérale et le juge de première instance qu'il n'y a pas lieu de prononcer les deuxième et troisième jugements déclaratoires, je rétablirais la décision du juge de première instance selon laquelle le mot « Indiens » utilisé au par. 91(24) inclut les Métis et les Indiens non inscrits.

[58] Le pourvoi est donc accueilli en partie et la conclusion de la Cour d'appel fédérale selon laquelle le premier jugement déclaratoire devrait exclure les Indiens non inscrits ou ne s'appliquer qu'aux Métis qui satisfont aux critères énoncés dans l'arrêt *Powley* est annulée. Le pourvoi incident est en conséquence rejeté. Les appelants ont droit à leurs dépens.

Pourvoi accueilli en partie et pourvoi incident rejeté, avec dépens.

Procureurs des appelants/intimés au pourvoi incident : Université d'Ottawa, Ottawa; Paliare Roland Rosenberg Rothstein, Toronto.

Procureur des intimés/appelants au pourvoi incident : Procureur général du Canada, Saskatoon, Ottawa et Edmonton.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

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Solicitors for the intervener the Gift Lake Métis Settlement: Gowling WLG (Canada) Inc., Ottawa.

Solicitors for the intervener the Native Alliance of Quebec: Gagné Letarte, Québec.

Solicitors for the intervener the Assembly of First Nations: Gowling WLG (Canada) Inc., Ottawa.

Solicitor for the intervener the Métis National Council: Métis National Council, Ottawa.

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Procureurs de l'intervenant Chiefs of Ontario : Nahwegahbow, Corbiere Genoodmagejig, Rama, Ontario.

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Procureurs de l'intervenante l'Assemblée des Premières Nations : Gowling WLG (Canada) Inc., Ottawa.

Procureur de l'intervenant le Ralliement national des Métis : Ralliement national des Métis, Ottawa.

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-048861-093

DATE : August 3, 2015

PRESIDING: THE HONOURABLE CHANTAL MASSE, J.S.C.

STÉPHANE DESCHENEAUX
and
SUSAN YANTHA
and
TAMMY YANTHA
Plaintiffs
v.
ATTORNEY GENERAL OF CANADA
Defendant

and

CHEF RICK O'BOMSAWIN, NICOLE O'BOMSAWIN, CLÉMENT SADOQUES, ALAIN O'BOMSAWIN AND JACQUES THÉRIAULT WATSO, on their own behalf and in their capacity as elected council representing the ABENAKI OF ODANAK
and
CHEF RAYMOND BERNARD, CHRISTIAN TROTTIER, KEVEN BERNARD, LUCIEN MILLETTE AND NAYAN BERNARD, on their own behalf and in their capacity as elected council representing the ABENAKI OF WÔLINAK
Interveners

JUDGMENT

JM 2158

Unofficial English Translation

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INTRODUCTION

[1] Is the discrimination on the basis of sex suffered by Indian women and their descendants in the past with respect to their right to be entered in the Indian Register ("the Register") still present today? If so, has it been shown to be justified in a free and democratic society? Is the Court bound by the judgment of the Court of Appeal for British Columbia ("BCCA") in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*[1] ("*McIvor*") or are there grounds to set it aside in whole or in part? These are, in a few words, the basic issues that must be resolved here.

[2] Regarding the right to equality at issue in this case, Parliament has performed its task well in terms of the new regime established in the *Act to amend the Indian Act*[2] in 1985 and remedied from that point on the discrimination based on sex that had existed under the 1951 Act, which had created the Register and determined the conditions for being recognized as an Indian that may register.

[3] Nevertheless, the treatment of persons to whom both regimes were applicable did not perfectly meet the demands of this fundamental right. And indeed, the judgment of the BCCA in *McIvor*, which the Supreme Court of Canada refused to hear in appeal, gave rise to a legislative amendment in 2010. The purpose of the 2010 Act was to respond to that judgment by correcting sex discrimination arising from certain transitional provisions of the 1985 Act.

[4] In that case, the BCCA found that the discriminatory treatment was justified because it existed to preserve rights that were vested under the former legislation.

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1 2009 BCCA 153.

2 S.C. 1985, c. 27. For ease of comprehension, this judgment will refer to this statute as the "1985 Act". Similarly, the *Indian Act*, R.S.C. 1927, c. 98, will be referred to as the "1927 Act"; the *Indian* Act, S.C. 1951, c. 29, as the "1951 Act"; The *Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)*, S.C. 2010, c. 18, as the "2010 Act"; *Indian Act*, R.S.C. (1985), c. I-5, which is the version of the statute currently in force, as the *Indian Act*.

[5] The unjustified discrimination identified by the BCCA in *McIvor* arose from an additional benefit conferred by the 1985 Act on a particular group, not from a vested right. Parliament could have chosen to identify the persons suffering from discrimination on the basis of a prohibited ground in comparison to this advantaged group and try to remedy this discrimination. Instead, however, it chose to restrict the remedy solely to the parties to the dispute and persons in situations strictly identical to theirs.

[6] Both the plaintiffs and the Attorney General of Canada ("the AGC") argue that the Court must depart from the judgment in *McIvor* in part, and both ask that the Court apply only the portions that benefit them. For the reasons explained below, it is not appropriate to rule in favour of one party or the other on this issue, at least with respect to the essential and determinative reasons for that judgment.

[7] Taking into account the precedent established in *McIvor*, the Court must decide in this case whether the plaintiffs have demonstrated that they are victims of the unjustified discrimination identified in the BCCA judgment that the 2010 Act failed to remedy, or whether they are victims of discrimination that was not identified in that case but which is also unjustified.

[8] All three of the plaintiffs have met their burdens and proved discriminatory infringement of their equality rights. The discriminatory treatment they have suffered is clear from a comparison with a sub-group that is part of the advantaged group identified by the BCCA in *McIvor*. As in that case, the AGC has failed to demonstrate that these infringements arising from sex discrimination can be justified in a free and democratic society.

[9] Thus, discrimination of the same nature as that which historically prevailed against Indian women and their descendants with respect to their being entered in the Register still exists today, despite Parliament's attempts to eradicate it in 1985 and 2010. In fact, by benefiting a group that was already advantaged under the former statute, the 1985 Act exacerbated the discriminatory treatment of certain persons, including the plaintiffs and other persons in their situation. The 2010 Act did not remedy the situation, at the very least, not fully.

[10] Sex discrimination, though more subtle than before, persists.

[11] This description represents, in a nutshell, the results of a deeper and sometimes quite technical analysis, which is outlined after the background provided directly below.

I- BACKGROUND

[12] The elements required to understand the background to this case and the stakes involved will be addressed under the following headings: the main legislative provisions at issue; the legislative history before the 1985 Act, the 1985 Act, the *McIvor* judgment and the 2010 Act, the plaintiffs and the discrimination they allege, and finally, the conclusions sought by the plaintiffs and the positions of the other parties to the dispute.

1. The main legislative provisions at issue

[13] The legislative provision at the heart of this debate is section 6 of the Act, including the 2010 amendment, which added paragraph 6(1)(*c*.1). It reads as follows:

> 6. (1) Subject to section 7, a person is entitled to be registered if
>
> (*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;
>
> (*b*) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
>
> (*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
>
> (*c*.1) that person
>
> (i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(*b*) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,
>
> (ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,
>
> (ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,
>
> (iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and

(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;

(d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

(3) For the purposes of paragraph (1)(*f*) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(*a*);

(b) a person described in paragraph (1)(*c*), (*d*), (*e*) or (*f*) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision; and

(c) a person described in paragraph (1)(*c*.1) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.

[14] The problems are caused by the effect of this provision on the persons to whom the so-called Double Mother Rule applied until it came into force.

[15] The Double Mother Rule was set out in sub-paragraph 12(1)(*a*)(iv) of the 1951 Act. Sections 10 to 12 of that Act are instructive with respect to the discriminatory regime that applied until the enactment of the *Canadian Charter*:

> 10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.
>
> 11. Subject to section twelve, a person is entitled to be registered if that person
>
> (*a*) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, chapter forty-two of the statutes of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada,
>
> (*b*) is a member of a band
>
> (i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or
>
> (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,
>
> (*c*) is a male person who is a direct descendant in the male line of a male person described in paragraph (*a*) or (*b*),
>
> (*d*) is the legitimate child of
>
> (i) a male person described in paragraph (*a*) or (*b*),
>
> or
>
> (ii) a person described in paragraph (*c*),
>
> (*e*) is the illegitimate child of a female person described in paragraph (a), (*b*) or (*d*), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered, or
>
> (*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*).

> 12. (1) The following persons are not entitled to be registered, namely,
>
> (*a*) a person who
>
> (i) has received or has been allotted half-breed lands or money scrip,
>
> (ii) is a descendant of a person described in sub-paragraph (i),
>
> (iii) is enfranchised, or
>
> (iv) is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (*a*), (*b*), (*d*), or entitled to be registered by virtue of paragraph (*e*) of section eleven, unless, being a woman, that person is the wife or widow of a person described in section eleven, and
>
> (*b*) a woman who is married to a person who is not an Indian.
>
> (2) the Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

[16] These provisions remained in effect in this form until 1985, save for an amendment in 1956, which has no bearing on this case.

[17] In the context of the discrimination alleged by Susan and Tammy Yantha, paragraph 2(*e*) of the 1927 Act is of particular relevance:

> 2. In this Act, unless the context otherwise requires,
>
> …
>
> (*d*) "Indian" means
>
> (i) any male person of Indian blood reputed to belong to a particular band,
>
> (ii) any child of such person,
>
> (iii) any woman who is or was lawfully married to such person;

[18] These provisions, along with the other most relevant legislative provisions, are reproduced in English and French in a schedule to this judgment.

2. Legislative history before the 1985 Act

[19] Several judgments provide detailed descriptions of the sex discrimination that Indian women have historically suffered since the late 19th century in connection with

their status and that of their descendants. This direct, patent discrimination, set out in black and white in multiple statutes through the years, persisted until the coming into force of the 1985 Act on April 17, 1985, which coincided with the enactment of section 15 of the *Canadian Charter.*

[20] In Canada, an Indian woman lost her status as soon as she married a non-Indian man. This was true even before the 1951 Act. In contrast, their male counterparts who married non-Indian women not only preserved their Indian status, but also conferred this status on the person they legally married. Thus, before 1985, persons whose Indian fathers had married women who were non-Indian (before the marriage) were considered Indian, subject to the Double Mother Rule, while children of Indian women who had lost their status through marriage to a non-Indian man were not considered Indian.

[21] The BCCA provides a good summary of the evolution of the legislative regime over time, including the Double Mother Rule, with one minor caveat. Here is what it said:

> [14] Historically, members of First Nations in Canada were subject to special disqualifications as well as special entitlements. Not surprisingly, it became necessary, even prior to Confederation, to enact legislation setting out who was and who was not considered to be an Indian. In 1868, the first post-confederation statute establishing entitlement to Indian status was enacted. Section 15 of *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42 (31 Vict.) provided as follows:
>
> > 15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property:
> >
> > *Firstly*. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
> >
> > *Secondly.* All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And

> *Thirdly.* All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

[15] This early legislation, then, treated Indian men and women differently, in that an Indian man could confer status on his non-Indian wife through marriage, while an Indian woman could not confer status on her non-Indian husband. It appears that one rationale for this distinction was a fear that non-Indian men might marry Indian women with a view to insinuating themselves into Indian bands and acquiring property reserved for Indians.

[16] In 1869, the first legislation that deprived Indian women of their status upon marriage to non-Indians was passed. Section 6 of *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6 (32-33 Vict.) amended s. 15 of the 1868 statute by adding the following proviso:

Provided always that any Indian woman marrying any other than an Indian shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only.

[17] The traditions of First Nations in Canada varied greatly, and this new legislation did not reflect the aboriginal traditions of all First Nations. To some extent, it may be the product of the Victorian mores of Europe as transplanted to Canada. The legislation largely parallels contemporary views of the legal status of women in both English common law and French civil law. The status of a woman depended on the status of her husband; upon marriage, she ceased, in many respects for legal purposes, to be a separate person in her own right.

[18] The general structure of 1869 legislation was preserved in the first enactment of the *Indian Act*, as S.C. 1876, c. 18 (39 Vict.). This statute added further bases for the loss of Indian status, including provisions whereby an illegitimate child of an Indian could be excluded by the Superintendent General of Indian Affairs.

[19] Substantial changes in the regime were introduced in the *Indian Act*, S.C. 1951, c. 29 (15 Geo. VI). The statute created an "Indian Register". Sections 10-12 of the *Act* defined entitlement to registration as an Indian:

> [The text of the legislative provisions cited in full in the judgment is omitted here.]

[20] Apart from one amendment in 1956, this legislation survived intact until the 1985 legislation. The 1956 amendment made a change in the manner in

> which the registration of an illegitimate child could be nullified. It allowed the council of the band to which a child was registered, or any ten electors of the band, to file a written protest against the registration of the child on the ground that the child's father was not an Indian. The Registrar was then required to investigate the situation, and to exclude the child if the child's father was determined to be a non-Indian.
>
> [21] For the purposes of this litigation, then, there were three significant features of the legislation that immediately pre-dated the coming into force of s. 15 of the *Charter*: First, a woman lost her status as an Indian if she married a non-Indian. On the other hand, an Indian man retained his status if he married a non-Indian, and his wife also became entitled to status.
>
> [22] Second, a child born of a marriage between an Indian and a non-Indian was an Indian only if his or her father was an Indian. The rules for illegitimate children were more complex – if both parents were Indians, the child was an Indian. If only the father was an Indian, the child was non-Indian, and if only the mother was an Indian, the child was an Indian, but subject to being excluded if a protest was made.
>
> [23] Finally, from 1951 onward, where an Indian man married a non-Indian woman, any child that they had was an Indian. If, however, the Indian man's mother was also non-Indian prior to marriage, the child would cease to have Indian status upon attaining the age of 21 under the Double Mother Rule.[3]

[22] The only qualification the Court would bring to this description, one which had no impact in the case before the BCCA but which has given rise to arguments in this case, results from the joint effect of the wording of paragraph 11(*c*) – which became 11(1)(*c*) in 1956 – and that of sub-paragraph 12(1)(*a*)(iv) of the 1951 Act, as well as the regime applicable to illegitimate male children of Indians.

[23] Subparagraph 12(1)(*a*)(iv), which set out the Double Mother Rule, specified that it applied only to children of a marriage that occurred after its coming into force, namely, September 4, 1951. The provision, however, did not refer to any requirement that the Indian father be born of a marriage for the Double Mother Rule to apply. Under the regime applicable before 1951, the term "Indian" was defined as including, *inter alia*, any child of a male Indian, without regard to whether the child was legitimate and or to the sex of the child.[4]

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3 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 14–23.

4 1927 Act, paragraph 2(*d*) in the English version reproduced above, and paragraph 2(*e*) in the French version. The child could be excluded from the Band, however, under section 12, unless he or she has shared in the distribution moneys of such band for a period exceeding two years.

[24] As of September 4, 1951, illegitimate male children of an Indian man could be registered under paragraph 11(*c*) – which became 11(1)(*c*) with the 1956 amendments - but an illegitimate female child could not.[5]

[25] The result of these provisions is that, for the purposes of the Double Mother Rule, applicable to children born of marriages that occurred between September 4, 1951, and April 16, 1985, inclusively, it was not necessary for the Indian grandfather and non-Indian grandmother to have been married. In other words, it did not matter if the Indian father was illegitimate.

[26] Thus, under the Double Mother Rule, if the Indian father married a non-Indian woman after 1951 and was himself the child of an Indian man and a non-Indian woman, married or not, the children of this marriage would be entitled to preserve their Registered Indian status only until the age of 21.

[27] It should be noted, however, that the evidence reveals that numerous exceptions to the Double Mother Rule were granted at the request of certain Bands. Because the rule did not apply to members of these Bands, male Indian members could have children with non-Indian women over several generations without any consequences on the status of their descendants, unless they were illegitimate girls. Moreover, the Double Mother Rule was not uniformly applied in practice, as children who should have been deleted from the Register at 21 sometimes remained on it their whole lives.

[28] Finally, starting with the 1951 Act, the illegitimate children of an Indian woman remained on the Register unless the Registrar considered that their father was not Indian. Subsequently, as stated by the BCCA, the 1951 Act, as amended in 1956, provided that if such children were born after the coming into force of this amendment, they would be registered unless a protest made within 12 months of their addition to the Register gave rise to a decision that the child was not entitled to be registered because his or her father was not Indian.

3. The 1985 Act

[29] The situation described above changed on April 17, 1985, the date the 1985 Act came into force. Although it did not correct all of the inequalities of the past, it recognized the status of persons in the Register and the right of those who could have been registered under the rules applicable to them immediately before the coming into force of the 1985 Act. This is the effect of paragraph 6(1)(*a*) of the Act, which stipulates that, subject to section 7, which is not relevant to the case before us, a person who was registered or entitled to be registered immediately prior to April 17, 1985, is entitled to be registered.

[5] This is Supreme Court's interpretation of paragraph 11(1)(*c*) in the nearly evenly split decision rendered in *Martin v. Chapman,* [1983] 1 S.C.R. 365.

[30] It is worth pointing out that before this, section 7 of the 1951 Act permitted, among other things, the Registrar to delete the name of any person not entitled to be registered from the lists making up the Register.

[31] As a result of the 1985 Act, the names of persons in the Register immediately prior to the coming into force of the Act could not in principle be deleted without regard for the actual rights of these persons under the law applicable at that time. This is the interpretation that was accepted by the BCCA in *Marchand v. Canada (Registrar, Indian and Northern Affairs)*,[6] although it refrained from deciding whether persons who were fraudulently registered could benefit from Indian status.[7]

[32] To correct certain past situations, Parliament decided to confer the right to register to Indian women who were excluded as a result of their marriage to a non-Indian, to victims of the Double Mother Rule, to illegitimate female Indian children excluded after a protest, and to persons excluded on certain other grounds.

[33] The newly instituted neutral rule is referred to as the "second generation cut-off". Under this rule, children with two parents who were living or dead after the coming into force of the 1985 Act and who were entitled to be registered under section 6 have the right to be registered under 6(1). If only one parent is entitled to be registered under this provision, however, the child is registered under section 6(2). In such cases, the next generation cannot be registered unless the 6(2) parent has a child with a person entitled to be registered under 6(1) or 6(2). Thus, the established rule seeks to eradicate discrimination on the basis of sex that was systemic under the former system.

[34] It is obvious that if this rule had been applicable at all times, no sex discrimination would have taken place. The difficulty, rather, resides in the effect of other provisions recognizing certain rights for Indians who were registered before the coming into force of the 1985 Act, as well as for other persons. The transition between these two regimes is what was problematic, as the BCCA noted in *McIvor*.

[35] An observation: this new rule means that Indian women and their descendants were never treated as favourably as Indian men and their descendants under the pre-1985 Acts.

4. *McIvor* and the 2010 Act

[36] The 2010 Act had the less ambitious objective of responding to the judgment of the BCCA in *McIvor*, which found that the 1985 Act had created a new, unjustified type of discrimination. Sharon McIvor, her son Jacob Grismer, and Jacob Grismer's children were members of a group suffering from this type of discrimination.

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6 2000 BCCA 642 at paras. 38–43.

7 *Ibid*. at para. 44.

[37] In their actions, McIvor and Grismer challenged the constitutional validity of subsections 6(1) and 6(2) of the 1985 Act. They alleged that the historical discrimination against Indian women persisted because of the vested rights recognized in paragraph 6(1)(*a*). They argued that the 1985 Act had the effect of maintaining discrimination between the descendants of Indian men and those of Indian women.

[38] The judgment of the Supreme Court of British Columbia (BCSC), the counterpart of the Superior Court of Quebec, ruled in their favour, finding that there was discrimination on the basis of sex and marital status.[8] The trial judge also decided which remedy should be awarded, the purpose of which was to allow the registration of persons who could trace their forebears back to a woman who lost her Indian status because of her marriage to a non-Indian man.[9]

[39] On appeal, the BCCA restricted the scope of the judgment to the specific complaints of the plaintiffs themselves. Refusing to find discrimination on a matrilineal basis as alleged, the Court found that the discrimination that McIvor and Grismer were suffering resulted from sex discrimination against McIvor, as she had lost her status through her marriage to a non-Indian.

[40] Following the coming into force of the 1985 Act, Grismer's mother had regained her status under paragraph 6(1)(*c*), and he was therefore entitled to 6(2) status, while in the group to which he compared himself – i.e., children of Indian fathers who married women who were not Indian (before their marriage) were given 6(1) status. Thus, while Grismer himself had Indian status, his children with a non-Indian woman would not, whereas the children of men belonging to the comparator group who married non-Indian women after 1985, as he did, would be able to benefit from 6(2) status.

[41] According to the BCCA, this discriminatory situation was justified insofar as it existed to preserve the rights of the persons in the comparator group that were vested under the legislation in force before April 17, 1985.

[42] By recognizing that children of Indian fathers and non-Indian mothers who were targeted by the Double Mother rule could remain status Indians beyond the age of 21, however, the 1985 Act improved the status of an already advantaged group. This discrimination amplified the differential treatment between this group and that of the children of Indian mothers who lost their status as a result of marrying non-Indians. The additional discrimination created by the 1985 Act was found not to be a minimal infringement of the right to equality and to be unjustifiable under section 1 of the *Canadian Charter*. Here is the crux of, the conclusions of the BCCA in *McIvor*:

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8 *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827; additional reasons on the remedy published in 2007 BCSC 1732.

9 That at least is the BCCA's interpretation of the remedy awarded by the trial judge in paragraphs 152 and 153 of her judgment in *McIvor*. The Court has a few reservations regarding this characterization, but this issue has no impact here.

[93] In any event, it seems to me that the inherently multi-generational nature of legislation of the sort involved in this case and in Benner requires a court to take a broad, "purposive approach" to determining issues of discrimination and of standing. The determination of Indian status under the Indian Act requires an examination of three generations (here, Ms. McIvor, Mr. Grismer, and his children); it would not be in keeping with the purpose of s. 15 of the Charter to hold that sex discrimination directed at one of those three generations was inconsequential so long as the disadvantageous treatment accrued only to another of them.

…

[111] The impugned legislation in this case is, in my opinion, discriminatory as that concept is used in s. 15 of the *Charter*. The historical reliance on patrilineal descent to determine Indian status was based on stereotypical views of the role of a woman within a family. It had (in the words of Law) "the effect of perpetuating or promoting the view that [women were] ... less ... worthy of recognition or value as a human being[s] or as a member[s] of Canadian society, equally deserving of concern, respect, and consideration". The impugned legislation in this case is the echo of historic discrimination. As such, it serves to perpetuate, at least in a small way, the discriminatory attitudes of the past.

[112] The limited disadvantages that women face under the legislation are not preserved in order to, in some way, ameliorate their position, or to assist more disadvantaged groups. None of the distinctions is designed to take into account actual differences in culture, ability, or merit.

…

[122] The discrimination in this case is the result of under-inclusive legislation. The combination of s. 6(1)(*a*) and 6(2) of the *Indian Act* results in a situation in which people in Mr. Grismer's position are unable to transmit Indian status to their children only because their mothers, rather than their fathers, are entitled to status as Indians. This discrimination applies only to a group caught in the transition between the old regime and the new one.

…

[151] I find that the infringement of the plaintiffs' s. 15 rights is not saved by s. 1 of the *Charter*. In according members of the comparator group additional rights beyond those that they possessed prior to April 17, 1985, the 1985 legislation did not minimally impair the equality rights of the plaintiffs. However, the legislation does pass all other aspects of the s. 1 test.

…

[154] The *Charter* violation that I find to be made out is a much narrower one than was found by the trial judge. The 1985 legislation violates the *Charter* by according Indian status to children

> (i) who have only one parent who is Indian (other than by reason of having married an Indian).
>
> (ii) where that parent was born prior to April 17, 1985, and
>
> (iii) where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian).
>
> If their Indian grand-parent is a man, but not if their Indian grandparent is a woman.
>
> [155] The legislation would have been constitutional if it had preserved only the status that such children had before 1985. By according them enhanced status, it created new inequalities, and violated the *Charter*.
>
> [156] There are two obvious ways in which the violation of s. 15 might have been avoided. The 1985 legislation could have given status under an equivalent of s. 6(1) to people in Mr. Grismer's situation. Equally, it could have preserved only the existing rights of those in the comparator group. While these are the obvious ways of avoiding a violation of s. 15, other, more complicated, solutions might also have been found.
>
> …
>
> [161] Sections 6(1)(a) and 6(1)(c) of the *Indian Act* violate the *Charter* to the extent that they grant individuals to whom the Double Mother Rule applied greater rights than they would have had under s. 12(1)(a)(iv) of the former legislation. Accordingly, I would declare ss. 6(1)(*a*) and 6(1)(*c*) to be of no force and effect, pursuant to s. 52 of the *Constitution Act, 1982*. I would suspend the declaration for a period of 1 year, to allow Parliament time to amend the legislation to make it constitutional.
>
> …
>
> [165] … In particular, I find that the infringement of s. 15 would be saved by s.1 but for the advantageous treatment that the 1985 legislation accorded those to whom the Double Mother Rule under previous legislation applied.
>
> [166] I would allow the appeal, and substitute for the order of the trial judge and order declaring ss. 6(1)(*a*) and 6(1)(*c*) of the *Indian Act* to be of no force and effect. I would suspend the declaration for a period of 1 year.[10]

[43] The application for leave to appeal to the Supreme Court presented by the plaintiffs in that case was dismissed. The AGC did not present such an application but had indicated that it wished to proceed by way of incidental appeal if the Supreme Court granted the plaintiff's application.

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[10] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 93, 122, 151, 154–156, 161 and 165.

[44] Two judgments prolonged the duration of the suspension. In the first, the BCCA had to decide an application requesting that Grismer's children be granted status immediately as a condition for prolonging the suspension, which it refused to do. On that occasion, with a draft bill in hand, it expressed itself as follows, stating in passing that Grismer's children belonged to a group of persons who were victims of discrimination and that solutions other than the ones considered in their judgment were available to Parliament:

> [14] We do not think it is accurate to describe our reasons as affirming the rights of Mr. Grismer's children to registration under the *Indian Act*. Rather, we found that aspects of the current regime put them in a manner within a class of persons who had been treated less favourably than others under the *Act*, that infringed their equality rights. We recognized that an obvious option open to the government to redress the inequality was to extend the right to Indian status to persons in the positions of Mr. Grismer's children. We also recognized, however, that other methods of eliminating the inequality might also be available to government, and left it to Parliament to formulate an appropriate response.[11]

[45] In the judgment prolonging the suspension a second time, the BCCA stated the following:

> [6] There were, we are advised, inter-party discussions on the bill between May 25 and June 17, 2010. We have been provided with some material that indicates that the bill's passage through the House of Commons has been slowed down because some members of the House wish to broaden the bill to deal with issues beyond those specifically raised by this Court's decision of April 6, 2009.
>
> …
>
> [8] Parliament, of course, is the master of its own procedure, and we do not in any way wish to interfere with its processes. The Court recognizes that there are many issues that must be dealt with in Parliament. We would remind the Attorney General, however that a final determination by the courts that provisions of the *Indian Act* violate constitutional rights is a serious matter that must be dealt with expeditiously. We would also observe that while efforts of Members of Parliament to improve provisions of the *Indian Act* not touched by our decision are laudable, those efforts should not be allowed to unduly delay the passage of legislation that deals with the specific issues that this Court has identified as violating the *Charter*.[12]

[46] It should be noted that the comments of the BCCA certainly do not exempt Parliament from continuing its efforts to enact a statute free of unjustified discrimination, as it is constitutionally bound to do. On the contrary, the BCCA recognized that many issues required the attention of Parliament.

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11 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 168 at para. 14.

12 *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 338 at paras.6 and 8.

[47] The 2010 Act, however, did not seek to remedy all potential discrimination arising from the advantageous treatment under the 1985 Act of persons to whom the Double Mother Rule applied before that Act came into force. Instead, Parliament chose measures that applied only to persons who were in situations strictly identical to Grismer's.

[48] The legislative choice resulted in the four conditions set out in paragraph 6(1)(*c*.1), which determine which new persons can register after the judgment in *McIvor* and the coming into force of the 2010 Act.

- The person's mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to 1951.

- The person's other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at the at time if the death occurred prior to September 4, 1951.

- The person was born on or after the day on which the marriage giving rise to the mother's exclusion and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date.

- The person had or adopted a child on or after September 4, 1951, with a person who was not entitled to be registered.

[49] In the event of a failure to meet each of these conditions, a person not entitled to register under 6(1) before the amendments still could not obtain status afterward.

[50] Furthermore, the effect of the 2010 Act is to confer 6(2) status on Grismer's children only indirectly, given the 6(1) status granted their father. The specific factual situation of Grismer, who got married after 1985, was surely not unknown to Parliament when it made this decision, as the BCCA had observed that the children of persons belonging to the selected comparator group who were married after that date to non-Indians did obtain status.

[51] Only Indian women who lost status as a result of marriage needed to have gotten married at a specific time, i.e. before April 17, 1985, because their loss of status could not have taken place after this date. Their descendants did not need to have gotten married at the same time as the members of the comparator group or even to be married at all; their situation in terms of their Indian forebears simply needed to be identical to that of the members of the comparator group.

[52] The effect of the judgment of the BCCA is that the characteristic relevant to the capacity to transmit Indian status to a child is the necessary Indian forebears, which do not include non-Indian women who acquired status through marriage.

[53] All of these issues shall be dealt with in greater detail below. It is useful, however, to point out immediately that there was nothing to prevent the comparison of persons to whom the Double Mother rule applied before 1985 and who got married before 1985 – a group that received even better treatment under the 1985 Act. The children of these persons obtained 6(1) status for life, not 6(2) status for life.

[54] Thus, indirectly conferring 6(2) status on Grismer's children, as the BCCA suggested and as Parliament in fact did, did not fully correct the discrimination against them. It should be added, however, that such a comparison was not argued in *McIvor*. Descheneaux is one of the victims of this situation. We will return to this subject also.

5. The plaintiffs and the discrimination they allege

[55] Plaintiff Stéphane Descheneaux has children born between 2002 and 2007, who cannot be registered because he married a non-Indian and has only 6(2) status. He maintains that he is deprived of 6(1) status because of sex discrimination.

[56] His grandmother, Clémente O'Bomsawin, lost her status in 1935 after marrying a non-Indian. His mother, Hélène Durand, had no status at birth and married a non-Indian. Stéphane Descheneaux was born without status in 1968, long before the 1985 Act. His grandmother regained Indian status under 6(1)(*c*) of the 1985 Act, and his mother obtained 6(2) status at the same time. Stéphane Descheneaux still did not have status.

[57] After the 2010 Act, Stéphane Descheneaux's mother obtained status under 6(1)(*c*.1) because she met each of the four conditions provided. Stéphane Descheneaux, however, did not directly benefit from this provision because his mother's name was not omitted or deleted from the Register because of her marriage, since she had not been entitled to register either at birth or before her marriage. The provision did have the indirect effect, however, of granting Stéphane Descheneaux status under 6(2).

[58] The nature of the discrimination Stéphane Descheneaux alleges is explained in the declaratory conclusion sought regarding section 6 of the *Indian Act*:

> [TRANSLATION]
>
> B - **DECLARE** that section 6 of the *Indian Act* violates the equality guarantee set out in subsection 15(1) of the *Canadian Charter of Rights and Freedoms* in that it creates discriminatory differential treatment:
>
> 1- Between:
>
> a. on the one hand, the grandchildren of an Indian woman who married a non-Indian man, who were, like plaintiff Stéphane Descheneaux, born of a marriage that occurred between September 4, 1951, and April 16, 1985, or born out of wedlock between the same dates; and

> b. on the other hand, the grandchildren of an Indian man who married a non-Indian woman born of a marriage that occurred between September 4, 1951 and April 16, 1985, or born out of wedlock between the same dates;
>
> with regard to their respective capacities to pass on to their children the right to be registered in the Indian Register;
>
> …[13]

[59] The plaintiff Descheneaux argues, *inter alia*, that this distinction based on the sex of the Indian grandparent is discriminatory in that it perpetuates a stereotype whereby the Indian identity of women and their descendants are less worthy of consideration or have less value than that of Indian men and their descendants, and by having the effect that Stéphane Descheneaux's children cannot have Indian status passed down to them or enjoy certain attendant benefits, including those relating to their postsecondary education, which has also had an impact on him. He also argues that his dignity suffers from his inequality in status with persons in the group to which he compares himself.

[60] Finally, he alleges that section 6 of the Act is interpreted and applied so as to perpetuate such discriminatory treatment, which is contrary to the *Canadian Charter*.

[61] Plaintiffs Susan Yantha and Tammy Yantha have a slightly different story.

[62] Susan Yantha is the illegitimate daughter of an Indian man and a non-Indian woman. She was born in 1954 and did not have status at birth. For the first years of her life, she did not even know that her biological father was Indian. In her late adolescence, she learned who her father was and made her first attempt to contact him, to no avail. Later, in 1972, she had a child, the plaintiff Tammy Yantha, with a non-Indian man. Her marriage was dissolved by ecclesiastical tribunal in February of 1976.[14] No divorce judgment was filed in the record. She remarried in November of 1976 and had a second child, Dennis, in 1983. Susan re-established contact with her Indian father and put Tammy in touch with him as well. Susan's Indian biological father adopted her after her adoptive parents died. After the 1985 Act came into force, Susan obtained Indian status under section 6(2).

[63] Susan and Tammy Yantha allege the following discrimination, which is described in the conclusions to the motion to institute proceedings.

> [TRANSLATION]

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[13] Eighth amended motion to institute proceedings, February 6, 2015, at 28. The Court notes in passing that the AGC objected to the amendments made at the hearing and that they were nevertheless allowed, while reserving the right of the AGC to make an application seeking additional evidence in their respect. The AGC chose not to make such an application.

[14] Exhibit P-59; this judgment explicitly states that it has no impact on her status under the civil law.

> B - **DECLARE** that section 6 of the *Indian* Act violates the equality guarantees set out in subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, in that it creates discriminatory differential treatment:
>
> …
>
> 2- Between:
>
> a. on the one hand, women, like the plaintiff Susan Yantha, born between September 4, 1951, and April 16, 1985, out of wedlock of the union of an Indian man and non-Indian woman; and
>
> b. men born of out of wedlock of the union of an Indian man and a non-Indian woman, during the same period.
>
> with regard to their right to be entered in the Indian Register and their capacity to pass on this right to their children and grandchildren;
>
> 3- Between:
>
> a. on the one hand, children, like plaintiff Tammy Yantha, born between September 4, 1951, and April 16, 1985, of a woman born out of wedlock of the union of an Indian man and a non-Indian woman; and
>
> b. children born during the same period from a man born of a similar union;
>
> with regard to their respective right to be entered in the Indian Register and their capacity to pass on this right to their children;[15]

[64] It should be noted here that the discrimination that Tammy Yantha alleges does not necessarily mean that she was born of a marriage.[16]

[65] Susan and Tammy Yantha argue, *inter alia*, that the distinctions in terms of registration based on Susan's sex are discriminatory because they perpetuate a stereotype whereby the Indian identity of women and their descendants does not have the same value or importance as that of Indian men and their descendants.

[66] Susan maintains that she experiences feelings of injustice and humiliation because she is unable to pass on full Indian identity and the attendant benefits of that status to her children and grandchildren, while the persons to whom she compares herself can. She believes that she was deprived in a discriminatory manner of benefits

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15 Eighth amended motion to institute proceedings, February 6, 2015, at 28–29.

16 Whether or not Susan Yantha's marriage is valid is of no import in this respect. The Court will return to the issue of the validity of the marriage raised in defence further on when discussing the discrimination against Susan and Tammy Yantha.

for her children, particularly by having to pay post-secondary tuition for them herself, whereas the parents belonging to the comparator group did not have to.

[67] Tammy makes the same allegations and submissions with regard to the passing on of Indian identity and other benefits flowing from Indian status to her daughter Julia Louise.

[68] Susan and Tammy Yantha also allege that their dignity is affected by the inequality in status with persons belonging to the group with which they compare themselves.

[69] In concluding on this issue, it should be pointed out that the plaintiffs have not taken up the general argument raised at trial and dismissed in appeal in *McIvor* whereby they are victims of more general matrilineal discrimination to which a systemic remedy must be applied by reinterpreting history. Although they referred to such discrimination in their motion to institute proceedings, they based their arguments instead on the facts affecting them directly but that nevertheless concern more than one generation, which the BCCA accepted in *McIvor*.

6. Conclusions sought by the plaintiffs and the positions of the other parties

[70] In addition to the conclusions quoted above seeking to have section 6 of the Act declared discriminatory and constitutionally invalid, the plaintiffs ask the Court to broaden the application of section 6(1) of the Act so that it applies to them, in particular so that they, like those to whom they compare themselves, may see their children benefit from Indian status, which they do not now. In their motion, they suggest the precise wording of the new legislative provisions.

[71] The three plaintiffs also ask for a conclusion declaring that they are entitled to be registered with the status they seek and request that the Court render any other order it deems just.

[72] The interveners support the plaintiffs.

[73] The AGC argues that none of the plaintiffs have the standing to challenge the constitutional validity of section 6 in its application to persons born after April 16, 1985.[17] It denies the discrimination and argues in addition that if such discrimination did exist, it would be justified under section 1 of the *Canadian Charter*. It claims that the comparators selected by the plaintiffs are inappropriate, particularly because they enjoy vested rights, and argues that the plaintiffs are asking for section 15 of the *Canadian Charter* to be applied to a time prior to its coming into force.

[74] Finally, according to the AGC, the conclusions seeking a broad interpretation of the Act and a declaration of the rights of the plaintiffs to register would, in the first case,

[17] Para. 303 of the AGC's reamended defence.

be inconsistent with the role of the courts and, in the second, not fall within the jurisdiction of the Court. The only possible remedy if the Court declares section 6 to be constitutionally invalid in whole or in part would be to suspend the effect of such remedy so that Parliament may consider the appropriate options.

II- ANALYSIS

[75] The Court will first determine to what measure it is bound by the judgment of the BCCA in *McIvor*. It will then decide the preliminary issues raised by the AGC in connection with the plaintiffs' standing and the retroactive application of the *Canadian Charter*, which it argues are involved in the present action. The next issue discussed will be the highly disputed question as to whether the provisions concerning registration that have been applicable since 1985 are a source of sex discrimination against each of the plaintiffs and, because such discrimination is in fact identified, whether the AGC has demonstrated that it can be justified in a free and democratic society. Finally, the appropriate remedy shall be discussed.

1. To what extent does the judgment in *McIvor* bind the Court?

[76] The BCCA judgment in *McIvor* concerns section 6 of the 1985 Act, a federal statute applicable all over the country, and its constitutional validity in light of section 15 of the *Canadian Charter*. The Court has before it the same issue, although it must take into account the amendments in the 2010 Act and factual situations that differ somewhat but contain several commonalities with the situation in *McIvor*.

[77] Under the doctrine of *stare decisis*, litigants whose situations in fact and in law are the same as one already decided in a judgment by a higher court will be treated by the courts in a manner consistent with the findings in the prior judgment.[18]

[78] The application of constitutional law across Canada must be consistent, starting at first instance. There is no reason for the final judgments of appellate courts in such matters not to be binding authority in their respective provinces, or at least before the trial courts. It should be noted that binding authority is distinct from the enforceability of a judgment, as the recognition of a foreign judgment in Quebec for the purpose of enforcement is governed by the provisions of the *Civil Code of Québec*.

[79] Save in the case of contradictory appellate judgments, which is not the case here, the Court considers itself in principle to be bound by the decision of an appellate court in a constitutional case, even if the judgment is from another province.

[80] In *Carter v. Canada (Attorney General)*,[19] the Supreme Court discussed the fundamental importance of the principle of *stare decisis*, stating that courts may

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[18] *Hall v. Hébert*, [1993] 2 S.C.R. 159 at 202.

[19] 2015 SCC 5 at para. 44.

disregard it only where a new legal issue is raised or where there is a change in circumstances or evidence that "fundamentally shifts the parameters of the debate":

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42

[81] In that case, the Supreme Court found that the trial judge was correct to reconsider the judgment in *Rodrigues v. British Columbia*[20] because the evidence adduced justified doing so and the applicable legal framework under section 7 of the *Canadian Charter* had evolved significantly since that judgment, which was rendered in 1993.

[82] The Supreme Court, however, did not agree with the trial judge on the development of the law on the justification of an infringement of section 15 of the *Canadian Charter*, the provision invoked here, as sufficient to justify setting aside the judgment that had been rendered. This is what the Supreme Court said:

> [48] While we do not agree with the trial judge that the comments in *Hutterian Brethren* on the s. 1 proportionality doctrine suffice to justify reconsideration of the s. 15 equality claim, we conclude it was open to the trial judge to reconsider the s. 15 claim as well, given the fundamental change in the facts.[21]

[83] In this case, the parties agree that the test applied in *Withler v. Canada (Attorney General)*[22] should be applied here to determine whether there has been a violation of section 15 of the *Canadian Charter*. This two-stage test is nothing more than a reformulation of the three-stage test[23] set out in Law v. *Canada (Minister of Employment and Immigration)*,[24] on which the BCCA relied in *McIvor*.

[84] There has, however, been a certain evolution in the approach to determining the comparator group, which is now more clearly focused on substantive equality than on the comparison of groups that are identical in all respects. The Court must take this into account, particularly since it is relevant to the consideration of an issue that was not submitted before the BCCA but is before us in this case.

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20 [1993] 3 S.C.R. 519.
21 *Carter v. Canada (Attorney General)*, *supra* note 19 at para. 48.
22 [2011] 1 S.C.R. 396.
23 *R. v. Kapp*, [2008] 2 R.C.S. 483 at para. 17. See also the opinion of Abella J., for the majority concerning s. 15 in *Québec (A.G.) v. A.*, [2013] 1 S.C.R. 61 at paras. 323–330.
24 [1999] 1 S.C.R. 497.

[85] That said, the legal framework for section 1 of the *Canadian Charter* has not significantly evolved since *McIvor*. Indeed, the remarks of the Supreme Court in *Carter*, *supra*, mean that it would be difficult to conclude otherwise.

[86] In *McIvor*, the AGC challenged the plaintiffs' standing, which is also the case before us and for nearly identical reasons. The AGC also argued that the plaintiffs' submissions involved a retroactive application of the *Canadian Charter*. The AGC's argument was rejected by the BCCA. The AGC's oral arguments in this case asked the Court to reject the reasoning accepted by the BCCA on these issues in favour of the AGC's arguments, which were rejected by the BCCA. Its oral argument did not, however, point to any development in the law with respect to these issues.

[87] It can only be concluded that, aside from issues relating to the determination of the comparator group, there has been no evolution of the law justifying a reconsideration of *McIvor*. The 2010 Act, which is at issue before us, clearly is not the subject of the judgment of the BCCA, which was rendered before that statute was enacted. Insofar as that statute has not entirely resolved the discrimination arising from the 1985 Act that was identified in *McIvor*, however – and this is one of the plaintiffs' arguments – the Court remains in principle bound by that judgment on the questions of law it decided.

[88] The plaintiffs also submit that the facts in evidence before the Court are sufficiently distinct from those established in *McIvor* to justify a reconsideration, particularly with regard to the scope of the discrimination they suffer.

[89] In the plaintiff Stéphane Descheneaux's case, the nature of the discrimination he alleges is nearly identical to that identified by the BCCA in the case of the plaintiffs McIvor and Grismer, despite certain differences between Descheneaux and Grismer's situations. In Grismer's case, the discrimination he suffered was related to his mother's loss of status, and in Descheneaux's case, the discrimination he suffers today in terms of his registration is related to his grandmother's loss of status. In its decision, the BCCA also dealt with discrimination against McIvor's grandchildren, particularly in comparison to the more favourable treatment given under the 1985 Act to persons to whom the Double Mother Rule applied before the 1985 Act.

[90] On issues relating to discrimination with multigenerational aspects before and after the coming into force of the *Canadian Charter*, the Court is most certainly bound by *McIvor*. The fact situation in Descheneaux's case, however, sheds new light on the scope of the preferential treatment given certain persons to whom the Double Mother Rule applied, since his mother – unlike Grismer's – got married before 1985. On this issue, which was raised because of the different factual background in evidence in this case, on which *McIvor* did not rule, the Court is not bound by that earlier judgment.

[91] The discrimination alleged by the plaintiffs Susan and Tammy Yantha takes place in a slightly different context from that described in *McIvor*.

[92] Before 1985, Susan Yantha, the illegitimate daughter of an Indian man and a non-Indian woman, never had Indian status, whereas any illegitimate son of an Indian man and a non-Indian woman born during the same period did. After 1985 she obtained 6(2) status because she had only one Indian parent, while illegitimate male children born during the same time period as her obtained 6(1) status because they were already registered or were entitled to be on April 16, 1985. Although the fact situation is different, the nature of the discrimination is identical: it flows from the historically lower value placed by Parliament on a woman's Indian identity. The current discriminatory treatment of Susan and Tammy Yantha with regard to their registration, which occurs under the 1985 Act, also results – as it did in *McIvor* – from rights recognized in 6(1)(*a*) and benefits conferred on victims of the Double Mother Rule beyond the preservation of vested rights.

[93] The trial judgment in *McIvor* provides a thorough description of the considerable impact of recognition under 6(1)(*a*).[25] Nevertheless, the BCCA found that such discrimination was justified by the objective of preserving rights vested under the former statute, while also stating that the same was not true with respect to discrimination resulting from benefits conferred on victims of the Double Mother Rule that go beyond the preservation of such vested rights.

[94] The fact situation before the Tribunal cannot be characterized as "fundamentally shifting the parameters of the debate" and therefore does not allow it to reconsider the precedent established in *McIvor* on the issues of discrimination and its justification that were considered by the BCCA.

[95] Even if the Court were to ignore the weight of the precedent of *McIvor*, it would still be entirely in agreement with all of the conclusions set out in that judgment, except for one. Later on the Court will express its reservations as to the conclusion that the discriminatory treatment arising from the vested rights was justified. Despite the Court's reservations on this one issue, however, because of the importance of the rule of *stare decisis*, even in constitutional matters, the principles set out in *McIvor* on the issues before the BCCA will all be applied. The Court agrees with all the other conclusions and will add its own reasons to those of the BCCA on all of the other issues.

[96] Moreover, it is worth noting that if the Court had the latitude not to consider itself bound by *McIvor* on the issue of the justification of discrimination flowing from the preservation of vested rights and chose to depart from that ruling, the remedy granted the parties to this case would not have been any different or more extensive.

[97] Thus, the Court considers itself bound by the precedent established by the BCCA in *McIvor* to the following extent:

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[25] See, for example, paragraphs 199 to 220 of the judgment of the BCSC trial judgment in *McIvor v. The Registrar, Indian and Northern Affairs Canada, supra* note 8.

- *McIvor* binds the Court on all issues relating to the interest and standing to act, as well as the retroactive application of the *Canadian Charter*, since issues similar to those before the BCCA in this respect have been raised in this case;

the Court may not diverge from the conclusions of the BCCA that situations analogous to that in *McIvor* are discriminatory and, if it finds that Stéphane Descheneaux is the victim of such discrimination and the 2010 Act enacted after *McIvor* did not fully remedy the situation, it will also be bound by the conclusions of the BCCA whereby discriminatory effects resulting from the preservation of vested rights are justified and those resulting from additional benefits conferred by the 1985 Act on persons to whom the Double Mother Rule applied prior to that Act are unjustified;

- if the Court finds that the situation alleged by Susan and Tammy Yantha also constitutes discrimination, it will also not be possible to depart from the BCCA's opinion whereby the discrimination resulting from the preservation of vested right is justified, or from that whereby the discrimination arising from benefits beyond the preservation of vested rights conferred on victims of the Double Mother Rule is not justified;

provided that the facts relating to the justification are not radically different, which is not the case, as explained below.

[98] Moreover, and this must be reiterated, this Court is not bound by BCCA's judgment on the issue of the appropriateness of an even more advantaged comparator group because that issue was not submitted before the BCCA.

[99] Finally, it goes without saying that the Court is not bound by the *obiter* of the BCCA on how to remedy the discrimination that is found to exist. The BCCA issued its opinion in this respect incidentally, preferring to let Parliament determine the appropriate remedy. As a result, if Parliament was not bound by the suggestions of the BCCA in this respect, the Court is not either.

2. Do the plaintiffs have standing to act?

[100] At the hearing, the AGC argued that the plaintiffs do not have standing or sufficient interest.

[101] With respect to the plaintiff Stéphane Descheneaux, the reamended defence states on a few occasions that the [TRANSLATION] "true plaintiffs" are his children. Tammy Yantha, Susan's daughter, is one of the parties to the case and does not have status. It is therefore not surprising that there is no similar reference made concerning her mother Susan. In paragraph 173 of the AGC's notes and authorities, the AGC seems in fact to acknowledge Tammy Yantha's standing, at least with regard to the benefit of which she personally is deprived.

[102] The reamended defence also generally alleges, however, that the Act does not confer a right on parents to pass on their status to their children. It must therefore be understood that the interest or standing of Stéphane Descheneaux and Susan Yantha, who both have 6(2) status, is therefore still disputed. They both have Indian status themselves, but are unable to pass it on to their children because their spouses are not Indian. The same is true with regard to Tammy Yantha's standing because, according to the AGC, she has interest only in respect of herself, since her children must become plaintiffs themselves to be able to benefit from this decision.

[103] From the Court's perspective, this issue is among those settled in *McIvor*. The following excerpts from judgments rendered at first instance and in appeal in that case testify to this fact:

- **BCSC judgment:**

> 176] The plaintiffs submit that they seek a right to equal registration status and that each of registration status and the ability to transmit status to one's children is a benefit of the law to which s. 15 of the ***Charter*** applies. The plaintiffs submit that the challenged registration provisions governing registration constitute a benefit of the law, for both progenitors through whom the children derive status, and those upon whom the status is conferred.
>
> [177] The defendants submit that there is no denial of a benefit of law at issue in these proceedings. First, the benefits associated with registration are the same for all individuals, whether registered pursuant to s. 6(1)(a) as the plaintiffs seek, 6(1)(c) such as Sharon McIvor is, or 6(2) such as Jacob Grismer is. Thus, the difference in registration classification does not result in a denial of any benefit.
>
> [178] The defendants submit further that there is no right to transmit status. Rather, the entitlement to registration is conferred on a person by statute, and is contingent on the entitlement to registration of his or her parents. Registration or status as an Indian is not a right or entitlement which resides in the parent and which can be transmitted to a child. Accordingly, since regardless of registration status the plaintiffs have no ability to transmit status, they suffer from no denial of a benefit of the law. There is therefore, they submit, no violation of their equality rights.
>
> [179] It is correct that, with exception of the question of the status of one's children, entitlement to the tangible benefits associated with registration is the same for all persons registered whether under s. 6(1)(a), 6(1)(*c*), 6(2), or any of the other provisions in s. 6 of the ***1985 Act***. However, a person in Jacob Grismer's circumstances, married to a person who is not entitled to be registered, and therefore with children who are not entitled to be registered, will not have access to the tangible benefits available to children who are entitled to registration, such as extended health benefits, financial assistance with post secondary education and extracurricular programs. Since parents are responsible for the support of their children, such programs can, it seems to me, be benefits for both parent and child.

[180] The question of transmission of status as a benefit of the law in which both the parent and the child have an interest has arisen in a number of decisions. In ***Benner***, the plaintiff was the child. The respondent had argued that the child lacked standing because the discrimination was really imposed on his mother and not upon him. The court rejected this submission, concluding that the impugned provisions of the ***Citizenship Act*** are aimed at the applicant in that they determine the citizenship rights of the children, not of the parent. The ***Charter*** was engaged because the extent of the child's rights was dependent upon the gender of his Canadian parent. In ***Benner*** at para. 397 Iacobucci J. cited with approval an observation of Linden J.A., in dissent, suggesting that the mother was also discriminated against: "in this situation, the discrimination against the mother is unfairly visited upon the child."

[181] In ***Canada (Attorney General) v. McKenna***, 1998 CanLII 9098 (FCA), [1999] 1 F.C. 401 (F.C.A.), the issue was the provisions of the ***Citizenship Act*** pertaining to adopted children. Although the appeal was dismissed on other grounds, the court concluded that the ***Citizenship Act*** *prima facie* discriminates against children born abroad and adopted by Canadian citizens in comparison to children born abroad of Canadian citizens. The court also concluded that the adoptive mother could be considered to be a victim within the meaning of the ***Canadian Human Rights Act***, R.S.C. 1995, c. H-6.

[182] In ***Trociuk v. British Columbia (Attorney General)***, 2003 SCC 34 (CanLII), [2003] 1 S.C.R. 835, the provisions at issue were those of the ***Vital Statistics Act, R.S.B.C. 1996, c. 479*** that permitted the arbitrary exclusion of a father's particulars from his children's birth registration and of his participation from the choice of the child's surname. The court concluded that the arbitrary exclusion of the father from such participation negatively affects an interest that is significant to a father and did so in a way that the reasonable claimant would perceive as harmful to his dignity.

[183] The issue of the transmission of status from parent to child has been the subject of comment in international tribunals. Sources from international human rights law provide support for the view that the s. 15 right to equality encompasses the right to be free from discrimination in respect of the transmission of status. The plaintiffs relied on the following authorities:

1. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Algeria (January 27, 1999) at para. 83;

2. Concluding Observations of the Committee on the Rights of the Child: Kuwait (October 26, 1998) at para. 20;

3. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Iraq (June 14, 2000) at para. 187;

4. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Jordan (January 27, 2000) at para. 172; and

5. Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Morocco (August 12, 1997) at para. 64.

[184] In ***U.S.A. v. Burns***, 2001 SCC 7 (CanLII), [2001] 1 S.C.R. 283, the court acknowledged sources of international human rights law as including declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, and customary norms. Such sources were acknowledged to constitute persuasive sources for the interpretation of the content of the rights guaranteed by the ***Charter*** in ***Slaight Communications Inc. v. Davidson***, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038..

[185] The question of transmission of status must be considered in light of the substance of the concept that is at issue. This touches upon the intangible implications of the concept of Indian discussed earlier in these reasons. The government created the concept of Indian, and in so doing, superimposed this concept upon the First Nations' own definitions of cultural identity. It is clear, as discussed earlier, that this concept of Indian has come to form an important aspect of cultural identity.

[186] It seems to me that it is one of our most basic expectations that we will acquire the cultural identity of our parents; and that as parents, we will transmit our cultural identity to our children. It is, therefore, not surprising to see this basic expectation reflected in the evidence, not only of Sharon *McIvor* and Jacob Grismer, but also of many of the witnesses who testified before the Standing Committee. It is also not surprising that one of the most frequent criticisms of the registration scheme is that it denies Indian women the ability to pass Indian status to their children. For example, "... we are unable to pass our Indian-ness and the Indian culture that is engendered by a woman in her children ..." Standing Committee, September 13, 1982, testimony of Mary Two-Axe Earley, President, Quebec Equal Rights for Indian Women at p. 4:46.

[187] Numerous publications that emanate from government ministries make use of the language of transmission of status in discussions of registration provisions under the ***1985 Act*** and its previous versions. For example, the publication of the Ministry of Indian and Northern Affairs entitled *Impacts of the 1985 Amendments to the Indian Act* (*Bill C-31*) (Ottawa: Indian and Northern Affairs Canada, Summary Report, 1990) reflects this understanding and uses the language of transmission of status. At p. ii the study notes that most ***Bill C-31*** registrants sought status for reasons of cultural belonging, personal identity and correction of injustice. At p. iv, in a discussion of concerns, the authors note:

Some gender discrimination remains because in certain family situations, women who lost status through marriage prior to 1985 cannot automatically pass on

status to their children as can their brothers who married prior to 1985 (emphasis added).

[188] Similar language was adopted by the Royal Commission on the Status of Women, cited earlier in these reasons, in the recommendation that the ***Indian Act*** be amended, *inter alia* to allow an Indian woman upon marriage to a non-Indian to "transmit her Indian status to her children". The Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1, *The Justice System and Aboriginal People; A Public Inquiry in to the Administration of Justice and Aboriginal People* (Manitoba, 1991), also incorporates the language of the transmission of status as follows at ch. 13, p. 479:

While Bill C-31 (1985) addressed many of these problems, it created new ones in terms of the differential treatment of male and female children of Aboriginal people. Under the new Act, anomalies can develop where the children of a status Indian woman can pass on status to their children only if they marry registered Indians, whereas the grandchildren of a status male will have full status, despite the fact that one of their parents does not have status.

[189] The *Royal Commission Report* quoted at para. 22 of these reasons in describing the discriminatory aspects of the registration system stated ... they lost Indian status, membership in their home community and the right to transmit Indian status to the children of that marriage at p. 28.

[190] Jill Wherrett, "Indian Status and Band Membership Issues", Political and Social Affairs Division, Research Branch, Feb. 1996, is another example of such an official publication referring to the transmission of status. In a section entitled "*Continuing Inequities in Legislation*", the author states at pp. 9-10:

> Despite efforts to eliminate inequities through the amendments, the effects of past discrimination remain and new forms of discrimination have been created. The amendments resulted in a complicated array of categories of Indians and restrictions on status, which have been significant sources of grievance. The most important target of criticism is the "second generation cut-off rule," which results in the loss of Indian status after two successive generations of parenting by non- Indians. People registered under section 6(2) have fewer rights than do those registered under section 6(1), as they cannot pass on status to their child unless the child's other parent is also a registered Indian. One criticism comes from women who, prior to 1985, lost status because of marriages to non-Indian men. These women are able to regain status under section 6(1); however, their children are entitled to registration only under section 6(2). In contrast, the children of Indian men who married non-Indian women, whose registration before 1985 was continued under section 6(1), are able to pass on status if they marry non-Indians.

[191] This use of language is consistent with the basic notion that one acquires one's cultural identity from one's parents and that a parent transmits such status to his or her child.

[192] In my view, status under the ***Indian Act*** is a concept that is closely akin to the concepts of nationality and citizenship. Status under the ***Indian Act***, like citizenship, is governed by statute. The eligibility of a child in both cases is related to the circumstances of his or her parents. In my view, the eligibility of the child to registration as an Indian based upon the circumstances of the parent, is a benefit of the law in which both the parent and the child have a legitimate interest.

[193] It is my view that the defendants' submission is a strained and unnatural construct that ignores the significance of the concept of Indian as an aspect of cultural identity. The defendants' approach would treat status as an Indian as if it were simply a statutory definition pertaining to eligibility for some program or benefit. However, having created and then imposed this identity upon First Nations peoples, with the result that it has become a central aspect of identity, the government cannot now treat it in that way, ignoring the true pith and substance or significance of the concept.[26]

- **BCCA judgment:**

[70] This case is concerned with entitlement to Indian status. The plaintiffs have adduced significant evidence demonstrating that Indian status is a benefit. Under the terms of the Indian Act and other legislation, persons who have Indian status are entitled to tangible benefits beyond those that accrue to other Canadians. These include extended health benefits, financial assistance with post-secondary education and extracurricular programs, and exemption from certain taxes. The trial judge also accepted that certain intangible benefits arise from Indian status, in that it results in acceptance within the aboriginal community. While some of the evidence of such acceptance may be overstated, in that it fails to distinguish between Indian status and membership in a band, I am of the view that the trial judge was correct in accepting that intangible benefits do flow from the right to Indian status.

[71] The plaintiffs assert that the right to transmit Indian status to one's child should also be recognized as a benefit. I agree with that submission. Parents are responsible for their children's upbringing, and financial benefits that an Indian child receives will, accordingly, alleviate burdens that would otherwise fall on the parent. Quite apart from such benefits, though, it seems to me that the ability to transmit Indian status to one's offspring can be of significant spiritual and cultural value. I accept that the ability to pass on Indian status to a child can be a matter of comfort and pride for a parent, even leaving aside the financial benefits that accrue to the family.

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[26] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8 at paras. 176–193.

[72] It is evident to me, therefore, that there is merit in Mr. Grismer's claim that the ability to transmit status to his children is a benefit of the law to which s. 15 applies. Ms. *McIvor*'s claim is a more remote one. She does not, as a grandparent, have the same legal obligations to support and nurture her grandchildren that a parent has to his or her children.

[73] Given that Mr. Grismer is a plaintiff in this matter, and given that any practical remedy that might be granted could be based on the claim by Mr. Grismer rather than that of Ms. *McIvor*, it is, strictly speaking, unnecessary to determine whether the ability to confer Indian status on a grandchild is a "benefit of the law" to which s. 15 of the Charter applies. In view of the cultural importance of being recognized as an Indian and the requirement to give s. 15 a broad, purposive interpretation, however, I would be inclined to the view that the ability to transmit Indian status to a grandchild is a sufficient "benefit of the law" to come within s. 15 of the Charter.

[74] In the analysis that follows, I will concentrate on Mr. Grismer's claim, since it is, in some ways, more straightforward and simpler to describe than that of Ms. *McIvor*. Except as I will indicate, however, the analysis of Ms. *McIvor*'s claim would be similar. In my view, the claims stand or fall together.

…

[91] I am unable to accept this argument. As I have already indicated, I am of the view that the ability to transmit Indian status to his children is a benefit to Mr. Grismer himself, and not solely a benefit to his children. He is, therefore, in a situation analogous to that of Mr. Benner.

[92] Similarly, I am of the view that the ability to transmit Indian status to her grandchildren through Mr. Grismer is a benefit to Ms. *McIvor*. I am, therefore, of the view that she can also demonstrate that the legislation accords her disadvantageous treatment on the basis of sex.

[93] In any event, it seems to me that the inherently multi-generational nature of legislation of the sort involved in this case and in *Benner* requires a court to take a broad, "purposive approach" to determining issues of discrimination and of standing. The determination of Indian status under the *Indian Act* requires an examination of three generations (here, Ms. *McIvor*, Mr. Grismer, and his children); it would not be in keeping with the purpose of s. 15 of the *Charter* to hold that sex discrimination directed at one of those three generations was inconsequential so long as the disadvantageous treatment accrued only to another of them.

[94] This is not to say that the Court should adopt a broad "discrimination by association" doctrine. The extent to which a person can raise a *Charter* claim based on discrimination directed primarily against a person's ancestors or

> descendants must depend on the context of the legislation in question and its effects on the claimant.[27]

[104] The Court considers itself bound by the judgment of the BCCA and, moreover, agrees with the reasoning expressed by all of the British Columbia judges on this issue.

[105] What is more, in addition to the remarks of the government cited by Ross J. in first instance, Parliament agreed with this perspective by creating the condition of having a child to obtain status under 6(1)(*c*.1) under the 2010 Act.

[106] This condition implies that persons whose status is recognized under 6(2) are not victims of discrimination if they do not have at least one child, as it is only then that their status effectively limits their right to transmit it. Thus, by limiting the corrective brought by the 2010 Act to persons with at least one child, Parliament implicitly recognized the interest of those seeking to pass on their status.

[107] From all of the foregoing, it must be concluded that the three plaintiffs have sufficient interest in this action, within the meaning of section 55 C.C.P. Their interest is direct and personal, even when it concerns their ability to transmit Indian status to their children and grandchildren.

3. Does the action instituted require the retroactive application of the *Canadian Charter*?

[108] The AGC reiterated the argument made and rejected in *McIvor* whereby, in actual fact, the action undertaken seeks the retroactive application of the *Canadian Charter*. Not only is the Court bound by the judgment in *McIvor*, but it is in full agreement with the reasons set out on this issue, both in first instance and appeal. Essentially, the continuous nature of status means that the conditions whereby this status may or may not be obtained may be considered under the *Canadian Charter* as long as it involves the application of the Charter to the current conditions for obtaining or refusing status rather than an event that took place before it came into force:

- **BCSC judgment:**

> [144] The defendants submit that the plaintiffs' claim constitutes an impermissible attempt to apply the *Charter* in a retroactive or retrospective fashion. They submit that the real essence of the plaintiffs' claim is a challenge of the repealed provisions of the 1951 and 1970 versions of the Indian Act. The plaintiffs, however, submit that their challenge seeks neither a retroactive nor a retrospective application of the Charter. It is common ground that the Charter cannot be invoked to apply to repealed legislation or to attach future consequences to distinctions made in repealed legislation.

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[27] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 70–74 and 91–94.

[145] The leading case with respect to the issues of retroactivity and retrospectivity in the context of Charter litigation is Benner v. Canada (Secretary of State), 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358 [Benner]. The issue in Benner was the constitutionality of certain provisions of the Citizenship Act, S.C. 1974-75-76, c. 108 [Citizenship Act], which provided for different treatment of persons born before February 14, 1977, wishing to become Canadian citizens who had Canadian mothers when compared with those who had Canadian fathers. Prior to the enactment of the provisions at issue, children born abroad of Canadian fathers were entitled to claim Canadian citizenship on registration of their birth, but there were no such provisions for the children of Canadian mothers. Parliament then enacted new remedial legislation. The remedial legislation however continued to preserve different treatment for children born abroad of Canadian mothers prior to February 14, 1977. The legislation at issue created three classes of applicants for Canadian citizenship based on parental lineage:

> 1. Children born abroad after February 14, 1977. These children will be citizens at birth if either of their parents is Canadian: ss. 3(1)(b);
>
> 2. Children born abroad before February 15, 1977, of a Canadian father or out of wedlock of a Canadian mother. These children are automatically entitled to Canadian citizenship upon registration of their birth within two years of that birth or within an extended period authorized by the Minister: ss. 3(1)(e) (continuing ss. 5(1)(b) of the old Citizenship Act).
>
> 3. Children born abroad before February 15, 1977, in wedlock of a Canadian mother. These children must apply to become citizens and are required to swear an oath and pass a security check in order to qualify for citizenship: ss. 5(2)(b), 3(1)(c), 12(2), (3), 22(2) and (3).

[146] Mr. Benner was born in 1962 in the United States to a Canadian mother in wedlock. His father was not a Canadian. He applied for citizenship after he moved to Canada in 1986 under s. 5(2)(b) of the Citizenship Act. The Registrar refused his application because Mr. Benner did not pass the security check as a result of outstanding criminal charges against him.

[147] The court held that providing for differential treatment of persons wishing to become Canadian citizens who had Canadian mothers as opposed to those with Canadian fathers violated s. 15 of the Charter and could not be justified under s. 1. The offending provisions were, to the extent of the unconstitutionality, declared to be of no force and effect.

[148] One aspect of the decision was an analysis of the concepts of retroactivity and retrospectivity as they apply in the context of Charter litigation. Mr. Justice Iacobucci, speaking for the court, adopted the following definition of the concepts at para. 39:

> E.A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264 at pp. 268-69, has offered these concise definitions which I find helpful:
>
> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

[149] The following principles emerge from Benner with respect to the analysis of these concepts in the context of a claim under the Charter:

> (a) the Charter has neither retroactive nor retrospective application;
>
> (b) there is no rigid test for determining when an application is retrospective;
>
> (c) the court must consider the factual and legal context and the nature of the right at issue;
>
> (d) when considering the application of the Charter in relation to facts which took place before it came into force, the court must consider whether the facts constitute a discrete event or an ongoing status or characteristic;
>
> (e) the Charter cannot be evoked to attack a discrete event which took place before the Charter came into force such as a pre- Charter conviction;
>
> (f) the Charter can be invoked where the effect of a law is to impose an ongoing discriminatory status or disability on an individual; and
>
> (g) in applying the Charter to questions of status, the time to consider is not when the individual acquired the status but when the status was held against him or disentitled him to a benefit.
>
> (*Benner* at paras. 39-59).

[150] In *Benner*, the court concluded that the application of the Charter was not retrospective because:

> (a) the appellant's position was a status or on-going condition, being a child born outside Canada prior to February 15, 1977, to a Canadian mother and a non-Canadian father in wedlock; and
>
> (b) the discrimination took place when the state denied the appellant's application for citizenship on the basis of criteria which he alleged violated s. 15 of the Charter. This occurred after s. 15 of the Charter came into effect.

[151] In the instant case, the plaintiffs submit that the challenge is neither retroactive nor retrospective because the plaintiffs are not seeking to change the law in the past or to change the current legal consequences of a distinct event in the past, but rather to apply the Charter to current legislation. The case, they submit, concerns the application of the Charter to the legal effect of an ongoing state of affairs. They submit that the eligibility requirements for Indian status violate s. 15 of the Charter because the test for Indian ancestry continues to discriminate on grounds of sex, marital status, and legitimacy. The requirements of the current statute, the 1985 Act, continue to discriminate against descendents who trace their ancestry along the maternal line.

[152] Finally, the plaintiffs submit that the current challenge is not retrospective because, as in Benner, Ms. *McIvor* did not apply for registration for herself and her children until after s. 15 of the Charter came into effect. The discrimination did not take place until the state actually responded to the applications. This was after s. 15 came into effect and accordingly the denial is open to scrutiny under the Charter.

[153] The defendants submitted that, in seeking to be registered under s. 6(1)(a), the plaintiffs are asking to apply the Charter retroactively since the only way to achieve this remedy would be to retroactively amend the 1951 Act and the 1970 Act so that they "were registered or entitled to be registered immediately before April 17, 1985". The plaintiffs, they submit, are seeking to redress the historical discrimination of those repealed provisions, all of which pre-date the coming into force of s. 15 of the Charter. In addition, the defendants submit that the distinction in treatment about which the plaintiffs complain arises from the discrete event of Ms. *McIvor*'s marriage in 1970 to a person who was not entitled to be registered. It was, the defendants contend, the single discrete event of that marriage which raised the distinction. Ms. *McIvor* was, to use the language of Benner, confronted with the law as of the date of her marriage. In Mr. Grismer's case, his entitlement to registration crystallized at birth and not upon application for registration. Finally, the defendants submit that the relief the plaintiffs seek would amount to a finding of discrimination by association and that the Supreme Court of Canada in Benner cautioned against such findings.

[154] In my view, the analysis of whether the claim is retrospective or retroactive must focus not on the particular remedies sought on the substance or essence of the complaint. In the case at bar, the substance or essence of the plaintiffs' complaint is that the eligibility criteria found in s. 6 of the 1985 Act discriminate contrary to s. 15 of the Charter. This is a claim that addresses the

present criteria for registration and not the criteria from previous versions of the Indian Act. I agree with the submission of the plaintiffs that the eligibility provisions of prior versions of Indian Acts are engaged only because and to the extent that these provisions have been continued in the 1985 Act. The fact that such criteria have been incorporated in the 1985 Act does not however make the application of those criteria to present eligibility for registration a retrospective exercise.

[155] In my view, the defendants' submission that the only way in which the plaintiffs can succeed is if the court were to amend repealed legislation is incorrect. I agree that such an exercise would be an inappropriate attempt to apply the Charter to repealed legislation. Further, it is the case that given the current legislation as drafted, the plaintiffs could only be entitled to registration under s. 6(1)(a) by amending repealed legislation. That is in fact, a reflection of the very distinction in treatment about which the plaintiffs complain in this litigation. However, the plaintiffs as part of their relief seek registration pursuant to s. 6(1)(a) as they propose it should be amended by this court. Thus, the relief sought in fact would not amend repealed legislation, but only the current legislation.

[156] Turning to the other factors identified in Benner, the plaintiffs' claim engages s. 15 of the Charter. The right to equality is, as Madam Justice Wilson noted in R. v. Gamble, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595 at para. 40, a right whose purpose is to protect against an on going condition or state of affairs. Such rights are susceptible of current application even where such application takes cognizance of pre-Charter events; See Benner para. 43-44.

[157] In my view, with respect to each plaintiff, it is an ongoing status that is at issue and not a discrete event. I agree with the plaintiffs' submission that Ms. *McIvor* did not become disentitled to registration because of the discrete act of marriage, but because she was a woman. Marriage was not, and is not, an event that results in the loss of status. Indian men and women could marry each other without effect on their status. Indian men could marry women without effect on their status. Marriage was a bar to status only when an Indian woman married a non-Indian man. The relevant factor, therefore, is not marriage, which typically did not result in a loss of entitlement to registration, but being a woman who married a non-Indian man. It was, therefore, Sharon *McIvor*'s sex and not the event of marriage, which was the primary cause of the loss of her entitlement to registration. Mr. Grismer's case, like that of Mr. Benner, involved the status of being the child of an Indian mother who married a non-Indian.

[158] The plaintiffs' challenge is directed to the present legislation and not to past repealed versions of the legislation. Finally, the state became engaged with each plaintiff when application was made for registration and the Registrar responded to the applications. That event occurred after s. 15 of the Charter

came into force. Accordingly, I conclude that this case does not involve either a retroactive or a retrospective application of the Charter.[28]

- **BCCA judgment:**

[47] It is evident from the history of the Charter that it was not intended to apply retroactively. This is particularly clear in respect of s. 15 of the Charter, which, pursuant to s. 32(2) of the Charter did not take effect until 3 years after the rest of the Charter came into force. The delay in bringing s. 15 into effect was a recognition of the fact that considerable legislative amendment might be necessary in order to bring the laws of Canada into compliance with its dictates. It is now well-settled that the Charter applies only prospectively from the date it was brought into effect. Section 15, therefore, cannot be used to question the validity of governmental action that pre-dated its coming into force.

[48] On the other hand, continuing governmental action may violate the Charter even if it began prior to the coming into force of the Charter. Violations of s. 15 cannot be countenanced simply because discrimination began before April 17, 1985:

> Section 15 cannot be used to attack a discrete act which took place before the Charter came into effect. It cannot, for example, be invoked to challenge a pre-Charter conviction: R. v. Edwards Books and Art Ltd., 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713; R. v. Gamble, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from Charter review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to Charter scrutiny today: Andrews v. Law Society of British Columbia, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143.
>
> The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the Charter created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the Charter came into effect?
>
> Benner v. Canada (Secretary of State), 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358 at paras. 44-45

[49] Unfortunately, differentiating between ongoing discrimination and mere effects of concluded pre-Charter discrimination is not always a simple matter. In *Benner*, at para. 46, the Supreme Court of Canada adopted a flexible and nuanced approach to the issue:

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[28] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8 at paras. 144–158.

> [M]any situations may be reasonably seen to involve both past discrete events and on-going conditions. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of "detainee". Similar observations could be made about a marriage or divorce. Successfully determining whether a particular case involves applying the Charter to a past event or simply to a current condition or status will involve determining whether, in all the circumstances, the most significant or relevant feature of the case is the past event or the current condition resulting from it. This is, as I already stated, a question of characterization, and will vary with the circumstances. Making this determination will depend on the facts of the case, on the law in question, and on the Charter right which the applicant seeks to apply.

[50] The Benner case is instructive. In 1962, Mr. Benner was born abroad to a mother who was a Canadian citizen and a father who was not. At the time of his birth, the Canadian Citizenship Act, R.S.C. 1952, c. 33, provided that a child born abroad was entitled to Canadian citizenship if the child's father was a citizen. A legitimate child born abroad whose only Canadian parent was his or her mother was not entitled to citizenship. Mr. Benner, therefore, had no right to Canadian citizenship at the time of his birth.

[51] A new Citizenship Act (S.C. 1974-75-76, c. 108) came into force in 1977. For the first time, it allowed persons in Mr. Benner's position to apply for Canadian citizenship. Still, it differentiated between people born abroad whose fathers were Canadian and those whose mothers (but not fathers) were Canadian. If only the mother was a citizen, the child was required to meet requirements with respect to criminal records and national security; people whose fathers were Canadian did not have to satisfy those requirements. The difference was of significance to Mr. Benner, because he was, when his application was before the Registrar in 1989, facing serious criminal charges that prevented him from gaining citizenship.

[52] Canada argued that Mr. Benner's right to citizenship had crystallized in 1962, when he was born, or in 1977, when the new statute came into force. Any discrimination faced by Mr. Benner, it claimed, pre-dated the coming into force of the Charter. Therefore, it said, Mr. Benner was not entitled to rely on s. 15 to found his claim.

[53] The Supreme Court of Canada, at para. 52, rejected that view, holding that Mr. Benner's situation should be characterized not as an "event", but as an ongoing status:

From the time of his birth, he has been a child, born outside Canada prior to February 15, 1977, of a Canadian mother and a non-Canadian father. This is no less a "status" than being of a particular skin colour or ethnic or religious background: it is an ongoing state of affairs. People in the appellant's condition

continue to this day to be denied the automatic right to citizenship granted to children of Canadian fathers.

[54] It followed that any discrimination occurred when Mr. Benner applied for and was denied citizenship, not at an earlier date. The Court concluded, at para. 56:

In applying s. 15 to questions of status, or what Driedger, [Construction of Statutes (2nd ed. 1983), at p. 192], calls "being something", the important point is not the moment at which the individual acquires the status in question, it is the moment at which that status is held against him or disentitles him to a benefit. Here, that moment was when the respondent Registrar considered and rejected the appellant's application. Since this occurred well after s. 15 came into effect, subjecting the appellant's treatment by the respondent to Charter scrutiny involves neither retroactive nor retrospective application of the Charter.

[55] The case at bar is, in many ways, similar to Benner. Mr. Grismer says that he suffers discrimination because his Indian status derives from his mother rather than his father. He says that the discrimination is ongoing; his children (who were not even born prior to the coming into force of the Charter) are denied Indian status based on differences between men and women in the pre-1985 law that were preserved in the transition to the current regime.

[56] The defendants argue that the source of discrimination, if any, is Ms. *McIvor*'s loss of Indian status when she married a non-Indian. They say that any discrimination was not on the basis of sex, but on the basis of marriage. Further, they contend that the marriage was an event, not a status; therefore, they argue, any discrimination pre-dated the Charter.

[57] I am unable to accept the defendants' characterization of the matter for several reasons. First, to describe any discrimination as being based on "marriage" rather than "sex" is arbitrary. It might equally have been said that Mr. Benner suffered discrimination not because of the sex of his Canadian parent, but by virtue of the event of being born abroad. Ms. *McIvor*'s loss of status was not based solely on marriage or on sex, but rather on a combination of the two. The claim in the case at bar is based primarily not on differences in treatment between married and single people (just as the claim in Benner was not based on the difference between people born in Canada and those born abroad), but rather on the differences in treatment between men and women. In that sense, the claim is based on an ongoing status (that of Ms. *McIvor* being a woman) rather than on a discrete event (marriage).

[58] Second, the defendants' argument focuses exclusively on Ms. *McIvor*'s loss of status prior to the coming into force of the Charter. That loss is not, per se, the foundation for the claim of discrimination. Rather, it is the fact that Ms. *McIvor*'s grandchildren lack status that constitutes the tangible basis for a claim of discrimination. Had they a male Indian grandparent rather than a female one, the current legislation would grant them status.

[59] Finally, and importantly, the defendants ignore the detailed effects of the 1985 statute in suggesting that the alleged discrimination against Ms. *McIvor* and Mr. Grismer arose from pre-Charter statutory provisions. This becomes clear when one compares the situation of Ms. *McIvor*'s male analogue (or "hypothetical brother") under the old legislation and under the current regime. The situation is summarized in the following table:

Situation under Old Legislation	**Situation under 1985 Statute**
Hypothetical Brother Status Indian (s. 11(*e*) of pre-1985 Act) Marries non-Indian Maintains status	**Hypothetical Brother** Status Indian (s. 11(*e*) of pre-1985 Act) Marries non-Indian Maintains status
Child born – Child entitled to status	Child born – Child entitled to status
	1985 Act comes into force
– Assume child marries a non-Indian and has children –	
Grandchild of hypothetical brother loses Indian status at age 21 (s. 12(1)(*a*)(iv)of pre-1985 Act) (Double Mother Rule)	Grandchild of hypothetical brother entitled to Indian status (s. 6(2))

[60] The old legislation treated the hypothetical brother's grandchildren somewhat better than those of Ms. *McIvor*; the hypothetical brother's grandchildren would have enjoyed status up until the age of 21. It is, however, the overlay of the 1985 amendments on the previous legislation that accounts for the bulk of the differential treatment that the plaintiffs complain about. Under the 1985 legislation, the hypothetical brother's grandchildren have Indian status. They are also able to transmit status to any children that they have with persons who have status under ss. 6(1) or 6(2). Ms. *McIvor*'s grandchildren, on the other hand, have no claim to Indian status.

> [61] Thus, the most important difference in treatment between Ms. *McIvor*'s grandchildren and those of her male analogue was a creation of the 1985 legislation itself, and not of the pre-Charter regime.
>
> [62] For all of these reasons, I would reject the defendants' contention that the plaintiffs' claim would require the Court to engage in a prohibited retroactive or retrospective application of the Charter. Just as in the Benner case, the plaintiffs' claim in this case is one alleging ongoing discrimination.»[29]

[109] The reasoning of the BCSC and the BCCA on this issue is directly applicable to the action brought by the three plaintiffs in this case. Their action relies in particular on their status or lack thereof and the impossibility of passing it on to their children and grandchildren under the new regime that has been in place since 1985.

[110] Concerning the table in paragraph 59 of the BCCA judgment, it should be pointed out that if the marriage occurred before the 1985 Act, the treatment of persons to whom the Double Mother Rule applied under the 1985 Act is still more favourable than if the marriage occurred after 1985. Children who before lost their status at the age of 21 now obtain 6(1) status for life, not 6(2) status for life.

[111] The AGC cannot claim that this advantage results from the fact that the non-Indian wife benefits from a right vested under the former statute, because the former statute did not allow status acquired through marriage to be passed on to her children with an Indian man past the age of 21, at which point the Double Mother Rule applied.

[112] The idea here is not to rewrite the legislation applicable before 1985 on the basis of the *Canadian Charter*, but rather to make a decision regarding the constitutional validity of rights granted under the 1985 Act.

[113] The AGC's argument regarding the retroactive application of the *Canadian Charter* cannot be accepted.

4. Is there discrimination?

[114] First, we shall outline the general principles applicable in discrimination cases before determining the comparator group and whether there is discrimination against the plaintiffs.

4.1 *General principles*

[115] The right to equality without distinction based on a prohibited or analogous ground is set out in subsection 15(1) of the *Canadian Charter*:

> 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

[29] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 47–62.

> particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[116] The Supreme Court has now established a two-part test for determining whether there is a violation of the right to equality: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[30]

[117] In a very recent decision rendered on May 28 of this year, the Supreme Court summarized the case law on the issue as follows:

> [16] The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies that s. 15(1) of the *Charter* requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group": para. 331 (emphasis added).
>
> [17] This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v. Canada (Attorney General)***, [2011] 1 S.C.R. 396, at para. 2**; *R v. Kapp*, [2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in Andrews, such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.
>
> [18] The focus of s. 15 is therefore on laws that draw discriminatory distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: Andrews, at pp. 174-75; *Quebec v. A*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.
>
> [19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants

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30 *Withler* v. *Canada (A.G.)*, *supra* note 22 at para.30.

> may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.
>
> [20] The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:
>
> > The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]
>
> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.[31]
>
> (Emphasis added.)

[118] In this case, the plaintiffs allege that the discriminatory treatment they suffer is based on the enumerated prohibited ground of sex.

[119] As the Supreme Court states, the focus must be substantive and not formal equality. Mere difference or lack of difference is not accepted as justification for differential treatment. It must be determined what the measure truly accomplishes and whether the characteristics on which the differential treatment is based are relevant in the circumstances:

> [39] Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going

[31] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras. 16–21.

> behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.
>
> [40] It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.[32]
>
> (Emphasis added.)

[120] Let us now consider how these principles apply to the present case.

4.2 *The comparator group selected and the relevant personal characteristics*

[121] The plaintiffs, in both their written proceedings and oral arguments, referred to the treatment of persons who are related to them. This element has no relevance in determining whether, in law, there has been a violation of the right to equality.[33] Moreover, it would likely cause confusion if exemptions to the Double Mother Rule obtained by the Bands to which the victims of discrimination belong were taken into account.

[122] The plaintiffs and the other victims of discrimination may compare themselves to the group that is most advantaged under the Act, as long as their personal characteristics relevant to the benefit sought are similar except for the prohibited ground of discrimination, whether the members of the group at issue are related to them or not.

[123] From the excerpt from *Withler* quoted above, it is clear that the characteristics of the comparator group selected need not be strictly identical to those of the persons complaining of discrimination. That judgment, it must be noted, was rendered after that of the BCCA in *McIvor*.

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[32] *Withler* v. *Canada (Attorney General)*, *supra* note 22 at paras. 39 and 40.

[33] This does not mean, however, that Parliament cannot consider the sometimes different effects of the Act on persons who are related (cousins, for example) for reasons of fairness even without there being any question of discrimination. The role of the Court, however, is limited to reviewing the constitutional validity of section 6, without regard to any issues of fairness that may arise.

[124] In *McIvor*, both the BCCA and the trial judge before it identified a comparator group identical in all aspects to Grismer's situation. It nevertheless referred to the characteristic it considered essential, that relating to Indian forebears, and made a very general finding of discrimination. This is apparent in the following paragraphs of its judgment:

> [76] It is clear that the claimant under s. 15 is entitled, in the first instance, to choose the group with which he or she wishes to be compared (*Law* at para. 58). This is partly a function of the nature of the equality inquiry. The right to equality is not a right to be treated as well as one particular comparator group. Rather, it is, prima facie, a right to be treated as well as the members of all appropriate comparator groups. It is, therefore, no defence to a s.15 claim that some particular comparator group is treated no better than the group to which the claimant belongs. On the other hand, all that the claimant need show, in order to pass the first stage of analysis of a s. 15 claim, is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs.
>
> [77] In this case, Mr. Grismer wishes to compare his group (people born prior to April 17, 1985 of Indian women who were married to non-Indian men) with people born prior to April 17, 1985 of Indian men who were married to non-Indian women. That comparator group was accepted by the trial judge.
>
> [78] On the face of it, the comparator group proposed by Mr. Grismer is the most logical one. It is a group that is in all ways identical to the group to which Mr. Grismer belongs, except for the sex of the parent who has Indian status. By selecting this comparator group, Mr. Grismer isolates the alleged ground of discrimination as the sole variable resulting in differential treatment. That is, generally, an indicator of an appropriate comparator group:
>
> > The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter. *Hodge v. Canada Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65 at para. 23.
>
> [79] Here Mr. Grismer says that the benefit or advantage sought is the ability to transmit Indian status to one's children. The relevant characteristic is Indian ancestry. The personal characteristic that is a requirement of the statute, and which is allegedly offensive to the *Charter* is that the Indian parent be the father. While it is true that that personal characteristic is not expressly referred to in the current legislation, the plaintiffs argue that in preserving Indian status for those who had it prior to the 1985 amendments, that personal characteristic has effectively been imported into the current legislation.
>
> …

> [154] The *Charter* violation that I find to be made out is a much narrower one than was found by the trial judge. The 1985 legislation violates the *Charter* by according Indian status to children
>
> i) who have only one parent who is Indian (other than by reason of having married an Indian).
>
> ii) where that parent was born prior to April 17, 1985, and
>
> iii) where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian).
>
> If their Indian grand-parent is a man, but not if their Indian grandparent is a woman.
>
> …
>
> [161] Sections 6(1)(a) and 6(1)(*c*) of the *Indian Act* violate the *Charter* to the extent that they grant individuals to whom the Double Mother Rule applied greater rights than they would have had under s. 12(1)(*a*)(iv) of the former legislation. Accordingly, I would declare ss. 6(1)(*a*) and 6(1)(*c*) to be of no force and effect, pursuant to s. 52 of the *Constitution Act, 1982*. I would suspend the declaration for a period of 1 year, to allow Parliament time to amend the legislation to make it constitutional.
>
> …
>
> [165] … In particular, I find that the infringement of s. 15 would be saved by s.1 but for the advantageous treatment that the 1985 legislation accorded those to whom the Double Mother Rule under previous legislation applied.[34]
>
> (Emphasis added.)

[125] The selection of the comparator group in this case is conditioned by the fact that, in *McIvor*, the BCCA considered the favourable treatment of persons with vested rights to be justified. The Court has therefore selected as comparator a group of persons benefiting from improved treatment under the 1985 Act according to the BCCA.

[126] The BCCA provided the following description of the advantageous treatment enjoyed by the comparator group it identified as being in all ways identical to Grismer, which meant that Grismer's children would obtain 6(2) status:

> [137] I say this because the 1985 legislation did not merely preserve the rights of the comparator group. As I have previously indicated, members of the comparator group were able, prior to 1985, to confer only limited Indian status on

[34] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 76–79, 154, 161 and 165.

> their children. Such children (who would have fallen under the Double Mother Rule) were given status as Indians only up to the age of 21. Under the 1985 legislation, persons who fell into the comparator group were given Indian status under s. 6(1). Their children had status under s. 6(2) for life, and the ability to transmit status to their own children as long as they married persons who had at least one Indian parent.[35]
>
> (Emphasis added.)

[127] This is the result of the fact that Grismer got married after April 17, 1985, as well as the fact that the grandchildren of people to whom the Double Mother Rule applied and who married non-Indian women after 1985 also had 6(2) status.

[128] The fact situation in this case sheds a different light on the scope of the preferential treatment given under the 1985 Act to persons to whom the Double Mother Rule used to apply. It is appropriate, as requested by the plaintiffs, who have presented a table to this effect, to select as a comparator group the more advantaged sub-group of persons to whom the Double Mother Rule applied before 1985 when the parents of children who would have been excluded at the age of 21 got married before 1985.[36]

[129] All of the children who are members of the comparator group that had to be excluded under the Double Mother Rule – and this includes all children not yet born – lost their Indian status at the age of 21 under the provisions in force immediately before the 1985 Act.[37] In other words, before the enactment of the 1985 Act, an Indian father married to a mother who was non-Indian (before the marriage) and whose parents were an Indian man and a non-Indian woman could pass on his status to his children only during the first 21 years of their lives.

[130] Indian children under the age of 21 who were members of the comparator group at the time of the coming into force of the 1985 Act were granted 6(1)(*a*) status for life because they were either registered or entitled to be registered before the enactment of the statute. Persons over the age of 21 and born before 1985 who belonged to this group yet were still registered by error or otherwise were also recognized as having Indian status for life under the same provision, when this status might have been

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35 *Ibid*. at para. 137.

36 The plaintiffs Descheneaux and Tammy Yantha do not allege discrimination in their capacity to transmit their Indian status to their grandchildren. Accordingly, they have not asked the Court to consider as a comparator group persons who were excluded under the Double Mother Rule and who married a non-Indian woman before the age of 21 and before 1985. This judgment therefore does not deal with this issue. It should also be pointed out that most of the people who had to be excluded under the Double Mother Rule probably did not get married until after the age of 21, if they did at all. In such a case, they could not confer Indian status on their non-Indian wives, as they had already lost it before they got married. Persons who married after 1985 obviously could not either. One thing is certain: the possibility of passing on to another generation the advantages conferred by the 1985 Act on persons to whom the Double Mother Rule applied and who got married before 1985 becomes unrealistic at a certain point.

37 Subject to exemptions, as noted above.

questioned by the Registrar in the past. Persons who lost their status under the Double Mother Rule regained their Indian status under 6(1)(*c*), for life. Finally, persons born after April 17, 1985, of an Indian father who had married a non-Indian woman prior to this date and whose paternal grandparents were an Indian man and a non-Indian woman obtained Indian status under 6(1)(*f*), for life. The parents and grandparents of these persons therefore obtained the capacity to pass on their improved status.

[131] While there may be a relatively limited number of victims of the Double Mother Rule who actually lost their status and then regained it, the evidence does not reveal the number of other persons who benefited from this treatment that was more advantageous than under the former statute.

[132] As stated in *McIvor*, the plaintiffs may compare themselves to the more advantaged group. *Withler* reiterated that not all of the characteristics of the groups compared are relevant to the benefits sought, specifying further that it is appropriate to determine what the relevant characteristics are in the circumstances so as to better focus the analysis on substantive equality.

[133] Here, the relevant characteristic consists in the Indian forebears necessary to obtain or pass on status. Although the plaintiffs have tried to establish that all of their characteristics corresponded in every respect to those of the comparator group, it is sufficient for them to have their Indian ancestors as a commonality with this better-treated group and to demonstrate that they were not treated as advantageously on the basis of a prohibited ground of discrimination.

[134] Thus, if the 1985 Act granted 6(1) status for life to an already privileged group that was not entitled to such status under the former Act, while refusing groups that have historically been victims of discrimination when their genealogical characteristics, other than the sex of their Indian forebears, were the same, it must be concluded that it is discriminatory.

4.3 *Plaintiff Descheneaux*

[135] Descheneaux argues that he would be entitled to 6(1) status today and could therefore pass it on to his children if his Indian grandmother had been an Indian grandfather instead.

[136] He compares his situation to that of the grandchild of a hypothetical Indian man of the same generation as his grandmother Clémente, to whom the Double Mother Rule should have applied. When this hypothetical Indian man got married, he preserved his status and conferred it on his non-Indian wife. His son, born in the same era as Stéphane Descheneaux's mother, would therefore have had Indian status at birth. When the hypothetical son in turn married a non-Indian woman, she would obtain status. If they had children before April 17, 1985, the date the 1985 Act came into force, these children would, upon their birth, have status but in principle would lose it at the

age of 21 under the Double Mother Rule because their father had married a woman who was non-Indian (before her marriage) and because they were the grandchildren of an Indian man and a woman who was non-Indian (before her marriage).

[137] Before the 1985 Act, Stéphane Descheneaux, grandson of Clémente O'Bomsawin, did not have status, while the grandchildren of the hypothetical Indian man of the same generation as his grandmother would have had Indian status until the age of 21.

[138] When it came into force, the 1985 Act granted 6(1) status to the grandchildren who were members of the comparator group, whether or not they were registered at the time. Stéphane Descheneaux still did not have status. He acquired 6(2)status upon the enactment of the 2010 Act, while the grandchildren of the comparator group preserved their status under 6(1).

[139] The following tables illustrate the preceding:

Comparator group	Plaintiff Descheneaux
1927 Act	
The Indian grandfather preserves his status after his marriage and his non-Indian wife obtains it through the marriage.	The Indian grandmother, Clémente O'Bomsawin, loses her status upon marrying a non-Indian man in 1935.
The children of the non-Indian grandfather have status at birth.	Her daughter, Hélène Durand, future mother of the plaintiff Descheneaux, is not entitled to status at birth.
1951 Act	
The Indian grandfather and his wife preserve their status.	The Indian grandmother, Clémente O'Bomsawin, is still without status.
The Indian grandfather's son who marries after 1951 and before April 17, 1985, preserves his status and confers it on his non-Indian wife; they have the capacity to pass on their status to their children but only until those children reach the age of 21 (Double Mother Rule).	The daughter of the Indian grandmother, Hélène Durand, is still not entitled to status after her marriage to a non-Indian in 1968.
The grandchildren on the side of the Indian grandfather's son are entitled to status from birth until the age of 21 (Double Mother rule).	The grandson of the Indian grandmother, the plaintiff Descheneaux, born in 1968, is not entitled to status.
1985 Act	
The Indian grandfather and his wife preserve their status under 6(1)(*a*)	The Indian grandmother Clémente O'Bomsawin, regains status under 6(1)(*c*).

The Indian grandfather's son and his wife preserve their status under 6(1)(*a*) and acquire the capacity to pass on status for life to their current and future children under 6(1)(*a*), 6(1)(*c*) or 6(1)(*f*).	The Indian grandmother's daughter, Hélène Durand, obtains status under 6(2); she cannot pass on status to her children because she married a non-Indian.
The grandchildren on the side of the Indian grandfather's son who were born before April 17, 1985, of a marriage that occurred before that date obtain status for life under 6(1)(*a*) or 6(1)(*c*) and, if they are born after that date of a marriage that occurred before that date, also obtain status for life under 6(1)(*f*); they have the capacity to pass on at least 6(2) status to their children.	The Indian grandmother's grandson, the plaintiff Descheneaux, still does not have status.

2010 Act

The Indian grandfather and his wife preserve their status under 6(10)(*a*).	The Indian grandmother, Clémente O'Bomsawin, preserves her status under 6(1)(*c*).
The Indian grandfather's son and his wife preserve their status under 6(1)(*a*) and their capacity to pass on status for life to their current and future children under 6(1)(*a*), 6(1)(*c*) or 6(1)(*f*).	The Indian grandmother's daughter, Hélène Durand, goes from 6(2) status to 6(1)(*c*.1) status; she acquires the possibility of passing on at least 6(2) status to her children.
The grandchildren on the side of the Indian grandfather's son born before April 17, 1985, of a marriage entered into before that date preserve status for life under 6(1)(*a*) or 6(1)(*c*) and, if they are born after that date of a marriage that occurred before that date, also preserve their status for life under 6(1)(*f*); they preserve the capacity to pass on at least 6(2) status to their children.	The Indian grandmother's grandson, the plaintiff Descheneaux, born before April 17, 1985, of a marriage that occurred before that date, obtains 6(2) status; he does not have the capacity to pass on any status whatsoever to his children because the mother of his children is non-Indian.
The great-grandchildren on the side of the Indian grandfather's son obtain at least 6(2) status.	The Indian grandmother's great-grandchildren are not entitled to status.

[140] It is obvious that Descheneaux does not receive the same treatment as those who preserve their status because of rights vested under the former Act pursuant to 6(1)(*a*), because of the sex of his Indian grandmother who lost her status after marrying a non-Indian. This group includes Indians to whom the Double Mother Rule would have applied if not for exemptions obtained by several Bands. These Indians were therefore registered or were entitled to be registered on April 16, 1985. In *McIvor*, however, discrimination related to such vested rights was deemed to be justified, and the Court considers itself bound by this conclusion, as stated above and for the reasons set out below on the issue of justification.

[141] He is also not treated equally, however, when he compares himself to the more limited group to whom the Double Mother Rule applied before the 1985 Act and on

whom the statute conferred an additional advantage beyond the rights vested under the former statute. The table above also refers to the treatment given persons to whom the rule applied when the parents of the children excluded under the rule were married before 1985, i.e., the comparator group selected in this case. It must be recalled that, as in *McIvor*, Descheneaux is entitled to compare himself to the group receiving the most advantageous treatment.

[142] In substance, the plaintiff Descheneaux's situation and that of the comparator group in respect of their forebears is identical: they have only one Indian parent (other than a non-Indian woman who acquired status through marriage), and this Indian parent had only one Indian parent (other than a non-Indian woman who acquired status through marriage). The member of the comparator group has status under 6(1)(*a*) because his or her Indian grandparent is male, as is his Indian parent, while Descheneaux has status under 6(2) because his Indian grandparent is female, regardless of the sex of his parent whose Indian mother lost status by marrying,

[143] The sex of the Descheneaux's Indian parent is in fact of no importance. Even if his father and not his mother had been the child of the Indian grandmother who lost her status, the 1985 Act and the 2010 Act would not have allowed his non-Indian spouse to be retroactively considered Indian so as to confer 6(1)(*a*) status on Descheneaux, because the 1951 Act never applied to her. In this scenario, Descheneaux, his father and his non-Indian mother would not have been registered or entitled to be registered on April 16, 1985.

[144] It should also be noted that, while this is the case for Descheneaux and his mother, it is not necessary for the victim of discrimination to have gotten married before 1985 as the members of the comparator group did. This characteristic is not relevant to the benefit sought.

[145] Moreover, the discrimination identified by the BCCA in *McIvor*, like that observed in this case, does not mean that the grandchildren belonging to the group suffering discrimination must be born of a marriage.[38] This is not a characteristic that is relevant to a finding of discrimination or to the recognition of substantive equality. The lack of relevance of such a distinction is also consistent with the 2010 Act and the neutral scheme it established.

[146] Similarly, as *McIvor* in fact illustrates (*McIvor*'s grandchildren were born after 1985), the group suffering from discrimination is not limited to persons born during the period during which the Double Mother Rule applied.

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[38] Grismer married a non-Indian woman in 1999, but their children were born in 1991 and 1993. See the trial judgment in *McIvor*, *McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8 at para. 97.

[147] The existence of discrimination at the time of the application for registration, however, depends on the exclusion of the grandmother because of her sex and her marriage to a non-Indian, which means that she was married before April 17, 1985.

[148] The advantageous treatment given under the 1985 Act to a group that was already advantaged under the former regime was considered discriminatory by the BCCA in *McIvor*:

> [72] It is evident to me, therefore, that there is merit in Mr. Grismer's claim that the ability to transmit status to his children is a benefit of the law to which s. 15 applies. Ms. *McIvor*'s claim is a more remote one. She does not, as a grandparent, have the same legal duties to support and nurture her grandchildren that a parent has to his or her children.
>
> [73] Given that Mr. Grismer is a plaintiff in this matter, and given that any practical remedy that might be granted could be based on the claim by Mr. Grismer rather than that of Ms. *McIvor*, it is, strictly speaking, unnecessary to determine whether the ability to confer Indian status on a grandchild is a "benefit of the law" to which s. 15 of the *Charter* applies. In view of the cultural importance of being recognized as an Indian and the requirement to give s. 15 a broad, purposive interpretation, however, I would be inclined to the view that the ability to transmit Indian status to a grandchild is a sufficient "benefit of the law" to come within s. 15 of the *Charter*.
>
> [74] In the analysis that follows, I will concentrate on Mr. Grismer's claim, since it is, in some ways, more straightforward and simpler to describe than that of Ms. *McIvor*. Except as I will indicate, however, the analysis of Ms. *McIvor*'s claim would be similar. In my view, the claims stand or fall together.
>
> …
>
> [83] It is apparent that the Indian Act treats Mr. Grismer's group less well than the comparator group. Unlike those in the comparator group, Mr. Grismer is unable to transmit Indian status to the children of his marriage to a non-Indian woman.
>
> [84] Interestingly, even if one accepted the defendants' assertion that only people who were benefited by the 1985 amendments can constitute a comparator group, the result would be the same. The defendants argue, in their factum, that no appropriate comparator group obtained, as a result of the 1985 amendment, any benefit superior to that afforded Mr. Grismer:
>
> > 68. ... [L]ike all children of registrants entitled under s. 6(2), Mr. Grismer's children will not be entitled to registration if he parents with a non-Indian. This is the real benefit that the Respondents seek – registration and the ability to transmit entitlement to registration after two successive generations of parenting with a non-Indian.

> 69. However, no one obtains this benefit under the impugned legislation. The 1985 Act incorporates a second generation cut-off rule, and no one was reinstated or registered with the ability to circumvent it. The entitlement of Mr. Grismer's hypothetical cousin was only maintained or confirmed ... and not obtained … under s. 6(1)(*a*). [Emphasis added]

[85] In my view, this assertion mischaracterizes the effects of the 1985 amendments. As I have already noted, prior to 1985, Mr. Grismer's hypothetical cousin was not entitled to transmit normal Indian status to his children if he married a non-Indian. Any children of the marriage would cease to have Indian status when they attained the age of 21 under s. 12(1)(*a*)(iv) of the pre-1985 legislation. It is only with the coming into force of the 1985 legislation that such children received (or were reinstated to) full status.

[86] Even, therefore, if I were convinced by the defendants' argument that only those who were afforded enhanced status by the 1985 amendments can constitute a comparator group for the purposes of s. 15 of the *Charter*, it seems to me that Mr. Grismer would be able to demonstrate differential treatment.

…

[90] The defendants acknowledge that, based on Benner, if Mr. Grismer suffers discrimination as a result of his mother's gender, he has standing to raise a s. 15 claim. They say, however, that the situation that is alleged to prevail in this case is not discrimination against Mr. Grismer based on his mother's gender, but rather discrimination against Mr. Grismer's children based on his mother's gender.

[91] I am unable to accept this argument. As I have already indicated, I am of the view that the ability to transmit Indian status to his children is a benefit to Mr. Grismer himself, and not solely a benefit to his children. He is, therefore, in a situation analogous to that of Mr. Benner.

[92] Similarly, I am of the view that the ability to transmit Indian status to her grandchildren through Mr. Grismer is a benefit to Ms. McIvor. I am, therefore, of the view that she can also demonstrate that the legislation accords her disadvantageous treatment on the basis of sex.

[93] In any event, it seems to me that the inherently multi-generational nature of legislation of the sort involved in this case and in Benner requires a court to take a broad, "purposive approach" to determining issues of discrimination and of standing. The determination of Indian status under the Indian Act requires an examination of three generations (here, Ms. McIvor, Mr. Grismer, and his children); it would not be in keeping with the purpose of s. 15 of the Charter to hold that sex discrimination directed at one of those three generations was inconsequential so long as the disadvantageous treatment accrued only to another of them.

…

[111] The impugned legislation in this case is, in my opinion, discriminatory as that concept is used in s. 15 of the *Charter*. The historical reliance on patrilineal descent to determine Indian status was based on stereotypical views of the role of a woman within a family. It had (in the words of Law) "the effect of perpetuating or promoting the view that [women were] ... less ... worthy of recognition or value as a human being[s] or as a member[s] of Canadian society, equally deserving of concern, respect, and consideration". The impugned legislation in this case is the echo of historic discrimination. As such, it serves to perpetuate, at least in a small way, the discriminatory attitudes of the past.

[112] The limited disadvantages that women face under the legislation are not preserved in order to, in some way, ameliorate their position, or to assist more disadvantaged groups. None of the distinctions is designed to take into account actual differences in culture, ability, or merit.

…

[117] It follows that the unequal treatment of which the plaintiffs complain is discriminatory, and that the justifications for the discrimination proposed by the defendants are most appropriately considered under s. 1 of the *Charter*. The impugned legislation constitutes a prima facie infringement of s. 15 of the *Charter*. Section 6 of the *Indian Act* must be justified, if at all, under s. 1.

…

[154] The *Charter* violation that I find to be made out is a much narrower one than was found by the trial judge. The 1985 legislation violates the *Charter* by according Indian status to children

i) who have only one parent who is Indian (other than by reason of having married an Indian).

ii) where that parent was born prior to April 17, 1985, and

iii) where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian).

If their Indian grand-parent is a man, but not if their Indian grandparent is a woman.

[155] The legislation would have been constitutional if it had preserved only the status that such children had before 1985. By according them enhanced status, it created new inequalities, and violated the *Charter*.

[156] There are two obvious ways in which the violation of s. 15 might have been avoided. The 1985 legislation could have given status under an equivalent of s. 6(1) to people in Mr. Grismer's situation. Equally, it could have preserved only the

> existing rights of those in the comparator group. While these are the obvious ways of avoiding a violation of s. 15, other, more complicated, solutions might also have been found.
>
> …
>
> [161] Sections 6(1)(*a*) and 6(1)(*c*) of the *Indian Act* violate the *Charter* to the extent that they grant individuals to whom the Double Mother Rule applied greater rights than they would have had under s. 12(1)(a)(iv) of the former legislation. Accordingly, I would declare ss. 6(1)(*a*) and 6(1)(*c*) to be of no force and effect, pursuant to s. 52 of the *Constitution Act, 1982*. I would suspend the declaration for a period of 1 year, to allow Parliament time to amend the legislation to make it constitutional.
>
> …
>
> [165] … In particular, I find that the infringement of s. 15 would be saved by s.1 but for the advantageous treatment that the 1985 legislation accorded those to whom the Double Mother Rule under previous legislation applied.[39]
>
> (Emphasis added.)

[149] It is clear that Descheneaux also suffers discriminatory treatment because of his Indian grandparent's sex, even when his situation is compared to the more limited group of persons to whom the Double Mother Rule applied before the enactment of the 1985 Act and to the even more advantaged group selected for comparison in this case.

[150] Despite what the AGC argued, this finding, given the historical and stereotypical nature of the discrimination at issue, i.e., the lesser value assigned to the Indian identity of women and their descendants, in no way depends on the way Descheneaux or his children actually coped with their diminished status or lack thereof. The benefit they were deprived of is related to their inability to pass on status the way those in the comparator group can.

[151] It should be noted that, for the purposes of the comparison and the finding of discrimination, we must disregard persons in the comparator group who obtained status through marriage, as the BCCA did in paragraph 154 of its judgment, quoted above. To do otherwise would not be consistent with an approach focused on substantive rather than formal equality. It would also constitute a failure to find that status acquired through marriage was not full status given the Double Mother Rule. The BCCA expressed itself on this subject as follows:

> [141] The defendants have not presented evidence or argument attempting to justify the 1985 legislation on any basis other than that it preserved existing rights. When pressed, they acknowledge that the situation of persons in what I

[39] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra*, note 1 at paras. 72–74, 83–86, 90–93, 111, 112 , 117, 154–156, 161 and 165.

> have found to be the appropriate comparator group was ameliorated by the 1985 legislation. They say, however, that there is an important difference between the comparator group and Mr. Grismer's group. They note that members of the comparator group have two Indian parents –a father who is of Indian heritage, and a mother who became Indian by virtue of marriage. In contrast, Mr. Grismer has only one parent of Indian heritage – his mother.
>
> [142] I find this distinction unconvincing. It is based on the very sort of discrimination that Mr. Grismer complains of. Further, notwithstanding the Indian status of the comparator group's mothers, the pre-1985 legislation specifically limited the member's ability to transmit status to their children, through the Double Mother Rule.[40]

[152] The Court is of the view that paragraphs 6(1)(*a*), (*c*), and (*f*) and subsection 6(2) of the Act infringe on the plaintiff Descheneaux's right to equality enshrined in the *Canadian Charter* by granting full 6(1) status or 6(1) status beyond the age of 21 to certain persons:

i) who have only one Indian parent (other than a non-Indian woman who acquired status through marriage), and

ii) this Indian parent had only one Indian parent (other than a non-Indian woman who acquired status through marriage),

if their Indian grandparent is a man, but not if the Indian grandparent is an Indian woman who lost her status through marriage.

[153] In other words, the Act discriminates against Descheneaux by not allowing him to be registered with a status equivalent to 6(1), thereby preventing him from passing on his status to his children unless he has them with an Indian woman, which is not the case here.

[154] Another way of expressing the discrimination identified by the Court is to say that one of the ways Parliament could have ensured treatment free of sex discrimination against the group Descheneaux belongs to would have been to give status equivalent to that in subsection 6(1) to all persons with a parent whose mother is an Indian woman who lost her status by marrying their non-Indian father and whose father is a non-Indian man.

[155] Now that the Court has established that Descheneaux belongs to a group suffering from sex discrimination, it must now determine whether the same is true for the plaintiffs Susan and Tammy Yantha before addressing the issue of justification.

4.4 *Plaintiffs Susan and Tammy Yantha*

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[40] *Ibid*. at paras. 141–142.

[156] Although technically speaking, it was argued that Susan and Tammy could compare themselves to persons benefiting from vested rights, their council placed more emphasis on the comparator group of persons to whom the Double Mother Rule applied before 1985.

[157] As stated above, the Court considers itself bound by the BCCA's finding that the discrimination arising from the treatment of persons with vested rights was justified. The analysis is therefore focused on discrimination arising from the special treatment given the comparator group, namely, persons to whom the Double Mother Rule applied before 1985 when the parents of children who would have been excluded at the age of 21 were married before 1985.

[158] Susan Yantha compares her situation to that of the hypothetical illegitimate son of an Indian man born in the same period as her, while Tammy's situation is compared to that of children of a marriage of such an Indian man with a non-Indian mother.

[159] The hypothetical illegitimate son was born of an Indian father and a non-Indian mother, like Susan, but has Indian status from birth under paragraph 11(*c*) of the 1951 Act – which became 11(1)(*c*) with the 1956 amendments – as interpreted by the Supreme Court in *Martin v. Chapman*.[41]

[160] He preserved his status upon marrying a non-Indian before 1985 and his wife obtained status under the provisions applicable at the time. Their children, however, while they had Indian status at birth, stood to lose it at the age of 21 because of the Double Mother Rule, as described above.

[161] The 1985 Act granted children of the comparator group status under 6(1), but because Susan had only 6(2) status after the coming into force of this statute since she had only one Indian parent and did not marry an Indian, she could not pass that status on to Tammy Yantha, who remains without status.

[162] The 2010 Act had no impact on the two Yantha plaintiffs. The plaintiff Tammy Yantha, whose mother Susan did not have status and therefore did not lose it though marriage, does not meet this condition for the application of the new paragraph 6(1)(*c*.1). As for the plaintiff Susan Yantha, her father is the Indian parent, which means that she also does not fall within the scope of application of this provision.

[163] The tables that follow illustrate the effect of the different Acts on the status of the plaintiffs Susan and Tammy Yantha and on the comparator group.

Comparator group	PlaintiffsYantha
1951 Act	

[41] *Supra* note 5.

The Indian grandfather has a son out of wedlock with a non-Indian woman.	Clément O'Bomsawin, an Indian man, has a daughter out of wedlock with a non-Indian woman; the daughter is the plaintiff Susan Yantha, born in 1954.
The son born out of wedlock is entitled to Indian status upon birth under paragraph 11(*c*) (which became 11(1)(*c*) in 1956).	The plaintiff Susan Yantha is not entitled to status.
The son born out of wedlock preserves his status after marrying a non-Indian woman, and she obtains status through the marriage. Their capacity to pass on their status to their children, however, ceases when the children reach the age of 21 (Double Mother Rule).	The plaintiff Susan Yantha remains without status upon her first marriage to a non-Indian man and her second marriage to a non-Indian man, whether or not these marriages are valid.
The children of the son born out of wedlock is entitled to status from birth until the age of 21 (Double Mother Rule).	The children of the daughter born out of wedlock, Tammy Yantha, born in 1972, and Dennis, born on April 23, 1983, are without status at birth.

1985 Act

The son born out of wedlock and his wife preserve their status under 6(1)(*a*) and acquire the capacity to pass on the status for life to their current and future children under 6(1)(*a*), 6(1)(*c*) or 6(1)(*f*).	The daughter born out of wedlock, the plaintiff Susan Yantha, obtains status under 6(2) and cannot pass on status to her daughter Tammy Yantha because Tammy's father is non-Indian.
The children of the son born out of wedlock before April 17, 1985, of a marriage that occurred before that date obtain status for life under 6(1)(*a*) or 6(1)(*c*) and, if they are born after that date of a marriage that occurred before that date, also obtain status for life under 6(1)(*f*); they have the capacity to pass on at least 6(2) status to their children.	The child of the daughter born out of wedlock, the plaintiff Tammy Yantha, born before April 17, 1985, of a marriage that occurred before that date, remains without status and cannot pass on status of any kind to her children, and the same is true for Dennis, whether or not the marriages are valid.
The grandchildren of the son born out of wedlock obtain at least 6(2) status at birth.	The granddaughter of the daughter born out of wedlock, Julia Yantha, has no status at birth (2006).

2010 Act

No change.	No change.

[164] It is clear that, because of Susan's sex, Susan and Tammy Yantha receive differential treatment with regard to their status and registration and the possibility of passing on their status following the 1985 Act, when compared to the group to which the Double Mother Rule applied under the former regime. Ultimately, the 1985 Act further emphasized the lesser value assigned under the former Act to the Indian identity of

women and their descendants compared to that of Indian men and their descendants. This is clearly discrimination that has existed historically and is based on stereotype, which means that it is discrimination under section 15.

[165] Susan Yantha was born in 1954 and was therefore without status at birth because she was an illegitimate female child. The result is that neither Susan nor Tammy could pass on status to their children with non-Indian men. Susan obtained only 6(2) status under the 1985 Act and Tammy has none. In contrast, as stated and shown in the table above, the comparator group benefited upon the coming into force of the 1985 Act from an improved status that is no longer limited to passing on status to children until they reach the age of 21. Thus, children comparable to Tammy in terms of their Indian forebears obtain 6(1) status for life, while she has none.

[166] The question of the validity of the marriage of Tammy's parents, Susan Yantha and Robert Marier, was raised during arguments regarding the Double Mother Rule to dispute the validity of the group to which she compares herself as a comparator group.

[167] In the case of both Susan and Tammy, whether or not Tammy was born in or out of wedlock is not a personal characteristic relevant to the benefit sought, which is the right to be entered in the Register with status that allows her to pass it on to her children.

[168] It is the Indian forebears needed to obtain status that can be passed on to children – with the exclusion of persons who obtained status through marriage – that allow Susan and Tammy to compare themselves to the group to which the Double Mother Rule applies. Susan Yantha's Indian father is sufficient for this purpose. As seen above, not excluding from consideration persons who obtained status through marriage would be tantamount to denying that this case requires a ruling on substantive as opposed to formal equality. Moreover, this is the approach that was applied by the BCCA in *McIvor*.[42]

[169] The finding of discrimination in respect of the current conditions for registration and the right to pass on status can only exist in cases where, as in the case of Susan Yantha, the illegitimate daughter of an Indian man and a non-Indian woman was born between September 4, 1951, and April 16, 1985, inclusively. Before September 4, 1951, the illegitimate daughters of an Indian father had status at birth, as has been the case again, since April 17, 1985.

[170] As the table above shows, the 2010 Act in no way remedied the discriminatory situation identified.

[171] The Court is of the view that paragraphs 6(1)(*a*), (*c*), and (*f*) and subsection 6(2) of the Act infringe on the right to equality enshrined in the *Canadian Charter*:

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[42] See note 40 of this judgment and the explanations therein.

1. of Susan Yantha, by making it possible for

(i) some male illegitimate children of an Indian man and a non-Indian woman to pass on 6(1) status to their children with a non-Indian woman (who acquired status through marriage),

(ii) beyond the children's age of 21 or, in other words, for life,

when she is not permitted to do so because she is a illegitimate female child born between September 4, 1951, and April 16, 1985, inclusively;

2. of Tammy Yantha, by granting status equivalent to that in subsection 6(1) to some persons:

i) who have only one Indian parent (other than a non-Indian woman who acquired status through marriage), and

ii) this Indian parent was born out of wedlock of an Indian father and a non-Indian mother between September 4, 1951, and April 16, 1985, inclusively,

if their Indian parent born out of wedlock is a man but not if this Indian parent born out of wedlock is a woman born between September 4, 1951, and April 16, 1985, inclusively.

[172] Another way of expressing the discrimination identified by the Court is to say that one of the ways Parliament could have ensured equal treatment for all illegitimate daughters of Indian fathers compared to the comparator group would have been to confer status equivalent to that in subsection 6(1) on all persons whose mother was born out of wedlock to an Indian man and non-Indian woman between the dates referred to above, and whose father is non-Indian. Granting 6(1) status only to the illegitimate daughter is in fact insufficient because it does not ensure status equivalent to 6(1) for persons in Tammy's situation, which is what would be required for equality to be achieved.

[173] Taking for granted that the only tangible benefit of having 6(1) status as opposed to 6(2) status is the greater possibility of passing that status on to children, giving 6(1) status to Tammy directly would be sufficient to eliminate the discriminatory effect against her mother Susan. Despite her 6(2) status, this illegitimate child of an Indian father and a non-Indian mother would, through a corrective provision to this effect, *de facto* pass on 6(1) status to her children with a non-Indian man and therefore at least 6(2) status to her grandchildren.

5. Is the discrimination justified?

[174] Section 1 of the *Canadian Charter* establishes the limits within which Parliament may restrict *Charter* rights and liberties:

> 1. 1. The *Canadian Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[175] The AGC has the burden of justifying the violation of the plaintiffs' rights under subsection 15(1). It must first demonstrate that the objective of the impugned provision is pressing and substantial and the means chosen are proportional to that objective. An infringing provision is proportional to its objective if:

- the means adopted are rationally connected to the objective;
- the right at issue is infringed minimally;
- there is proportionality between its prejudicial and beneficial effects.

[176] This is essentially the test set out in *Oakes*[43] and applied in *McIvor*. In the proportionality analysis, courts must show a certain amount of deference to Parliament, as proportionality does not require perfection but merely that the limitations on fundamental rights and freedoms be reasonable. Also, when several solutions are possible, a complex regulatory measure is owed great deference.[44]

[177] The infringement on the plaintiffs' rights is prescribed by a legal rule, namely, section 6 of the Act.

5.1 *Pressing and substantial objective*

[178] In *McIvor*, the BCCA decided that preserving the rights of persons vested under the applicable legislative provisions prior to the coming into force of the 1985 Act is a pressing and substantial objective. This is how the BCCA expressed itself on this point, referring to the five objectives that Parliament itself had set:

> [123] I have already quoted from the speech of the Minister of Indian Affairs and Northern Development in the House of Commons on moving second reading of the legislation. He set out five objectives, or principles, for the legislation:
>
> (1) Removal of sex discrimination from the *Indian Act*.
>
> (2) Restoration of Indian status and band membership to those who lost such status as a result of discrimination in the former legislation.

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[43] [1986] 1 S.C.R. 103.

[44] See *Carter v. Canada (Attorney General)*, *supra* note 19 at para. 102 and the case law referred to in this paragraph.

> (3) Removal of any provisions conferring or removing Indian status as a result of marriage.
>
> (4) Preservation of all rights acquired by persons under the former legislation.
>
> (5) Conferral on Indian bands of the right to determine their own membership.

[124] The extensive legislative history presented in this case clearly establishes that these were, indeed, the objectives of the 1985 legislation. It cannot be seriously suggested that the government acted other than in good faith in enacting legislation in pursuit of these objectives.

[125] It is the fourth of the listed objectives, *i.e.*, preservation of existing rights, which is the most important for the purposes of the s. 1 analysis in this case.

[126] I am of the view that the objective of preserving the rights of people who acquired Indian status and band membership under pre-1985 legislation is properly considered to be pressing and substantial. The law generally places significant value on protecting vested rights. This is particularly important in situations where people have made life choices and planned their futures in reliance on their legal status.

[127] In enacting new legislation in 1985, the government cannot, in my view, be criticised for embracing the principle that those who had Indian status under the previous legislative regime ought to be able to retain the benefits of such status going forward. Indeed, such a principle was necessary in order to avoid the disruption and hardship to individuals that would have resulted from depriving them of Indian status.

[128] Because the legislation in this case is criticized as being under-inclusive, however, it is necessary to consider whether the government had a proper objective in refusing to grant Indian status under s. 6(1) to persons in the position of Mr. Grismer. In other words, was there a pressing and substantial objective that was satisfied by preserving the status of the comparator group, while not extending that status to the group to which Mr. Grismer belongs?

[129] In my view, there was such an objective, though the objective is apparent only when one examines the broader provisions and goals of the regime put in place in 1985. The 1985 legislation was passed only after years of consultation and discussion. The legislation resulted in a significant increase in the number of people entitled to Indian status in Canada. There were widespread concerns that the influx might overwhelm the resources available to bands, and that it might serve to dilute the cultural integrity of existing First Nations groups. The goal of the legislation, therefore, was not to expand the right to Indian status *per se*, but rather to create a new, non-discriminatory regime which recognized the importance of Indian ancestry to Indian status.

> [130] In fashioning the legislation, the government decided that having a single Indian grandparent should not be sufficient to accord Indian status to an individual. This was in keeping with the views expressed by a number of aboriginal groups. It was also in keeping with the existing legislative regime, which included the Double Mother Rule.
>
> [131] It is in this context that we must examine the transitional provisions of the 1985 legislation. It would have been quite anomalous for the legislation to extend Indian status to Mr. Grismer's children. They did not qualify for status under the old regime, nor would people in their situation (*i.e.*, having only a single Indian grandparent) have status in the future under the new regime.
>
> [132] It is true that one group of persons who have only a single Indian grandparent are entitled to status under the 1985 legislation. That group is comprised of persons who had status prior to April 17, 1985. That anomaly is (subject to what I will say later about the Double Mother Rule) justified by the governmental objective of preserving vested rights. To extend that anomaly to Mr. Grismer would give him equality with the existing anomalous group, but only at the expense of creating yet more anomalies in the legislation.
>
> [133] Given that there is a clear pressing and substantial objective in preserving the status of those who had Indian status prior to 1985, and given that it would be anomalous and not in keeping with the post-1985 regime to extend status to people in Mr. Grismer's situation, I am of the view that the first part of the s. 1 test is satisfied in this case. The legislative regime is premised on a pressing and substantial governmental objective.[45]
>
> (Emphasis added.)

[179] The evidence the AGC has adduced on this issue is essentially that which was filed in the record before the BCCA in *McIvor*. Regarding the issue of the objective of the 1985 Act, the plaintiffs' evidence adds nothing sufficiently different to give the Court the latitude to reconsider the BCCA's reasoning on the point.

[180] With great respect, the Court nevertheless has reservations with regard to the BCCA's analysis of the existence of a pressing and substantial objective justifying the refusal to grant status identical to that of Indians with vested rights to groups that have historically suffered from discrimination whose personal characteristics relevant to being granted such status are the same, except for the characteristic related to a prohibited ground of discrimination. Here is why.

[181] The specific considerations relating to vested rights, i.e. the practical consequences of the failure to respect those rights as described by the BCCA, are undeniable. The issue of why equal treatment was not given to Indian women and their descendants, when they possess the same characteristics in terms of their Indian forebears as those who benefit from the vested rights, poses a problem.

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[45] *McIvor v. Canada (Registrar of Indian and Northern Affairs*), *supra* note 1 at paras. 123–133.

[182] First, such a refusal is contrary to the primary objective identified by Parliament itself, namely, the eradication of any discrimination in the Act, and is not necessary to achieve the objective of maintaining the vested rights. The objective of eradicating all provisions conferring or withdrawing Indian status because of a marriage is not at issue. Neither the plaintiffs in *McIvor* nor those in this case have maintained that this objective is not valid or have asked that their spouses be given status because of their marriage. Their claims are limited to themselves and their capacity to obtain status and pass it on to their descendants. In any event, in terms of substantive equality and the justification, if this issue were ever raised, it would not necessarily receive the same treatment as claims made by Indian women and their descendants.

[183] Moreover, by referring to an objective that Parliament had not itself identified and that became apparent only upon a broader consideration of the provisions and objectives of the 1985 Act, the BCCA exempted the AGC from producing actual evidence of justification, taking as it did in paragraph 129 of its judgment the "concerns" expressed by interested groups as established.

[184] Thus, the concerns of some regarding the dilution of the cultural identity of First Nations could be considered in the context of the justification of an infringement of the right to equality only at the risk of giving weight to stereotypes. Indeed, the trial judge refers instead to evidence that runs contrary to her judgment,[46] and the BCCA did not point out any error on her part on this issue and makes no reference to specific evidence other than the concerns expressed by interested groups during consultations.

[185] In addition, in *Corbière v. Canada (Minister of Indian and Northern Affairs)*,[47] the Supreme Court held that it would be inconsistent with an approach seeking to achieve substantive equality to take into account stereotypes that assume that the very persons who were alienated from the First Nations because of the discrimination they suffered – in this case off-reserve members of Indian Bands, including those who had to leave the reserve because of discrimination – are not interested in participating meaningfully in the life of their band or in preserving their cultural identity:

> [18] Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on

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[46] See the judgment of the BCSC in *McIvor*, *McIvor v. The Registrar, Indian and Northern Affairs* Canada, *supra* note 8 at paras. 312–314.

[47] *Corbière v. Canada (Minister of Indian and Northern Affairs Canada)*, [1999] 2 S.C.R. 203 at paras. 17 and 18.

> reserves. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.
>
> (Emphasis added.)

[186] Similarly, the concerns for resources that were expressed are problematic, particularly if they are used as sole justification for the fact that appropriate measures were not taken to confer equality on persons suffering from discrimination based on a prohibited ground. Even if duly established, budgetary restrictions alone do not justify an infringement and could very well be greeted with skepticism by the courts.[48] The BCCA could not refer to these concerns as an element grounding its conclusion that there was a pressing and substantial objective justifying the refusal of equal benefits to a group that has historically been discriminated against, even if it was obvious that granting them these advantages would incur additional costs.[49] When an advantage is refused on the basis of a prohibited ground, equality often involves additional costs for society. The argument that there are suddenly insufficient resources for everyone once it is necessary to satisfy the requirements of the right to equality may in fact constitute another affront to this right.

[187] Admittedly, if the legislative choice had been to give Grismer the right to status under 6(1)(*a*), as was done for those who were entitled to be or were already registered, a new anomaly in terms of the neutrality of the established regime would have been created; in other words, it would have made it impossible to preserve the integrity of this part of the new regime as much as possible.

[188] The failure to decide that this new anomaly should be created to bring the group that continued to suffer discrimination when applying to register after April 16, 1985, to the same level as the advantaged group perpetuates the discrimination, making the new regime discriminatory in part. The “anomaly” favouring persons benefiting from vested

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[48] See on this issue the nuanced analysis of Binnie J., who drafted the reasons of the Supreme Court in *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at paras. 59 et seq., urging the courts in particular to “continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints” because “there are *always* budgetary constraints and there are *always* other pressing government priorities”, while also indicating that the courts cannot close their eyes to the periodic occurrence of financial emergencies (para. 72).

[49] In this case, the effects of the 1985 Act as well as the different scenarios of the increased numbers of persons entitled to be registered and their budgetary impact, taking for granted that health and postsecondary benefits would be maintained, were examined by the expert Stewart Clatworthy in his amended report D-276 and were the subject of his testimony for the defence at the hearing. The cost aspect could not be considered for all of the scenarios submitted and is subject to a number of reservations. The scenarios considered do not necessarily correspond exactly to what is contemplated in this judgment and are worded as though the pre-1985 statutes should be retroactively amended, which is not the case, as we have seen. This expert also filed another, more recent report under D-277, but the issue of costs was not updated. Furthermore, nothing in the record indicates that Parliament considered a detailed cost analysis before legislating in 1985. It should also be noted that this same expert also testified for the plaintiff on another issue.

rights is an integral part of the new regime. Maintaining the integrity of such a regime cannot be considered an objective justifying discrimination.

[189] Moreover, if an additional "anomaly" is necessary to eradicate discrimination – which is one of the objectives of the 1985 Act – it is at least as justified as the anomaly arising from the objective of maintaining the vested rights.

[190] For all of these reasons, and with the greatest respect, the Court has significant reservations with respect to the reasoning of the BCCA on the existence of a pressing and substantial objective justifying the refusal to treat persons in the situation of McIvor, Grismer, and their descendants equally to persons with vested rights.

[191] The reasoning of the BCCA, however, in a case very similar to Descheneaux's, is binding authority from a higher court. Despite its reservations, the Court considers itself bound by its assessment and therefore applies it in this judgment.

[192] It must be reiterated, however, that the remedy granted the plaintiffs would not be different if the Court did not feel itself bound by *McIvor*.

[193] In the case of the plaintiffs Yantha, giving them a status equivalent to 6(1) would also create new anomalies with respect to the neutral part of the new regime. The reasoning of the BCCA in *McIvor* also applies to them and is equally binding on the Court in their respect.

[194] Here, however, as in *McIvor*, the alleged violation does not arise solely from vested rights but also from additional rights granted persons to whom the Double Mother Rule applied. For this group, Parliament clearly ignored its objectives – particularly that of preserving vested rights but also that of eliminating discrimination. It also restored status to those who were victims of the Double Mother Rule, when these persons had not suffered from sex discrimination but had in fact received advantageous treatment because of the greater value placed on Indian identity transmitted by male Indians.

[195] By granting them this treatment, Parliament also failed to preserve the integrity of the newly established neutral regime. As the BCCA indicates in *McIvor*, the treatment of this group is also an anomaly in the context of the new regime. This anomaly is even more significant when we consider the treatment given the specific comparator group selected in this case, i.e., persons to whom the Double Mother Rule applied before 1985, when the parents of children who would have been excluded at the age of 21 were married before 1985.

[196] *McIvor* addressed this issue at the minimal impairment stage. It could also have been discussed at the pressing and substantial objective stage. Not only was it not demonstrated that there was such an objective justifying the grant of a more extensive right to this group while refusing it to persons in the plaintiffs' situation, but this legislative choice totally contradicts the objectives of the 1985 Act. Therefore, these

objectives could in no way be used to justify the discrimination arising from the additional rights granted this group in 1985.

5.2 *Proportionality of the chosen methods*

The rational connection between the methods chosen and the pressing and substantial objective

[197] If we accept that the objectives identified are pressing and substantial but only in relation to the preservation of vested rights, there is a rational connection between the measure – granting 6(1) status to persons registered or entitled to be registered while refusing to do the same to persons in the plaintiffs' position – and these objectives, which are to preserve rights vested under the former statute and to preserve the integrity of the neutral regime established as much as possible. A rational or logical causal connection between the violation and the benefit sought is established. This is what the BCCA found in *McIvor*, although it expressed a reservation as to the very existence of a pressing and substantial objective related to the additional benefits conferred on the group to which the Double Mother Rule applied.[50]

[198] In the absence of a pressing and substantial objective justifying the grant of additional benefits to the group to which the Double Mother Rule applied while simultaneously refusing them to comparable groups, the 1985 Act also fails this part of the test.

Minimal impairment

[199] The AGC will meet its burden with regard to minimal impairment if it demonstrates a lack of less infringing means to achieve the objective in a real and substantial manner. This stage of the analysis "is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's objective".[51]

[200] The BCCA found that, even when deference is shown to Parliament, which must reach a compromise between various interests, the 1985 Act cannot be considered to minimally impair the rights of Grismer and his group, specifically with respect to the rights it confers on the group to which the Double Mother Rule applied. The BCCA states the following on this issue:

> [140] The 1985 legislation put Mr. Grismer and his group at a further disadvantage *vis-à-vis* the comparator group than they were at prior to its enactment. Had the 1985 legislation merely preserved the right of children of persons in the comparator group to Indian status until the age of 21, the government could rely on preservation of vested rights as being neatly tailored to

[50] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, *supra* note 1 at paras. 132–134.
[51] *Carter v. Canada (Attorney General)*, *supra* note 19 at para. 102.

> the pressing and substantial objective under s. 1. Such legislation would have minimally impaired Mr. Grismer's right to equality. Instead, the 1985 legislation appears to have given a further advantage to an already advantaged group. I am unable to accept that this result is in keeping with the minimal impairment requirement of the *Oakes* test.
>
> [141] The defendants have not presented evidence or argument attempting to justify the 1985 legislation on any basis other than that it preserved existing rights. When pressed, they acknowledge that the situation of persons in what I have found to be the appropriate comparator group was ameliorated by the 1985 legislation. They say, however, that there is an important difference between the comparator group and Mr. Grismer's group. They note that members of the comparator group have two Indian parents – a father who is of Indian heritage, and a mother who became Indian by virtue of marriage. In contrast, Mr. Grismer has only one parent of Indian heritage – his mother.
>
> [142] I find this distinction unconvincing. It is based on the very sort of discrimination that Mr. Grismer complains of. Further, notwithstanding the Indian status of the comparator group's mothers, the pre-1985 legislation specifically limited the member's ability to transmit status to their children, through the Double Mother Rule.
>
> [143] I find that the 1985 legislation does not minimally impair the equality rights of Mr. Grismer, because it served to widen the existing inequality between his group and members of the comparator group.[52]

[201] This same reasoning, with which the Court is this time in full agreement and by which it is bound, applies to the situation of the three plaintiffs.

[202] The AGC has of course tried to persuade the Court to distance itself from the BCCA's judgment on the issue of minimal impairment.

[203] Largely on the basis of the same evidence as that presented to the BCCA in *McIvor*, which was also filed in this case, it argues that it would not have been fair or reasonable to refuse to give more to persons affected by the Double Mother Rule than what might have resulted from the preservation of rights vested under the former legislation. In its written submissions, it maintains that it would not have been reasonable to perpetuate a policy that removed the right to register at the age of 21 in the name of preserving vested rights and that this would have been contrary to the general thrust of the 1985 Act. Here are its precise arguments on this issue:

> [TRANSLATION]
>
> 106. First, we submit that the DMR resulted in a unique situation in which the strict application of the principle of the "preservation of vested rights" in 1985 would not have been reasonable for the persons directly affected. The

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[52] *McIvor v. Canada (Registrar of Indian and Northern Affairs*), *supra* note 1 at paras. 140–143.

> government cannot be faulted for refusing in 1985 to perpetuate a policy that removed the right to register from persons at the age of 21. It would have been contrary to the general thrust of Bill C-31.
>
> 107. In other words, removing a person's right to be registered after the age of 21 after having spent his or her entire life as a registered Indian is not something that the government could reasonably have done in the name of strictly preserving vested rights. Removing the right to register from an adult, taking away a right on which he or she has relied while growing up, is problematic in itself.
>
> 108. If we apply the reasons of the BCCA (on the minimal impairment test) to the facts of this case, it would render the government's justification of the line it drew after re-establishing the right to registration (in this case not going so far as to allow the registration of the great-grandchildren of women who got married) conditional on the perpetuation of a practice that was found untenable in 1985, namely, the DMR.[53]
>
> (Emphasis added.)

[204] Arguments closely related to those above were submitted before the BCCA in the *McIvor* case[54] and were not accepted. The Court is also of the view that they should not be accepted in this case.

[205] The first remark to be made is that the general thrust of the 1985 Act was to put an end to sex discrimination, not to emphasize it, and to restore status to persons who had suffered discrimination, not to improve the fate of advantaged groups who had not. The AGC's argument that it would be contrary to the general thrust of the 1985 Act not to grant further recognition to the rights of persons to whom the Double Mother Rule applied is therefore without merit.

[206] The second point to be made concerns the scope of the additional rights conferred by the 1985 Act on this group, which was already better treated than the groups to which the plaintiffs belong. These additional rights benefit not only those who were likely to be or were already excluded by the Double Mother Rule, but also their Indian fathers who married their mothers who were non-Indian (before the marriage) before the 1985 Act came into effect. Because of this additional advantage, these fathers may in fact transmit their status to their children, both those born before the 1985 Act came into effect and those born after, and this status is passed on for life, whereas under the Double Mother Rule they could pass on their status only for the first 21 years of their children's lives. Grandparents also benefit, as they have the increased possibility of transmitting their status to their grandchildren even though their mother and grandmother were non-Indian (before they were married).

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53 Notes and authorities of the AGC at paras. 106–108.

54 See in particular para. 62 of the written submissions of the AGC submitted on the issue raised by Groberman J. at the hearing, Exhibit P-50.

[207] Third, the AGC's argument that it was necessary to go beyond preserving rights vested under the former statute is tantamount to considering a concern for fairness for an already advantaged group to be a pressing and substantial objective justifying an emphasis on sex discrimination against persons belonging to historically disadvantaged groups. Such an outcome is unacceptable in law.

[208] It is very true, as counsel for the AGC ably argued, that there is something odious about withdrawing Indian status from a person at the age of 21, given how such status is intrinsic to identity. It certainly must be borne in mind, and it is to Parliament's credit that it had the sensitivity to grant persons affected by the Double Mother Rule a status that lasted beyond their vested right to hold it until the age of 21.

[209] It is no less odious, however, to totally refuse to grant such a status, so intimately linked as it is to identity, to a person in the same situation with respect to their Indian forebears as others who have it, and to do so for discriminatory reasons. Such discrimination was ignored by Parliament in the 1985 Act, and this infringement on the fundamental right to equality was deemed to be justified by the BCCA precisely on the basis of the maintenance of vested rights.

[210] The preservation of the integrity of the new neutral regime was also invoked by the BCCA as justification for the infringement, but this integrity is not preserved by recognizing the vested rights, and even less by granting a new, superior benefit.

[211] Taking the additional step of determining that the discrimination arising from the grant of rights beyond vested rights to the already advantaged group to whom the Double Mother Rule applied was justified would be tantamount to finding that Parliament may add insult to injury with impunity.

[212] In short, to the extent that Parliament wished to treat these persons fairly by granting them additional rights in the 1985 Act, it was required to respect the right to equality in so doing, given the enactment of the *Canadian Charter*.

[213] It follows from the foregoing that the differential treatment alleged by the plaintiffs is not limited to what is reasonably necessary to achieve the objectives of the Act, which would have been the case if only the vested rights had been preserved. This is what the BCCA decided in *McIvor*. Again according to the BCCA, this less infringing option would have made it possible to achieve the pressing and substantial objectives identified by Parliament.

The proportionality between the prejudicial and beneficial effects

[214] Given the preceding, it is not necessary to decide the issue the proportionality of the prejudicial and beneficial effects of the measures at issue. The BCCA, however, did rule on the issue. The Court shall refrain from making any comment on this part of the judgment in *McIvor*, noting only that this analysis did not modify the conclusion that the AGC had not successfully shown that the discrimination observed in comparison with

the persons to whom the Double Mother Rule applied was justified under section 1 of the *Canadian Charter*.

5.3 *The 2010 Act*

[215] The evidence also reveals that the 2010 Act sought to bring a solution to the discrimination identified by the BCCA only in the case of persons with situations identical to Grismer's by bringing them to the same level as the group affected by the Double Mother Rule when the parents of children who would have been excluded at the age of 21 under that rule were married after 1985, as was Grismer's case. It did not correct the situation of the plaintiffs compared to that of the comparator group selected in this case, which is the same except the parents of children who would have been excluded at age 21 were married before 1985.

[216] The 2010 Act therefore did not entirely correct the situation of increased discrimination resulting from the 1985 Act. Its objective of correction, which was limited to persons in the same situation as Grismer, does not justify the augmented discrimination caused by the 1985 Act, which continued to exist in the plaintiffs' cases even after the 2010 Act.

5.4 *Conclusion on justification*

[217] The AGC has not successfully discharged its burden of showing that the impairment is minimal or that there were no less infringing means or, even more fundamentally, that there was a pressing and substantial objective justifying the more marked discriminatory treatment suffered by the plaintiffs since the 1985 Act came into effect.

[218] Given the finding of an unjustified infringement of the plaintiffs' right to equality under section 15 of the *Canadian Charter*, it is not necessary to analyze the plaintiffs' arguments regarding the other potential sources of a right to equality.[55]

6. What is the appropriate remedy?

[219] Paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the Act violate subsection 15(1) of the *Canadian Charter*, and the AGC has not shown that this discrimination is justified under section 1.

[220] The Court is not bound by the wording of the conclusions for declaratory relief in the plaintiffs' motion, as long as the Court's conclusions do not stray from the issue in

[55] See paragraphs 189 to 196 of the eighth amended motion and its conclusions.

dispute. According to the case law, the Court may even add to the conclusions sought to bring a more complete solution to the legal debate.[56]

[221] In this case, paragraph 3 of the motion specifically asks the court to grant the plaintiffs the [TRANSLATION] "appropriate remedy", and one of the conclusions asks that it render any other order it deems just. Moreover, during arguments, the AGC explicitly submitted that a declaration whereby the provisions at issue are constitutionally invalid should be suspended.

[222] For the reasons that follow, however, the Court finds that it would not be appropriate to impose solutions as precise as the ones suggested by the plaintiffs. In their conclusions, they ask the Court to require that new provisions be enacted to allow the plaintiffs to register.

[223] The year now is 2015. The 1985 Act from which the discrimination arises has been in force for a little more than 30 years. The general finding of discrimination in the 2009 judgment of the BCCA in *McIvor* could have enabled Parliament to make more sweeping corrections than what was accomplished by the measures in the 2010 Act. The discrimination suffered by the plaintiffs arises from the same source as the one identified in that case.

[224] While it may be tempting to impose a remedy immediately, given the specific facts of this case, the Court instead finds that Parliament should once again be given the opportunity to play its role. The following remarks by the BCCA in 2009 on the remedy, however, have become more weighty due to the years that have passed since that judgment and the inclusion of a new group in the 2010 Act:

> [155] The legislation would have been constitutional if it had preserved only the status that such children [TRANSLATION: children affected by the Double Mother Rule] had before 1985. By according them enhanced status, it created new equalities, and violated the *Charter*.
>
> [156] There are two obvious ways in which the violation s. 15 might have been avoided. The 1985 legislation could have given status under an equivalent of s. 6(1) to people in Mr. Grismer's situation [TRANSLATION: including his children]. Equally, it could have preserved only the existing rights of those in the comparator group. While these are the obvious ways of avoiding a violation of s. 15, other, more complicated solutions might also have been found.
>
> [158] Contextual factors, including the reliance that people have placed on the existing state of the law, may affect the options currently available to the Federal government in remedying the *Charter* violation. It may be that some of the options that were available in 1985 are no longer practical. On the other hand,

[56] *Centre québécois du droit de l'environnement v. Junex,* J.E. 2014-850 (C.A.) at para. 28, *Québec (Ville) v. Québec (Curateur public)*, [2001] R.J.Q. 954 (C.A.) at paras. 41–42 and *Syndicat canadien des communications de l'énergie et du papier v. St-Jean*, J.E. 2006-591 (C.A.) at para. 43.

> options that would not have been appropriate in 1985 may be justifiable today, under s. 1 of the *Charter,* in order to avoid draconian effects.
>
> [159] I cannot say which legislative choice would have been made in 1985 had the violation of s. 15 been recognized. For that reason, I am reluctant to read new entitlements into s. 6 of the *Indian Act*. I am even more reluctant to read down the entitlement of the comparator group, especially given that it is not represented before this Court.
>
> (Emphasis added.)

[225] In view of these observations, the BCCA chose to suspend the declaration of invalidity for one year, as the Supreme Court suggests be done when the benefits granted in a statute is underinclusive, to allow Parliament to determine whether to extend or cancel the benefits.[57] This suspension, however, had to be extended twice.

[226] Although the Court considers it highly unlikely that Parliament will choose to cancel the benefits conferred on persons to whom the Double Mother Rule applied, the lawmakers must nevertheless have sufficient room to maneuver when drafting the details of the provisions to remedy the discrimination.

[227] Indeed, it is in a better position than the Court to determine what these details should be and how consistent they are with the new regime in place, especially given the highly technical and complex nature of the Act. For example, there must be a connection between what is stated in this judgment and sections 8 and following of the Act with regard to Band Lists and the membership rules that may be established by a Band that has assumed control of its List, as was the case when paragraph 6(1)(*c*.1) was added in 2010.

[228] Thus, even if the Court considered it appropriate to circumscribe the legislative measures that should be taken, it would refrain from imposing precise wording and would merely frame the issue in terms of the result that Parliament should seek to comply with the requirements of the fundamental right to equality. Such a conclusion, which would be consistent with the reasons of this judgment, could have read as follows:

> **DECLARE** that paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Canadian Charter of Rights and Freedoms* and are inoperative insofar as:
>
> (a) they do not allow persons belonging to the following groups:
>
> (i) persons whose only Indian grandparent is a woman who lost her status through marriage, and whose parents are not both Indian; the

[57] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 715–716.

> plaintiff Stéphane Descheaux is one of the persons belonging to this group, and
>
> (ii) persons whose parents are not both Indian and whose mother is a daughter born out of wedlock of an Indian father and a non-Indian mother and without status (i.e., between September 4, 1951, and April 16, 1985, inclusively); the plaintiff Tammy Yantha is one of the persons belonging to this group,
>
> to add their name to the Indian Register with an Indian status equivalent to paragraph 6(1) or that permits transmitting a status equivalent to 6(2) to their children with non-Indian parents; and
>
> (b) as long as they do not grant status equivalent to 6(1) to persons in the situation of the plaintiff Tammy Yantha, they do not allow persons belonging to the following group:
>
> - girls born without status and out of wedlock to Indian fathers and non-Indian mothers, i.e. between September 4, 1951, and April 16, 1985, inclusively, who have one or more children with a non-Indian man; the plaintiff Susan Yantha is one of the persons belonging to this group;
>
> to pass on to their children with a non-Indian man a status equivalent to that under subsection 6(1), which would allow them in turn to transmit status to their children with a non-Indian.

[229] But even this conclusion would not be appropriate. Parliament may in fact choose other avenues than those suggested in this judgment, although the options do appear rather limited. It is also possible that it selects even more inclusive options than those dictated by the imperatives of the right to equality out of a concern for fairness or for some other reason. Indeed, this is what it did in 1985 for persons to whom the Double Mother Rule applied.

[230] It also goes without saying that the issue of the costs that more inclusive provisions would incur is one element among many that Parliament may consider.[58] Some remarks have already been made, however, regarding the skepticism that the courts may display when faced with such an approach. Moreover, because the factual situation has persisted, as the BCCA points out in the above-quoted excerpt, and because Parliament preferred to extend the 6(1) benefit to another group in 2010 instead of withdrawing it from others, its room to manoeuvre is likely more limited. With respect to costs, it should also be noted that, according to expert Stewart Clatworthy, the logic of section 6 and its "second generation cut off" dictates that, given the current state of affairs, in about 100 years, no new child will be entitled to have his or her name added to the Register in the plaintiffs' Bands. If there are more people registered under

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[58] See notes 48 and 49 and the explanations therein.

6(1), this evolution will be slightly slower, but because of the nature of the mechanism in subsection 6(1), there will eventually be no more children born with an entitlement to be entered in the Register.[59] There is no evidence on other Indian Bands specifically, but it should be noted that the same mechanism is at work.

[231] In view of the preceding, it would also not be appropriate for the Court to render orders directly granting status to the plaintiffs. Moreover, such decisions fall under the purview of the Registrar.

[232] A year and a half to decide which measures to take seems reasonable, in light of the current pre-election context and the fact that this is not the first time that Parliament has been asked to analyze the issue and that consultations on this subject are planned. It should be reiterated that the situation has persisted for a little more than 30 years now without a complete solution. And the Court is not taking into consideration discussions on the discrimination arising from the 1951 Act, which took place long before there were even plans for the enactment of the *Canadian Charter*.[60] The time period takes into account the fact that the issues raised here have been known for several years. Although new consultations are in the works, they must take place promptly.

[233] In determining this suspension, the Court is well aware that the plaintiffs and other persons in their situation will continue to suffer discrimination during the eighteen-month period granted, unless Parliament acts more quickly. This is nevertheless the price that must be paid to respect the fundamental role of the legislative power in our society, a role that the Court cannot usurp.

CONCLUSION

[234] This judgment aims to dispose of the plaintiffs' action.

[235] It does not, however, exempt Parliament from taking the appropriate measures to identify and settle all other discriminatory situations that may arise from the issue identified, whether they are based on sex or another prohibited ground, in accordance with its constitutional obligation to ensure that the laws respect the rights enshrined in the *Canadian Charter*.

[236] This task incumbent on Parliament is complex and commensurate with the general impact of the statutes it enacts. It must take into account the effects of a statute in all the situations to which it will likely apply, and do so in light of the reports, studies and factual situations discussed and raised during the enactment process, and in light of the applicable law, including the principles set out in judicial decisions.

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[59] Exhibits P-20 and P-21, and the testimony of Stewart Clatworthy at the hearing on the application.

[60] In her additional reasons on the remedy, the trial judge refers to discussions on this subject in the early 1970s: *McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8.

[237] Judges hear only one specific dispute and are privy only to what is adduced and argued before them. They are not in the best position to grasp all of the implications of the laws and their potentially discriminatory effects.

[238] In the 2010 Act, Parliament chose to limit the remedy to the parties in *McIvor* and those in situations strictly identical to theirs. It did not attempt to identify the full measure of the advantages given the privileged group identified in that case.

[239] When Parliament chooses not to consider the broader implications of judicial decisions by limiting their scope to the bare minimum, a certain abdication of legislative power in favour of the judiciary will likely take place. In such cases, it appears that the holders of legislative power prefer to wait for the courts to rule on a case-by-case basis before acting, and for their judgments to gradually force statutory amendments to finally bring them in line with the Constitution.

[240] From the perspective of Canadian citizens, all of whom are potential litigants, the failure to perform this legislative duty and the abdication of power that may result are obviously not desirable.

[241] First, it would compel them to argue their constitutional rights in the judicial arena in many closely related cases and at great cost, instead of benefiting from the broader effects of a policy decision and counting on those who exercise legislative power to ensure that their rights are respected when statutes concerning them are enacted and revised. What is more, limited judicial resources used on disputes that a well-interpreted prior judgment should have settled are squandered instead of being used efficiently, with unfortunate effects for all litigants.

[242] It is clear that, because of the technical nature of the Act, its evolution over time, and its multi-generational effects, the task of ensuring that it has no unjustifiable discriminatory effects is a significant challenge. These are not, however, reasons that justify not taking on that challenge once again.

[243] Parliament should not interpret this judgment as strictly as it did the BCCA's judgment in *McIvor*. If it wishes to fully play its role instead of giving free reign to legal disputes, it must act differently this time, while also quickly making sufficiently significant corrections to remedy the discrimination identified in this case. One approach does not exclude the other.

[244] Given the plaintiffs' constitutional right to equality, paragraphs 6(1)(*a*), (*c*) and (*f*) and subsection 6(2) of the Act must be declared inoperative. The effect of this judgment will be suspended, however, for a period of eighteen months.

FOR THESE REASONS, THE COURT:

[245] **DECLARES** that paragraphs 6(1)(*a*),(*c*) and (*f*) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Canadian Charter of Rights and Freedoms* and are inoperative;

[246] **SUSPENDS** this declaration of invalidity for a period of eighteen months;

[247] **WITH COSTS**, including expert fees.

CHANTAL MASSE, J.S.C.

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Mtre Marie-Ève Dumont
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Mtre Mary Eberts
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Minister of Justice Canada
Counsel for the defendant

Dates of hearing: January 6, 7, 8, 12, 13, 14, 27, 28, 29 and 30, 2015, and February 3, 4, 5 and 6, 2015. Additional written notes following the hearing received on February 23 and 27, 2015.

SCHEDULE

Most relevant excerpts from legislation

1. *Indian Act,* R.S.C. 1927, c. 98 (excerpts).

2. *Indian Act*, S.C. 1951, c. 29 (excerpts).

3. *Act to amend the Indian Act*, S.C. 1956, c. 40, s. 3.

4. *Act to amend the Indian Act*, S.C. 1985, c. 27, s. 4.

5. *Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs)*, S.C. 2010, c. 18.

6. *Indian Act,* R.S.C. 1985, c. I-5, s. 6 (as currently in force).

1. *Indian Act*, S.R.C. 1927, c. 98 (excerpts):

2. En la présente loi, à moins que le contexte ne s'y oppose, l'expression […] e) «Indien» signifie i) tout individu du sexe masculin et de sang indien réputé appartenir à une bande particulière, ii) tout enfant de cet individu, iii) toute femme qui est ou a été légalement mariée à cet individu; […]	2. In this Act, unless the context otherwise requires, … d) "Indian" means i) any male person of Indian blood reputed to belong to a particular band, ii) any child of such person, iii) any woman who is or was lawfully married to such person; …
12. Le surintendant général peut, en tout temps, refuser de reconnaître tout enfant illégitime comme membre de la bande, à moins que, du consentement de la bande dont est membre son père ou sa mère, il n'ait eu part, pendant une période de plus de deux ans, aux deniers distribués à cette bande.	12. Any illegitimate child may, unless he has, with the consent of the band whereof the father or mother of such child is a member, shared in the distribution moneys of such band for a period exceeding two years, be, at any time, excluded from the membership thereof by the Superintendent General.
13. Tout Indien qui a résidé pendant cinq ans consécutifs dans un pays étranger, sans le consentement par écrit du surintendant général ou de son agent, cesse de faire partie de la bande à laquelle il appartenait, et il ne peut faire de nouveau partie de cette même bande ni d'aucune autre bande, à moins que le consentement de cette bande, avec l'approbation du surintendant général ou de son agent, ne soit préalablement obtenu.	13. Any Indian who has for five years continuously resided in a foreign country without the consent, in writing, of the Superintendent General or his agent, shall cease to be a member of the band of which he was formerly a member and he shall not again become a member of that band, or of a any other band, unless the consent of such band, with the approval of the Superintendent General or his agent, is first obtained.
14. Toute femme indienne qui épouse une autre personne qu'un Indien, ou un Indien non soumis au régime d'un traité, cesse, à tous égards, d'être Indienne, au sens de la présente loi, sauf qu'elle a droit de participer également avec les membres de la bande à laquelle elle appartenait antérieurement, à la distribution	14. Any Indian woman who marries any person other than an Indian, or a non-treaty Indian, shall cease to be an Indian in every respect within the meaning of this Act, except that she shall be entitled to share equally with the members of the band to which she formerly belonged, in the

annuelle ou semi-annuelle des annuités, intérêts et rentes de celle-ci; mais, avec l'assentiment du surintendant général, ce revenu peut, en tout temps, être converti en un rachat de dix ans.	annual or semi-annual distribution of their annuities, interest moneys and rents; but such income may be commuted to her at any time at ten years' purchase, with the approval of the Superintendent General.
15. Toute femme indienne qui épouse un Indien d'une autre bande, ou un Indien non soumis aux traités, cesse de faire partie de la bande à laquelle elle appartenait antérieurement, et elle devient membre de la bande ou de la bande irrégulière dont son mari fait partie.	15. Any Indian woman who marries an Indian of any other band, or a non-treaty Indian, shall cease to be a member of the band to which she formerly belonged, and shall become a member of the band or irregular band or which her husband is a member.
2. Si elle épouse un Indien non soumis au régime d'un traité, elle a droit, tout en devenant membre de la bande irrégulière dont son mari fait partie, de participer également avec les membres de la bande à laquelle elle appartenait antérieurement; mais, avec l'assentiment du surintendant général, ce revenu peut, en tout temps, être converti en un rachat de dix ans.»	2. If she marries a non-treaty Indian, while becoming a member of the irregular band of which her husband is a member, she shall be entitled to share equally with the members of the band of which she was formerly a member, in the distribution of their moneys; but such income may be commuted to her at any time at ten years' purchase, with the consent of the band.»

2. *Indian Act*, S.C. 1951, c. 29 (extraits):

«2. (1) Dans la présente loi, l'expression […] g) «Indien» signifie une personne qui, conformément à la présente loi, est inscrite à titre d'Indien ou a droit de l'être; […] m) «inscrit» signifie inscrit comme Indien dans le registre des Indiens; n) «registraire» désigne le fonctionnaire du ministère qui est préposé au registre des Indiens; […]	2. (1) In this Act, … (g) "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian; … (m) "registered" means registered as an Indian in the Indian Register; (n) "Registrar" means the officer of the Department who is in charge of the Indian Register; …
5. Est maintenu au ministère un registre des Indiens, lequel consiste dans des listes de bande et des listes générales et où doit être consigné le nom de chaque personne ayant droit d'être inscrite comme Indien.	5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.
6. Le nom de chaque personne qui est membre d'une bande et a droit d'être inscrite doit être consigné sur la liste de bande pour la bande en question, et le nom de chaque personne qui n'est pas membre d'une bande et a droit d'être inscrite doit apparaître sur une liste générale.	6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.
7. (1) Le registraire peut en tout temps ajouter à une liste de bande ou à une liste générale, ou en retrancher, le nom de toute personne qui, d'après les dispositions de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste. (2) Le registraire des Indiens doit indiquer la date où chaque nom y a été ajouté ou en a été retranché.	7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that List. (2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.
8. Dès l'entrée en vigueur de la présente loi, les listes de bande alors dressées au ministère doivent constituer	8. Upon the coming into force of this Act, the band lists then in existence in the Department shall constitute the Indian Register, and the applicable lists shall be

le registre des Indiens et les listes applicables doivent être affichées à un endroit bien en vue dans le bureau du surintendant qui dessert la bande ou les personne visées par la lite et dans tous les autres endroits où les avis concernant la bande sont ordinairement affichés.	posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the list relates and in all other places where band notices are ordinarily displayed.
9. (1) Dans les six mois de l'affichage d'une liste conformément à l'article huit ou dans les trois mois de l'addition du nom d'une personne à une liste de bande ou à une liste générale ou de son retranchement d'une telle liste, en vertu de l'article sept, a) dans le cas d'une liste de bande, le conseil de la bande, dix électeurs de la bande ou trois électeurs, s'il y en a moins de dix, b) dans le cas d'une portion affichée d'une liste générale, tout adulte dont le nom figure sur cette portion affichée, et c) la personne dont le nom a été inclus dans la liste mentionnée à l'article huit, ou y a été omis, ou dont le nom a été ajouté à une liste de bande ou une liste générale, ou en a été retranché, peuvent, par avis écrit au registraire, renfermant un bref exposé des motifs invoqués à cette fin, protester contre l'inclusion, l'omission, l'addition ou le retranchement, selon le cas, du nom de cette personne.	9. (1) Within six months after a list has been posted in accordance with section eight or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section seven (a) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less than ten electors in the band, (b) in the case of a posted portion of a General List, any adult person whose name appears on that posted portion, and (c) the person whose name was included in or omitted from the list referred to in section eight, or whose name was added to or deleted from a Band List or a General List, may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person.
(2) Lorsqu'une protestation est adressée au registraire, en vertu du présent article, il doit faire tenir une enquête sur la question et rendre une décision qui, sous réserve d'un renvoi prévu au paragraphe trois, est définitive et péremptoire.	(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection three, the decision of the Registrar is final and conclusive.
(3) Dans les trois mois de la date d'une décision du registraire aux termes du présent article, a) le conseil de la bande que vise la décision du registraire, ou b) la personne qui a fait la	(3) Within three months from the date of a decision of the Registrar under this section (a) the council of the band affected by the Registrar's decision, or (b) the person by or in respect of whom the protest was made, may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar

protestation ou à l'égard de qui elle a eu lieu, peut, moyennant un avis par écrit, demander au registraire de soumettre la décision à un juge, pour révision, et dès lors le registraire doit déférer la décision, avec tous les éléments que le registraire a examinés en rendant sa décision, au juge de la cour de comté ou district du comté ou district où la bande est située ou dans lequel réside la personne à l'égard de qui la protestation a été faite, ou de tel autre comté ou district que le Ministre peut désigner, ou, dans la province de Québec, au juge de la cour supérieure du district où la bande est située ou dans lequel réside la personne à l'égard de qui la protestation a été faite, ou de tel autre district que le Ministre peut désigner.	shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge of the county or district court of the county or district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other county or district as the Minister may designate, or in the Province of Quebec, to the judge of the Superior Court for the district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other district as the Minister may designate.
(4) Le juge de la cour de comté, de la cour de district ou de la cour supérieure, selon le cas, doit enquêter sur la justesse de la décision du registraire et, à ces fins, peut exercer tous les pouvoirs d'un commissaire en vertu de la Partie I de la Loi des enquêtes. Le juge doit décider si la personne qui a fait l'objet de la protestation a ou n'a pas droit, selon le cas, d'après les dispositions de la présente loi, à l'inscription de son nom au registre des Indiens, et la décision du juge est définitive et péremptoire.	(4) The judge of the county, district or Superior Court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise all the powers of a commissioner under Part I of the *Inquiries Act*; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with the provisions of this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.
10. Lorsque le nom d'une personne du sexe masculin est inclus dans une liste de bande ou une liste générale, ou y est ajouté ou omis, ou en est retranché, les noms de son épouse et de ses enfants mineurs doivent également être inclus, ajoutés, omis ou retranchés, selon le cas.	10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.
11. Sous réserve de l'article douze, une personne a droit d'être inscrite si	11. Subject to section twelve, a person is entitled to be registered if that person
a) elle était, le vingt-six mai mil huit cent soixante-quatorze, aux fins de la loi	(a) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, chapter forty-two of the statutes of 1868, as amended by section six of chapter six of the statutes of 1869, and

alors intitulée: Acte pourvoyant à l'organisation du Département du Secrétaire d'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance, chapitre quarante-deux des Statuts de 1868, modifiée par l'article six du chapitre six des Statuts de 1869 et par l'article huit du chapitre vingt et un des Statuts de 1874, considérée comme ayant droit à la détention, l'usage ou la jouissance des terres et autres biens immobiliers appartenant aux tribus, bandes ou groupes d'Indiens au Canada, ou affectés à leur usage,	section eight of chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada,
b) elle est membre d'une bande (i) à l'usage et au profit communs de laquelle des terres ont été mises de côté ou, depuis le vingt-six mai mil huit cent soixante-quatorze, ont fait l'objet d'un traité les mettant de côté, ou (ii) que le gouverneur en conseil a déclaré une bande aux fins de la présente loi,	(b) is a member of a band (i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,
c) elle est du sexe masculin et descendante directe, dans la ligne masculine, d'une personne du sexe masculin décrite à l'alinéa a) ou b),	(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b),
d) elle est l'enfant légitime (i) d'une personne du sexe masculin décrite à l'alinéa a) ou b), ou (ii) d'une personne décrite à l'alinéa c),	(d) is the legitimate child of (i) a mal person described in paragraph (a) or (b), or (ii) a person described in paragraph (c),
(e) elle est l'enfant illégitime d'une personne du sexe féminin décrite à l'alinéa a), b) ou d), à moins que le registraire ne soit convaincu que le père de l'enfant n'était pas un Indien et n'ait déclaré que l'enfant n'a pas le droit d'être inscrit, ou	(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered, or
(f) elle est l'épouse ou la veuve d'une personne ayant le droit d'être inscrite aux termes de l'alinéa a), b), c), d) ou e).	(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).
	12. (1) The following persons are not entitled to be registered, namely, (a) a person who (i) has received or has been allotted half-breed lands or money scrip, (ii) is a descendant of a person described in sub-paragraph (i), (iii) is enfranchised, or (iv) is a person born of a marriage

12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites, savoir: a) une personne qui (i) a reçu ou à qui il a été attribué, des terres ou certificats d'argent de métis, (ii) est un descendant d'une personne décrite au sous-alinéa (i), (ii) est émancipée, ou (iii) est née d'un mariage contracté après l'entrée en vigueur de la présente loi et a atteint l'âge de vingt et un ans, dont la mère et la grand-mère paternelle ne sont pas des personnes décrites à l'alinéa a), b) ou d) ou admises à être inscrites en vertu de l'alinéa e) de l'article onze, sauf si, étant une femme, cette personne est l'épouse ou la veuve de quelqu'un décrit à l'article onze, et b) une femme qui a épousé une personne non indienne.	entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), (d), or entitled to be registered by virtue of paragraph (e) of section eleven, unless, being a woman, that person is the wife or widow of a person described in section eleven, and (b) a woman who is married to a person who is not an Indian.
(2) Le Ministre peut délivrer à tout Indien auquel la présente loi cesse de s'appliquer, un certificat dans ce sens.	(2) the Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.
13. (1) Sous réserve de l'approbation du Ministre, une personne dont le nom apparaît sur une liste générale peut être admise au sein d'une bande avec le consentement de la bande ou du conseil de la bande.	13. (1) Subject to the approval of the Minister, a person whose name appears on a General List may be admitted into membership of a band with the consent of the band or the council of that band.
(2) Sous réserve de l'approbation du Ministre, un membre d'une bande peut être admis parmi les membres d'une autre bande avec le consentement de cette dernière ou du conseil de celle-ci.	(2) Subject to the approval of the Minister, a member of a band may be admitted into membership of another band with the consent of the latter band or the council of that band.
14. Une femme qui est membre d'une bande cesse d'en faire partie si elle épouse une personne qui n'en est pas membre, mais si elle épouse un membre d'une autre bande, elle entre dès lors dans la bande à laquelle	14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member.

appartient son mari.	

3. *Act to amend the Indian Act*, S.C. 1956, c. 40, s. 3:

«3. (1) L'alinéa e) de l'article 11 de ladite loi est abrogé et remplacé par ce qui suit:	3. (1) Paragraph (e) of section 11 of the said Act is repealed and the following substituted therefor:
«e) elle est l'enfant illégitime d'une personne du sexe féminin décrite à l'alinéa a), b) ou d); ou».	(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or.
(2) L'article 12 de ladite loi est modifié par l'adjonction, immédiatement après le paragraphe (1), du paragraphe suivant:	(2) Section 12 of the said Act is amended by adding thereto, immediately after subsection (1) thereof, the following subsection:
«(1a) L'addition, à une liste de bande, du nom d'un enfant illégitime décrit à l'alinéa e) de l'article 11 peut faire l'objet d'une protestation en tout temps dans les douze mois de l'addition et si, à la suite de la protestation, il est décidé que le père de l'enfant n'était pas un Indien, l'enfant n'a pas le droit d'être inscrit selon l'alinéa e) de l'article 11».	(1a) The addition to a Band List of the name of an illegitimate child described in paragraph (e) of section 11 may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under paragraph (e) of section 11.
(3) Le présent article ne s'applique qu'aux personnes nées après l'entrée en vigueur de la présente loi.»	(3) This section applies only to persons born after the coming into force of this Act.

4. *Act to amend the Indian Act*, S.C. 1985, c. 27, s. 4:

4. Sections 5 to 14 of the said Act arc repealed and the following substituted therefor:	4. Les articles 5 à 14 de la même loi sont abrogés et remplacés par ce qui suit :
"Indian Register	«Registre des 1ndiens
5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.	5. (I) Est tenu au ministère un registre des Indiens où est consigné le nom de chaque personne ayant droit d'être inscrite comme Indien en vertu de la présente loi.
(2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.	(2) Les noms figurant au registre des Indiens immédiatement avant le 17 avril 1985 constituent le registre des Indiens au 17 avril 1985.
(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.	(3) Le registraire peut ajouter au registre des Indiens, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans ce registre.
(4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.	(4) Le registre des Indiens indique la date où chaque nom y a été ajouté ou en a été retranché.
(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.	(5) Il n'est pas requis que le nom d'une personne qui a droit d'être inscrite soit consigné dans le registre des Indiens, à moins qu'une demande à cette effet soit présentée au registraire.
6. (I) Subject to section 7, a person is entitled to be registered if	6. (1) Sous réserve de l'section 7, une personne a right d'être inscrite si elle remplit une des conditions suivantes :
(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;	a) elle était inscrite ou

(b) that person is a member of a body of persons that has been declared, by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;	avait right de l'être immédiatement avant le 17 April 1985; b) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 April 1985 être une bande pour l'application de la présente loi;
(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(I)(a)(iv), paragraph 12(I)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under sub- section 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act	c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iv), de l'article 12(1)b) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109 (2), dans leur version précédant immédiatement
relating to the same subject-matter as any of those provisions;	le 17 April 1985, ou en vertu de toute provision antérieure de la présente loi portant sur le même sujet que celui d'une de ces provisions;
(d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;	d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre1951, d'une liste de bande en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(1), dans leur version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;
(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4,1951,	e) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande :
(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this	

Act relating to the same subject-matter as that section, or (ii) under section III, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject- matter as that section; or *(f)* that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section. (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1). (3) For the purposes of paragraph (1)(f) and subsection (2), (a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (I)(a); and (b) a person described in paragraph (1)(c),(d) or (e) who was no longer living on April 17, 1985 shall be deemed lobe entitled to be registered under that paragraph.	(i) soit en vertu de l'article 13, dans sa version précédant immédiatement le 4 septembre 1951, ou en vertu de toute provision antérieure de la présente loi portant sur le même sujet que celui de cet section, (ii) soit en vertu de l'article lll, dans sa version précédant immédiatement le 1er juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article; f) ses parents ont tous deux droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès. (2) Sous réserve de l'article 7, une personne a droit d'être inscrite si l'un de ses parents a droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès. (3) Pour l'application de l'article (1) f) et du paragraphe (2) : a) la personne qui est décédée avant le 17 avril 1985 mais qui avait droit d'être inscrite à la date de son décès est réputée avoir droit d'être inscrite en vertu de l'alinéa (l)a); b) la personne visée aux alinéas (l)c), d) ou e) qui est décédée avant le 17 avril 1985 est réputée avoir droit d'être inscrite en vertu de ces alinéas.

7. (1) The following persons are not entitled to be registered:	7. (1) Les personnes suivantes n'ont pas droit d'être inscrites :
(a) a person who was registered under paragraph 11 (l)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or	a) celles qui étaient inscrites en vertu de l'alinéa ll (1)f), dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et dont le nom a ultérieurement été omis ou retranché du registre des 1ndiens en vertu de la présente loi;
(b) a person who is the child of a person who ·was registered or entitled to be registered under paragraph 11 (1)(f), as it read immediately prior to April 17,1985, or under any former provision of this Act relating to the same subject- matter as that paragraph, and is also the child of a person who is not entitled to be registered.	b) celles qui sont les enfants d'une personne qui était inscrite ou avait droit de l'être en vertu de l'alinéa 11 (1)f), dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et qui sont également les enfants d'une personne qui n'a pas right d'être inscrite.
(2) Paragraph (l)(a) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11 (1 *) f),* entitled to be registered under any other provision of this Act.	(2) L'alinéa (1)a) ne s'applique pas à une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)f), avait droit d'être inscrite en vertu de toute autre disposition de la présente loi.
(3) Paragraph (I)(b) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph ll (l)(f), entitled to be registered under any other provision of this Act.	(3) L'alinéa (I)b) ne s'applique pas à l'enfant d'une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'article 11 (1)f), avait droit d'être inscrite en vertu de toute autre disposition de la présente loi.
Band Lists	*Listes de bande*
8. There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band.	8. Est tenue conformément à la présente loi la liste de chaque bande où est consigné le nom de chaque personne qui en est membre.
9. (1) Until such time as a band assumes control of its Band List, the Band	9. (1) Jusqu'à ce que la bande assume la responsabilité de sa liste, celle-ci est tenue au ministère par le

List of that band shall be maintained in the Department by the Registrar.	registraire.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April I7, 1985.	(2) Les noms figurant à une liste d'une bande immédiatement avant le 17 avril 1985 constituent la liste de cette bande au 17 avril 1985.
(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.	(3) Le registraire peut ajouter à une liste de bande tenue au ministère, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.
(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted therefrom.	(4) La liste de bande tenue au ministère indique la date où chaque nom y a été ajouté ou en a été retranché.
(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.	(5) Il n'est pas requis que le nom d'une personne qui a droit à ce que celui-ci soit consigné dans une liste de bande tenue au ministère y soit consigné à moins qu'une demande à cet effet soit présentée au registraire.
10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.	**10.** (1) La bande peut décider de l'appartenance à ses effectifs si elle en fixe les règles par écrit conformément au présent article et si, après qu'elle a donné un avis convenable de son intention de décider de cette appartenance, elle y est autorisée par la majorité de ses électeurs.
(2) A band may, pursuant to the consent of a majority of the electors of the band, (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and (b) provide for a mechanism for reviewing decisions on membership.	(2) La bande peut, avec l'autorisation de la majorité de ses électeurs : a) après avoir donné un avis convenable de son intention de ce faire, fixer les règles d'appartenance à ses effectifs; b) prévoir une procédure de révision des décisions portant sur l'appartenance à ses effectifs.
(3) Where the council of a band makes a by-law under paragraph 81(I)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall	(3) Lorsque le conseil d'une bande établit un statut administratif en vertu de l'article 81 (I) p.4) mettant en vigueur le présent paragraphe à l'égard d'une bande, l'autorisation requise en vertu des paragraphes (1) et (2) doit être donnée par la majorité des

be given by a majority of the members of the band who are of the full age of eighteen years.	membres de la bande qui ont dix-huit ans révolus.
(4) Membership rules established by a band under this section may not deprive any person who had the right to have his	(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce
name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.	que son nom soit consigné dans la liste de bande immédiatement avant la fixation des règles du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.
(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11 (1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.	(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11 (1)c) immédiatement avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.
(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forth- with give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.	(6) Une fois remplies les conditions du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre du fait que celle-ci décide désormais de l'appartenance à ses effectifs et lui transmet le texte des règles d'appartenance.
(7) On receipt of a notice from the council of a band under subsection {6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith	(7) Sur réception de l'avis du conseil de bande prévu au paragraphe (6), le Ministre, sans délai, s'il constate que les conditions prévues au paragraphe (1) sont remplies:
(a) give notice to the band that it has control of its own membership; and	a) avise la bande qu'elle décide désormais de l'appartenance à ses effectifs;
(b) direct the Registrar to provide the band with a copy of the Band List	*b)* ordonne au registraire de

maintained in the Department.	transmettre à la bande une copie de la liste de bande tenue au ministère.
(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.	(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au Ministre a été donné en vertu du paragraphe (6); les additions ou retranchements de la liste de la bande effectués par le registraire après cette date ne sont valides que s'ils ont été effectués conformément aux règles d'appartenance fixées par la bande.
(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(b), and, subject to section	(9) À compter de la réception de l'avis prévu à l'alinéa (7)b), la bande est responsable de la tenue de sa liste. Sous réserve de l'article 13.2, le ministère, à compter de

13.2, the Department shall have no further responsibility with respect to that Band List from that date.	cette date, est dégagé de toute responsabilité à l'égard de cette liste.
(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.	(10) La bande peut ajouter à la liste de bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste.
(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.	(11) La liste de bande tenue par celle-ci indique la date où chaque nom y a été ajouté ou en a été retranché.
11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if (a) the name of that person was entered in the Band List for that band, or that person was entitled to have his name entered in the Band List for that band, immediately prior to April 17, 1985; (b) that person is entitled to be registered under paragraph 6(l)(b) as a member of that band; (c) that person is entitled to be registered under paragraph 6(l)(c) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or *(d)* that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.	**11.** (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes : *a)* son nom a été consigné dans cette liste, ou elle avait droit à ce qu'il le soit immédiatement avant le 17 avril 1985; b) elle a droit d'être inscrite en vertu de l'alinéa 6(1)b) comme membre de cette bande; c) elle a droit d'être inscrite en vertu de l'alinéa 6(1)c) et a cessé d'être un membre de cette bande en raison des circonstances prévues à cet alinéa; *d)* elle est née après le 16 avril 1985 et a droit d'être inscrite en vertu de l'alinéa 6(1) f) et ses parents ont tous deux droit à ce que leur nom soit consigné dans la liste de bande ou, s'ils sont décédés, avaient ce droit à la date de leur décès.
(2) Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act,* introduced in	(2) À compter du jour qui suit de deux ans le jour où la loi intitulée *Loi modifiant la Loi sur les Indiens,* déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale ou de la date antérieure choisie en vertu de l'article 13.1, lorsque la bande n'a pas la responsabilité de la tenue de sa liste prévue à la présente loi, une

the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band	personne a droit à ce que son nom soit consigné dans la liste de bande tenue au ministère pour cette dernière :

(a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or	a) soit si elle a droit d'être inscrite en vertu des alinéas 6(1)d) ou *e)* et qu'elle a cessé d'être un membre de la bande en raison des circonstances prévues à l'un de ces alinéas;
(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.	*b)* soit si elle a droit d'être inscrite en vertu de l'alinéa 6(1) f) ou du paragraphe 6(2) et qu'un de ses parents visés à l'une de ces alinéas a droit à ce que son nom soit consigné dans la liste de bande ou, s'il est décédé, avait ce droit à la date de son décès.
(3) For the purposes of paragraph (1)(d) and subsection (2), a person whose name was omitted or deleted from the Indian Register or a band list in the circumstances set out in paragraph 6(1)(c), (d) or (e) who was no longer living on the first day on which he would otherwise be entitled to have his name entered in the Band List of the band of which he ceased to be a member shall be deemed to be entitled to have his name so entered.	(3) Pour l'application de l'alinéa (1)d) et du paragraphe (2), la personne dont le nom a été omis ou retranché du registre des Indiens ou d'une liste de bande dans les circonstances prévues aux alinéas 6(1)c), d) ou e) et qui est décédée avant le premier jour où elle a acquis le droit à ce que son nom soit consigné dans la liste de bande dont elle a cessé d'être membre est réputée avoir droit à ce que son nom y soit consigné.
(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have his name entered in the Band List of the amalgamated band or the new band to which he has the closest family ties, as the case may be.	(4) Lorsqu'une bande fusionne avec une autre ou qu'elle est divisée pour former de nouvelles bandes, toute personne qui aurait par ailleurs eu droit à ce que son nom soit consigné dans la liste de la bande en vertu du présent article a droit à ce que son nom soit consigné dans la liste de la bande issue de la fusion ou de celle de la nouvelle bande à l'égard de laquelle ses liens familiaux sont les plus étroits.
12. Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act,* introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who	12. À compter du jour qui suit de deux ans le jour où la loi intitulée *Loi modifiant la Loi sur les Indiens,* déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale ou de la date antérieure choisie en vertu de l'article 13.1, la personne qui,
(a) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under	*a)* soit a droit d'être inscrite en vertu de l'section 6 sans avoir droit à ce que son nom soit consigné dans une

section 11, or	liste de bande tenue au ministère en vertu de l'article 11,
(b) is a member of another band, is entitled to have his name entered in the Band List maintained in the Department	(3.1) Toute personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour celle-ci au ministère si elle a le droit d'être inscrite en vertu de l'alinéa 6(1)c.1) et si sa mère a cessé d'être un membre de la bande en raison des circonstances prévues au sous-alinéa 6(1)c.1)(i).
for a band if the council of the admitting band consents.	pour cette dernière si le conseil de la bande qui l'admet en son sein y consent.
13. Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.	13. Par dérogation aux articles II et 12, nul n'a droit à ce que son nom soit consigné en même temps dans plus d'une liste de bande tenue au ministère.
13.1 (1) A band may, at any time prior to the day that is two years after the day that an Act entitled *An Act to amend the Indian Act,* introduced in the House of Commons on February 28, 1985, is assented to, decide to leave the control of its Band List with the Department if a majority of the electors of the band gives its consent to that decision.	**13.1** (I) Une bande peut, avant le jour qui suit de deux ans le jour où la loi intitulée *Loi modifiant la* Loi *sur les Indiens,* déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale, décider de laisser la responsabilité de la tenue de sa liste au ministère à condition d'y être autorisée par la majorité de ses électeurs.
(2) Where a band decides to leave the control of its Band List with the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect.	(2) Si la bande décide de laisser la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre de la décision.
(3) Notwithstanding a decision under subsection (1), a band may, at any time after that decision is taken, assume control of its Band List under section 10.	(3) Malgré la décision visée au paragraphe (1), la bande peut, en tout temps après cette décision, assumer la responsabilité de la tenue de sa liste en vertu de l'article 10.
13.2 (1) A band may, at any time after assuming control of its Band List under section 10, decide to return control of the Band List to the Department if a majority of the electors of the band gives its consent to that decision.	**13.2** (1) La bande peut, en tout temps après avoir assumé la responsabilité de la tenue de sa liste en vertu de l'article 10, décider d'en remettre la responsabilité au ministère à condition d'y être autorisée par la majorité de ses électeurs.

(2) Where a band decides to return control of its Band List to the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect and shall provide the Minister with a copy of the Band List and a copy of all the membership rules that were established by the band under subsection 10(2) while the band maintained its own Band List.	(2) Lorsque la bande décide de remettre la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre de la décision et lui transmet une copie de la liste et le texte des règles d'appartenance fixées par la bande conformément au paragraphe 10 (2) pendant qu'elle assumait la responsabilité de la tenue de sa liste.
(3) Where a notice is given under subsection (2) in respect of a Band List, the maintenance of that Band List shall be the responsibility of the Department from the date on which the notice is received and from that time the Band List shall be maintained in accordance with the membership rules set out in section 11.	(3) Lorsqu'est donné l'avis prévu au paragraphe (2) à l'égard d'une liste de bande, la tenue de cette dernière devient la responsabilité du ministère à compter de la date de réception de l'avis. Elle est tenue, à compter de cette date, conformément aux règles d'appartenance prévues à l'article 11.
13.3 A person is entitled to have his name entered in a Band List maintained in the Department pursuant to section 13.2 if that person was entitled to have his name entered, and his name was entered, in the Band List immediately before a copy of it was provided to the Minister under subsection 13.2(2), whether or not that person is also entitled to have his name entered in the Band List under section II.	13.3 Une personne a droit à ce que son nom soit consigné dans une liste de bande tenue par le ministère en vertu de l'article 13.2 si elle avait droit à ce que son nom soit consigné dans cette liste, et qu'il y a effectivement été consigné, immédiatement avant qu'une copie en soit transmise au Minister en vertu du paragraphe 13.2(2), que cette personne ait ou non droit à ce que son nom soit consigné dans cette liste en vertu de l'article II.
Notice of Band Lists	*Affichage des listes de bande*
14. (1) Within one month after the day an Act entitled *An Act to amend the Indian Act,* introduced in the House of Commons on February 28, 1985, is assented to, the Registrar shall provide the council of each band with a copy of the	**14.** (1) Au plus tard un mois après la date où la loi intitulée *Loi modifiant la Loi sur les Indiens,* déposée à la Chambre des communies le 28 février 1985, a reçu la sanction royale, le registraire transmet au conseil de

Band List for the band as it stood immediately prior to that day.	chaque bande une copie de la liste de la bande dans son état précédant immédiatement cette date.
(2) Where a Band List is maintained by the Department, the Registrar shall, at least once every two months after a copy of the Band List is provided to the council of a band under subsection (1), provide the council of the band with a list of the additions to or deletions from the Band List not included in a list previously pro- vided under this subsection.	(2) Si la liste de bande est tenue au ministère, le registraire, au moins une fois tous les deux mois après la transmission prévue au paragraphe (1) d'une copie de la liste au conseil de la bande, transmet à ce dernier une liste des additions à la liste et des retranchements de celle-ci non compris dans une liste antérieure transmise en· vertu du présent paragraphe.
(3) The council of each band shall, forthwith on receiving a copy of the Band List under subsection (l), or a list of additions to and deletions from its Band List under subsection (2), post the copy or the list, as the case may be, in a conspicuous place on the reserve of the band.	(3) Le conseil de chaque bande, dès qu'il reçoit copie de la liste de bande prévue au paragraphe (1) ou la liste des additions et des retranchements prévue au paragraphe (2), affiche la copie ou la liste, selon le cas, en un lieu bien en évidence dans la réserve de la bande.
Inquiries	*Demandes*
14.1 The Registrar shall, on inquiry from any person who believes that he or any person he represents is entitled to have his name included in the Indian Register or a Band List maintained in the Department, indicate to the person making the inquiry whether or not that name is included therein.	**14.1** Le registraire, à la demande de toute personne qui croit qu'elle-même ou que la personne qu'elle représente a droit à l'inclusion de son nom dans le registre des Indiens ou une liste de bande tenue au ministère, indique sans délai à l'auteur de la demande si ce nom y est inclus ou non.
Protests	*Protestations*
14.2 (1) A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds	**14.2** (l) Une protestation peut être formulée, par avis écrit au registraire renfermant un bref exposé des motifs invoqués, contre l'inclusion ou l'addition du nom d'une personne dans le registre des Indiens ou une liste de bande tenue au ministère ou contre l'omission ou le retranchement de son nom de ce registre ou d'une telle liste dans les trois ans suivant soit l'inclusion ou l'addition,

therefor.	soit l'omission ou le retranchement.
(2) A protest may be made under this section in respect of the Band List of a band by the council of the band, any member of the band or the person in respect of whose name the protest is made or his representative.	(2) Une protestation peut être formulée en vertu du présent article à l'égard d'une liste de bande par le conseil de cette bande, un membre de celle-ci ou la personne dont le nom fait l'objet de la protestation ou son représentant.
(3) A protest may be made under this section in respect of the Indian Register by the person in respect of whose name the protest is made or his representative.	(3) Une protestation peut être formulée en vertu du présent article à l'égard du registre des Indiens par la personne dont le nom fait l'objet de la protestation ou son représentant.
(4) The onus of establishing the grounds of a protest under this section lies on the person making the protest.	(4) La personne qui formule la protestation prévue au présent article a la charge d'en prouver le bien-fondé.
(5) Where a protest is made to the Registrar under this section, he shall cause an investigation to be made into the matter and render a decision.	(5) Lorsqu'une protestation lui est adressée en vertu du présent article, le registraire fait tenir une enquête sur la question et rend une décision.
(6) For the purposes of this section, the Registrar may receive such evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law, as in his discretion he sees fit or deems just.	(6) Pour l'application du présent article, le registraire peut recevoir toute preuve présentée sous serment, sous déclaration sous serment ou autrement, si celui-ci, à son appréciation, l'estime indiquée ou équitable, que cette preuve soit ou non admissible devant les courts.
(7) Subject to section 14.3, the decision of the Registrar under subsection (5) is final and conclusive.	(7) Sous réserve de l'article 14.3 la décision du registraire visée au paragraphe (5) est finale et péremptoire.
14.3 (1) Within six months after the Registrar renders a decision on a protest under section 14.2,	**14.3** (1) Dans les six mois suivant la date de la décision du registraire sur une protestation prévue à l'article 14.2 :
(a) in the case of a protest in respect of the Band List of a band, the council of the band, the person by whom the protest was made, or the person in respect	a) soit, s'il s'agit d'une protestation formulée à l'égard d'une liste de bande, le conseil de la bande, la personne qui a formulé la protestation ou la personne

of whose name the protest was made or his representative, or	dont le nom fait l'objet de la protestation ou son représentant,
(b) in the case of a protest in respect of the Indian Register, the person in respect of whose name the protest was made or his representative,	*b)* soit, s'il s'agit d'une protestation formulée à l'égard du registre des Indiens, la personne dont le nom a fait l'objet de la protestation ou son représentant,
may, by notice in writing, appeal the decision to a court referred to in subsection (5).	peuvent, par avis écrit, interjeter appel de la décision à la cour visée au paragraphe (5).
(2) Where an appeal is taken under this section, the person who takes the appeal shall forthwith provide the Registrar with a copy of the notice of appeal.	(2) Lorsqu'il est interjeté appel en vertu du présent article, l'appelant transmet sans délai au registraire une copie de l'avis d'appel.
(3) On receipt of a copy of a notice of appeal under subsection (2), the Registrar shall forthwith file with the court a copy of the decision being appealed together with all documentary evidence considered in arriving at that decision and any recording or transcript of any oral proceedings related thereto that were held before the Registrar.	(3) Sur réception de la copie de l'avis d'appel prévu au paragraphe (2), le registraire dépose sans délai à la cour une copie de la décision en appel, toute la preuve documentaire prise en compte pour la décision, ainsi que l'enregistrement ou la transcription des débats devant le registraire.
(4) The court may, after hearing an appeal under this section,	(4) La cour peut, à l'issue de l'audition de l'appel prévu au présent article :
(a) affirm, vary or reverse the decision of the Registrar; or	a) soit confirmer, modifier ou renverser la décision du registraire;
(b) refer the subject-matter of the appeal back to the Registrar for reconsideration or further investigation.	b) soit renvoyer la question en appel au registraire pour réexamen ou nouvelle enquête.
(5) An appeal may be heard under this section	(5) L'appel prévu au présent article peut être entendu :
(a) in the Province of Prince Edward Island, the Yukon Territory or the Northwest Territories, before the Supreme Court;	*a)* dans la province de l'Île-du-Prince-Édouard, le territoire du Yukon et les territoires du Nord-Ouest, par la Cour suprême;
(b) in the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, before the Court of Queen's Bench;	b) dans la province du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou d'Alberta, par la Cour du Banc de la Reine;
(c) in the Province of Quebec, before the Superior Court for the district in which the band is situated or in which the person who made the protest resides, or for such other district as the Minister may designate; or	c) dans la province de Québec, par la Cour supérieure du district où la bande est située ou dans lequel réside la personne qui a formulé la protestation, ou de tel autre district désigné par le Ministre;
(d) in any other province, before the county or district court of the county or district in which the band is situated or in which the person who made the protest resides, or of such other county or	

district as the Minister may designate.»	d) dans les autres provinces, par un juge de la cour de comté ou de district du comté ou du district où la bande est située ou dans lequel réside la personne qui a formulé la protestation, ou de tel autre comté ou district désigné par le Ministre.

5. *Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs*, S.C. 2010, c. 18:

«1. This Act may be cited as the Gender Equity in Indian Registration Act.	1. Loi sur l'équité entre les sexes relativement à l'inscription au registre des Indiens.
INDIAN ACT	LOI SUR LES INDIENS
2. (1) The portion of subsection 6(1) of the French version of the Indian Act before paragraph (a) is replaced by the following:	2. (1) Le passage du paragraphe 6(1) de la version française de la Loi sur les Indiens précédant l'alinéa a) est remplacé par ce qui suit :
6. (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :	6. (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :
(2) Paragraph 6(1)(a) of the Act is replaced by the following:	(2) L'alinéa 6(1)a) de la même loi est remplacé par ce qui suit :
(a) that person was registered or entitled to be registered immediately prior to April 17,1985;	a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;
(3) Paragraph 6(1)(c) of the Act is replaced by the following: (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 1 2 (1) (a) (iv) , paragraph 12(1)(b) or subsection 12(2) or under sub-paragraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;	(3) L'alinéa 6(1)c) de la même loi est remplacé par ce qui suit: c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iv), de l'alinéa 12(1)b) ou du paragraphe 12(2) ou en vertu du sous-alinéa12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;
(v.1) that person (i) is a person whose mother's name was, as a result of the mother's marriage, omitted or	c.1) elle remplit les conditions suivantes : (i) le nom de sa mère a été, en raison du

deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(b) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,	mariage de celle-ci, omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu de l'alinéa 12(1)b) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions,
(ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,	(ii) son autre parent n'a pas le droit d'être inscrit ou, s'il est décédé, soit n'avait pas ce droit à la date de son décès, soit n'était pas un Indien à cette date dans le cas d'un décès survenu avant le 4 septembre 1951,
(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and	(iii) elle est née à la date du mariage visé au sous-alinéa (i) ou après cette date et, à moins que ses parents se soient mariés avant le 17 avril 1985, est née avant cette dernière date,
(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;	(iv) elle a eu ou a adopté, le 4 septembre 1951 ou après cette date, un enfant avec une personne qui, lors de la naissance ou de l'adoption, n'avait pas le droit d'être inscrite;
(4) Subsection 6(3) of the Act is amended by striking out "and" at the end of paragraph (a), by adding "and" at the end of paragraph (b) and by adding the following after paragraph (b):	(4) Le paragraphe 6(3) de la même loi est modifié par adjonction, après l'alinéa b), de ce qui suit :
(c) a person described in paragraph (1)(c.1) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.	c) la personne visée à l'alinéa (1)c.1) et qui est décédée avant l'entrée en vigueur de cet alinéa est réputée avoir le droit d'être inscrite en vertu de celui-ci.
3. Section 11 of the Act is amended by adding the following after subsection (3):	3. (4) Le paragraphe 6(3) de la même loi est modifié par adjonction, après l'alinéa b), de ce qui suit :
(3.1) A person is entitled to have the person's name entered in a Band List maintained in the Department for a band if the person is entitled to	(3.1) Toute personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour celle-ci au ministère si elle a le droit

be registered under paragraph 6(1)(c.1) and the person's mother ceased to be a member of that band by reason of the circumstances set out in subparagraph 6(1)(c.1)(i).	d'être inscrite en vertu de l'alinéa 6(1)c.1) et si sa mère a cessé d'être un membre de la bande en raison des circonstances prévues au sous-alinéa 6(1)c.1)(i).
REPORT TO PARLIAMENT	RAPPORT AU PARLEMENT
3.1 (1) The Minister of Indian Affairs and Northern Development shall cause to be laid before each House of Parliament, not later than two years after this Act comes into force, a report on the provisions and implementation of this Act.	3.1 (1) Au plus tard deux ans après la date d'entrée en vigueur de la présente loi, le ministre des Affaires indiennes et du Nord canadien fait déposer devant chaque chambre du Parlement un rapport sur les dispositions de la présente loi et sa mise en œuvre.
(2) Such committee of Parliament as may be designated or established for the purposes of this subsection shall, forthwith after the report of the Minister is tabled under subsection (1), review that report and shall, in the course of that review, undertake a review of any provision of this Act.	(2) Le comité parlementaire désigné ou constitué pour l'application du présent paragraphe examine sans délai le rapport visé au paragraphe (1) après son dépôt. Dans le cadre de l'examen, le comité procède à la révision des dispositions de la présente loi.
RELATED PROVISIONS	DISPOSITIONS CONNEXES
4. In sections 5 to 8, "band", "Band List", "council of a band", "registered" and "Registrar" have the same meaning as in subsection 2(1) of the Indian Act.	4. Aux articles 5 à 8, « bande », « conseil de bande », « inscrit », « liste de bande » et « registraire » s'entendent au sens du paragraphe 2(1) de la Loi sur les Indiens.
5. For greater certainty, subject to any deletions made by the Registrar under subsection 5(3) of the Indian Act, any person who was, immediately before the day on which this Act comes into force, registered and entitled to be registered under paragraph 6(1)(a) or (c) of the Indian Act continues to be registered.	5. Il est entendu que, sous réserve de tout retranchement effectué par le registraire en vertu du paragraphe 5(3) de la Loi sur les Indiens, toute personne qui, à l'entrée en vigueur de la présente loi, était inscrite et avait le droit de l'être en vertu des alinéas 6(1)a) ou c) de la Loi sur les Indiens le demeure.
6. For greater certainty, for the purposes of paragraph 6(1)(f) and subsection 6(2) of the Indian Act, the Registrar must recognize any entitlements to be registered that existed under paragraph 6(1)(a) or (c) of that Act immediately before the day on which this Act comes into force.	6. Il est entendu que, pour l'application de l'alinéa 6(1)f) et du paragraphe 6(2) de la Loi sur les Indiens, le registraire est tenu de reconnaître tout droit d'être inscrit qui existait en vertu des alinéas 6(1)a) ou c) de cette loi à l'entrée en vigueur de la présente loi.
7. For greater certainty, subject to any membership rules established by a band, any	7. Il est entendu que, sous réserve des règles d'appartenance fixées par la bande, toute personne qui, à l'entrée en vigueur de la présente loi, avait le droit d'être inscrite en

person who, immediately before the day on which this Act comes into force, was entitled to be registered under paragraph 6(1)(a) or (c) of the Indian Act and had the right to have their name entered in the Band List maintained by that band continues to have that right.

8. For greater certainty, subject to any membership rules established by a band on or after the day on which this Act comes into force, any person who is entitled to be registered under paragraph 6(1)(c.1) of the Indian Act, as enacted by subsection 2(3), and who had, immediately before that day, the right to have their name entered in the Band List maintained by that band continues to have that right.

9. For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because

(a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this Act comes into force; and

(b) one of the person's parents is entitled to be registered under paragraph 6(1)(c.1) of the Indian Act, as enacted by subsection 2(3).

COMING INTO FORCE

10. This Act comes into force, or is deemed to have come into force, on a day, on or after April 5, 2010, to be fixed by order of the Governor in Council.

vertu des alinéas 6(1)a) ou c) de la Loi sur les Indiens et avait droit à ce que son nom soit consigné dans la liste de bande tenue par celle-ci conserve le droit à ce que son nom y soit consigné.

8. Il est entendu que, sous réserve des règles d'appartenance fixées par la bande, toute personne qui, à l'entrée en vigueur de la présente loi, avait le droit d'être inscrite en vertu des alinéas 6(1)a) ou c) de la Loi sur les Indiens et avait droit à ce que son nom soit consigné dans la liste de bande tenue par celle-ci conserve le droit à ce que son nom y soit consigné.

9. Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou mandataires ou d'un conseil de bande en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une personne n'était pas consigné dans une liste de bande — à l'entrée en vigueur de la présente loi et que l'un de ses parents a le droit d'être inscrit en vertu de l'alinéa 6(1)c.1) de la Loi sur les Indiens, édicté par le paragraphe 2(3).

ENTRÉE EN VIGUEUR

10. La présente loi entre en vigueur ou est réputée être entrée en vigueur à la date fixée par décret, laquelle ne peut être antérieure au 5 avril 2010.»

6. Indian Act, S.R.C. (1985), c. I-5, s. 6 (as currently in force):

6. (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :	**6.** (1) Subject to section 7, a person is entitled to be registered if
a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;	(*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;
b) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 avril 1985 être une bande pour l'application de la présente loi;	(*b*) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iv), de l'alinéa 12(1)b) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;	(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
c.1) elle remplit les conditions suivantes :	(*v.1*) that person
(i) le nom de sa mère a été, en raison du mariage de celle-ci, omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu de l'alinéa 12(1)b) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le	(i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(*b*) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,

même sujet que celui d'une de ces dispositions,	(ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,
(ii) son autre parent n'a pas le droit d'être inscrit ou, s'il est décédé, soit n'avait pas ce droit à la date de son décès, soit n'était pas un Indien à cette date dans le cas d'un décès survenu avant le 4 septembre 1951,	
(iii) elle est née à la date du mariage visé au sous-alinéa (i) ou après cette date et, à moins que ses parents se soient mariés avant le 17 avril 1985, est née avant cette dernière date,	(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and
(iv) elle a eu ou a adopté, le 4 septembre 1951 ou après cette date, un enfant avec une personne qui, lors de la naissance ou de l'adoption, n'avait pas le droit d'être inscrite;	(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;
d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(1), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;	(*d*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
e) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande:	(*e*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,
(i) soit en vertu de l'article 13, dans sa version antérieure au 4 septembre 1951, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet	(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

article, (ii) soit en vertu de l'article 111, dans sa version antérieure au 1er juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article; *f) ses parents ont tous deux le droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès.* (2) Sous réserve de l'article 7, une personne a le droit d'être inscrite si l'un de ses parents a le droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès. (3) Pour l'application de l'alinéa (1)f) et du paragraphe (2) : *a) la personne qui est décédée avant le 17 avril 1985 mais qui avait le droit d'être inscrite à la date de son décès est réputée avoir le droit d'être inscrite en vertu de l'alinéa (1)a);* *b) la personne visée aux alinéas (1)c), d), e) ou f) ou au paragraphe (2) et qui est décédée avant le 17 avril 1985 est réputée avoir le droit d'être inscrite en vertu de ces dispositions;* *c) la personne visée à l'alinéa (1)c.1) et qui est décédée avant l'entrée en vigueur de cet alinéa est réputée avoir le droit d'être inscrite en vertu de celui-ci.*	(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or (*f*) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section. (2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1). (3) For the purposes of paragraph (1)(*f*) and subsection (2), (*a*) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(*a*); (*b*) a person described in paragraph (1)(*c*), (*d*), (*e*) or (*f*) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision; and (c) a person described in paragraph (1)(c*.1*) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.

The Ontario Human Rights Commission and Bruce Dunlop and Harold E. Hall and Vincent Gray (*Respondents*) *Appellants*;

and

The Borough of Etobicoke (*Appellant*) *Respondent.*

File No.: 16269.

1981: May 13; 1982: February 9.

Present: Laskin C.J. and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil rights — Alleged discrimination on basis of age — Firemen dismissed at age 60 pursuant to collective agreement — Whether or not mandatory retirement a bona fide occupational qualification — The Ontario Human Rights Code, R.S.O. 1970, c. 318, ss. 4(1),(6), 14a, 14d, as amended.

This appeal concerned the construction of s. 4(6) of *The Ontario Human Rights Code*. Appellants Hall and Gray, firemen employed by Etobicoke, each filed a complaint under the Code because of their forced retirement at age sixty pursuant to a clause in a collective agreement. A one-man board of inquiry (Dunlop) found appellants' forced retirement to be a refusal to employ contrary to s. 4(1)(*b*) of the Code, and ordered their reinstatement with compensation subject to their possessing the physical and mental capacities required to perform their jobs. The Divisional Court's judgment allowing an appeal from the board of inquiry was upheld at the Court of Appeal.

Held: The appeal should be allowed.

The employer has not shown that compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. A *bona fide* occupational qualification must be imposed honestly, in good faith, and in the sincerely held belief that it is imposed in the interests of adequate performance of the work involved with reasonable dispatch, safety and economy and not for ulterior or extraneous reasons that could defeat the Code's purpose. The qualification must be objectively related to the employment concerned, ensuring its efficient and economical performance without endangering the employee or others. Evidence as to the duties to be performed and the relationship between

La Commission ontarienne des droits de la personne, Bruce Dunlop, Harold E. Hall et Vincent Gray (*Intimés*) *Appelants*;

et

La municipalité d'Etobicoke (*Appelante*) *Intimée.*

N° du greffe: 16269.

1981: 13 mai; 1982: 9 février.

Présents: Le juge en chef Laskin et les juges Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

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

Libertés publiques — Prétendue mesure discriminatoire fondée sur l'âge — Pompiers congédiés à l'âge de 60 ans conformément à la convention collective — La retraite obligatoire est-elle une exigence professionnelle réelle? — The Ontario Human Rights Code, R.S.O. 1970, chap. 318, art. 4(1),(6), 14a, 14d, et modifications.

Le présent pourvoi porte sur l'interprétation du par. 4(6) de *The Ontario Human Rights Code*. Les appelants Hall et Gray, des pompiers au service de la municipalité d'Etobicoke, ont tous deux porté plainte en vertu du Code en raison de leur mise à la retraite obligatoire à l'âge de soixante ans conformément à une clause d'une convention collective. Le commissaire enquêteur (Dunlop) a conclu que la mise à la retraite obligatoire des appelants équivalait à un refus de les employer contrairement à l'al. 4(1)*b*) du Code, et il a ordonné leur réintégration avec indemnité à la condition qu'ils possèdent les aptitudes physiques et mentales nécessaires à l'exécution de leurs tâches. La Cour d'appel a maintenu l'arrêt de la Cour divisionnaire qui a accueilli l'appel de la décision du commissaire enquêteur.

Arrêt: Le pourvoi est accueilli.

L'employeur n'a pas prouvé que la retraite obligatoire est une exigence professionnelle réelle de l'emploi en question. Une exigence professionnelle réelle doit être imposée honnêtement, de bonne foi et avec la conviction sincère qu'elle est imposée en vue d'assurer la bonne exécution du travail en question d'une manière raisonnablement diligente, sûre et économique et non pour des motifs inavoués ou étrangers susceptibles d'aller à l'encontre du Code. La restriction doit se rapporter objectivement à l'emploi en question et en assurer l'exécution efficace et économique sans mettre en danger l'employé ou d'autres personnes. Il est nécessaire de présenter des éléments de preuve relativement aux tâches à accomplir

the aging process and the safe, efficient performance of those duties is imperative, with statistical and medical evidence being of more weight than the impressions of persons experienced in the field.

As the Code was enacted for the general benefit of the community and its members, its provisions cannot be waived or varied by a collective agreement.

Re Ontario Human Rights Commission and City of North Bay (1977), 21 O.R. 607 (Ont. C.A.), affirming 17 O.R. (2d) 712, considered; *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (1974); *Little v. Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. 1; *Equitable Life Assurance Society of the United States v. Reed*, [1914] A.C. 587; *Re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *R. v. Roma*, [1942] 3 W.W.R. 525; *Outen v. Stewart and Grant and City of Winnipeg*, [1932] 3 W.W.R. 193; *Dunn v. Malone* (1903), 6 O.L.R. 484, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of the Divisional Court allowing an appeal from an order made by a board of inquiry appointed pursuant to *The Ontario Human Rights Code*. Appeal allowed.

J. Polika, Q.C., for the appellants.

Douglas K. Gray and *R. Ross Dunsmore*, for the respondent.

The judgment of the Court was delivered by

McINTYRE J.—This appeal concerns the construction of *The Ontario Human Rights Code*, R.S.O. 1970, c. 318, s. 4(6), as amended, in a case where it is alleged that a mandatory retirement at age sixty, provided for in a collective agreement, contravenes the provisions of the Code by discriminating against certain employees on the basis of age.

The individual appellants Hall and Gray were employed by the respondent municipality as firefighters. The terms of their employment were contained in a collective agreement which provided that the firefighters would be compulsorily retired at age sixty. Hall and Gray attained that age and

et au rapport entre le vieillissement et l'exécution sûre et efficace de ces tâches, une preuve de nature statistique et médicale étant plus convaincante que les impressions de personnes expérimentées en la matière.

Puisque le Code a été adopté dans l'intérêt général de la collectivité et de ses membres, on ne peut, par convention collective, renoncer à ses dispositions ni les modifier.

Jurisprudence: arrêt examiné: *Re Ontario Human Rights Commission and City of North Bay* (1977), 21 O.R. 607 (C.A. Ont.) confirmant 17 O.R. (2d) 712; arrêts mentionnés: *Hodgson v. Greyhound Lines, Inc.*, 499 F. 2d 859 (1974); *Little v. Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. 1; *Equitable Life Assurance Society of the United States v. Reed*, [1914] A.C. 587; *Re Estate of Charles Millar, Deceased*, [1938] R.C.S. 1; *Fender v. Mildmay*, [1937] 3 All E.R. 402; *R. v. Roma*, [1942] 3 W.W.R. 525; *Outen v. Stewart and Grant and City of Winnipeg*, [1932] 3 W.W.R. 193; *Dunn v. Malone* (1903), 6 O.L.R. 484.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario qui a rejeté un appel d'une décision de la Cour divisionnaire qui a accueilli l'appel d'une ordonnance d'un commissaire enquêteur nommé conformément à *The Ontario Human Rights Code*. Pourvoi accueilli.

J. Polika, c.r., pour les appelants.

Douglas K. Gray et *R. Ross Dunsmore*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE McINTYRE—Le présent pourvoi porte sur l'interprétation de *The Ontario Human Rights Code*, R.S.O. 1970, chap. 318, par. 4(6), et modifications, dans le cas où on allègue que la retraite obligatoire à soixante ans, prévue dans une convention collective, va à l'encontre des dispositions du Code pour le motif qu'elle constitue pour certains employés une mesure discriminatoire fondée sur l'âge.

Les appelants Hall et Gray étaient des pompiers au service de la municipalité intimée. Leurs conditions de travail étaient énoncées dans une convention collective qui fixait à soixante ans l'âge de la retraite obligatoire des pompiers. Dès qu'ils eurent atteint cet âge, Hall et Gray furent licenciés. Ils

their employment was terminated. Each filed a complaint under *The Ontario Human Rights Code*. The Minister of Labour, pursuant to the provisions of s. 14*a* of the Code, appointed one Bruce Dunlop as a board of inquiry. He decided after a hearing that the compulsory retirement of the appellants amounted to a refusal to employ, or to continue to employ them, contrary to s. 4(1)(*b*) of the Code. He rejected the employer's defence that the compulsory retirement at age sixty constituted a *bona fide* occupational qualification and requirement for the position or employment within s. 4(6) of the Code. He ordered the reinstatement of the appellants provided that they continued to possess the requisite physical and mental capacities to carry out their jobs. He ordered, as well, compensation for loss of earnings from the date of retirement to the date of reinstatement.

ont tous deux porté plainte en vertu de *The Ontario Human Rights Code*. Conformément aux dispositions de l'art. 14*a* du Code, le ministre du Travail a nommé Bruce Dunlop commissaire enquêteur. Le commissaire a conclu, à l'issue d'une audience, que la mise à la retraite obligatoire des appelants équivalait à un refus de les employer ou de continuer à les employer, contrairement aux dispositions de l'al. 4(1)*b*) du Code. Il a rejeté le moyen de défense de l'employeur selon lequel la retraite obligatoire à soixante ans constitue une exigence professionnelle réelle (*bona fide*) du poste ou de l'emploi, au sens du par. 4(6) du Code. Il a ordonné la réintégration des appelants pourvu qu'ils conservent les aptitudes physiques et mentales nécessaires à l'exécution de leurs tâches. Il a en outre ordonné le versement d'une indemnité pour la perte de revenu subie entre la date de la mise à la retraite et celle de leur réintégration.

An appeal was taken by the respondent to the Divisional Court (O'Leary, Osborne JJ., Cory J. dissenting). O'Leary J., for the majority, in allowing the appeal adopted the test for a *bona fide* occupational qualification and requirement which had been propounded by Professor R. S. McKay, acting as a board of inquiry in another case concerning the firefighters of the City of North Bay. That case raised the same issue which presents itself here. On the appeals in the *North Bay* case the McKay test was adopted in the Divisional Court and the Court of Appeal (see: *Re Ontario Human Rights Commission and City of North Bay* (1977), 17 O.R. (2d) 712 in the Divisional Court and 21 O.R. (2d) 607 in the Court of Appeal). The McKay test provides that to be a *bona fide* qualification and requirement the limitation complained of must be imposed honestly, that is in good faith, and not based on any extraneous or ulterior motive, and it must bear a reasonable relationship to the circumstances of the employment. He said: "In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason 'based on the practical reality of the work a day world and of life'."

L'intimée a formé un appel auprès de la Cour divisionnaire (les juges O'Leary et Osborne, le juge Cory étant dissident). Le juge O'Leary, qui a accueilli l'appel au nom de la majorité de la Cour, a adopté le critère de l'exigence professionnelle réelle proposé par le professeur R. S. McKay, en sa qualité de commissaire enquêteur dans une autre affaire concernant les pompiers de la ville de North Bay. Cette affaire soulevait une question identique à celle dont nous sommes saisis en l'espèce. Dans les appels relatifs à l'affaire *North Bay*, la Cour divisionnaire et la Cour d'appel ont retenu le critère McKay (voir: *Re Ontario Human Rights Commission and City of North Bay* (1977), 17 O.R. (2d) 712 en Cour divisionnaire et 21 O.R. (2d) 607 en Cour d'appel). Le critère McKay prévoit que pour constituer une exigence réelle, la restriction dont on se plaint doit être imposée honnêtement, c'est-à-dire de bonne foi, ne pas se fonder sur un motif étranger ou inavoué et avoir un lien raisonnable avec les conditions de travail. Voici ce qu'il a dit: [TRADUCTION] «En d'autres termes, même s'il est indispensable qu'une restriction soit adoptée ou imposée honnêtement ou sincèrement, elle doit en outre reposer, en fait et logiquement, «sur la réalité pratique du milieu de travail et du quotidien».»

Professor Dunlop, in the case at bar, propounded his test in these words:

The meaning of "bona fide" that seems most consistent with this objective would be "real" or "genuine" i.e. that there is a sound reason for imposing an age limitation and the onus of establishing this justification for discrimination is on the person alleging it to be justified.

In a further hearing, called to deal with compensation to be paid, the employer argued that Professor Dunlop had applied an incorrect test, asserting that he should have applied the test developed in the *North Bay* case by Professor McKay. In his supplementary reasons, dated December 7, 1978, Professor Dunlop expressed the opinion that the test he had formulated, and that of Professor McKay, were in essence the same, aimed at the same result and endeavouring to deal with the same problems. He declined to alter his earlier disposition in favour of the complainants. A further appeal to the Court of Appeal was dismissed when the court simply adopted the majority reasons of O'Leary J. in the Divisional Court. The appellants appealed to this Court by leave, granted November 3, 1980.

The Ontario Human Rights Code commences with a preamble, which declares the purpose of the enactment and declares public policy in Ontario, in the following words:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;

AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature;

AND WHEREAS it is desirable to enact a measure to codify and extend such enactments and to simplify their administration;

En l'espèce, le professeur Dunlop a énoncé son critère en ces termes:

[TRADUCTION] Le sens de l'expression «bona fide» [utilisée dans le texte anglais] qui semble le plus compatible avec cet objectif serait celui de «réel» ou «véritable», c'est-à-dire qu'il y a un motif valable pour imposer une limite d'âge, et l'obligation de justifier la mesure discriminatoire incombe à celui qui la prétend justifiée.

Au cours d'une autre audience, convoquée pour traiter de l'indemnité à verser, l'employeur a fait valoir que le professeur Dunlop avait appliqué un critère erroné et qu'il aurait dû appliquer le critère énoncé par le professeur McKay dans l'affaire *North Bay*. Dans des motifs supplémentaires, en date du 7 décembre 1978, le professeur Dunlop a exprimé l'avis que le critère qu'il avait formulé et celui du professeur McKay sont essentiellement identiques, qu'ils visent au même résultat et à régler les mêmes problèmes. Il a refusé de modifier sa décision antérieure en faveur des plaignants. La Cour d'appel, alors saisie, a rejeté l'appel et tout simplement adopté les motifs énoncés, au nom de la majorité, par le juge O'Leary en Cour divisionnaire. Les appelants se sont pourvus devant cette Cour après en avoir reçu l'autorisation le 3 novembre 1980.

Le préambule de *The Ontario Human Rights Code*, qui énonce l'objet de la Loi et la politique générale de l'Ontario, se lit comme suit:

[TRADUCTION] CONSIDÉRANT que la reconnaissance de la dignité inhérente à tous les membres de la famille humaine et de leurs droits égaux et inaliénables constitue le fondement de la liberté, de la justice et de la paix dans le monde et que cette reconnaissance est conforme à la Déclaration universelle des droits de l'homme proclamée par les Nations Unies;

CONSIDÉRANT que l'Ontario a pour principe que toutes les personnes sont libres et égales en dignité et en droits, quels que soient leur race, leurs croyances, leur couleur, leur sexe, leur état civil, leur nationalité, leur ascendance ou leur lieu d'origine;

CONSIDÉRANT que ces principes sont confirmés en Ontario par un certain nombre de lois adoptées par l'Assemblée législative;

ET CONSIDÉRANT qu'il est souhaitable d'adopter une mesure tendant à codifier ces lois, à étendre leur portée et à simplifier leur administration;

Part I prohibits discrimination in general terms and the publication of signs or notices indicating an intention to discriminate for any purpose because of race, creed, colour, sex, marital status, nationality, ancestry or place of origin. Section 2 forbids discrimination on those bases in respect of admission to and use of public facilities, while s. 3 prohibits similar discrimination in respect of rental of commercial or housing accommodation. Section 4, which is the section in issue in the case at bar, prohibits discrimination in connection with employment. Subsection (1) is expressed in these terms:

4.—(1) No person shall,

(*a*) refuse to refer or to recruit any person for employment;

(*b*) dismiss or refuse to employ or to continue to employ any person;

(*c*) refuse to train, promote or transfer an employee;

(*d*) subject an employee to probation or apprenticeship or enlarge a period of probation or apprenticeship;

(*e*) establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment;

(*f*) maintain separate lines of progression for advancement in employment or separate seniority lists where the maintenance will adversely affect any employee; or

(*g*) discriminate against any employee with regard to any term or condition of employment,

because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person or employee.

An exception to the application of the above provisions is provided in subs. (6), which is reproduced hereunder:

(6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a *bona fide* occupational qualification and requirement for the position or employment.

La Partie I interdit la discrimination en termes généraux et la publication, à quelque fin que ce soit, d'enseignes ou d'avis indiquant une intention discriminatoire fondée sur la race, la croyance, la couleur, le sexe, l'état civil, la nationalité, l'ascendance ou le lieu d'origine. L'article 2 interdit la discrimination fondée sur ces motifs, quant à l'accès aux installations publiques et à leur utilisation alors que l'art. 3 interdit toute discrimination semblable à l'égard de la location de locaux commerciaux ou de logements. L'article 4, sur lequel porte le litige en l'espèce, interdit la discrimination en matière d'emploi. Le paragraphe (1) se lit comme suit:

[TRADUCTION] **4.**—(1) Nul ne doit,

a) refuser de proposer ou de recruter une personne en vue d'un emploi;

b) congédier ni refuser d'employer ou de continuer à employer une personne;

c) refuser de former, de muter un employé ou de lui accorder une promotion;

d) soumettre un employé à un stage ou à un apprentissage ni proroger une période de stage ou d'apprentissage;

e) établir ou maintenir une classification ou une catégorie d'emplois dont la définition ou l'application empêche l'embauche d'une personne ou le maintien d'une personne dans un emploi;

f) maintenir des lignes de progression distinctes aux fins de promotion ou des listes d'ancienneté distinctes qui ont pour effet de nuire à un employé; ni

g) assujettir un employé à une distinction injuste quant à une condition de travail,

en raison de la race, des croyances, de la couleur, de l'âge, du sexe, de l'état civil, de la nationalité, de l'ascendance ou du lieu d'origine de la personne ou de l'employé.

Une exception à l'application des dispositions précitées est prévue au par. (6) qui se lit comme suit:

[TRADUCTION] (6) Les dispositions du présent article relatives à un acte discriminatoire, à une restriction, à une condition ou à une préférence pour un poste ou un emploi fondés sur l'âge, le sexe ou l'état civil ne s'appliquent pas lorsque l'âge, le sexe ou l'état civil constituent une exigence professionnelle réelle du poste ou de l'emploi.

Part II continues the Ontario Human Rights Commission and outlines its duties. Part III provides for the resolution of complaints. Section 14 and the subsequent sections in Part III set out the procedure to be followed in dealing with complaints. In s. 14*d* a right of appeal to the courts is given. The scope of the judicial appeal created by s. 14*d* is broad and is expressed in these terms:

14*d*.—(1) Any party to a hearing before a board may appeal from the decision or order of the board to the Supreme Court in accordance with the rules of court.

(2) Where notice of an appeal is served under this section, the board shall forthwith file in the Supreme Court the record of the proceedings before it in which the decision or order appealed from was made, which, together with a transcript of the oral evidence taken before the board if it is not part of the record of the board, shall constitute the record in the appeal.

(3) The Minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section.

(4) An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the board or direct the board to make any decision or order that the board is authorized to make under this Act and the court may substitute its opinion for that of the board.

Part IV provides for prosecution for breaches of the Act and Part V provides for definitions, that of the word 'age' appearing in these terms: " 'age' means any age of forty years or more and less than sixty-five years".

The case at bar involves complaints of discrimination in respect of employment on account of age. It was common ground that the compulsory retirement at age sixty constituted a refusal to employ or continue to employ the complainants. While discrimination on the basis of age is in terms forbidden in s. 4 of the Code, in accordance with subs. (6) an employer may discriminate on that basis where age is a *bona fide* occupational qualification and requirement for the position or employ-

La Partie II maintient l'existence de la Commission ontarienne des droits de la personne et énonce ses fonctions. La Partie III porte sur le règlement des plaintes. L'article 14 et les articles suivants de la Partie III énoncent la procédure à suivre en matière de traitement des plaintes. L'article 14*d* prévoit un droit d'appel aux tribunaux judiciaires. Le droit d'appel prévu à l'art. 14*d* est de portée générale et il est énoncé comme suit:

[TRADUCTION] **14*d*.**—(1) Toute partie à une audience devant une commission d'enquête peut en appeler de la décision ou de l'ordonnance de cette commission auprès de la Cour suprême, conformément aux règles de pratique de cette cour.

(2) Lorsqu'un avis d'appel est signifié en vertu du présent article, la commission d'enquête dépose sans délai devant la Cour suprême le dossier des procédures qui se sont déroulées devant elle et au cours desquelles a été rendue la décision ou l'ordonnance qui fait l'objet de l'appel. Ce dossier, ainsi que la transcription des témoignages entendus devant la commission si elle ne fait pas partie de son dossier, constituent le dossier d'appel.

(3) Le Ministre a le droit de se faire entendre, par procureur ou autrement, à l'audition d'un appel formé en vertu du présent article.

(4) Il peut être interjeté appel en vertu du présent article sur des questions de droit ou de fait, ou des questions mixtes de droit et de fait, et la cour peut confirmer ou infirmer la décision ou l'ordonnance de la commission ou lui ordonner de rendre une décision ou ordonnance qu'elle est habilitée à rendre en vertu de la présente loi et la cour peut substituer son opinion à celle de la commission.

La Partie IV concerne les poursuites relatives aux infractions à la Loi et la Partie V définit certains termes dont l'«âge»: [TRADUCTION] « «âge» s'entend de quarante ans ou plus et moins de soixante-cinq ans».

La présente instance porte sur des plaintes de discrimination en matière d'emploi fondée sur l'âge. Il est reconnu que la retraite obligatoire à soixante ans constitue un refus d'employer ou de continuer à employer les plaignants. Même si l'art. 4 du Code interdit formellement la discrimination fondée sur l'âge, un employeur peut, en vertu du par. (6), établir une distinction pour ce motif lorsque l'âge est une exigence professionnelle réelle du poste ou de l'emploi en question. Lorsque l'exi-

ment involved. Where such *bona fide* occupational qualification and requirement is shown the employer is entitled to retire employees regardless of their individual capacities, provided only that they have attained the stated age. It will be seen at once that under the Code non-discrimination is the rule of general application and discrimination, where permitted, is the exception.

Once a complainant has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.

Two questions must be considered by the Court. Firstly, what is a *bona fide* occupational qualification and requirement within s. 4(6) of the Code and, secondly, was it shown by the employer that the mandatory retirement provisions complained of could so qualify? In my opinion, there is no significant difference in the approaches taken by Professors Dunlop and McKay in this matter and I do not find any serious objection to their characterization of the subjective element of the test to be applied in answering the first question. To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

gence professionnelle réelle est établie, l'employeur a le droit de mettre les employés à la retraite indépendamment de leurs aptitudes personnelles, à la seule condition qu'ils aient atteint l'âge prescrit. On constate donc immédiatement qu'aux termes du Code, la non-discrimination est la règle générale et la discrimination, lorsqu'elle est permise, est l'exception.

Lorsqu'un plaignant établit devant une commission d'enquête qu'il est, de prime abord, victime de discrimination, en l'espèce que la retraite obligatoire à soixante ans est une condition de travail, il a droit à un redressement en l'absence de justification de la part de l'employeur. La seule justification que peut invoquer l'employeur en l'espèce est la preuve, dont le fardeau lui incombe, que la retraite obligatoire est une exigence professionnelle réelle de l'emploi en question. La preuve, à mon avis, doit être faite conformément à la règle normale de la preuve en matière civile, c'est-à-dire suivant la prépondérance des probabilités.

La Cour doit examiner deux questions. En premier lieu, qu'est-ce qu'une exigence professionnelle réelle au sens du par. 4(6) du Code et, en second lieu, l'employeur a-t-il démontré que les dispositions relatives à la retraite obligatoire qui font l'objet de la plainte peuvent être ainsi qualifiées? A mon avis, les positions adoptées respectivement par les professeurs Dunlop et McKay en la matière ne diffèrent pas sensiblement et je ne vois aucune objection sérieuse à leur description de l'élément subjectif du critère qui doit être appliqué pour répondre à la première question. Pour constituer une exigence professionnelle réelle, une restriction comme la retraite obligatoire à un âge déterminé doit être imposée honnêtement, de bonne foi et avec la conviction sincère que cette restriction est imposée en vue d'assurer la bonne exécution du travail en question d'une manière raisonnablement diligente, sûre et économique, et non pour des motifs inavoués ou étrangers qui visent des objectifs susceptibles d'aller à l'encontre de ceux du Code. Elle doit en outre se rapporter objectivement à l'exercice de l'emploi en question, en étant raisonnablement nécessaire pour assurer l'exécution efficace et économique du travail sans mettre en danger l'employé, ses compagnons de travail et le public en général.

The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned. As far as the subjective element of the matter is concerned, there was no evidence to indicate that the motives of the employer were other than honest and in good faith in the sense described. It will be the objective aspect of the test which will concern us. We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable. In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.

Faced with the uncertainty of the aging process an employer has, it seems to me, two alternatives. He may establish a retirement age at sixty-five or over, in which case he would escape the charge of discrimination on the basis of age under the Code. On the other hand, he may, in certain types of employment, particularly in those affecting public safety such as that of airline pilots, train and bus drivers, police and firemen, consider that the risk of unpredictable individual human failure involved in continuing all employees to age sixty-five may be such that an arbitrary retirement age may be justified for application to all employees. In the case at bar it may be said that the employment falls into that category. While it is no doubt true that some below the age of sixty may become unfit for firefighting and many above that age may remain fit, recognition of this proposition affords no assistance in resolving the second question. In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a *bona*

La réponse à la seconde question dépend en l'espèce, comme dans tous les cas, de l'examen de la preuve et de la nature de l'emploi concerné. Quant à l'élément subjectif de la question, aucune preuve ne démontre que les motifs de l'employeur n'étaient pas honnêtes et sincères au sens qui a été décrit. Nous nous intéresserons donc à l'aspect objectif du critère. Chronologiquement, nous vieillissons tous au même rythme, mais le vieillissement, au sens fonctionnel du terme, se fait à des rythmes très différents et il est difficilement prévisible. Lorsque le souci de la capacité de l'employé est surtout d'ordre économique, c'est-à-dire lorsque l'employeur s'intéresse à la productivité, et que les conditions de travail ne requièrent aucune qualification particulière susceptible de diminuer sensiblement avec l'âge, ou ne comportent pour les employés ou le public aucun danger exceptionnel qui peut augmenter avec l'âge, il peut être difficile, voire impossible, d'établir que la retraite obligatoire à un âge déterminé, sans égard à la capacité d'une personne en particulier, peut valablement être imposée en vertu du Code. Dans un emploi de ce genre, à mesure que la capacité décline, et que ce déclin devient évident, les employés peuvent être, à juste titre, congédiés ou mis à la retraite.

Devant l'incertitude du vieillissement, deux solutions, à mon avis, s'offrent à l'employeur. Il peut fixer l'âge de la retraite à soixante-cinq ans ou plus, et le cas échéant, il ne peut être accusé de discrimination fondée sur l'âge aux termes du Code. D'autre part, il peut, en ce qui concerne certains types d'emplois, en particulier ceux qui ont trait à la sécurité publique comme c'est le cas des pilotes de ligne aérienne, des conducteurs de trains et d'autobus, des policiers et des pompiers, estimer que le risque d'erreur humaine imprévisible que comporte le maintien de tous les employés à leur poste jusqu'à soixante-cinq ans peut justifier l'application à tous les employés d'un âge de retraite fixé arbitrairement. On peut affirmer que l'emploi dont il est question en l'espèce entre dans cette catégorie. Même s'il ne fait aucun doute que certaines personnes âgées de moins de soixante ans peuvent devenir inaptes au travail de pompier et que maintes personnes plus âgées sont encore aptes à la tâche, la reconnaissance de cette prémisse n'aide aucunement à résoudre la seconde

fide occupational qualification and requirement has been shown the board of inquiry and the court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large.

The employer argued that firefighting was a dangerous occupation which required physical strength, stamina and alertness beyond most other occupations. It contended that there were such dangers and hazards that young and fit men were required, and that the adequate performance of all members of a firefighting unit was essential to preserve public safety and that of the employees themselves. The arbitrary retirement age was therefore justified as a reasonable measure to assure the maintenance of adequate fire protection in the municipality and, at the same time, to avoid the dangers which could result from keeping all members employed until age sixty-five.

In dealing with the evidence Professor Dunlop remarked that it was largely "impressionistic". He considered that something more was required to discharge the burden of proof and noted the insufficiency of general assertions and expressions of witnesses, some with long experience in firefighting, to the effect that firefighting was a "young man's game". He remarked upon the absence of any scientific evidence to support the employer's position and concluded against the employer, saying:

> While these are sound reasons for allowing a firefighter to retire at the age of 60, they do not seem to me to be reasons for compelling it, absent some scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe.

question. Dans un métier où, comme en l'espèce, l'employeur cherche à justifier la retraite par la sécurité publique, le commissaire enquêteur et la cour doivent, pour décider si on a prouvé l'existence d'une exigence professionnelle réelle, se demander si la preuve fournie justifie la conclusion que les personnes qui ont atteint l'âge de la retraite obligatoire présentent un risque d'erreur humaine suffisant pour justifier la mise à la retraite prématurée dans l'intérêt de l'employé, de ses compagnons de travail et du public en général.

L'employeur a fait valoir que le métier de pompier est un métier dangereux qui exige plus de force physique, de résistance et de vigilance que la plupart des autres métiers. Il a allégué que les risques et le danger présents exigent des hommes jeunes et en bonne forme physique, et qu'il est nécessaire d'obtenir un bon rendement de tous les membres d'une équipe de pompiers pour assurer la sécurité du public et celle des employés eux-mêmes. L'établissement arbitraire de l'âge de la retraite se justifie donc comme une mesure raisonnable qui permet d'assurer le maintien d'un bon service de protection contre les incendies dans la municipalité et, en même temps, d'éviter les dangers susceptibles de découler du maintien en fonction de tous les employés jusqu'à l'âge de soixante-cinq ans.

Lorsqu'il a examiné la preuve, le professeur Dunlop a fait remarquer qu'elle était très [TRADUCTION] «impressionniste». Il a estimé qu'il faut une preuve plus étoffée pour s'acquitter du fardeau de la preuve et il a souligné l'insuffisance des affirmations et des déclarations générales des témoins, dont certains avaient beaucoup d'expérience dans la lutte contre les incendies, que le métier de pompier est [TRADUCTION] «une affaire de jeune homme». Il a fait remarquer l'absence de preuve scientifique à l'appui de la thèse de l'employeur et il a conclu de manière défavorable à l'employeur en disant:

> [TRADUCTION] Même si ce sont là de bonnes raisons de permettre à un pompier de prendre sa retraite à 60 ans, elles ne me semblent pas justifier la mise à la retraite obligatoire en l'absence de données scientifiques ou statistiques qui prouvent que, passé l'âge de 60 ans, les pompiers deviennent moins efficaces et moins sûrs.

He also gave it as his opinion that the main or one of the main reasons the arbitrary retirement age had been established was to create uniformity throughout the municipalities in the Province of Ontario. There was evidence that some sixty per cent had established such a retirement policy and, as well, that the union representing the firefighters had pressed for the early retirement as a benefit for employees.

In the Divisional Court the evidence was canvassed and the majority of the court took a different view. It commented on the reference made by the board of inquiry to scientific evidence and seemed to be of the opinion that the decision turned on its absence. The majority then concluded that on all the evidence before the board the respondent had made out a justification showing that the compulsory retirement was a *bona fide* occupational qualification and requirement under s. 4(6).

The majority of the Divisional Court thus chose to review the evidence and substitute its views for those of the board of inquiry on the conclusions to be drawn. In this, as has been pointed out above, it was supported by the Court of Appeal. The majority of the Divisional Court apparently acted under the broad powers given the court upon an appeal from a decision or order of a board of inquiry in s. 14*d*(4) of the Code. The appellate court is specifically empowered to review the evidence and substitute its own findings for those of the board of inquiry and, while I acknowledge the importance of the general principle expressed by Hughes J. in the *North Bay* case, at p. 716, regarding interference with findings of fact made at first instance, it cannot be said, as was argued by the appellant before us, that it will always be error for an appellate court acting under the broad powers so conferred to negate findings made below. However, in the circumstances of this case, with the utmost deference to the views of the majority in the Divisional Court and to those of the Court of Appeal, I am of the view that the evidence adduced before the board of inquiry was inadequate to discharge the burden of proof lying

Il a également exprimé l'avis que la principale ou l'une des principales raisons de l'établissement arbitraire de l'âge de la retraite était de réaliser l'uniformité entre les municipalités de la province de l'Ontario. Il a été démontré qu'environ soixante pour cent de ces municipalités ont adopté une telle politique en matière de retraite et également, que le syndicat qui représente les pompiers avait réclamé la retraite anticipée en tant qu'avantage pour les employés.

La Cour divisionnaire a examiné la preuve minutieusement et, à la majorité, a adopté un point de vue différent. Elle a fait des observations concernant la mention, par le commissaire enquêteur, de la preuve scientifique et elle a semblé estimer que la décision reposait sur l'absence d'une preuve de cette nature. Elle a alors conclu à la majorité que, d'après l'ensemble de la preuve déposée devant le commissaire enquêteur, l'intimée avait établi une justification en prouvant que la retraite obligatoire était une exigence professionnelle réelle au sens du par. 4(6).

Ainsi, la Cour divisionnaire a choisi, à la majorité, d'examiner la preuve et de substituer sa propre opinion à celle du commissaire enquêteur quant aux conclusions à tirer. Comme je l'ai déjà souligné, la Cour d'appel a confirmé cette décision en ce sens. La Cour divisionnaire à la majorité semble avoir agi en vertu des pouvoirs généraux que lui confère le par. 14*d*(4) du Code en matière d'appel d'une décision ou ordonnance d'une commission d'enquête. Le tribunal d'appel est expressément habilité à examiner la preuve et à substituer ses propres conclusions à celles de la commission d'enquête et, bien que je reconnaisse l'importance du principe général énoncé par le juge Hughes dans l'arrêt *North Bay*, à la p. 716, concernant la modification des constatations de fait d'une cour de première instance, on ne peut dire, comme l'appelant l'a fait valoir ici, qu'une cour d'appel qui agit en vertu des pouvoirs généraux qui lui sont ainsi attribués, commet toujours une erreur si elle nie les conclusions de l'instance inférieure. Toutefois, compte tenu des circonstances de l'espèce et avec grands égards pour l'opinion exprimée à la majorité par la Cour divisionnaire et celle de la Cour d'appel, j'estime que

upon the employer. In my opinion, the appeal must succeed and the judgment of the board of inquiry be restored.

It would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of sixty-five under the provisions of s. 4(6) of the Code. In the final analysis the board of inquiry, subject always to the rights of appeal under s. 14*d* of the Code, must be the judge of such matters. In dealing with the question of a mandatory retirement age it would seem that evidence as to the duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties would be imperative. Many factors whould be involved and it would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the work place, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported. The aging process is one which has involved the attention of the medical profession and it has been the subject of substantial and continuing research. Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to adduce evidence upon this subject.

I am by no means entirely certain what may be characterized as "scientific evidence". I am far from saying that in all cases some "scientific evidence" will be necessary. It seems to me, however, that in cases such as this, statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is "a young man's game". My review of the evidence leads me to agree with the board of inquiry. While the evidence given and the views expressed were, I am sure, honestly advanced, they were, in my view, properly described as "impressionistic"

la preuve soumise au commissaire enquêteur était insuffisante pour libérer l'employeur du fardeau de la preuve qui lui incombait. A mon avis, le pourvoi doit être accueilli et la décision du commissaire enquêteur doit être rétablie.

Il serait imprudent de tenter de formuler une règle fixe concernant la nature et le caractère suffisant de la preuve requise pour justifier la retraite obligatoire avant l'âge de soixante-cinq ans en vertu des dispositions du par. 4(6) du Code. En dernière analyse et toujours sous réserve du droit d'appel prévu à l'art. 14*d* du Code, le commissaire enquêteur doit être le juge en cette matière. A l'examen de la question d'un âge de retraite obligatoire, il semble nécessaire de présenter des éléments de preuve relativement aux tâches à accomplir et au rapport entre le vieillissement et l'exécution sûre et efficace de ces tâches. Un bon nombre de facteurs doivent être considérés et il semble essentiel que la preuve porte sur les aspects détaillés des tâches à accomplir, les conditions régnant sur les lieux de travail et l'effet de ces conditions sur les employés, en particulier sur ceux qui ont atteint ou qui atteindront bientôt l'âge qu'on veut prescrire pour la retraite. Le phénomène du vieillissement a retenu l'attention des médecins et a fait l'objet de recherches importantes et suivies. Lorsqu'une limitation de la période d'emploi doit, pour être valide, reposer sur la preuve que l'extension de cette période après un certain âge fait naître un danger pour la sécurité publique, il paraît nécessaire que l'employeur, pour s'acquitter du fardeau de la preuve qui lui incombe, produise une preuve à ce sujet.

Je ne suis pas du tout certain de ce qu'on peut qualifier de «preuve scientifique». Je ne dis absolument pas qu'une «preuve scientifique» sera nécessaire dans tous les cas. Il me semble cependant que, dans des cas comme celui en l'espèce, une preuve de nature statistique et médicale qui s'appuie sur l'observation et l'étude de la question du vieillissement, même si elle n'est pas absolument nécessaire dans tous les cas, sera certainement plus convaincante que le témoignage de personnes même très expérimentées dans la lutte contre les incendies, portant que le travail de pompier est «une affaire de jeune homme». L'examen que j'ai fait de la preuve m'amène à souscrire aux conclusions du commissaire enquêteur. Tout en étant

and were of insufficient weight. The question of sufficiency and the nature of evidence in such matters has been discussed in various cases, and of particular interest are: *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (1974); *Little v. Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. 1.

A further argument must be dealt with. The respondent in paragraph 38 of its factum, noting that the mandatory retirement had been agreed upon in the collective agreement with the union representing the appellants, submitted:

> It is submitted that where the parties engage in the statutorily-required bargaining, and as a result thereof agree, in good faith, on a standard retirement age based, in part, on the particular rigours and demands of the job of fire-fighting, then the resulting qualification and requirement must be considered to be "bona fide" in the absence of evidence that the limitation was inserted for an ulterior purpose.

While this submission is that the condition, being in a collective agreement, should be considered a *bona fide* occupational qualification and requirement, in my opinion to give it effect would be to permit the parties to contract out of the provisions of *The Ontario Human Rights Code*.

Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy. In *Halsbury's Laws of England*, 3rd ed., vol. 36, p. 444, para. 673, the following appears:

> **673. Waiver of statutory rights.** Individuals for whose benefit statutory duties have been imposed may by contract waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest.

persuadé que la preuve et les opinions entendues ont été soumises honnêtement, c'est avec raison, à mon avis, qu'on a dit qu'elles étaient «impressionnistes» et qu'elles n'étaient pas concluantes. La question de la suffisance et de la nature de la preuve en la matière a été analysée dans divers arrêts, dont en particulier: *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (1974); *Little v. Saint John Shipbuilding and Drydock Co. Ltd.* (1980), 1 C.H.R.R. 1.

Il reste un autre point à examiner. Lorsqu'elle fait remarquer que la retraite obligatoire a été acceptée dans la convention collective passée avec le syndicat qui représente les appelants, l'intimée fait valoir, au paragraphe 38 de son exposé, ce qui suit:

> [TRADUCTION] Nous prétendons que lorsque les parties entrent en négociation conformément aux exigences de la loi et qu'il en résulte une entente de bonne foi sur un âge de retraite normalisé qui se fonde en partie sur les rigueurs et les exigences particulières du travail de pompier, l'exigence qui en résulte doit alors être considérée comme «réelle» en l'absence de preuve que la restriction a été insérée dans un but inavoué.

Alors que cet argument porte que cette condition, stipulée dans une convention collective, doit être considérée comme une exigence professionnelle réelle, j'estime que ce serait permettre aux parties de renoncer par contrat aux dispositions de *The Ontario Human Rights Code* que de l'entériner.

Même s'il n'apporte aucune restriction formelle à une renonciation de ce genre, le Code est néanmoins une loi publique qui énonce une politique générale de l'Ontario, comme on le constate en lisant le texte législatif lui-même et son préambule. Il ressort clairement de la doctrine, tant canadienne qu'anglaise, que les parties n'ont pas la faculté de renoncer par contrat aux dispositions de telles lois et que les contrats à cet effet sont nuls parce que contraires à l'ordre public. Dans *Halsbury's Laws of England*, 3e éd., vol. 36, p. 444, par. 673, on lit:

> [TRADUCTION] **673. Renonciation aux droits prévus par la loi.** Les personnes en faveur desquelles la loi impose des obligations peuvent renoncer par contrat à leur droit à l'exécution de ces obligations, à moins que ce ne soit contraire à l'ordre public ou encore aux dispositions ou à l'économie générale de la loi qui impose cette obligation particulière, ou que les obligations ne soient imposées dans l'intérêt public.

And in the fourth edition of the same work the following is to be found in vol. 9, p. 289, para. 421:

421. Contracting out. As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.

By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee.

English authority expressing this principle is to be found in *Equitable Life Assurance Society of the United States v. Reed*, [1914] A.C. 587. The question of the enforcement of a contract contrary to public policy is generally dealt with by Duff C.J. in *Re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1, where reference is made to *Fender v. Mildmay*, [1937] 3 All E.R. 402, and other authorities. Examples of the application of the principle are such cases as *R. v. Roma*, [1942] 3 W.W.R. 525; *Outen v. Stewart and Grant and City of Winnipeg*, [1932] 3 W.W.R. 193, and *Dunn v. Malone* (1903), 6 O.L.R. 484. *The Ontario Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.

For these reasons I would allow the appeal with costs and reinstate the order of the board of inquiry.

Appeal allowed with costs.

Solicitor for the appellants: H. Allan Leal, Toronto.

Solicitors for the respondent: Hinks, Morley, Hamilton, Stewart, Storie, Toronto.

Et dans la quatrième édition de cet ouvrage, on lit au vol. 9, p. 289, par. 421:

[TRADUCTION] **Renonciation.** En règle générale, une personne peut, dans un contrat valide, renoncer aux avantages que lui accorde une loi du Parlement ou, comme on dit, elle peut renoncer à l'application de la loi, à moins qu'il ne puisse être établi qu'il serait contraire à l'ordre public de permettre ce contrat. La loi peut toutefois imposer des conditions en des termes tels qu'on ne puisse y renoncer par contrat; et, dans certains cas, il est expressément prévu qu'un tel contrat sera nul.

A titre d'exemple d'exception à la règle générale, un contrat entre un employeur et un employé par lequel ce dernier accepte de renoncer à une obligation que la loi impose à l'employeur pour des motifs de sécurité ne lie généralement pas l'employé.

La jurisprudence anglaise énonce ce principe dans l'arrêt *Equitable Life Assurance Society of the United States v. Reed*, [1914] A.C. 587. Le juge en chef Duff traite de façon générale de la question de l'exécution d'un contrat contraire à l'ordre public dans l'arrêt *Re Estate of Charles Millar, Deceased*, [1938] R.C.S. 1, qui renvoie notamment à l'arrêt *Fender v. Mildmay*, [1937] 3 All E.R. 402. On trouve des exemples de l'application du principe dans les arrêts *R. v. Roma*, [1942] 3 W.W.R. 525, *Outen v. Stewart and Grant and City of Winnipeg*, [1932] 3 W.W.R. 193 et *Dunn v. Malone* (1903), 6 O.L.R. 484. La législature de l'Ontario a adopté *The Ontario Human Rights Code* dans l'intérêt de l'ensemble de la collectivité et de chacun de ses membres, et il est évident que cette loi tombe dans la catégorie des lois auxquelles on ne peut renoncer ou qu'on ne peut modifier par contrat privé; par conséquent, cet argument ne peut être admis.

Pour ces motifs, je suis d'avis d'accueillir le pourvoi avec dépens et de rétablir l'ordonnance du commissaire enquêteur.

Pourvoi accueilli avec dépens.

Procureur des appelants: H. Allan Leal, Toronto.

Procureurs de l'intimée: Hinks, Morley, Hamilton, Stewart, Storie, Toronto.

Federal Court Cour fédérale

Date: 20130404

Docket: T-1045-11

Citation: 2013 FC 342

Toronto, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Pictou Landing Band Council and Ms. Maurina Beadle apply for judicial review of the decision of Ms. Barbara Robinson, Manager, Social Programs, Aboriginal Affairs and Northern Development Canada (AANDC), not to reimburse the Pictou Landing Band Council (PLBC) for in-home health care to one of its members beyond a normative standard of care identified by Ms. Robinson.

[2] The Applicants also request that the Court make an order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], directing the Respondent to reimburse the PLBC for exceptional costs incurred providing home care to Jeremy Meawasige and his mother, Ms. Beadle, from May 27, 2010 to the present.

[3] I have decided to grant the application for judicial review because I have determined Jordan's Principle is applicable in this case. Having decided as I have, I need not consider the application for an order for reimbursement pursuant to section 24(1) of the *Charter*.

[4] My reasons follow.

Background

[5] The Pictou Landing Band Council is the elected government of the Pictou Landing First Nation and makes governance decisions concerning its members, including the allocation of funding received from the federal government through block contribution agreements. This includes funding from AANDC and Health Canada to deliver continuing care services to members in need on the Pictou Landing Reserve.

[6] The other Applicant is Ms. Maurina Beadle, a 55 year-old member of the Pictou Landing First Nation. Her son, Jeremy Meawasige, is a teenager with multiple disabilities and high care needs. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism.

Jeremy can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety.

[7] Jeremy lives on the Pictou Landing Indian Reserve. Ms. Beadle, his mother, is Jeremy's primary caregiver and she was able to care for her son in the family home without government support or assistance until Ms. Beadle suffered a stroke in May 2010.

[8] After her stroke, Ms. Beadle was unable to continue to care for Jeremy without assistance. She was hospitalized for several weeks, and when she was released, required a wheelchair and assistance with her own personal care. The PLBC immediately started providing 24 hour care for both Ms. Beadle and Jeremy in their home. Between May 27, 2010 and March 31, 2011, the PLBC spent $82,164.00 on in-home care services for Ms. Beadle and Jeremy.

[9] The PLBC continued to provide home care support to Ms. Beadle and Jeremy. In October 2010, the Pictou Landing Health Centre arranged for an assessment of the family's needs. Since that time, the Health Centre has provided the family with in-home services as recommended by the assessment. From Monday to Friday, a personal care worker is present from 8:30 a.m. to 11:30 p.m. Over the weekends, there is 24 hour care. This level of care meets Jeremy's need for 24-hour care, less what his family can provide. The family providers are Ms. Beadle, to the degree she has recovered from her stroke and Jeremy's older brother, Jonavan, who attends to assist.

[10] Ms. Beadle and her son Jeremy have a deep bond with each other. His mother is often the only person who can understand his communication and needs. She spent many hours training him to walk and helping him with special exercises. She discovered his love of music and sings to him when he is upset or does not want to cooperate. Her voice calms him and can make him desist in self-abusive behaviour. She takes him on the pow-wow trail, travelling to communities where pow-wows are held. She says Jeremy is happiest when he is dancing with other First Nations people and singing to traditional music. Jeremy has never engaged in self-abusive behaviour on those occasions.

[11] By February 2011, the costs associated with caring for the family were approximately $8,200 per month. This represented nearly 80% of the PLBC's total monthly budget for personal and home care services funded by AANDC under the Assisted Living Program (ALP) and by Health Canada under the Home and Community Care Program (HCCP).

The Assisted Living Program and the Home and Community Care Program

[12] The ALP is administered by the PLBC and has both an institutional and in-home care component. The ALP provides funding for non-medical, social support services to seniors, adults with chronic illness, and children and adults with disabilities (mental and physical) living on reserve and includes such things as attendant care, housekeeping, laundry, meal preparation, and non-medical transportation.

[13] The Home and Community Care Program is also administered by the PLBC. Under the HCCP, the PLBC is required to prioritize and fund essential services before support services and Health Canada spells out what falls under each of these headings. The HCCP provides funding to assist with delivery of basic in-home health care services which require a licensed/certified health practitioner or the supervision of such a person. The PLBC determines how the contribution agreement dollars for the HCCP are spent in the provision of basic in-home health care services.

[14] The ALP and the HCCP are programs designed to complement each other, but not to provide duplicate funding for the same service. If a type of care, such as respite care, is already being paid for by one of the programs, it will not be an eligible expense under the other.

[15] Under the current block contribution agreement between the PLBC and Aboriginal Affairs and Northern Development Canada [AANDC] the PLBC receives $55,552.00 for funding eligible ALP services. Under the block contribution agreement between PLBC and Health Canada, the PLBC receives $75,364.00.

Request for Funding

[16] On February 16, 2011, Ms. Philippa Pictou, the Health Director at the Pictou Landing First Nation Health Centre contacted Ms. Susan Ross, the Atlantic Regional Home and Community Care Coordinator at Health Canada. Ms. Pictou expressed her opinion that Jeremy's case met the definition of Jordan's Principle and asked Ms. Ross to participate in case conferencing regarding his needs.

[17] Jordan's Principle was developed in response to a sad case involving a severely disabled First Nation child who remained in a hospital for over two years due to jurisdictional disputes between different levels of government over payment of home care on his First Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[18] Jordan's Principle is a child-first principle that says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status.

[19] On February 28, 2011, a case conference was held regarding Jeremy's needs. In attendance were provincial care assessors from the Nova Scotia Department of Health and Wellness, the Pictou Landing Community Health Nurse, representatives of the PLBC, and Ms. Ross and Ms. Deborah Churchill on behalf of Canada.

[20] On April 19, 2011, a second case conference took place to discuss Jeremy's needs. Because Ms. Pictou had earlier requested that Jeremy's situation be considered a Jordan's Principle case, Ms. Barbara Robinson, the Jordan's Principal focal point for AANDC, was asked to participate. Both Ms. Ross and Ms. Robinson attended the second case conference, as did Mr. Troy Lees, a civil servant with the Nova Scotia provincial Department of Community Services.

[21] At the second case conference, Mr. Lees explained what the province would provide to a child with similar needs and circumstances off reserve. He explained there was a departmental directive that a family living off reserve could receive up to a maximum of $2,200 per month in respite services. Mr. Lees also stated that the province would not provide 24-hour care in the home by funding the equivalent to the costs of institutional care.

[22] On May 12, 2011, Ms. Pictou wrote to Health Canada and AANDC officials to formally request additional funding so that the PLBC could continue to provide home care services to Ms. Beadle and Jeremy. Attached to the request was a briefing note describing Ms. Beadle's and Jeremy's situation and their home care needs. Also attached was a copy of the Nova Scotia Supreme Court's March 29, 2011 decision in *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126, 302 NSR (2d) 50 [*Boudreau*].

[23] On May 27, 2011, Ms. Robinson, the Manager for Social Programs and the Jordan's Principle focal point for AANDC, emailed her decision to Ms. Pictou. The decision was delivered on behalf of both AANDC and Health Canada. In her decision, Ms. Robinson concluded there was no jurisdictional dispute in this matter as both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve. Ms. Robinson determined that Jeremy's case did not meet the federal definition of a Jordan's Principle case.

Decision Under Review

[24] Ms. Robinson [the Manager] informed Ms. Pictou of her decision to refuse the PLBC's request for additional funding for Jeremy's case by an extensive email dated May 27, 2011. She advised that she had an opportunity to confer with provincial health authorities and verified that the request for the provision of 24-hour home care for Jeremy would exceed the normative standard of care.

[25] The Manager recognized the First Nation's right to enhance the services that are provided to this family through own source revenues, but emphasized that services that exceed the normative standard of care and which are outside of the federal funding authorities would not be reimbursed through the AANDC Assisted Living or Health Canada Home and Community Care Programs.

[26] The Manager went on to state that provincial officials had confirmed that Jeremy's care needs would meet the placement criteria for long term institutional care, and that depending upon the classification of the long term care facility, the expenses associated with Jeremy's care would be fully funded by the AANDC Assisted Living, Institutional Care Program and/or the Province of Nova Scotia. However, she recognized this was a personal decision and that Jeremy's mother did not wish to place her child in a long term care facility.

[27] The Manager concluded by noting that although the case did not meet the federal definition of a Jordan's Principle case, AANDC and Health Canada would continue to work with stakeholders and to participate in case conferencing as required.

Relevant Legislation

[28] The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 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.

[29] The *Social Assistance Act*, RSNS 1989, c 432 [*SAA*] provides:

> 9 (1) Subject to this Act and the regulations the social services committee shall furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.
>
> [Emphasis added]

[30] The *Municipal Assistance Regulations*, NS Reg 76-81 provides:

> 1. In these regulations
>
> (e) "assistance" means the provision of money, goods or services to a person in need, including
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,

> (ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,
>
> (iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,
>
> (iv) care in homes for special care,
>
> (v) social services, including family counselling, homemakers, home care and home nursing services,
>
> (vi) rehabilitation services;
>
> [Emphasis added]

Arguments of the Parties

Applicants' Submissions

[31] The Applicants organized their submissions according to the issues they identified.

What is the appropriate standard of review?

[32] The Applicants submit the central issue raised in this judicial review is whether the decision-maker ought to have exercised her discretion to provide additional funding to the PLBC for continuing care services. The Applicants submit that in the particular circumstances of this case, a positive decision was necessary to ensure Jeremy and Ms. Beadle continue to receive equal benefit

under the law as guaranteed by section 15 of the *Charter*. The Applicants submit the appropriate standard of review for issues involving the *Charter* is invariably one of correctness.

[33] The Applicants also submit that the Respondent erred in law by failing to properly interpret and apply the Nova Scotia *SAA* in accordance with the jurisprudence of the Nova Scotia Supreme Court. As an error of law, the Applicants submit the standard of review on this issue must also be correctness.

[34] Finally, the Applicants allege that the impugned decision was based on a serious misapprehension of the evidence following a gravely flawed fact-finding process. The Applicants submit this Court has held that the Government of Canada may be held to a reasonableness standard when exercising discretionary power pursuant to contribution funding agreements with First Nations Bands.

Did the decision-maker err in law in interpreting and applying the Nova Scotia Social Assistance Act?

[35] The Applicants submit the ALP Manual and the relevant funding agreement with the PLBC both state that funding is provided to bands to ensure individuals living on reserve receive services "reasonably comparable" to those provided by the province. The Applicants submit the Respondent denied additional funding to the PLBC on the grounds that Jeremy and Ms. Beadle would only be entitled to home-care services to a maximum of $2,200 per month if they lived off reserve. The Applicants argue that in reaching this decision, the Respondent committed an error of law.

[36] In Nova Scotia, social services and assistance for people with disabilities are provided under the *SAA*. Section 9 of the *SAA* states that, subject to regulations, the government "shall furnish assistance to all persons in need". Section 18 of the *SAA* provides the Governor in Council to make regulations pursuant to the *SAA*. Under s 1(e)(iv) of the *Municipal Assistance Regulations*, NS Reg 76-81 "assistance" is defined to include "home care".

[37] Nova Scotia's Direct Family Support Policy from 2006 states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". The Applicants submit Ms. Robinson conceded in cross-examination that Jeremy and Ms. Beadle met much of the criteria under the "exceptional circumstances" portion of the policy. However, the Applicants submit Ms. Robinson concluded this Policy did not reflect Nova Scotia's normative standard of care because a provincial official had issued a separate directive that stated that no funding in excess of $2,200 would ever be provided.

[38] The Applicants submit that in cross-examination Ms. Robinson also indicated that she had read the judgment in *Boudreau*, where the Nova Scotia Supreme Court concluded that the $2,200 monthly cap was not lawful or binding in any way.

[39] The Applicants cited from the Court decision in *Boudreau* at paras 61 & 62 stating:

> What does the SAA obligate the Department to do in the case at Bar? I note s. 27 of the SAA permits regulations "prescribing the maximum amount of assistance that may be granted" but no regulations relevant to the case at Bar are in place.

> …
>
> How much "assistance" as defined in the Municipal Assistance Regulations, is the "care" obligation *vis-à-vis* Brian Boudreau? In my view, the obligations of the Department pursuant to the SAA and Regulations are met when the "assistance" reasonably meets the "need" in each specific case.
>
> [Emphasis added]

[40] The Applicants submit that Ms. Robinson stated in cross-examination that the *Boudreau* judgment was "not relevant" to her decision. They submit this is an error of law and that the decision must be quashed for this reason alone.

Was the decision based on a serious misunderstanding of the evidence?

[41] The Applicants submit that even if the refusal to provide additional funding to the PLBC is not found to be discriminatory, the decision remains unreasonable as it was based on a serious misapprehension of evidence and on a gravely flawed fact finding process.

[42] The Applicants argue that the decision is unreasonable because it was based on an erroneous understanding of what was actually being requested by the PLBC. The Applicants point to Ms. Robinson's decision of May 27, 2011 to illustrate that Ms. Robinson denied the PLBC's request on the basis that 24 hour care was not available off reserve. However, the Applicants submit this was not what was requested by the PLBC.

[43] The Applicants point to a particular paragraph in Ms. Pictou's Briefing Note which was attached to the request for additional funding which states:

> Jeremy Meawasige's reasonable "need" for "homecare" is 24 hours a day, 7 days a week (less the time his family can reasonably attend to his care), but which department is obliged to meet his care needs?

The Applicants submit that this demonstrates that Ms. Robinson erred by characterizing the PLBC's request as funding for 24-hour services as well as additional assistance for meal preparation and light housekeeping.

[44] The Applicants argue that since Ms. Robinson failed to understand what was requested by the PLBC, it cannot be said that the request for additional funding was properly or fairly considered. The Applicants submit that Courts have held that a decision-maker's misapprehension of facts or evidence constitutes a palpable and overriding error. *Crane v Ontario (Director, Disability Support Program)*, (2006), 83 OR (3d) 321 (ON CA) at paras 35-36. The Applicants submit that in this case, Ms. Robinson's misapprehension of the PLBC's request not only affected the fact-finding process, but it formed the very basis for the denial of the request. The Applicants submit this amounts to an unreasonable error.

[45] The Applicants submit Ms. Robinson also ignored relevant information before her. The Applicants argue the provincial Home Care Policy confers up to $6,600 per month in home care services to people with disabilities, and is not capped at $2,200. The Applicants argue that presented

with this evidence, Ms. Robinson's assertion that the normative standard of care off reserve is invariably limited to $2,200 per month is untenable and that this amounts to an error in law.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[46] The Applicants claim that the decision to deny additional funding to the PLBC so that it could continue providing Jeremy and Ms. Beadle with home care was discriminatory and contrary to s. 15(1) of the *Charter*. The Applicants submit that while the federal government may enter into contribution agreements with Band Councils to provide services, such agreements cannot supersede its obligations under the *Charter*. The Applicants also submit that the government's exercise of discretionary powers must conform to the *Charter*. The Applicants argue that Ms. Robinson had a duty to consider the requests for additional funding under the relevant agreements in a manner that respects the Beadles' rights to receive equal benefits compared to those residing off reserve in their province of residence.

[47] The Applicants submit that for First Nations people living on reserve, Jordan's Principle is a means by which the fundamental objectives of s. 15(1) can be achieved.

[48] The Applicants argue that the exceptional and unanticipated health needs of the Beadle family jeopardize the PLBC's ability to provide the services the family reasonably requires and would likely be entitled to off reserve. The Applicants submit that Ms. Robinson had a duty to exercise her discretion under the relevant funding agreements in a manner that conforms to s. 15(1) of the *Charter*.

[49] The Applicant also argues that infringement under s. 15(1) cannot be justified under s. 1 of the *Charter*.

Respondent's Submissions

[50] The Respondent's submissions are similarly organized according to the issues identified by the Respondent.

The standard of review is reasonableness

[51] The Respondent submits the question of whether the service provided by the PLBC exceeded the provincial normative standard of care is a question of fact and requires a decision maker to gather facts about the assistance needs of the claimant, the treatments required, and the nature of the disabilities at issue. The Respondent asserts that it also requires fact gathering about the services that are currently available to similar people living off reserve and gathering factual information from provincial authorities and the federal program requirements. The Respondent submits the decision maker is entitled to give significant weight to the definition of the normative standard of care provided by the provincial authorities.

With respect to the assessment of the request made by the Applicants, the Respondent submits the determination of what was actually requested is a question of fact. Ms. Robinson was required to review Jeremy's situation and determine what their request constituted based on all of the material submitted. The Respondent submits that the Supreme Court of Canada in *Dunsmuir v New*

Brunswick, 2008 SCC 9 [*Dunsmuir*] has determined that where a question is a factual determination which depends purely on the weighing of evidence, the applicable standard of review is reasonableness. The Respondent submits that where, as here, the underlying factual and legal issues cannot be separated, the appropriate standard of review is still reasonableness. *Dunsmuir* at paras 53-54.

[52] The Respondent submits that the standard of reasonableness in the present case is particularly appropriate because the decision maker was asked to make a determination of eligibility under a federal policy for which she was the expert designated authority in a discrete and special administrative regime, with particular expertise, and with the unique ability to interact with provincial authorities whose cooperation is required to make the necessary determination. The Respondent submits that the reasonableness standard is the most reflective of the nature of the inquiry and the context in which it takes place.

[53] Regarding the *Charter* issue, the Respondent submits there is no standard of review of this issue in this Court. The Respondent argues that the *Charter* issue is a matter of constitutional law and not administrative law. This is the first time that the s. 15 argument has been raised in this matter. The Respondent submits this is the Court of first instance for the determination of the constitutional question.

Jordan's Principle was not engaged in this case

[54] The Respondent submits that in order to determine whether Jordan's Principle was engaged, Ms. Robinson had to determine if there was a jurisdictional dispute between Canada and Nova Scotia regarding the provision of funding for Jeremy's care and if the funding provided by Canada met the normative standard of care in Nova Scotia.

[55] The Respondent submits there was no jurisdictional dispute. Both Canada and Nova Scotia agreed that Jeremy's situation entitled him to receive institutional care and the Province acknowledged it would pay for those services over and above federal authority.

[56] The Respondent argues that Ms. Robinson determined the normative standard of care for in-home services in Nova Scotia was $2,200 per month as a result of her consultation with provincial officials from multiple departments, and after raising with them the applicability of the *SAA*, the Direct Family Support Policy, the Health and Wellness Program, and the recent decision of the Nova Scotia Supreme Court in *Boudreau*. The Respondent submits Ms. Robinson brought all of the Applicants' concerns and arguments before the provincial officials who informed her that the amount Jeremy would receive if he lived off reserve would be no more than $2,200.

[57] The Respondent asserts that Ms. Robinson's approach to determining the normative standard of care was correct and her conclusion that the request was beyond the normative standard of care was reasonable. The Respondent submits the provincial officials were in the best position to

say what services are available to residents of the province living off reserve and thus using this information as a basis for her decision was reasonable.

[58] Regarding the Applicants' submissions on the applicability of the *Boudreau* case, the Respondent submits *Boudreau* is a case about exceptional circumstances to the provincial standard of care but does not purport to change the standard of care itself. The provincial authority had already determined that Boudreau required in-home care in an amount less than what the PLBC has provided here. Also, the $2,200 limit had not previously been applied in Boudreau's case because he had been "grandfathered".

[59] The Respondent submits that the situation in *Boudreau* is quite different from Jeremy's because Boudreau was receiving exceptional circumstances funding prior to the October 2006 Directive from the Department of Community Services that indicated the maximum for respite in-home care was $2,200 per month, with no exceptions. Moreover, the Respondent submits Canada and Nova Scotia have already determined that the applicable standard for Jeremy is institutional, not respite care. The Respondent submits the Applicants are trying to use the *Boudreau* case to create a new standard of care that neither the Province nor Canada recognizes.

The request for additional funding was properly assessed

[60] The Respondent submits the evidence is clear that the Applicants requested the equivalent of 24-hour per day care, and only for Jeremy, contrary to the Applicants' arguments that Ms. Robinson misapprehended the request for additional funding.

[61] The Respondent submits the Applicants allege that they requested only funding for in-home care 24 hours per day, 7 days per week, less what Jeremy's own family could provide. For this proposition, the Respondent notes the Applicants rely on a specific sentence in the Briefing Note Ms. Pictou prepared on Jeremy's case which was sent to Health Canada and AANDC.

[62] The Respondent submits that in the immediately preceding paragraph in the Briefing Note, Ms. Pictou refers to 24 hour per day, 7 days a week care without any limitation regarding family assistance. Further, the Respondent argues that in the email with the formal request for additional funding (to which the Briefing Note was attached), Ms. Pictou stated:

> Even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day).

[63] The Respondent submits it was reasonable for Ms. Robinson to conclude that the Applicants had requested the funding equivalent of 24 hour per day in-home care, and to verify whether that need was beyond the normative standard of care that the province would provide for in-home care for any Nova Scotian.

[64] Even if the Applicants' request could be interpreted as 24 hours minus what family members could provide (which is not admitted), the Respondent submits Ms. Robinson's factual finding that the Applicants' funding request exceeded the provincial standard for in-home care is reasonable given the evidence.

The decision does not violate section 15(1) of the Charter.

[65] The Respondent submits the decision not to grant the request for additional funding up to the daily rate of institutional care does not discriminate against Jeremy or any other First Nations child. First, the Respondent submits the benefit the Applicants requested is not a benefit provided by law. Under the ALP and HCCP, the PLBC has funding to provide their community with reasonably comparable services to those that would be available to the off reserve population. The Respondent submits funding for those benefits was and is available to Jeremy, and he is treated no differently from any other Nova Scotian with similar needs. There is no distinction on which a discrimination claim can rest.

[66] The Respondent submits that Jordan's Principle clearly is not engaged in this case. Jordan's Principle was adopted to ensure that no First Nations child would be denied services while governments debated over the jurisdictional responsibility to provide an eligible service. The Respondent argues that what is at stake in this case is not a jurisdictional dispute at all, but a claim that the PLBC's decision to provide in-home care to one of its members beyond the normative provincial standard of care legally obliges Canada to fund such services.

[67] The Respondent submits that the evidence clearly indicates that Jeremy's needs well exceed the levels of in-home care that would be available to anyone living off reserve in Nova Scotia. This was confirmed by the provincial officials who indicated that this level of in-home care would not be available and institutionalization would be the supported option. The Respondent submits this is not a case where the application of federal programs or policies denies a benefit that would otherwise be

available to someone else. The Respondent argues that the Applicants are attempting to create a benefit out of the ALP and HCCP that simply does not exist at law.

[68] The Respondent submits that neither Ms. Robinson's decision, nor the structure of the ALP and HCCP funding itself creates any distinction between Jeremy and a person with similar disabilities and care needs that is not living on a reserve. The Respondent notes that under the ALP and the HCCP, Canada has elected to provide funding for services that are reasonably comparable with people living off reserve so that no such distinction will be created. In this regard, the Respondent submits Ms. Robinson was required to verify the provincial normative standard of care, and did so by specifically enquiring with the provincial authorities whether, if Jeremy was living off reserve, funding for his care needs could be provided in-home. The Respondent submits that the information provided to Ms. Robinson from the provincial authorities was clear that if Jeremy lived off reserve, the supported option would be institutionalization, and that the maximum funding he could receive for in-home care if he remained in the home was $2,200 per month.

Issues

[69] In my view the following issues arise in this case:

1. Was Jordan's Principle engaged in this case?
2. Did the Manager properly assess the request for funding?
3. Did the Manager exercise her discretion in a manner that violated section 15(1) of the *Charter*?

Standard of Review

[70] The Supreme Court of Canada held in *Dunsmuir* that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53.

[71] The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62.

[72] I have been unable to find any previous jurisprudence in which Jordan's Principle and the appropriate standard of review in determining the "normative standard of care off reserve" has been considered.

[73] I note that this matter involves questions of fact, and questions of mixed law and fact as they relate to a question of policy, that of Jordan's Principle. There is no privative provision and the matters are determined by an official designated as an AANDC departmental "focal point for Jordan's Principle" which is suggestive of expertise.

[74] The Manager was required to determine what it was that the PLBC was requesting. This was a factual determination based on the submissions of Ms. Philippa Pictou and information provided in case assessments. The Manager was also charged with determining whether this case met the criteria for a Jordan's Principle case. As the Jordan's Principle focal point for AANDC the Manager had a specialized expertise in this matter.

[75] Finally, the Manager was required to determine the normative standard of care that would be available from provincial health authorities to individuals living off reserve in the same circumstances as Jeremy. There appears to be no specific procedure for her to follow to determine what the normative standard of care is. The Manager was not specifically tasked with interpreting and applying the *SAA* or any jurisprudence. Essentially, it was a fact-finding exercise which would attract a reasonableness standard of review.

[76] In *Dunsmuir* questions of mixed fact and law and fact give rise to a standard of reasonableness. *Dunsmuir* at paras 50 and 53. Accordingly, I agree with the Respondent that the appropriate standard of review for the Manager's decision with respect to Jordan's Principle is reasonableness.

Analysis

[77] The issues in this case revolve around the question of on-reserve, in-home support for Jeremy, a First Nation child with multiple handicaps who was cared for by his mother until the time of her stroke.

[78] The Applicants submit Canadian children with disabilities and their families rely on continuing care generally provided by provincial governments according to provincial legislation. Provincial governments do not provide the same services to First Nations children who live on reserves. The federal government assumed responsibility for funding delivery of continuing care programs and services on reserve at levels reasonably comparable to those offered in the province of

residence. Such services have been historically funded and provided by the federal government through AANDC and Health Canada as a matter of policy.

[79] AANDC and Health Canada entered into a funding agreement with the PLBC to deliver services offered under the ALP and HCCP. The PLBC is required to administer the programs "according to provincial legislation and standards." The ALP funding agreement states the PLBC can seek additional funding in "exceptional circumstances" which are not "reasonably foreseen" at the time the agreement was entered into. The HCCP agreement has a similar clause which refers to necessary increases due to "unforeseen circumstances".

[80] Personal home care services off reserve for people with disabilities in Nova Scotia are governed by the *Social Assistance Act*. Section 9(1) of the *SAA* provides persons in need shall be provided with assistance, including home care and home nursing services. The Nova Scotia Department of Community Services implements the *SAA* and funds home care for people with disabilities through the Direct Family Support Policy. The policy provides that funding for home care shall not normally exceed $2,200 per month but states additional funding may be granted in exceptional circumstances.

Was Jordan's Principle engaged in this case?

[81] As stated above, Jordan's Principle was developed in response to a case involving a severely disabled First Nation child who remained in a hospital due to jurisdictional disputes between the federal and provincial governments over payment of home care services for Jordan in his First

Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[82] Jordan's Principle says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. While Jordan's Principle is not enacted by legislation, it has been approved by a unanimous vote of the House of Commons. Such a motion is not binding on the government.

[83] In order to understand the status of Jordan's Principle, it is helpful to have regard to the Hansard reports of the debate in the House of Commons. The private member's motion of May 18, 2007 reads:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

The motion was further debated on October 31, 2007 and again on December 5, 2007. At that time, a member of the governing party stated:

> I support this motion, as does the government. I am pleased to report the Minister of Indian Affairs and Northern Development and officials in his department are working diligently with their partners in other federal departments, provincial and territorial governments, and first nations organizations on child and family services initiatives that will transform the commitment we make here today into a fact of daily life for first nations parents and their children.

> That is not all. In addition to implementing immediate, concrete measures to apply Jordan's principle in aboriginal communities, I would like to inform the House and my colleague that the government is also implementing other measures to improve the well-being of first nations children…

The vote in the House of Commons on December 12, 2007 was unanimous, recording Yeas: 262, Nays: 0.

[84] Clearly, Jordan's principle was implemented by AANDC. Ms. Barbara Robinson, Manager – Social Programs, was designated the Jordan's Principle focal point for AANDC in Atlantic Canada. She described AANDC's implementation of Jordan's Principle in the following terms:

> Jordan's Principle is a child-first principle which exists to resolve jurisdictional disputes between the federal and provincial governments regarding health and social services for on-reserve First Nations children. It ensures that a child will continue to receive care while the jurisdictional dispute between the provincial and federal government is resolved but does not create a right to funding that is beyond the normative standard of care in the child's geographic location.
>
> Jordan's Principle applies when:
>
> a) The First Nations child is living on reserve (or ordinarily resident on reserve); and
>
> b) A First Nations child who has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; and
>
> c) The case involves a jurisdictional dispute between a provincial government and the federal government; and
>
> d) Continuity of care – care for the child will continue even if there is a dispute about responsibility. The current service provider that is caring for the child will continue to pay for the necessary services until there is a resolution; and

> e) Services to the child are comparable to the standard of care set by the province – a child living on reserve (or ordinarily resident on reserve) should receive the same level of care as a child with similar needs living off-reserve in similar geographic locations.
>
> [Emphasis added]

[85] The Respondent submits there is no evidence that a jurisdictional dispute exists between the Province of Nova Scotia and the federal government for the provision of in-home care services. Both provincial health authorities and AANDC and Health Canada agree that the maximum Jeremy would receive if he lived on or off the reserve is $2,200 for home care services.

[86] I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute.

[87] I would observe that the normative standard of care in this case encompasses the provincial rules for the range of services available to persons in Nova Scotia residing off reserve. Jordan's Principle would have been meant to include services for exceptional cases where allowed for in the province where the child is geographically located.

[88] While there is an administratively prescribed maximum level of $2,200 per month for in-home services in Nova Scotia, the statutorily mandated policy has been found to encompass exceptional cases that may exceed that maximum.

[89] In *Boudreau*, a Nova Scotia Court heard an application for a *certiorari* order by the Department of Community Services of the Assistance Appeal Board decision holding that Boudreau, a 34-year old adult off reserve with multiple handicaps, was entitled to receive increased home care services under the exceptional circumstances provision of the Direct Family Services Policy and also under section 9 of the *SSA*.

[90] The Court found the application for *certiorari* to be valid because the Appeal Board erred in referring to *Employment Support and Income Assistance Act* instead of the *SAA*. However, the Court declined to make a *certiorari* order because it found the Department of Family Community Services had a clear obligation to provide "assistance" to Boudreau as required by section 9 of the *SSA*. In the alternative, the Court found even if the respite decision by the Department was discretionary, the facts accepted established the assistance was essential and the Department's obligations included the additional funding requested.

[91] The effective result in *Boudreau* is that a person with multiple handicaps residing off reserve was entitled to receive home services assistance over the $2,200 maximum limit which the Court observed "cannot override the legislation and regulations".

[92] In the case at hand, the Manager stated in cross-examination that her legal authority to fund is rooted under the Treasury Board authority referencing the applicable provincial policy. She acknowledged she was told by provincial officials that the provincial policy provides they can fund above the $2,200 level but they can't because of the directive. She acknowledged she was informed the Department of Family Services provincial policy says there may be exceptional circumstances

but provincial officials told her there would be no exceptional circumstances recognized. Ms. Robinson stated she needed to ensure she was following the provincial policy as it is being implemented.

[93] The Manager does not need to interpret the *SAA* and *Regulations*. She was clearly informed by provincial officials of the legislatively mandated policy. She knew the legislated provincial policy provided for exceptional circumstances. She knew the provincial officials were administratively disregarding the Department of Social Services legislated policy obligations. She also was put on notice by the PLBC of this issue as they had provided her with a copy the *Boudreau* decision. Ms. Robinson's mandate from Treasury Board does not extend to disregarding legislated provincial policy.

[94] Nova Scotia's Direct Family Support Policy states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". Finally, the Direct Family Support Policy explicitly states that First Nations children living on reserves are not eligible to services from the Province.

[95] As I stated, Jordan's principle is not to be narrowly interpreted.

[96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.

[97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the *SAA* and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[98] I find the Manager's finding that Jordan's Principle was not engaged is unreasonable.

Did the decision-maker properly assess the request for funding?

[99] The Manager took part in case conferences in which provincial health officials, First Nation officials and other AANDC and Health Canada officials took part. As a result of taking part in these case conferences, she had a full understanding of the issues and care needs Jeremy required. She was able to obtain opinions from the health assessors as to what was needed in Jeremy's case.

[100] I begin by addressing the factual issue in the PLBC request for funding. The monetary amount is necessarily linked to the extent of care home care support required for Jeremy although not for Ms. Beadle's personal needs who, presumably is within the normal scope of the ALP and HCCP funded home care services.

[101] The Applicants have stated that the request for additional funding was for "Jeremy Meawasige's reasonable 'need' for 'homecare' [as] 24 hours a day, 7 days a week, less the time his

family can reasonable attend to his care." [Emphasis added] This paragraph is found in the briefing note attached to the request for additional funding. On the other hand, the Respondent submits that the paragraph preceding the paragraph cited by the Applicants indicates that the request is for 24 hour care, 7 days a week.

[102] It is clear from the PLBC's submissions that at the time of the Manager's decision, the Pictou Landing Health Centre provided the family with a personal care worker from 8:30 am to 11:30 pm from Monday to Friday, and 24 hour care over the weekends by an off reserve agency. As I understand it, the 24 hour care on the weekends was in response to the Pictou Landing Health Centre being closed over the weekend rather than the need for 24-hour home care. On the evidence, the request for in home support did not cover the overnight period during weekdays.

[103] Moreover, one has to have regard for the extent of family support. It must be remembered that, before her stroke, Ms. Beadle provided for all of Jeremy's needs without government assistance. Ms. Beadle has recovered to some extent from her stroke and helps Jeremy as she can. Jeremy's older brother stays overnight to also assist. When one considers the importance of Ms. Beadle to Jeremy's communicative and personal needs, it seems to me that the family support is not inconsequential. I find the request for Jeremy's in home support was not for 24 hours a day, 7 days a week.

[104] It is not entirely clear exactly what amount is being requested. I do note, as the Respondent pointed out, the PLBC requested it would like to be reimbursed up to the level that Jeremy would qualify for if institutionalized. This amount, as estimated by the Department of Community

Services, was $350 per day. The $350 per day represents the equivalent expense to have Jeremy live in an institution. However, it is clear the PLBC was not asking to institutionalize Jeremy; rather, it was proposing that as a means of quantifying the request for funding.

[105] The Manager was required to assess the factual circumstances, the submissions made and the recommendations and information provided by the in-home assessors. I conclude that the Manager erred in determining that what was being requested was 24 hour in home care. This was an unreasonable finding based on all the information provided.

Application of Jordan's Principle

[106] Issues involving Jordan's Principle are new. The principle requires the first agency contacted respond with child-first decisions leaving jurisdictional and funding decisions to be sorted out later. Parliament has unanimously endorsed Jordan's Principle and the government, while not bound by the House of Commons resolution, has undertaken to implement this important principle.

[107] The PLBC is required by its contributions agreements with AANDC and Health Canada to administer the programs and services "according to provincial legislation and standards". When Ms. Beadle suffered her stroke, the PLBC responded and provided the needed services for her and Jeremy.

[108] The PLBC is a small First Nation with some 600 members. The exceptional circumstances here have required nearly 80% of the costs of the PLBC total monthly ALP and HCCP budget for personal and home care services. In short, this is not a cost that the PLBC can sustain.

[109] Jordan's Principle applies between the two levels of government. In this case the PLBC was delivering program and services as required by AANDC and Health Canada in accordance with provincial legislative standards. The PLBC is entitled to turn to the federal government and seek reimbursement for exceptional costs incurred because Jeremy's caregiver, his mother, can no longer care for him as she did before.

[110] I also note that the only other option for Jeremy would be institutionalization and separation from his mother and his community. His mother is the only person who, at times, is able to understand and communicate with him. Jeremy would be disconnected from his community and his culture. He, like sad little Jordan, would be institutionalized, removed from family and the only home he has known. He would be placed in the same situation as was little Jordan.

[111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The *SAA* and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.

[112] It is to be observed that AANDC does not deny that home services be provided for Jeremy; rather it denies funding home services above the $2,200 administratively imposed provincial maximum which the Court found in *Boudreau* cannot override provincial legislation and regulation.

[113] The PLBC has met its obligations under its funding agreement with AANDC and Health Canada. The participating federal departments, particularly AANDC, have adopted Jordan's Principle. In my view, they are now required by their adoption of Jordan's Principle to fulfil this assumed obligation and adequately reimburse the PLBC for carrying out the terms of the funding agreements and in accordance with Jordan's Principle.

[114] In the alternative, much as in *Boudreau*, if the implementation of Jordan's Principle is discretionary, the federal government undertook to apply Jordan's Principle when exceptional circumstances arose. The facts of Jeremy's situation clearly establish the exceptional circumstances necessary to meet this requirement. The federal government cannot deny is obligation to provide additional funding not requested by PLBC for Jeremy.

[115] In either situation, the PLBC is, in my view, due reimbursement and additional funding from AANDC and Health Canada for Jeremy's needs. I note both AANC and Health Canada have expressed willingness to continue to work with PLBC to resolve the situation.

[116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and

costs that meet the needs of the on reserve First Nation child. The funding amount is not definitively determined in accordance with these requirements, in that the needs of Jeremy and Ms. Beadle are somewhat mixed, the case conferences did not appear to quantify the costs involved, and alternative reimbursement amounts were proposed. In result, the amount remains to be addressed by the parties.

[117] I conclude the decision-maker did not properly assess the PLBC request for funding to meet Jeremy's needs. The request for judicial review succeeds and the Manager's decision is quashed.

[118] There remains the question of whether or not, in the circumstances, reconsideration should be ordered. Clearly, deference is due to the administrative entity that makes decisions within the realm of its expertise.

[119] In *Stetler v the Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234 at paragraph 42, the Ontario Court of Appeal stated:

> While "[a] court may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily", exceptional circumstances may warrant the court rendering a final decision on the merits. Such circumstances include situations where remitting a final decision would be "pointless", where the tribunal is no longer "fit to act", and cases where, "in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": *Giguère v. Chambre des notaires du Quebec,* 2004 SCC 1 (CanLII), [2004] 1 S.C.R. 3 at para. 66.

[120] When one considers Jordan's Principle calls for an immediate timely response regardless of jurisdictional questions and the exceptional circumstances that arise here in Jeremy's case, I am of the view this constitutes an exceptional circumstance warranting this Court to not remit the matter back for reconsideration but to direct the that the PLBC is entitled to reimbursement beyond the $2,200 maximum as it relates to Jeremy's needs for assistance. The remaining question is the amount of reimbursement which I consider must be left to the parties.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[121] Having decided as I did, I need not consider the *Charter* submissions by the Applicant and Respondent.

Costs

[122] In oral submissions, the Respondent did not oppose the Applicants' submission for costs, should the latter be successful, acknowledging the matter to be complex but suggesting the middle range of Column 3.

[123] I thank both parties for their able submissions in addressing this complex but important matter.

Conclusion

[124] I conclude the Manager failed to consider the application of Jordan's Principle in Jeremy's case as required.

[125] I also find the Manager's refusal of the PLBC reimbursement request was unreasonable.

[126] The application for judicial review is granted and I hereby quash the impugned decision.

[127] I do not remit the matter back for reconsideration but direct that the PLBC is entitled to reimbursement by the Respondent beyond the $2,200 maximum as it relates to Jeremy's needs for assistance.

[128] I would award costs to the Applicants for two counsel at the middle range of Column 3.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The May 27, 2011 decision of the Manager is quashed.

3. I direct that Applicant PLBC is entitled to reimbursement beyond the $2,200 maximum by the Respondent as it relates to Jeremy's needs for assistance.

4. Costs for the Applicants for two counsel at the middle range of Column 3.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1045-11
STYLE OF CAUSE:	PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 11, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	APRIL 4, 2013

APPEARANCES:

Paul Champ Anne Levesque	FOR THE APPLICANTS
Jonathan D.N. Tarlton Melissa Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

Jamie Tanis Gladue *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General for Alberta and Aboriginal Legal Services of Toronto Inc. *Interveners*

INDEXED AS: R. *v.* GLADUE

File No.: 26300.

1998: December 10; 1999: April 23.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Sentencing — Aboriginal offenders — Accused sentenced to three years' imprisonment after pleading guilty to manslaughter — No special consideration given by sentencing judge to accused's aboriginal background — Principles governing application of s. 718.2(e) of Criminal Code — Class of aboriginal people coming within scope of provision — Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(e).

The accused, an aboriginal woman, pled guilty to manslaughter for the killing of her common law husband and was sentenced to three years' imprisonment. On the night of the incident, the accused was celebrating her 19th birthday and drank beer with some friends and family members, including the victim. She suspected the victim was having an affair with her older sister and, when her sister left the party, followed by the victim, the accused told her friend, "He's going to get it. He's really going to get it this time". She later found the victim and her sister coming down the stairs together in her sister's home. She believed that they had been engaged in sexual activity. When the accused and the victim returned to their townhouse, they started to quarrel. During the argument, the accused confronted the victim with his infidelity and he told her that she was fat and ugly and not as good as the others. A few minutes later, the victim fled their home. The accused ran toward him with a

Jamie Tanis Gladue *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général du Canada, le procureur général de l'Alberta et Aboriginal Legal Services of Toronto Inc. *Intervenants*

RÉPERTORIÉ: R. *c.* GLADUE

N° du greffe: 26300.

1998: 10 décembre; 1999: 23 avril.

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

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

Droit criminel — Détermination de la peine — Délinquants autochtones — Accusée condamnée à trois ans d'emprisonnement après avoir plaidé coupable à l'accusation d'homicide involontaire coupable — Aucune attention particulière accordée aux origines autochtones de l'accusée par le juge de la peine — Principes régissant l'application de l'al. 718.2e) du Code criminel — Catégorie d'autochtones visés par la disposition — Code criminel, L.R.C. (1985), ch. C-46, art. 718.2e).

L'accusée, une autochtone, a plaidé coupable à l'accusation d'homicide involontaire coupable de son conjoint de fait et a été condamnée à trois ans d'emprisonnement. La nuit de l'incident, l'accusée célébrait son 19e anniversaire de naissance et avait bu de la bière avec des amis et des membres de la famille, dont la victime. Elle soupçonnait ce dernier d'avoir une liaison avec sa sœur aînée, et lorsque celle-ci a quitté la soirée, suivie de la victime, l'accusée a dit à son amie: «Il va l'avoir. Il va vraiment l'avoir cette fois». Elle a vu plus tard la victime et sa sœur descendre l'escalier ensemble dans l'appartement de sa sœur. Elle les a soupçonnés d'avoir eu des relations sexuelles. À leur retour à la maison, l'accusée et la victime ont commencé à se quereller. Au cours de l'échange, l'accusée a reproché à la victime son infidélité; il lui a répondu qu'elle était grosse et laide et qu'elle n'était pas aussi bonne que les autres. Quelques minutes plus tard, la victime s'est enfuie de la maison.

large knife and stabbed him in the chest. When returning to her home, she was heard saying "I got you, you fucking bastard". There was also evidence indicating that she had stabbed the victim on the arm before he left the townhouse. At the time of the stabbing, the accused had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

At the sentencing hearing, the judge took into account several mitigating factors. The accused was a young mother and, apart from an impaired driving conviction, she had no criminal record. Her family was supportive and, while on bail, she had attended alcohol abuse counselling and upgraded her education. The accused was provoked by the victim's insulting behaviour and remarks. At the time of the offence, the accused had a hyperthyroid condition which caused her to overreact to emotional situations. She showed some signs of remorse and entered a plea of guilty. The sentencing judge also identified several aggravating circumstances. The accused stabbed the deceased twice, the second time after he had fled in an attempt to escape. From the remarks she made before and after the stabbing it was clear that the accused intended to harm the victim. Further, she was not afraid of the victim; she was the aggressor. The judge considered that the principles of denunciation and general deterrence must play a role in the present circumstances even though specific deterrence was not required. He also indicated that the sentence should take into account the need to rehabilitate the accused. The judge decided that a suspended sentence or a conditional sentence of imprisonment was not appropriate in this case. He noted that there were no special circumstances arising from the aboriginal status of the accused and the victim that he should take into consideration. Both were living in an urban area off-reserve and not "within the aboriginal community as such". The sentencing judge concluded that the offence was a very serious one, for which the appropriate sentence was three years' imprisonment. The majority of the Court of Appeal dismissed the accused's appeal of her sentence.

Held: The appeal should be dismissed.

The considerations which should be taken into account by a judge sentencing an aboriginal offender have been summarized at para. 93 of the reasons for judgment. The following is a reflection of that summary.

L'accusée a couru vers lui, un grand couteau à la main, et l'a poignardé à la poitrine. Comme elle revenait vers son appartement, on l'a entendu dire: «Je t'ai eu, je t'ai eu, maudit chien». La preuve indiquait aussi qu'elle avait poignardé la victime au bras avant que celui-ci se soit enfui de l'appartement. Au moment où elle a donné le coup de couteau, l'accusée avait dans le sang entre 155 et 165 mg d'alcool par 100 ml de sang.

À l'audience de détermination de la peine, le juge a pris en compte plusieurs facteurs atténuants. L'accusée était une jeune mère et, hormis une déclaration de culpabilité pour conduite avec facultés affaiblies, elle n'avait pas de casier judiciaire. Elle avait le soutien de sa famille et, pendant qu'elle était en liberté sous caution, elle suivait une thérapie pour son alcoolisme et poursuivait ses études. L'accusée avait été provoquée par la conduite et les remarques insultantes de la victime. À l'époque de l'infraction, l'accusée souffrait d'hyperthyroïdie, ce qui la conduisait à réagir excessivement à des situations émotionnelles. Elle a montré des signes de remords et a plaidé coupable. Le juge de la peine a aussi relevé plusieurs circonstances aggravantes. L'accusée a poignardé la victime deux fois, la deuxième après sa tentative de fuite. D'après les remarques qu'elle a faites avant et après les coups de couteau, il était clair qu'elle avait l'intention de causer du mal à la victime. De plus, elle n'avait pas peur de la victime; en fait, elle était l'agresseur. Le juge a estimé que les principes de la dénonciation et de l'effet dissuasif général devaient jouer un rôle dans les circonstances de l'espèce même s'il n'y avait pas lieu de rechercher un effet dissuasif particulier. Il a aussi indiqué que la peine devait tenir compte de la nécessité de favoriser la réinsertion sociale de l'accusée. Le juge a conclu qu'une condamnation avec sursis ou un sursis de sentence n'étaient pas indiqués en l'espèce. Il a estimé que du statut d'autochtone de l'accusée et de la victime ne découlait aucune circonstance particulière qu'il devait prendre en considération. Les deux vivaient en milieu urbain, à l'extérieur de la réserve, et non «dans la communauté autochtone en tant que telle». Le juge de la peine a conclu qu'il s'agissait d'une infraction très grave, pour laquelle il convenait d'infliger une peine de trois ans d'emprisonnement. La Cour d'appel a rejeté à la majorité l'appel de sa sentence interjeté par l'accusée.

Arrêt: Le pourvoi est rejeté.

Les considérations dont le juge de la peine doit tenir compte lorsqu'il s'agit d'un délinquant autochtone sont résumées au par. 93 des motifs de la décision. Les paragraphes qui suivent reflètent ce résumé.

Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence. In that Part, s. 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders. The provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force. Section 718.2(*e*) must be read in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. In determining a fit sentence, all principles and factors set out in that Part must be taken into consideration. Attention should be paid to the fact that Part XXIII, through certain provisions, has placed a new emphasis upon decreasing the use of incarceration.

La partie XXIII du *Code criminel* codifie l'objet et les principes essentiels de détermination de la peine ainsi que les facteurs dont le juge doit tenir compte pour fixer une peine appropriée eu égard au délinquant et à l'infraction. Dans cette partie, l'al. 718.2*e*) impose au juge de la détermination de la peine d'examiner toutes les sanctions substitutives applicables et de porter attention aux circonstances, plus particulièrement en ce qui concerne les délinquants autochtones. Cette disposition n'est pas une simple codification de la jurisprudence existante. Elle a un caractère réparateur et elle a pour objet de remédier au grave problème de la surreprésentation des autochtones dans les prisons et d'encourager le juge à aborder la détermination de la peine selon une approche corrective. Le juge est tenu de donner une force réelle à l'objet réparateur de la disposition. L'alinéa 718.2*e*) doit être interprété dans le contexte des autres facteurs mentionnés dans cette disposition et à la lumière de l'ensemble de la partie XXIII. Tous les principes et facteurs énoncés dans cette partie doivent être pris en considération dans la détermination de la peine. Il faut porter attention au fait que la partie XXIII, par certaines dispositions, a réaffirmé l'importance de la réduction du recours à l'incarcération.

Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. The effect of s. 718.2(*e*), however, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(*e*) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. In order to undertake these considerations the sentencing judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions, which in turn may come from representations of the relevant aboriginal community. The

La détermination de la peine est un processus individualisé, et, dans chaque cas, il faut continuer de se demander quelle est la peine appropriée pour tel accusé, telle infraction dans telle communauté. L'alinéa 718.2*e*) a toutefois l'effet de modifier la méthode d'analyse que les juges doivent suivre lorsqu'ils déterminent la peine appropriée pour des délinquants autochtones. L'alinéa 718.2*e*) impose aux juges d'aborder la détermination de la peine à infliger à de tels délinquants d'une façon individualisée, mais différente parce que la situation des autochtones est particulière. En déterminant la peine à infliger à un délinquant autochtone, le juge doit examiner: a) les facteurs systémiques ou historiques distinctifs qui peuvent être une des raisons pour lesquelles le délinquant autochtone se retrouve devant les tribunaux; b) les types de procédures de détermination de la peine et de sanctions qui, dans les circonstances, peuvent être appropriées à l'égard du délinquant en raison de son héritage ou attaches autochtones. Aux fins de l'examen de ces considérations, le juge de la peine aura besoin de renseignements concernant l'accusé. Les juges peuvent prendre connaissance d'office des facteurs systémiques et historiques généraux touchant les autochtones, et de la priorité donnée dans les cultures autochtones à une approche corrective de la détermination de la peine. Normalement, des renseignements spécifiques à l'affaire proviendront des avocats et d'un rapport présentenciel qui tiendra compte des facteurs systémiques ou histo-

offender may waive the gathering of that information. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

If there is no alternative to incarceration the length of the term must be carefully considered. The jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence. However, s. 718.2(*e*) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. It is also unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

Section 718.2(*e*) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including one in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

In this case, the sentencing judge may have erred in limiting the application of s. 718.2(*e*) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, he does not appear to have considered the systemic or background factors which may have influenced the accused to engage in criminal conduct, or the possibly distinct conception of sentencing held by the accused, by the victim's family, and by their

riques et des procédures de détermination de la peine et des sanctions appropriées, pouvant aussi provenir d'observations présentées par la communauté autochtone intéressée. Le délinquant peut renoncer à réunir ces renseignements. L'absence de programme de peines substitutives spécifique à une communauté autochtone n'élimine pas la possibilité pour le juge d'imposer une peine qui tienne compte des principes de la justice corrective et des besoins des parties en cause.

En l'absence de solution de rechange à l'incarcération, la durée de la peine devra être soigneusement examinée. La période d'emprisonnement imposée à un délinquant autochtone pourra dans certaines circonstances être moins longue que celle imposée à un délinquant non-autochtone pour la même infraction. Toutefois, l'al. 718.2*e*) ne doit pas être considéré comme un moyen de réduire automatiquement la peine d'emprisonnement des délinquants autochtones. Il ne faut pas présumer non plus que le délinquant reçoit une peine plus légère pour la simple raison que l'incarcération n'est pas imposée. Il n'est pas raisonnable de présumer que les peuples autochtones ne croient pas en l'importance des objectifs traditionnels de la détermination de la peine, tels la dissuasion, la dénonciation et l'isolement, quand ils sont justifiés. Dans ce contexte, en règle générale, plus grave et violent sera le crime, plus grande sera la probabilité d'un point de vue pratique que la période d'emprisonnement soit la même pour des infractions et des délinquants semblables, que le délinquant soit autochtone ou non-autochtone.

L'alinéa 718.2*e*) s'applique à tous les délinquants autochtones où qu'ils résident, à l'intérieur comme à l'extérieur d'une réserve, dans une grande ville ou dans une zone rurale. Aux fins de déterminer la collectivité autochtone pertinente en vue de fixer une peine efficace, le terme «collectivité» devrait recevoir une définition assez large pour inclure tout réseau de soutien et d'interaction qui pourrait exister, y compris en milieu urbain. En même temps, le fait que le délinquant autochtone habite dans un milieu urbain qui ne possède aucun réseau de soutien ne relève pas le juge qui inflige la peine de son obligation d'essayer de trouver une solution de rechange à l'emprisonnement.

En l'espèce, le juge qui a prononcé la peine s'est trompé s'il a limité l'application de l'al. 718.2*e*) aux délinquants autochtones vivant en milieu rural ou dans une réserve. De plus, il paraît ne pas avoir examiné les facteurs systémiques ou historiques qui ont pu influer sur la conduite criminelle de l'accusée, ou la conception distincte de la sanction pénale que pouvaient avoir l'accusée, la famille de la victime et leur communauté. En

community. The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors. Although in most cases such errors would be sufficient to justify sending the matter back for a new sentencing hearing, in these circumstances it would not be in the interests of justice to order a new hearing in order to canvass the accused's circumstances as an aboriginal offender. Both the sentencing judge and all members of the Court of Appeal acknowledged that the offence was a particularly serious one. For that offence by this offender a sentence of three years' imprisonment was not unreasonable. More importantly, the accused was granted, subject to certain conditions, day parole after she had served six months in a correctional centre and, about a year ago, was granted full parole with the same conditions. The results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the accused and society.

rejetant l'appel de l'accusée, les juges majoritaires de la Cour d'appel paraissent eux aussi ne pas avoir examiné plusieurs des facteurs pertinents. Même si, dans la plupart des cas, de telles erreurs suffiraient à justifier le renvoi de l'affaire pour une nouvelle audience de détermination de la peine, dans les circonstances, il ne serait pas dans l'intérêt de la justice d'ordonner une nouvelle audience pour examiner les circonstances dans lesquelles se trouve l'accusée en tant que délinquante autochtone. Le juge de la peine et tous les juges de la Cour d'appel ont reconnu que l'infraction en cause était particulièrement grave. Pour cette infraction commise par cette délinquante, une peine de trois ans d'emprisonnement n'était pas déraisonnable. De façon plus importante, l'accusée, sous réserve de certaines conditions, a obtenu une libération conditionnelle de jour après avoir purgé une peine de six mois à un centre correctionnel et, il y a environ un an, elle a obtenu une libération conditionnelle totale aux mêmes conditions. Les résultats de la peine imposée, avec une incarcération de six mois suivie d'une libération contrôlée, étaient dans l'intérêt de l'accusée et dans celui de la société.

Cases Cited

Referred to: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. McDonald* (1997), 113 C.C.C. (3d) 418; *R. v. J. (C.)* (1997), 119 C.C.C. (3d) 444; *R. v. Wells* (1998), 125 C.C.C. (3d) 129; *R. v. Hunter* (1998), 125 C.C.C. (3d) 121; *R. v. Young* (1998), 131 Man. R. (2d) 61; *R. v. Fireman* (1971), 4 C.C.C. (2d) 82; *R. v. Williams*, [1998] 1 S.C.R. 1128; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

Jurisprudence

Arrêts mentionnés: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *R. c. Chartrand*, [1994] 2 R.C.S. 864; *R. c. McDonald* (1997), 113 C.C.C. (3d) 418; *R. c. J. (C.)* (1997), 119 C.C.C. (3d) 444; *R. c. Wells* (1998), 125 C.C.C. (3d) 129; *R. c. Hunter* (1998), 125 C.C.C. (3d) 121; *R. c. Young* (1998), 131 Man. R. (2d) 61; *R. c. Fireman* (1971), 4 C.C.C. (2d) 82; *R. c. Williams*, [1998] 1 R.C.S. 1128; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 15, 25.
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Criminal Code, R.S.C., 1985, c. C-46, Part XXIII [repl. 1995, c. 22, s. 6], ss. 718, 718.1, 718.2 [am. 1997, c. 23, s. 17], 742.1 [am. 1997, c. 18, s. 107].
Interpretation Act, R.S.C., 1985, c. I-21, s. 12.

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APPEAL from a judgment of the British Columbia Court of Appeal (1997), 98 B.C.A.C. 120, 161 W.A.C. 120, 119 C.C.C. (3d) 481, 11 C.R. (5th) 108, [1997] B.C.J. No. 2333 (QL), affirming a judgment of Hutchinson J. sentencing the accused to three years' imprisonment. Appeal dismissed.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1997), 98 B.C.A.C. 120, 161 W.A.C. 120, 119 C.C.C. (3d) 481, 11 C.R. (5th) 108, [1997] B.C.J. No. 2333 (QL), qui a confirmé le jugement du juge Hutchinson infligeant à l'accusée une peine d'emprisonnement de trois ans. Pourvoi rejeté.

Gil D. McKinnon, Q.C., and *Michael D. Smith*, for the appellant.

Gil D. McKinnon, c.r., et *Michael D. Smith*, pour l'appelante.

Wendy L. Rubin, for the respondent.

Wendy L. Rubin, pour l'intimée.

Kimberly Prost and *Nancy L. Irving*, for the intervener the Attorney General of Canada.

Kimberly Prost et *Nancy L. Irving*, pour l'intervenant le procureur général du Canada.

Goran Tomljanovic, for the intervener the Attorney General for Alberta.

Goran Tomljanovic, pour l'intervenant le procureur général de l'Alberta.

Kent Roach and *Kimberly R. Murray*, for the intervener Aboriginal Legal Services of Toronto Inc.

Kent Roach et *Kimberly R. Murray*, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

CORY AND IACOBUCCI JJ. — On September 3, 1996, the new Part XXIII of the *Criminal Code*, R.S.C., 1985, c. C-46, pertaining to sentencing came into force. These provisions codify for the first time the fundamental purpose and principles of sentencing. This appeal is particularly concerned with the new s. 718.2(*e*). It provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. This appeal must consider how this provision should be interpreted and applied.

I. Factual Background

The appellant, one of nine children, was born in McLennan, Alberta in 1976. Her mother, Marie Gladue, who was a Cree, left the family home in 1987 and died in a car accident in 1990. After 1987, the appellant and her siblings were raised by their father, Lloyd Chalifoux, a Metis. The appellant and the victim Reuben Beaver started to live together in 1993, when the appellant was 17 years old. Thereafter they had a daughter, Tanita. In August 1995, they moved to Nanaimo. Together with the appellant's father and two of her siblings, Tara and Bianca Chalifoux, they lived in a townhouse complex. By September 1995, the appellant and Beaver were engaged to be married, and the appellant was five months pregnant with their second child, a boy, whom the appellant subsequently named Reuben Ambrose Beaver in honour of his father.

In the early evening of September 16, 1995, the appellant was celebrating her 19th birthday. She and Reuben Beaver, who was then 20, were drinking beer with some friends and family members in the townhouse complex. The appellant suspected that Beaver was having an affair with her older sister, Tara. During the course of the evening she voiced those suspicions to her friends. The appellant was obviously angry with Beaver. She said, "the next time he fools around on me, I'll kill him". The appellant told one of her friends that she

Version française du jugement de la Cour rendu par

LES JUGES CORY ET IACOBUCCI — Le 3 septembre 1996, la nouvelle partie XXIII du *Code criminel*, L.R.C. (1985), ch. C-46, relative à la détermination de la peine est entrée en vigueur. Ces dispositions codifient pour la première fois l'objectif et les principes fondamentaux de la détermination de la peine. Le présent pourvoi s'intéresse en particulier au nouvel al. 718.2*e*), qui prévoit l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones. Il nous faut examiner comment interpréter et appliquer cette disposition. 1

I. Les faits

L'appelante, issue d'une famille de neuf enfants, est née à McLennan, en Alberta, en 1976. Sa mère, Marie Gladue, une Crie, a quitté le foyer familial en 1987 et est morte dans un accident de voiture en 1990. Après 1987, l'appelante et ses frères et sœurs ont été élevés par leur père, Lloyd Chalifoux, un Métis. L'appelante et la victime Reuben Beaver ont commencé à vivre ensemble en 1993, alors que l'appelante avait 17 ans. Ils ont eu une fille, Tanita. En août 1995, ils ont déménagé à Nanaimo. Avec le père de l'appelante et deux de ses sœurs, Tara et Bianca Chalifoux, ils habitaient dans un complexe résidentiel. En septembre 1995, l'appelante et Beaver se sont fiancés. L'appelante était alors enceinte de cinq mois de leur deuxième enfant, un garçon, qu'elle a par la suite appelé Reuben Ambrose Beaver en l'honneur de son père. 2

Le 16 septembre 1995, au début de la soirée, l'appelante célébrait son 19e anniversaire de naissance. Elle et Reuben Beaver, alors âgé de 20 ans, buvaient de la bière avec des amis et des membres de leur famille dans le complexe résidentiel. L'appelante soupçonnait Beaver d'avoir une liaison avec sa sœur aînée, Tara. Au cours de la soirée, elle a fait part de ces soupçons à ses amis. Elle était visiblement en colère contre Beaver. [TRADUCTION] «La prochaine fois qu'il me trompe, a-t-elle dit, je vais le tuer». L'appelante a dit à l'une de ses 3

wanted to test Beaver, and asked her friend to "hit on Reuben to see if he would go with her", but the friend refused.

amies qu'elle voulait mettre Beaver à l'épreuve, et lui a demandé de [TRADUCTION] «faire des avances à Reuben pour voir s'il irait avec elle». Son amie a refusé.

4 The appellant's sister Tara left the party, followed by Beaver. After he had left, the appellant told her friend, "He's going to get it. He's really going to get it this time." The appellant, on several occasions, tried to find Beaver and her sister. She eventually located them coming down the stairs together in her sister's suite. The appellant suspected that they had been engaged in sexual activity and confronted her sister, saying, "You're going to get it. How could you do this to me?"

Tara, la sœur de l'appelante, a quitté la soirée, suivie de Beaver. Après son départ, l'appelante a dit à son amie: [TRADUCTION] «Il va l'avoir. Il va vraiment l'avoir cette fois.» À plusieurs reprises, l'appelante a essayé de trouver Beaver et sa sœur. Elle les a finalement vus, descendant l'escalier ensemble dans l'appartement de sa sœur. Les soupçonnant d'avoir eu des relations sexuelles, l'appelante a apostrophé sa sœur, lui disant: [TRADUCTION] «Tu vas l'avoir. Comment as-tu pu me faire ça?»

5 The appellant and Beaver returned separately to their townhouse and they started to quarrel. During the argument, the appellant confronted him with his infidelity and he told her that she was fat and ugly and not as good as the others. A neighbour, Mr. Gretchin, who lived next door was awakened by some banging and shouting and a female voice saying "I'm sick and tired of you fooling around with other women." The disturbance was becoming very loud and he decided to ask his neighbours to calm down. He heard the front door of the appellant's residence slam. As he opened his own front door, he saw the appellant come running out of her suite. He also saw Reuben Beaver banging with both hands at Tara Chalifoux's door down the hall saying, "Let me in. Let me in."

L'appelante et Beaver sont revenus séparément à la maison et ils ont commencé à se quereller. Au cours de l'échange, l'appelante lui a reproché son infidélité; il lui a répondu qu'elle était grosse et laide et qu'elle n'était pas aussi bonne que les autres. Un voisin, M. Gretchin, qui habitait à côté, a été réveillé par des coups et des cris, et il a entendu une voix de femme qui disait: [TRADUCTION] «J'en ai marre que tu me trompes avec d'autres femmes.» Comme il y avait de plus en plus de bruit, il a décidé d'aller demander à ses voisins de se calmer. Il a entendu claquer la porte de la résidence de l'appelante. Comme il ouvrait sa propre porte d'entrée, il a vu l'appelante sortir en courant de son appartement. Il a également vu Reuben Beaver frapper à deux mains à la porte de Tara Chalifoux plus loin dans le corridor en disant: [TRADUCTION] «Laisse-moi entrer. Laisse-moi entrer.»

6 Mr. Gretchin saw the appellant run toward Beaver with a large knife in her hand and, as she approached him, she told him that he had better run. Mr. Gretchin heard Beaver shriek in pain and saw him collapse in a pool of blood. The appellant had stabbed Beaver once in the left chest, and the knife had penetrated his heart. As the appellant went by on her return to her apartment, Mr. Gretchin heard her say, "I got you, you fucking bastard." The appellant was described as jumping up and down as if she had tagged someone. Mr. Gretchin said she did not appear to realize

Monsieur Gretchin a vu l'appelante courir vers Beaver, un grand couteau à la main, s'approcher de lui et lui dire qu'il ferait mieux de courir. Monsieur Gretchin a entendu Beaver crier de douleur et s'effondrer dans une mare de sang. L'appelante avait poignardé Beaver une fois à la poitrine, du côté gauche, et le couteau avait atteint le cœur. Comme l'appelante revenait vers son appartement, M. Gretchin l'a entendu dire: [TRADUCTION] «Je t'ai eu, je t'ai eu, maudit chien.» Selon sa description, l'appelante sautillait comme si elle avait attrapé quelqu'un. Monsieur Gretchin a dit qu'elle

what she had done. At the time of the stabbing, the appellant had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

ne paraissait pas réaliser ce qu'elle avait fait. Au moment où elle a donné le coup de couteau, l'appelante avait dans le sang entre 155 et 165 milligrammes d'alcool par 100 millilitres de sang.

On June 3, 1996, the appellant was charged with second degree murder. On February 11, 1997, following a preliminary hearing and after a jury had been selected, the appellant entered a plea of guilty to manslaughter. 7

Le 3 juin 1996, l'appelante a été accusée de meurtre au second degré. Le 11 février 1997, après une enquête préliminaire et la sélection du jury, l'appelante a plaidé coupable à l'accusation d'homicide involontaire coupable.

There was evidence which indicated that the appellant had stabbed Beaver before he fled from the apartment. A paring knife found on the living room floor of their apartment had a small amount of Beaver's blood on it, and a small stab wound was located on Beaver's right upper arm. 8

Des éléments de preuve indiquaient que l'appelante avait poignardé Beaver avant qu'il se soit enfui de l'appartement. Il y avait une petite quantité du sang de Beaver sur un couteau à légumes trouvé sur le plancher du salon de l'appartement, et son bras droit portait une petite marque de blessure par couteau.

There was also evidence that Beaver had subjected the appellant to some physical abuse in June 1994, while the appellant was pregnant with their daughter Tanita. Beaver was convicted of assault, and was given a 15-day intermittent sentence with one year's probation. The neighbour, Mr. Gretchin, told police that the noises emanating from the appellant's and Beaver's apartment suggested a fight, stating: "It sounded like someone got hit and furniture was sliding, like someone pushed around" and "The fight lasted five to ten minutes, it was like a wrestling match." Bruises later observed on the appellant's arm and in the collarbone area were consistent with her having been in a physical altercation on the night of the stabbing. However, the trial judge found that the facts as presented before him did not warrant a finding that the appellant was a "battered or fearful wife". 9

D'autres éléments de preuve indiquaient que Beaver avait commis des actes de violence physique à l'endroit de l'appelante en juin 1994, alors qu'elle était enceinte de leur fille Tanita. Beaver avait déclaré coupable de voies de fait, et il s'était vu infliger une peine discontinue de 15 jours suivie d'un an de probation. Le voisin, M. Gretchin, a dit à la police que les bruits provenant de l'appartement de l'appelante et de Beaver laissaient croire à une bagarre. Selon lui, [TRADUCTION] «Il semblait qu'on frappait quelqu'un, que des meubles étaient déplacés, comme quelqu'un qui était poussé», puis «La bagarre a duré de cinq à dix minutes, c'était comme une partie de lutte.» Les meurtrissures observées plus tard sur le bras de l'appelante et dans la région de la clavicule tendaient à confirmer qu'elle avait eu une altercation la nuit où la victime a été poignardée. Le juge du procès a toutefois estimé que les faits qui lui étaient soumis ne permettaient pas de conclure que l'appelante était une [TRADUCTION] «femme battue ou effrayée».

The appellant's sentencing took place 17 months after the stabbing. Pending her trial, she was released on bail and lived with her father. She took counselling for alcohol and drug abuse at Tillicum Haus Native Friendship Centre in Nanaimo, and completed Grade 10 and was about to start Grade 11. After the stabbing, the appellant was diagnosed as suffering from a hyperthyroid condition, which 10

Le prononcé de la peine de l'appelante a eu lieu 17 mois après le crime. En attendant son procès, elle avait été mise en liberté sous caution et vivait chez son père. Elle a suivi une thérapie pour alcoolisme et toxicomanie au Tillicum Haus Native Friendship Centre à Nanaimo, a terminé sa dixième année et s'apprêtait à commencer sa onzième année. Après le crime, on a diagnostiqué

was said to produce an exaggerated reaction to any emotional situation. The appellant underwent radiation therapy to destroy some of her thyroid glands, and at the time of sentencing she was taking thyroid supplements which regulated her condition. During the time she was on bail, the appellant pled guilty to having breached her bail on one occasion by consuming alcohol.

11 At the sentencing hearing, when asked if she had anything to say, the appellant stated that she was sorry about what happened, that she did not intend to do it, and that she was sorry to Beaver's family.

12 In his submissions on sentence at trial, the appellant's counsel did not raise the fact that the appellant was an aboriginal offender but, when asked by the trial judge whether in fact the appellant was an aboriginal person, replied that she was Cree. When asked by the trial judge whether the town of McLennan, Alberta, where the appellant grew up, was an aboriginal community, defence counsel responded: "it's just a regular community". No other submissions were made at the sentencing hearing on the issue of the appellant's aboriginal heritage. Defence counsel requested a suspended sentence or a conditional sentence of imprisonment. Crown counsel argued in favour of a sentence of between three and five years' imprisonment.

13 The appellant was sentenced to three years' imprisonment and to a ten-year weapons prohibition. Her appeal of the sentence to the British Columbia Court of Appeal was dismissed.

II. Relevant Statutory Provisions

14 It may be helpful at this stage to set out ss. 718, 718.1 and 718.2 of the *Criminal Code* as well as s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21.

chez elle une hyperthyroïdie, maladie qui provoquerait des réactions exagérées à toute situation émotionnelle. L'appelante a subi une radiothérapie pour détruire une partie de sa glande thyroïde, et au moment du prononcé de la peine, elle prenait des suppléments pour régulariser son état. Pendant qu'elle était en liberté sous caution, l'appelante a plaidé coupable à l'accusation d'avoir violé une fois les conditions de sa libération en consommant de l'alcool.

À l'audience de détermination de la peine, lorsqu'on lui a demandé si elle avait quelque chose à dire, l'appelante a dit qu'elle regrettait ce qui était arrivé, qu'elle n'avait pas eu l'intention d'agir ainsi et qu'elle était peinée pour la famille de Beaver.

Dans ses observations relatives à la peine, au procès, l'avocat de l'appelante n'a pas soulevé le fait que l'appelante était une délinquante autochtone, mais lorsque le juge lui a demandé si elle était effectivement autochtone, il a répondu qu'elle était Crie. Quand le juge lui a demandé si la ville de McLennan, en Alberta, où l'appelante a grandi était une communauté autochtone, l'avocat de la défense a répondu que c'était [TRADUCTION] «une communauté ordinaire». Aucune autre observation n'a été présentée à l'audience de détermination de la peine sur la question de l'origine autochtone de l'appelante. L'avocat de la défense a demandé une condamnation avec sursis ou un sursis de sentence. Le procureur du ministère public a plaidé en faveur d'une peine de trois à cinq ans d'emprisonnement.

L'appelante a été condamnée à une peine d'emprisonnement de trois ans et à dix ans d'interdiction de port d'arme. L'appel de sa sentence à la Cour d'appel de la Colombie-Britannique a été rejeté.

II. Dispositions législatives pertinentes

Il peut être utile à ce stade de citer les art. 718, 718.1 et 718.2 du *Code criminel* ainsi que l'art. 12 de la *Loi d'interprétation*, L.R.C. (1985), ch. I-21.

Criminal Code

Purpose and Principles of Sentencing

718. [Purpose] The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 [Fundamental principle] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization

shall be deemed to be aggravating circumstances;

Code criminel

Objectif et principes

718. [Objectif] Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants:

a) dénoncer le comportement illégal;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

718.1 [Principe fondamental] La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

718.2 [Principes de détermination de la peine] Le tribunal détermine la peine à infliger compte tenu également des principes suivants:

a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant:

(i) que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique ou l'orientation sexuelle,

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement de son conjoint ou de ses enfants,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iv) que l'infraction a été commise au profit ou sous la direction d'un gang, ou en association avec lui;

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Interpretation Act

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

III. Judicial History

A. *Supreme Court of British Columbia*

15 In his reasons, the trial judge took into account several mitigating factors. The appellant was only 20 years old at the time of sentence, and apart from an impaired driving conviction, she had no criminal record. She had two children and was expecting a third although he considered her pregnancy a neutral factor. Her family was supportive and she was attending alcohol abuse counselling and upgrading her education. The appellant was provoked by the deceased's insulting behaviour and remarks. At the time of the offence, the appellant had a hyperthyroid condition which caused her to overreact to emotional situations. The appellant showed some signs of remorse and entered a plea of guilty.

16 On the other hand, the trial judge identified several aggravating circumstances. The appellant stabbed the deceased twice, the second time after he had fled in an attempt to escape. Also, the offence was of particular gravity. From the remarks she made before and after the stabbing it

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

Loi d'interprétation

12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

III. Historique des procédures judiciaires

A. *Cour suprême de la Colombie-Britannique*

Dans ses motifs, le juge du procès a pris en compte plusieurs facteurs atténuants. L'appelante n'avait que 20 ans au moment du prononcé de la peine, et hormis une déclaration de culpabilité pour conduite avec facultés affaiblies, elle n'avait pas de casier judiciaire. Elle avait deux enfants et en attendait un troisième, bien que le juge ait considéré sa grossesse comme un facteur neutre. Elle avait le soutien de sa famille, suivait une thérapie pour son alcoolisme et poursuivait ses études. C'est la victime qui, par sa conduite et ses remarques insultantes, a provoqué l'appelante. Au moment de la perpétration de l'infraction, l'appelante souffrait d'hyperthyroïdie, ce qui la conduisait à réagir excessivement à des situations émotionnelles. Elle a montré des signes de remords et a plaidé coupable.

En revanche, le juge du procès a relevé plusieurs circonstances aggravantes. L'appelante a poignardé la victime deux fois, la deuxième après sa tentative de fuite. L'infraction était aussi particulièrement grave. D'après les remarques qu'elle a faites avant et après les coups de couteau, il était

was very clear that the appellant intended to harm the deceased. Further, the appellant was not afraid of the deceased; indeed, she was the aggressor.

clair que l'appelante avait l'intention de causer du mal à la victime. De plus, elle n'avait pas peur de la victime; en fait, elle était l'agresseur.

The trial judge considered that specific deterrence was not required in the circumstances of this case. However, in his opinion the principles of denunciation and general deterrence must play a role. He was of the view that the sentence should also take into account the need to rehabilitate the appellant and give her some insight both into her conduct and the effect of her propensity to drink. The trial judge decided that in this case it was not appropriate to suspend the passing of sentence or to impose a conditional sentence.

17 Le juge du procès a estimé qu'il n'y avait pas lieu de rechercher un effet dissuasif particulier dans les circonstances de l'espèce. À son avis, toutefois, le principe de la dénonciation et celui de l'effet dissuasif général devaient jouer un rôle. Il a estimé que la peine devait également tenir compte de la nécessité de favoriser la réinsertion sociale de l'appelante et de lui permettre de réfléchir soigneusement à sa conduite et à son penchant pour l'alcool. Il a décidé qu'il ne convenait pas en l'espèce de surseoir au prononcé de la peine ou d'imposer une condamnation avec sursis.

The trial judge noted that both the appellant and the deceased were aboriginal, but stated that they were living in an urban area off-reserve and not "within the aboriginal community as such". He found that there were not any special circumstances arising from their aboriginal status that he should take into consideration. He stated that the offence was a very serious one, for which the appropriate sentence was three years' imprisonment with a ten-year weapons prohibition.

18 Le juge du procès a fait remarquer que l'appelante et la victime étaient tous deux autochtones, mais a souligné qu'ils vivaient en milieu urbain, à l'extérieur de la réserve, et non [TRADUCTION] «dans la communauté autochtone en tant que telle». Il a estimé que de leur statut d'autochtone ne découlait aucune circonstance particulière qu'il devait prendre en considération. Il a dit qu'il s'agissait d'une infraction très grave, pour laquelle il convenait d'infliger une peine de trois ans d'emprisonnement avec interdiction de posséder une arme pendant dix ans.

B. *Court of Appeal for British Columbia* (1997), 98 B.C.A.C. 120

B. *Cour d'appel de la Colombie-Britannique* (1997), 98 B.C.A.C. 120

The appellant appealed her sentence of three years' imprisonment, but not the ten-year weapons prohibition. She appealed on four grounds, only one of which is directly relevant, namely whether the trial judge failed to give appropriate consideration to the appellant's circumstances as an aboriginal offender. The appellant also sought to adduce fresh evidence at her appeal regarding her efforts since the killing to maintain links with her aboriginal heritage. The fresh evidence showed that the appellant had applied to become a full status Cree, and that she had obtained that status for her daughter Tanita. She had also maintained contact with Beaver's mother, who is a status Cree, and who

19 L'appelante a interjeté appel de la peine de trois ans d'emprisonnement, mais non de l'interdiction de port d'armes pendant dix ans. Elle a fait valoir quatre moyens d'appel, dont un seul est directement pertinent, savoir si le juge du procès avait omis de prendre dûment en considération les circonstances dans lesquelles elle se trouvait en tant que délinquante autochtone. Elle a également cherché à présenter de nouveaux éléments de preuve concernant ses efforts, depuis la perpétration de l'infraction, pour conserver ses liens avec la culture autochtone. Ces nouveaux éléments établissaient que l'appelante avait demandé le plein statut de Crie, statut qu'elle avait obtenue pour sa

was in turn assisting the appellant with the status applications.

20 The Court of Appeal unanimously concluded that the trial judge had erred in concluding that s. 718.2(*e*) did not apply because the appellant was not living on a reserve. However, Esson J.A. (Prowse J.A. concurring) found no error in the trial judge's conclusion that, in this case, there was no basis for giving special consideration to the appellant's aboriginal background. Esson J.A. noted that the appellant's actions involved deliberation, motivation, and "an element of viciousness and persistence in the attack", and that the killing constituted a "near murder" (p. 138). He found that, on the facts presented in this case, it could not be said that the sentence, if a fit one for a non-aboriginal person, would not also be fit for an aboriginal person. Esson J.A. concluded therefore that the trial judge did not err in not giving effect to the principle set out in s. 718.2(*e*) of the *Criminal Code* and dismissed the appeal. Although it is not entirely clear from the reasons of Esson J.A., he appears also to have dismissed the appellant's application to adduce fresh evidence regarding her efforts to maintain links with her aboriginal heritage.

21 Rowles J.A. (dissenting) reviewed many reports and parliamentary debates and determined that the mischief that s. 718.2(*e*) was designed to remedy was the excessive use of incarceration generally, and the disproportionately high number of aboriginal people who are imprisoned, in particular. She stated that s. 718.2(*e*) invites recognition and amelioration of the impact which systemic discrimination in the criminal justice system has upon aboriginal people. She referred to the importance of acknowledging and implementing the different conceptions of criminal justice and of appropriate criminal sanctions held by many aboriginal peoples, including, in particular, the conception of criminal justice as involving a strong restorative element.

fille Tanita. Elle a également maintenu des liens avec la mère de Beaver, une Crie inscrite, qui l'a aidée dans ses démarches pour obtenir le statut.

La Cour d'appel a conclu à l'unanimité que le juge du procès avait commis une erreur en concluant que l'al. 718.2*e*) ne s'appliquait pas parce que l'appelante n'habitait pas dans une réserve. Toutefois, le juge Esson (avec l'appui du juge Prowse) a estimé que le juge du procès ne s'était pas trompé en concluant qu'il n'y avait aucune raison, dans cette affaire, d'accorder une attention particulière aux origines autochtones de l'appelante. Le juge Esson a fait remarquer qu'il y avait dans les actes de l'appelante des éléments de délibération et de motivation, ainsi [TRADUCTION] «qu'un élément de brutalité et de persistance dans l'attaque», et qu'il s'agissait d'un [TRADUCTION] «quasi-meurtre» (p. 138). Il a estimé que, compte tenu des faits présentés en l'espèce, il était impossible de dire que la peine, si elle était indiquée pour un non-autochtone, ne l'était pas également pour un autochtone. Il a donc conclu que le juge du procès n'avait pas commis d'erreur en ne donnant pas effet au principe énoncé à l'al. 718.2*e*) du *Code criminel*, et il a rejeté l'appel. Bien que cela ne ressorte pas très clairement de ses motifs, le juge Esson paraît avoir également rejeté la demande de l'appelante de présenter de nouveaux éléments de preuve concernant ses efforts pour conserver ses liens avec sa culture autochtone.

Le juge Rowles (dissident) a décidé, après avoir examiné de nombreux rapports et débats parlementaires, que la situation que l'al. 718.2*e*) visait à réformer était celle du recours excessif à l'incarcération de façon générale, et du nombre disproportionné d'autochtones emprisonnés, en particulier. À son avis, l'al. 718.2*e*) appelle à la reconnaissance et à l'amélioration de la situation de discrimination systémique que vivent les autochtones au sein du système de justice pénale. Elle a souligné l'importance de reconnaître et d'implanter les conceptions différentes de la justice et des sanctions pénales qui sont celles de nombreux peuples autochtones, y compris, en particulier, la conception d'une justice pénale comportant un fort élément correctif.

In this case, Rowles J.A. agreed that the crime committed by the appellant was serious. The circumstances surrounding the offence were tragic for everyone, including the appellant's children. Yet, the circumstances of the offence included provocation, superimposed on an undiagnosed medical problem affecting the appellant's emotional stability. The offender was young and emotionally immature. She had an alcohol problem but no history of other criminal conduct or acts of violence. The success the appellant enjoyed while on bail awaiting trial showed that she was likely to be a good candidate for further rehabilitation. Rowles J.A. also referred favourably to the fresh evidence which showed that the appellant was taking steps to maintain links with her aboriginal heritage.

Rowles J.A. concluded that a sentence of three years' imprisonment was excessive. The principles of general deterrence and denunciation had to be reflected in the sentence, but the sentence could have been designed to advance the appellant's rehabilitation through a period of supervised probation. Rowles J.A. would have allowed the appeal and reduced the sentence to two years less a day to be followed by a three-year period of probation.

IV. Issue

The issue in this appeal is the proper interpretation and application to be given to s. 718.2(*e*) of the *Criminal Code*. The provision reads as follows:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The question to be resolved is whether the majority of the British Columbia Court of Appeal erred in finding that, in the circumstances of this case, the trial judge correctly applied s. 718.2(*e*) in impos-

En l'espèce, le juge Rowles a reconnu la gravité du crime commis par l'appelante. Les circonstances entourant la perpétration de l'infraction ont été tragiques pour tout le monde, y compris les enfants de l'appelante. Toutefois ces circonstances incluaient la provocation, combinée à un problème médical non diagnostiqué affectant la stabilité émotive de l'appelante. La délinquante était jeune et immature sur le plan émotif. Elle avait un problème d'alcool mais pas d'antécédents de conduite criminelle ou d'actes de violence. Les progrès accomplis par l'appelante quand elle était en liberté sous caution en attendant son procès démontraient qu'elle serait vraisemblablement une bonne candidate pour la réinsertion sociale. Le juge Rowles a également parlé en termes favorables des nouveaux éléments de preuve indiquant que l'appelante prenait des mesures pour conserver des liens avec la culture autochtone.

Le juge Rowles a conclu qu'une peine de trois ans d'emprisonnement était excessive. Les principes de la dissuasion générale et de la dénonciation devaient se refléter dans la peine imposée, mais celle-ci aurait pu être conçue de manière à favoriser la réinsertion sociale de l'appelante dans le cadre d'une période de probation sous surveillance. Le juge Rowles était d'avis d'accueillir l'appel et de réduire la peine à deux ans moins un jour, suivie d'une période de probation de trois ans.

IV. Question en litige

La question à trancher dans le présent pourvoi est la façon dont il convient d'interpréter et d'appliquer l'al. 718.2*e*) du *Code criminel*:

> **718.2** Le tribunal détermine la peine à infliger compte tenu également des principes suivants:
>
> . . .
>
> *e*) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

La question qu'il nous faut résoudre est de savoir si les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont commis une erreur en concluant que, vu les circonstances de l'espèce, le

ing a sentence of three years' imprisonment. To answer this question, it will be necessary to determine the legislative purpose of s. 718.2(*e*), and, in particular, the words "with particular attention to the circumstances of aboriginal offenders". The appeal requires this Court to begin the process of articulating the rules and principles that should govern the practical application of s. 718.2(*e*) of the *Criminal Code* by a trial judge.

V. Analysis

A. *Introduction*

25 As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at p. 875; E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 131.

26 Also of importance in interpreting federal legislation is s. 12 of the federal *Interpretation Act*, which provides:

> **12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

27 Section 718.2(*e*) has already received judicial consideration in several provincial appellate court decisions: see, e.g., *R. v. McDonald* (1997), 113 C.C.C. (3d) 418 (Sask. C.A.); *R. v. J. (C.)* (1997), 119 C.C.C. (3d) 444 (Nfld. C.A.); *R. v. Wells* (1998), 125 C.C.C. (3d) 129 (Alta. C.A.); *R. v. Hunter* (1998), 125 C.C.C. (3d) 121 (Alta. C.A.); *R. v. Young* (1998), 131 Man. R. (2d) 61 (C.A.).

juge du procès a correctement appliqué l'al. 718.2*e*) en infligeant une peine de trois ans d'emprisonnement. Pour ce faire, nous devons définir l'objet de l'al. 718.2*e*), et en particulier, des mots «plus particulièrement en ce qui concerne les délinquants autochtones». Le pourvoi oblige ainsi notre Cour à commencer le processus d'élaboration des règles et des principes qui régiront l'application concrète de l'al. 718.2*e*) du *Code criminel* par le juge du procès.

V. Analyse

A. *Introduction*

Comme notre Cour l'a dit maintes fois, il faut, pour interpréter correctement une disposition de loi, lire les termes de la disposition en suivant leur sens grammatical et ordinaire et dans leur contexte global, en harmonie avec l'économie générale de la loi, son objet ainsi que l'intention du législateur. L'objet de la loi et l'intention du législateur, en particulier, doivent être définis sur le fondement de sources intrinsèques et de sources extrinsèques admissibles touchant l'historique législatif de la loi et le contexte de son adoption: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 20 à 23; *R. c. Chartrand*, [1994] 2 R.C.S. 864, à la p. 875; E. A. Driedger, *Construction of Statutes* (2e éd. 1983), à la p. 87; *Driedger on the Construction of Statutes* (3e éd. 1994), par R. Sullivan, à la p. 131.

En ce qui concerne l'interprétation de la législation fédérale, l'art. 12 de la *Loi d'interprétation*, loi fédérale, est également important:

> **12.** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

L'alinéa 718.2*e*) a déjà été examiné dans plusieurs décisions de cours d'appel provinciales, notamment, *R. c. McDonald* (1997), 113 C.C.C. (3d) 418 (C.A. Sask.); *R. c. J. (C.)* (1997), 119 C.C.C. (3d) 444 (C.A.T.-N.); *R. c. Wells* (1998), 125 C.C.C. (3d) 129 (C.A. Alb.); *R. c. Hunter* (1998), 125 C.C.C. (3d) 121 (C.A. Alb.); *R. c. Young* (1998), 131 Man. R. (2d) 61 (C.A.). C'est

This is the first occasion on which this Court has had the opportunity to construe and apply the provision.

With this introduction, we now wish to discuss the wording of s. 718.2(*e*) and the scheme of Part XXIII of the *Criminal Code*, as well as the legislative history and the context behind s. 718.2(*e*), with the aim of determining and describing the circumstances of aboriginal offenders. This discussion is followed by a framework for the sentencing judge to use in sentencing an aboriginal offender. The reasons then deal with the specific facts and sentence in this case.

B. *The Wording of Section 718.2(e) and the Scheme of Part XXIII*

The interpretation of s. 718.2(*e*) must begin by considering its words in context. Although this appeal is ultimately concerned only with the meaning of the phrase "with particular attention to the circumstances of aboriginal offenders", that phrase takes on meaning from the other words of s. 718.2(*e*), from the purpose and principles of sentencing set out in ss. 718-718.2, and from the overall scheme of Part XXIII.

The respondent observed that some caution is in order in construing s. 718.2(*e*), insofar as it would be inappropriate to prejudge the many other important issues which may be raised by the reforms but which are not specifically at issue here. However, it would be equally inappropriate to construe s. 718.2(*e*) in a vacuum, without considering the surrounding text which gives the provision its depth of meaning. To the extent that the broader scheme of Part XXIII informs the proper construction to be given to s. 718.2(*e*), it will be necessary to draw at least some general conclusions about the new sentencing regime.

A core issue in this appeal is whether s. 718.2(*e*) should be understood as being remedial in nature, or whether s. 718.2(*e*), along with the other provisions of ss. 718 through 718.2, are simply a codification of existing sentencing principles. The

cependant la première fois que notre Cour a l'occasion d'interpréter et d'appliquer cette disposition.

28 Cette introduction étant faite, nous nous proposons maintenant d'examiner le texte de l'al. 718.2*e*) et l'économie de la partie XXIII du *Code criminel*, ainsi que l'historique législatif et le contexte qui ont donné naissance à l'al. 718.2*e*), en vue de définir et de circonscrire la situation des délinquants autochtones. Cet examen sera suivi d'un cadre d'analyse dont le juge qui détermine la peine pourra se servir dans le cas des délinquants autochtones. Nous examinerons ensuite les faits de la présente espèce et la peine infligée.

B. *Le texte de l'al. 718.2e) et l'économie de la partie XXIII*

29 Pour interpréter l'al. 718.2*e*), il faut commencer par en examiner les termes en contexte. Bien que le présent pourvoi ne porte ultimement que sur le sens du passage «plus particulièrement en ce qui concerne les délinquants autochtones», ce passage tire son sens du reste de l'al. 718.2*e*), de l'objectif et des principes de détermination de la peine énoncés aux art. 718 à 718.2, ainsi que de l'économie générale de la partie XXIII.

30 L'intimée a fait observer qu'il faut interpréter avec prudence l'al. 718.2*e*), en ce sens qu'il serait inopportun de préjuger des nombreuses autres questions importantes que les réformes apportées sont susceptibles de poser mais qui ne sont pas précisément en litige dans la présente affaire. Toutefois, il serait tout aussi inopportun d'interpréter l'al. 718.2*e*) dans l'abstrait, sans examiner son contexte textuel qui lui confère sa signification profonde. Dans la mesure où l'économie générale de la partie XXIII éclaire l'interprétation à donner à l'al. 718.2*e*), il sera nécessaire à tout le moins de tirer certaines conclusions générales au sujet du nouveau régime de détermination de la peine.

31 Une question est centrale dans le présent pourvoi: l'al. 718.2*e*) doit-il être interprété comme une disposition essentiellement réparatrice, ou n'est-il, avec les autres dispositions des art. 718 à 718.2, qu'une simple codification des principes de déter-

respondent, although acknowledging that s. 718.2(*e*) was likely designed to encourage sentencing judges to experiment to some degree with alternatives to incarceration and to be sensitive to principles of restorative justice, at the same time favours the view that ss. 718-718.2 are largely a restatement of existing law. Alternatively, the appellant argues strongly that s. 718.2(*e*)'s specific reference to aboriginal offenders can have no purpose unless it effects a change in the law. The appellant advances the view that s. 718.2(*e*) is in fact an "affirmative action" provision justified under s. 15(2) of the *Canadian Charter of Rights and Freedoms*.

32 Section 12 of the *Interpretation Act* deems the purpose of the enactment of the new Part XXIII of the *Criminal Code* to be remedial in nature, and requires that all of the provisions of Part XXIII, including s. 718.2(*e*), be given a fair, large and liberal construction and interpretation in order to attain that remedial objective. However, the existence of s. 12 does not answer the essential question of what the remedial purpose of s. 718.2(*e*) is. One view is that the remedial purpose of ss. 718, 718.1 and 718.2 taken together was precisely to codify the purpose and existing principles of sentencing to provide more systematic guidance to sentencing judges in individual cases. Codification, under this view, is remedial in and of itself because it simplifies and adds structure to trial level sentencing decisions: see, e.g., *McDonald*, *supra*, at pp. 460-64, *per* Sherstobitoff J.A.

33 In our view, s. 718.2(*e*) is more than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. It should be said that the words of s. 718.2(*e*) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender.

mination de la peine existants? Tout en reconnaissant que l'al. 718.2*e*) a vraisemblablement été conçu pour inciter les juges à expérimenter jusqu'à un certain point les solutions de rechange à l'incarcération et à être sensibles aux principes de justice corrective, l'intimée privilégie l'opinion que les art. 718 à 718.2 sont avant tout une reformulation du droit existant. En revanche, l'appelante soutient fermement que la mention expresse des délinquants autochtones à l'al. 718.2*e*) ne peut avoir d'autre objet qu'une modification du droit. Elle fait valoir que l'al. 718.2*e*) est en fait une disposition de «promotion sociale» justifiée en vertu du par. 15(2) de la *Charte canadienne des droits et libertés*.

Suivant l'art. 12 de la *Loi d'interprétation*, la nouvelle partie XXIII du *Code criminel* est censée apporter une solution de droit, et toutes ses dispositions, dont l'al. 718.2*e*), doivent s'interpréter de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de cet objectif de réparation. Toutefois, l'existence de l'art. 12 ne permet pas de répondre à la question essentielle de savoir quel est l'objet réparateur de l'al. 718.2*e*). On peut soutenir que les art. 718, 718.1 et 718.2 combinés avaient précisément pour objet réparateur de codifier l'objectif et les principes de détermination de la peine existants afin de fournir aux juges un guide plus systématique dans les cas individuels. Suivant cette conception, la codification est réparatrice en soi parce qu'elle simplifie et structure le prononcé des peines en première instance: voir, par ex., *McDonald*, précité, aux pp. 460 à 464, le juge Sherstobitoff.

À notre avis, l'al. 718.2*e*) est plus qu'une simple réaffirmation de principes de détermination de la peine existants. La composante réparatrice de la disposition réside non seulement dans le fait qu'elle codifie un principe de détermination de la peine, mais de façon beaucoup plus importante, dans sa directive aux juges d'aborder différemment le processus de détermination de la peine à l'égard des délinquants autochtones, pour en arriver à une peine véritablement adaptée et appropriée dans un cas donné. Il importe de dire que le libellé de l'al. 718.2*e*) ne change rien au devoir fondamental du

For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders. What s. 718.2(*e*) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. In our view, the scheme of Part XXIII of the *Criminal Code*, the context underlying the enactment of s. 718.2(*e*), and the legislative history of the provision all support an interpretation of s. 718.2(*e*) as having this important remedial purpose.

juge d'infliger une peine adaptée à l'infraction et au délinquant. Par exemple, comme nous l'indiquons ci-après, il s'avérera généralement qu'en pratique les infractions particulièrement violentes ou graves entraîneront l'emprisonnement pour les délinquants autochtones aussi souvent que pour les délinquants non-autochtones. Là où l'al. 718.2*e*) apporte un changement, c'est dans la méthode d'analyse que doit utiliser chaque juge pour déterminer la nature de la peine indiquée pour un délinquant autochtone. À notre avis, tant l'économie de la partie XXIII du *Code criminel* que le contexte de l'adoption et l'historique législatif de l'al. 718.2*e*) concourent à en faire une disposition ayant cet important objet réparateur.

In his submissions before this Court, counsel for the appellant expressed the fear that s. 718.2(*e*) might come to be interpreted and applied in a manner which would have no real effect upon the day-to-day practice of sentencing aboriginal offenders in Canada. In light of the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system, we do not consider this fear to be unreasonable. In our view, s. 718.2(*e*) creates a judicial duty to give its remedial purpose real force.

34 Dans sa plaidoirie devant notre Cour, l'avocat de l'appelante a exprimé la crainte que l'al. 718.2*e*) n'en vienne à être interprété et appliqué de telle manière qu'il n'aurait aucun effet réel sur la façon dont se pratique quotidiennement la détermination de la peine dans le cas des délinquants autochtones au Canada. Étant donné l'histoire tragique du traitement des autochtones au sein du système canadien de justice pénale, cette crainte ne nous paraît pas déraisonnable. À notre avis, l'al. 718.2*e*) impose aux tribunaux l'obligation de donner à son objet réparateur une force réelle.

Let us consider now the wording of s. 718.2(*e*) and its place within the overall scheme of Part XXIII of the *Criminal Code*.

35 Examinons maintenant le texte de l'al. 718.2*e*) et la place qu'il occupe dans l'économie générale de la partie XXIII du *Code criminel*.

Section 718.2(*e*) directs a court, in imposing a sentence, to consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, "with particular attention to the circumstances of aboriginal offenders". The broad role of the provision is clear. As a general principle, s. 718.2(*e*) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.

36 L'alinéa 718.2*e*) oblige un tribunal qui inflige une peine à examiner toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, «plus particulièrement en ce qui concerne les délinquants autochtones». Il est clair que la disposition a une large portée. À titre de principe général, l'al. 718.2*e*) s'applique à tous les délinquants, et il porte que l'emprisonnement devrait être la sanction pénale de dernier recours. On ne devrait imposer l'emprisonnement que lorsque aucune autre sanction ou combinaison de sanctions n'est appropriée pour l'infraction et le délinquant.

The next question is the meaning to be attributed to the words "with particular attention to the

37 La question suivante est le sens à attribuer aux mots «plus particulièrement en ce qui concerne les

circumstances of aboriginal offenders". The phrase cannot be an instruction for judges to pay "more" attention when sentencing aboriginal offenders. It would be unreasonable to assume that Parliament intended sentencing judges to prefer certain categories of offenders over others. Neither can the phrase be merely an instruction to a sentencing judge to consider the circumstances of aboriginal offenders just as she or he would consider the circumstances of any other offender. There would be no point in adding a special reference to aboriginal offenders if this was the case. Rather, the logical meaning to be derived from the special reference to the circumstances of aboriginal offenders, juxtaposed as it is against a general direction to consider "the circumstances" for all offenders, is that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(*e*), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.

délinquants autochtones». Il ne peut s'agir d'une directive donnée aux juges de porter «plus» d'attention à la détermination de la peine dans le cas des délinquants autochtones. Il serait déraisonnable de présumer que le Parlement a voulu que les juges privilégient certaines catégories de délinquants par rapport à d'autres. Il ne peut s'agir non plus d'une simple directive donnée au juge de la peine de prendre en compte la situation des délinquants autochtones de la même façon que la situation de tout autre délinquant. La mention spéciale des délinquants autochtones n'aurait alors aucune utilité. Logiquement, la mention spéciale de la situation des délinquants autochtones, juxtaposée à la directive générale de tenir compte des «circonstances» dans le cas de tous les délinquants, signifie que les juges devraient porter une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones parce que ces circonstances sont particulières, et différentes de celles dans lesquelles se trouvent les non-autochtones. Le fait notamment que la mention des délinquants autochtones soit contenue à l'al. 718.2*e*), disposition incitant à la retenue dans le recours à l'emprisonnement, donne à penser qu'il y a, dans le cas des autochtones, quelque chose de différent qui pourrait précisément faire de l'emprisonnement une sanction moins appropriée ou moins utile.

38 The wording of s. 718.2(*e*) on its face, then, requires both consideration of alternatives to the use of imprisonment as a penal sanction generally, which amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders. The respondent argued before this Court that this statutory wording does not truly effect a change in the law, as some courts have in the past taken the unique circumstances of an aboriginal offender into account in determining sentence. The respondent cited some of the recent jurisprudence dealing with sentencing circles, as well as the decision of the Court of Appeal for Ontario in *R. v. Fireman* (1971), 4 C.C.C. (2d) 82, in support of the view that s. 718.2(*e*) should be seen simply as a codification of the state of the case law regarding the sentencing of aboriginal

Ainsi, d'après son libellé, l'al. 718.2*e*) exige à la fois, de façon générale, l'examen des sanctions substitutives à l'emprisonnement comme sanction pénale, ce qui équivaut à une restriction du recours à la peine d'emprisonnement, et la reconnaissance par le juge prononçant la peine de la situation particulière des délinquants autochtones. L'intimée a soutenu devant notre Cour que la formulation de la loi ne modifie pas vraiment le droit puisque, dans le passé, certains tribunaux ont tenu compte de la situation particulière d'un délinquant autochtone dans la détermination de la peine. L'intimée a cité des décisions récentes touchant les conseils de détermination de la peine, ainsi que l'arrêt de la Cour d'appel de l'Ontario *R. c. Fireman* (1971), 4 C.C.C. (2d) 82, à l'appui du point de vue que l'al. 718.2*e*) devrait être considéré comme une simple codification de l'état de la jurisprudence touchant

offenders before Part XXIII came into force in 1996. In a similar vein, it was observed by Sherstobitoff J.A. in *McDonald*, *supra*, at pp. 463-64, that it has always been a principle of sentencing that courts should consider all available sanctions other than imprisonment that are reasonable in the circumstances. Thus the general principle of restraint expressed in s. 718.2(*e*) with respect to all offenders might equally be seen as a codification of existing law.

la détermination de la peine dans le cas des délinquants autochtones avant l'entrée en vigueur de la partie XXIII en 1996. Dans la même veine, le juge Sherstobitoff a fait observer, dans l'arrêt *McDonald*, précité, aux pp. 463 et 464, que le principe a toujours été, en matière de détermination de la peine, que les tribunaux doivent examiner toutes les sanctions applicables autres que l'emprisonnement qui sont justifiées dans les circonstances. Ainsi, le principe général de retenue énoncé à l'al. 718.2*e*) en ce qui concerne tous les délinquants pourrait également être considéré comme une codification du droit existant.

With respect for the contrary view, we do not interpret s. 718.2(*e*) as expressing only a restatement of existing law, either with respect to the general principle of restraint in the use of prison or with respect to the specific direction regarding aboriginal offenders. One cannot interpret the words of s. 718.2(*e*) simply by looking to past cases to see if they contain similar statements of principle. The enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law. Each of the provisions of Part XXIII, including s. 718.2(*e*), must be interpreted in its total context, taking into account its surrounding provisions.

39 En toute déférence pour l'opinion contraire, l'al. 718.2*e*) ne nous apparaît pas uniquement comme une reformulation du droit existant, ni à l'égard du principe général de retenue dans le recours à l'emprisonnement ni à l'égard de la directive spécifique visant les délinquants autochtones. On ne peut interpréter les termes de l'al. 718.2*e*) en consultant simplement les décisions antérieures pour voir si l'on y retrouve des énoncés de principe similaires. L'adoption de la nouvelle partie XXIII a marqué une étape majeure, soit la première codification et la première réforme substantielle des principes de détermination de la peine dans l'histoire du droit criminel canadien. Chacune des dispositions de la partie XXIII, y compris l'al. 718.2*e*), doit être interprétée dans son contexte global, compte tenu des dispositions qui l'entourent.

It is true that there is ample jurisprudence supporting the principle that prison should be used as a sanction of last resort. It is equally true, though, that the sentencing amendments which came into force in 1996 as the new Part XXIII have changed the range of available penal sanctions in a significant way. The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration. The general principle expressed in

40 Il est vrai que la jurisprudence supporte amplement le principe de l'emprisonnement comme sanction de dernier recours. Il est également vrai, toutefois, que les modifications entrées en vigueur en 1996 avec la nouvelle partie XXIII ont changé de façon importante la gamme des sanctions pénales applicables. La possibilité de prononcer une condamnation avec sursis, en particulier, modifie le paysage de telle manière qu'elle donne un sens entièrement nouveau au principe du recours à l'emprisonnement dans le seul cas où aucune autre option n'est justifiée dans les circonstances. La création de la condamnation avec sursis, comme telle, traduit le désir de diminuer le recours à l'incarcération. C'est dans cet esprit qu'il faut

s. 718.2(*e*) must be construed and applied in this light.

41 Further support for the view that s. 718.2(*e*)'s expression of the principle of restraint in sentencing is remedial, rather than simply a codification, is provided by the articulation of the purpose of sentencing in s. 718.

42 Traditionally, Canadian sentencing jurisprudence has focussed primarily upon achieving the aims of separation, specific and general deterrence, denunciation, and rehabilitation. Sentencing, like the criminal trial process itself, has often been understood as a conflict between the interests of the state (as expressed through the aims of separation, deterrence, and denunciation) and the interests of the individual offender (as expressed through the aim of rehabilitation). Indeed, rehabilitation itself is a relative late-comer to the sentencing analysis, which formerly favoured the interests of the state almost entirely.

43 Section 718 now sets out the purpose of sentencing in the following terms:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. [Emphasis added.]

interpréter et appliquer le principe général énoncé à l'al. 718.2*e*).

La manière dont est formulé l'objectif du prononcé de la peine à l'art. 718 vient elle aussi étayer l'opinion que le principe de retenue énoncé à l'al. 718.2*e*) participe de la réparation, plutôt que de la simple codification.

Traditionnellement, la jurisprudence canadienne en matière de détermination de la peine a mis principalement l'accent sur l'atteinte de certains buts, savoir l'isolement du délinquant, l'effet dissuasif particulier et général, la dénonciation et la réinsertion sociale. Le processus de détermination de la peine, tout comme le procès criminel lui-même, était souvent perçu comme un conflit entre les intérêts de l'État (qu'incarnaient les buts d'isolement, de dissuasion et de dénonciation) et les intérêts du délinquant individuel (qu'incarnait le but de réinsertion sociale). La réinsertion sociale est d'ailleurs une notion relativement nouvelle dans l'analyse de la peine à infliger, analyse qui auparavant privilégiait presque exclusivement les intérêts de l'État.

L'article 718 énonce en ces termes l'objectif du prononcé de la peine:

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants:

a) dénoncer le comportement illégal;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité. [Nous soulignons.]

Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (*a*) through (*d*). What are new, though, are paras. (*e*) and (*f*), which along with para. (*d*) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras. (*d*), (*e*), and (*f*) is briefly discussed below, but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process: D. Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996), 60 *Sask. L. Rev.* 153, at p. 165. Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament's choice to include (*e*) and (*f*) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s. 718.2(*e*) will necessarily be informed by this reorientation.

Manifestement, l'art. 718 est, en partie, une reformulation des objectifs de base du prononcé de la peine, qui sont énumérés aux al. *a*) à *d*). Ce qui est nouveau, toutefois, se trouve aux al. *e*) et *f*) qui, avec l'al. *d*), mettent l'accent sur les objectifs correctifs que sont la réparation des torts subis par les victimes individuelles et l'ensemble de la collectivité, l'éveil de la conscience des responsabilités, la reconnaissance du tort causé et les efforts de réinsertion sociale ou de guérison du délinquant. Le concept de justice corrective qui sous-tend les al. *d*), *e*) et *f*) fait l'objet d'un bref examen plus loin, mais de façon générale, la justice corrective comporte une forme de restitution et de réinsertion dans la collectivité. La nécessité pour les délinquants d'assumer la responsabilité de leurs actes est un élément central au processus de détermination de la peine: D. Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996), 60 *Sask. L. Rev.* 153, à la p. 165. Les objectifs correctifs ne concordent habituellement pas avec le recours à l'emprisonnement. À notre avis, la décision du Parlement d'ajouter les al. *e*) et *f*) aux objectifs traditionnels de la détermination de la peine témoigne d'une intention d'élargir les paramètres de l'analyse de la peine pour tous les délinquants. Le principe de retenue énoncé à l'al. 718.2*e*) sera nécessairement coloré par cette réorientation.

Just as the context of Part XXIII supports the view that s. 718.2(*e*) has a remedial purpose for all offenders, the scheme of Part XXIII also supports the view that s. 718.2(*e*) has a particular remedial role for aboriginal peoples. The respondent is correct to point out that there is jurisprudence which pre-dates the enactment of s. 718.2(*e*) in which aboriginal offenders have been sentenced differently in light of their unique circumstances. However, the existence of such jurisprudence is not, on its own, especially probative of the issue of whether s. 718.2(*e*) has a remedial role. There is also sentencing jurisprudence which holds, for example, that a court must consider the unique circumstances of offenders who are battered spouses, or who are mentally disabled. Although the validity of the principles expressed in this latter jurisprudence is unchallenged by the 1996 sentencing

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Tout comme le contexte de la partie XXIII étaye l'opinion selon laquelle l'al. 718.2*e*) a un objet réparateur pour tous les délinquants, l'économie de cette partie appuie également l'opinion que l'al. 718.2*e*) joue un rôle réparateur particulier pour les autochtones. L'intimée souligne à bon droit que, suivant une jurisprudence antérieure à l'adoption de l'al. 718.2*e*), des délinquants autochtones se sont vu infliger des peines différentes en raison de leur situation particulière. L'existence de ce courant, toutefois, n'est pas en soi particulièrement probante quant à la question du rôle réparateur de l'al. 718.2*e*). Il y a aussi une jurisprudence qui porte, par exemple, que le tribunal doit tenir compte de la situation particulière des délinquants qui sont des conjoints battus, ou qui souffrent d'une déficience mentale. Bien que la validité des principes véhiculés par ce dernier courant ne soit

reforms, one does not find reference to these principles in Part XXIII. If Part XXIII were indeed a codification of principles regarding the appropriate method of sentencing different categories of offenders, one would expect to find such references. The wording of s. 718.2(*e*), viewed in light of the absence of similar stipulations in the remainder of Part XXIII, reveals that Parliament has chosen to single out aboriginal offenders for particular attention.

pas mise en cause par les réformes de 1996, la partie XXIII n'en fait aucune mention. Or si la partie XXIII était effectivement une codification des principes régissant la méthode à appliquer pour déterminer la peine selon les diverses catégories de délinquants, on pourrait s'attendre à ce qu'elle en fasse mention. Étant donné l'absence de dispositions similaires dans le reste de la partie XXIII, le libellé de l'al. 718.2*e*) indique que le Parlement a choisi d'accorder une attention particulière aux délinquants autochtones.

C. *Legislative History*

C. *Historique législatif*

45 Support for the foregoing understanding of s. 718.2(*e*) as having the remedial purpose of restricting the use of prison for all offenders, and as having a particular remedial role with respect to aboriginal peoples, is provided by statements made by the Minister of Justice and others at the time that what was then Bill C-41 was before Parliament. Although these statements are clearly not decisive as to the meaning and purpose of s. 718.2(*e*), they are nonetheless helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision in the context of Part XXIII as a whole: *Rizzo & Rizzo Shoes*, *supra*, at paras. 31 and 35.

L'analyse consistant à voir l'al. 718.2*e*) comme une disposition réparatrice visant à restreindre le recours à l'emprisonnement pour tous les délinquants, et jouant un rôle réparateur particulier à l'égard des autochtones, trouve appui dans les déclarations faites par le ministre de la Justice et d'autres personnes à l'époque où ce qui était alors le projet de loi C-41 était devant le Parlement. Même s'il est clair que ces déclarations ne sont pas concluantes quant au sens et à l'objet de l'al. 718.2*e*), elles sont néanmoins utiles, particulièrement dans la mesure où elles corroborent et ne contredisent pas le sens et l'objet qu'on peut inférer du libellé de la disposition dans le contexte de l'ensemble de la partie XXIII: *Rizzo & Rizzo Shoes*, précité, aux par. 31 et 35.

46 For instance, in introducing second reading of Bill C-41 on September 20, 1994 (*House of Commons Debates*, vol. IV, 1st Sess., 35th Parl., at pp. 5871 and 5873), Minister of Justice Allan Rock made the following statements regarding the remedial purpose of the bill:

Ainsi, en présentant le projet de loi C-41 en deuxième lecture, le 20 septembre 1994 (*Débats de la Chambre des communes*, vol. IV, 1re sess., 35e lég., aux pp. 5871 et 5873), le ministre de la Justice Allan Rock a fait les déclarations suivantes concernant l'objectif réparateur du projet:

> Through this bill, Parliament provides the courts with clear guidelines . . . .
>
> . . .
>
> The bill also defines various sentencing principles, for instance that the sentence must be proportionate to the gravity of the offence and the offender's degree of

> Le Parlement donne aux tribunaux une ligne de conduite précise grâce à ce projet de loi . . .
>
> . . .
>
> Le projet de loi définit également divers principes de détermination de la peine, par exemple: la peine infligée doit être proportionnelle à la gravité de l'infraction et au degré de responsabilité du contrevenant. Lorsqu'il est approprié de le faire, le recours aux solutions de

responsibility. When appropriate, alternatives must be contemplated, especially in the case of Native offenders.

. . .

A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.

. . .

Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. . . . [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.

It is not simply by being more harsh that we will achieve more effective criminal justice. We must use our scarce resources wisely. [Emphasis added.]

The Minister's statements were echoed by other Members of Parliament and by Senators during the debate over the bill: see, e.g., *House of Commons Debates*, vol. V, 1st Sess., 35th Parl., September 22, 1994, at p. 6028 (Mr. Morris Bodnar); *Debates of the Senate*, vol. 135, No. 99, 1st Sess., 35th Parl., June 21, 1995, at p. 1871 (Hon. Duncan J. Jessiman).

In his subsequent testimony before the House of Commons Standing Committee on Justice and Legal Affairs (*Minutes of Proceedings and Evidence*, Issue No. 62, November 17, 1994, at p. 62:15), the Minister of Justice addressed the specific role the government hoped would be played by s. 718.2(*e*):

[T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of

rechange doit être envisagé, surtout lorsqu'il s'agit de contrevenants autochtones.

. . .

On retrouve, tout au long du projet de loi C-41, un principe général voulant que l'on n'emprisonne que les personnes qui méritent d'être emprisonnées. Il faudrait prévoir d'autres solutions pour les personnes qui commettent des infractions ne nécessitant pas une incarcération.

. . .

Les prisons seront là pour ceux qui en ont besoin, ceux qui devraient être punis de cette façon ou exclus de la société . . . [L]e projet de loi crée un climat qui encourage les sanctions communautaires et la réinsertion sociale des délinquants parallèlement à la réparation accordée aux victimes, en plus d'amener les criminels à mieux assumer la responsabilité de leurs actes.

Ce n'est pas simplement en étant plus stricts que nous nous doterons d'un système de justice pénale plus efficace. Nous devons utiliser nos ressources limitées de façon judicieuse. [Nous soulignons.]

Les déclarations du Ministre ont été reprises par des députés et des sénateurs au cours du débat sur le projet de loi: voir, par. ex., *Débats de la Chambre des communes*, vol. V, 1re sess., 35e lég., 22 septembre 1994, à la p. 6028 (M. Morris Bodnar); *Débats du Sénat*, vol. 135, no 99, 1re sess., 35e lég., 21 juin 1995, à la p. 1871 (Hon. Duncan J. Jessiman).

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Dans son témoignage subséquent devant le Comité permanent de la Justice et des questions juridiques (*Procès-verbaux et témoignages*, fascicule no 62, 17 novembre 1994, à la p. 62:15), le ministre de la Justice a parlé du rôle précis que le gouvernement espérait voir jouer à l'al. 718.2*e*):

[S]i l'on mentionne expressément les délinquants autochtones, c'est parce qu'ils sont malheureusement surreprésentés dans la population carcérale du Canada. Si je me rappelle bien, l'enquête sur le système judiciaire au Manitoba a révélé que si les autochtones ne représentent que 12 p. 100 de la population du Manitoba, ils représentent plus de 50 p. 100 de la population carcérale dans cette province. À l'échelle nationale, les autochtones constituent environ 2 p. 100 de la population canadienne, mais 10,6 p. 100 de la population car-

Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.

What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of the public — alternatives to jail — and not simply resort to that easy answer in every case. [Emphasis added.]

48 It can be seen, therefore, that the government position when Bill C-41 was under consideration was that the new Part XXIII was to be remedial in nature. The proposed enactment was directed, in particular, at reducing the use of prison as a sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders.

D. *The Context of the Enactment of Section 718.2(e)*

49 Further guidance as to the scope and content of Parliament's remedial purpose in enacting s. 718.2(*e*) may be derived from the social context surrounding the enactment of the provision. On this point, it is worth noting that, although there is quite a wide divergence between the positions of the appellant and the respondent as to how s. 718.2(*e*) should be applied in practice, there is general agreement between them, and indeed between the parties and all interveners, regarding the mischief in response to which s. 718.2(*e*) was enacted.

50 The parties and interveners agree that the purpose of s. 718.2(*e*) is to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples. They also agree that one of the roles of s. 718.2(*e*), and of various other provisions in Part XXIII, is to encourage sentencing judges to apply principles of restorative justice alongside or in the place of

cérale du Canada. De toute évidence, il y a un problème ici.

Ce que nous voulons faire, particulièrement dans le contexte des initiatives permettant aux communautés autochtones de se doter d'une justice communautaire, c'est encourager les tribunaux à recourir à des mesures de rechange dans la mesure où celles-ci sont compatibles avec la protection du public — je parle des mesures de rechange préférables à l'emprisonnement — et non pas à recourir simplement à ce moyen facile dans tous les cas. [Nous soulignons.]

On voit donc qu'à l'époque de l'étude du projet de loi C-41, le gouvernement estimait que la nouvelle partie XXIII avait un caractère essentiellement réparateur. Les modifications proposées visaient tout particulièrement à réduire le recours à l'emprisonnement comme sanction, à élargir l'application des principes de justice corrective au moment du prononcé de la peine, et à poursuivre ces deux objectifs en étant sensibles, dans le cas des délinquants autochtones, aux initiatives autochtones en matière de justice communautaire.

D. *Le contexte de l'adoption de l'al. 718.2e)*

La portée et la nature de l'objectif réparateur que visait le Parlement en édictant l'al. 718.2*e*) se dégagent également du contexte social entourant l'adoption de la disposition. Sur ce point, il convient de souligner que, malgré la divergence substantielle entre les positions de l'appelante et de l'intimée sur la façon d'appliquer l'al. 718.2*e*) en pratique, celles-ci s'entendent généralement, de même que tous les intervenants, en ce qui concerne la situation que l'al. 718.2*e*) visait à corriger.

Les parties et les intervenants conviennent en effet que l'al. 718.2*e*) vise à régler le problème de l'incarcération excessive au Canada, et plus particulièrement celui, plus aigu, de l'incarcération disproportionnée des autochtones. Ils conviennent également que l'un des rôles de l'al. 718.2*e*), et de diverses autres dispositions de la partie XXIII, est d'inciter les juges chargés d'infliger les peines à appliquer les principes de la justice corrective

other, more traditional sentencing principles when making sentencing determinations. As the respondent states in its factum before this Court, s. 718.2(*e*) "provides the necessary flexibility and authority for sentencing judges to resort to the restorative model of justice in sentencing aboriginal offenders and to reduce the imposition of jail sentences where to do so would not sacrifice the traditional goals of sentencing".

The fact that the parties and interveners are in general agreement among themselves regarding the purpose of s. 718.2(*e*) is not determinative of the issue as a matter of statutory construction. However, as we have suggested, on the above points of agreement the parties and interveners are correct. A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada's aboriginal peoples, provides additional insight into the purpose and proper application of this new provision.

(1) The Problem of Overincarceration in Canada

Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison. Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada's rate of approximately 130 inmates per 100,000 population places it second or third highest: see Federal/Provincial/Territorial Ministers Responsible for Justice, *Corrections Population Growth: First Report on Progress* (1997), Annex B, at p. 1; Bulletin of U.S. Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 1998* (March 1999); The Sentencing Project, *Americans Behind Bars: U.S. and International Use of Incarceration, 1995* (June 1997), at p. 1. Moreover, the rate at which Canadian courts have been imprisoning offenders has risen sharply in recent years, although there has been a slight decline of late: see Statistics Canada, "Prison population and costs" in *Infomat:*

parallèlement aux principes plus traditionnels en la matière ou à leur place. Comme l'intimée le dit dans son mémoire à notre Cour, l'al. 718.2*e*) [TRADUCTION] «donne aux juges appelés à prononcer une peine la latitude et l'autorité nécessaires pour recourir au modèle de la justice corrective dans le cas des délinquants autochtones et pour réduire l'infliction de peines d'emprisonnement dans les cas où il est possible de le faire sans compromettre les buts traditionnels de détermination de la peine».

51 Certes, le fait que les parties et les intervenants ont la même conception générale de l'objet de l'al. 718.2*e*) n'est pas concluant du point de vue de l'interprétation des lois. Toutefois, ainsi que nous l'avons dit, les parties et les intervenants ont raison quant aux points d'accords susmentionnés. Un examen du problème de l'incarcération excessive au Canada, et de son impact particulièrement dévastateur sur les autochtones, fournit un autre éclairage sur l'objet et sur l'application correcte de cette nouvelle disposition.

(1) Le problème du recours excessif à l'incarcération au Canada

52 Le Canada fait figure de chef de file mondial dans de nombreux domaines, et particulièrement en matière de politiques sociales progressistes et de droits de la personne. Malheureusement, notre pays se distingue aussi, à l'échelle mondiale, par le nombre de personnes qu'il met en prison. Bien que les États-Unis, avec plus de 600 détenus pour 100 000 habitants, aient de loin le plus haut taux d'incarcération parmi les démocraties industrialisées, le taux au Canada est d'environ 130 détenus pour 100 000 habitants, ce qui le place au deuxième ou au troisième rang: voir Ministres responsables de la Justice du gouvernement fédéral, des provinces et des territoires, *Croissance de la population carcérale: Premier rapport d'étape* (1997), annexe B, à la p. 1; Bulletin of U.S. Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 1998* (mars 1999); The Sentencing Project, *Americans Behind Bars: U.S and International Use of Incarceration, 1995* (juin 1997), à la p. 1. Qui plus est, le taux d'incarcération par les tribunaux canadiens s'est accru consi-

A Weekly Review (February 27, 1998), at p. 5. This record of incarceration rates obviously cannot instil a sense of pride.

dérablement au cours des dernières années, avec cependant une légère baisse récemment: voir Statistique Canada, «Population carcérale et coûts connexes» dans *Infomat: Revue hebdomadaire* (27 février 1998), à la p. 6. Ces statistiques relatives aux taux d'incarcération n'inspirent aucune fierté.

53 The systematic use of the sanction of imprisonment in Canada may be dated to the building of the Kingston Penitentiary in 1835. The penitentiary sentence was itself originally conceived as an alternative to the harsher penalties of death, flogging, or imprisonment in a local jail. Sentencing reformers advocated the use of penitentiary imprisonment as having effects which were not only deterrent, denunciatory, and preventive, but also rehabilitative, with long hours spent in contemplation and hard work contributing to the betterment of the offender: see Law Reform Commission of Canada, Working Paper 11, *Imprisonment and Release* (1975), at p. 5.

Le recours systématique à la peine d'emprisonnement au Canada remonte à la construction du pénitencier de Kingston en 1835. À l'origine, l'emprisonnement avait lui-même été conçu comme une solution de rechange aux peines plus sévères qu'étaient la mort, le fouet ou l'emprisonnement dans une prison locale. Les réformateurs faisaient valoir que l'emprisonnement en pénitencier avait non seulement un effet de dissuasion, de dénonciation ou de prévention, mais qu'il contribuait aussi à la réinsertion sociale des délinquants, les longues heures consacrées à la réflexion et aux durs travaux contribuant à leur rééducation: voir Commission de réforme du droit du Canada, Document de travail 11, *Emprisonnement — Libération* (1975), à la p. 5.

54 Notwithstanding its idealistic origins, imprisonment quickly came to be condemned as harsh and ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals. The history of Canadian commentary regarding the use and effectiveness of imprisonment as a sanction was recently well summarized by Vancise J.A., dissenting in the Saskatchewan Court of Appeal in *McDonald*, *supra*, at pp. 429-30:

Malgré ses origines empreintes d'idéalisme, l'emprisonnement a vite été condamné pour sa dureté et son inefficacité, non seulement eu égard à ses objectifs proclamés de réinsertion sociale, mais aussi relativement à ses objectifs publics plus généraux. Le juge Vancise, dissident en Cour d'appel de la Saskatchewan dans l'arrêt *McDonald*, précité, a bien résumé les commentaires qu'a suscités au fil des ans au Canada l'efficacité du recours à l'emprisonnement, aux pp. 429 et 430:

> A number of inquiries and commissions have been held in this country to examine, among other things, the effectiveness of the use of incarceration in sentencing. There has been at least one commission or inquiry into the use of imprisonment in each decade of this century since 1914. . . .
>
> . . . An examination of the recommendations of these reports reveals one constant theme: imprisonment should be avoided if possible and should be reserved for the most serious offences, particularly those involving violence. They all recommend restraint in the use of incarceration and recognize that incarceration has failed to reduce the crime rate and should be used with caution and moderation. Imprisonment has failed to satisfy a

> [TRADUCTION] Nombre d'enquêtes et de commissions ont été tenues dans ce pays pour examiner, entre autres choses, l'efficacité du recours à la peine d'incarcération. Depuis 1914, chaque décennie a vu au moins une commission ou une enquête sur le recours à l'emprisonnement . . .
>
> . . . Une constante se dégage de l'examen des recommandations de ces rapports: il faut éviter l'emprisonnement autant que possible et réserver cette sanction pour les infractions les plus graves, particulièrement les infractions avec violence. Tous recommandent que l'incarcération soit utilisée avec retenue, reconnaissant que la prison n'a pas permis de réduire le taux de criminalité et qu'on ne devrait y recourir qu'avec prudence et

basic function of the Canadian judicial system which was described in the Report of the Canadian Committee on Corrections entitled: "Toward Unity: Criminal Justice and Corrections" (1969) as "to protect society from crime in a manner commanding public support while avoiding needless injury to the offender". [Emphasis added; footnote omitted.]

In a similar vein, in 1987, the Canadian Sentencing Commission wrote in its report entitled *Sentencing Reform: A Canadian Approach*, at pp. xxiii-xxiv:

> Canada does not imprison as high a portion of its population as does the United States. However, we do imprison more people than most other western democracies. The *Criminal Code* displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment. A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction. [Emphasis added.]

With equal force, in *Taking Responsibility* (1988), at p. 75, the Standing Committee on Justice and Solicitor General stated:

> It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution, as the lengths of prison sentences handed down vary for the same type of crime.
>
> Since imprisonment generally offers the public protection from criminal behaviour for only a limited time,

modération. L'emprisonnement n'a pas rempli la fonction de base du système judiciaire canadien que le Rapport du Comité canadien de la réforme pénale et correctionnelle, intitulé «Justice pénale et correction: un lien à forger» (1969), avait ainsi défini: «protéger la société du crime d'une manière qui commande le respect du public tout en évitant de porter inutilement préjudice au contrevenant». [Nous soulignons; note omise.]

55 Dans la même veine, en 1987, la Commission canadienne sur la détermination de la peine écrivait ceci dans son rapport *Réformer la sentence: une approche canadienne*, à la p. xxiv:

> Le pourcentage de la population canadienne qui est incarcérée n'est pas aussi élevé que celui de la population américaine, mais il dépasse celui de la plupart des autres démocraties occidentales. Le *Code criminel* témoigne d'une certaine partialité en faveur de l'incarcération, puisque la peine indiquée pour la plupart des infractions l'est sous forme d'une peine d'incarcération maximale. Le fait que l'emprisonnement soit perçu comme la sanction préférée pour la plupart des infractions pose cependant un certain nombre de difficultés. La plus importante est sans doute qu'en dépit du fait que nous infligeons régulièrement cette sanction particulièrement lourde et coûteuse, elle n'a produit que très peu d'effet, si ce n'est de mettre des contrevenants à l'écart de la société pendant un certain temps. Depuis plusieurs décennies, bon nombre de groupements et de comités et commissions chargés par le gouvernement fédéral d'étudier les divers aspects du système pénal ont affirmé que l'incarcération ne devrait être qu'une solution de dernier recours ou qu'elle devrait être réservée aux auteurs des infractions les plus graves. Cependant, malgré la fréquence avec laquelle cette recommandation a été formulée, peu de pas ont été faits dans cette direction. [Nous soulignons.]

56 Avec une égale force, le Comité permanent de la Justice et du Solliciteur général disait ceci dans *Des responsabilités à assumer* (1988), à la p. 81:

> En règle générale, on admet aujourd'hui que l'emprisonnement n'a pas eu pour effet de réadapter ou de réformer les délinquants, ne s'est pas révélé très dissuasif, n'a permis que temporairement de protéger la société et n'a pas contribué à l'uniformité du châtiment, la durée des peines de prison prononcées variant pour le même genre d'infraction.
>
> Puisque l'emprisonnement ne permet généralement de protéger la société contre le comportement criminel

rehabilitation of the offender is of great importance. However, prisons have not generally been effective in reforming their inmates, as the high incidence of recidivism among prison populations shows.

The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society. Moreover, modern technology may now permit the monitoring in the community of some offenders who previously might have been incarcerated for incapacitation or denunciation purposes. Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments. [Emphasis added; footnotes omitted.]

The Committee proposed that alternative forms of sentencing should be considered for those offenders who did not endanger the safety of others. It was put in this way, at pp. 50 and 54:

[O]ne of the primary foci of such alternatives must be on techniques which contribute to offenders accepting responsibility for their criminal conduct and, through their subsequent behaviour, demonstrating efforts to restore the victim to the position he or she was in prior to the offence and/or providing a meaningful apology.

. . .

[E]xcept where to do so would place the community at undue risk, the "correction" of the offender should take place in the community and imprisonment should be used with restraint.

57 Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming

que pour un temps limité, la réadaptation du délinquant est très importante. Les prisons n'ont pas vraiment réussi à réformer les détenus, comme en témoigne le taux élevé de récidive.

Concrètement, le recours à l'emprisonnement comme principale punition pour toutes sortes d'infractions à la loi n'est pas une approche défendable. La plupart des délinquants ne sont ni violents ni dangereux. Il est peu probable que leur comportement s'améliore par suite d'un séjour en prison. De plus, leur nombre croissant dans les prisons et les pénitenciers pose de graves problèmes de coût et d'administration et augmente peut-être les risques qu'ils pourraient faire courir plus tard à la société. En outre, la technologie moderne peut permettre aujourd'hui de surveiller dans la collectivité des délinquants que l'on aurait pu autrefois incarcérer à des fins de neutralisation ou de dénonciation. Par conséquent, les solutions de rechange à l'incarcération et les sanctions intermédiaires sont de plus en plus considérées comme des mesures nécessaires. [Nous soulignons; notes omises.]

Le Comité a recommandé d'envisager des solutions de rechange pour les contrevenants qui n'ont pas mis en danger la sécurité d'autrui, disant ceci aux pp. 57 et 61:

[I]l faut d'abord et avant tout mettre l'accent sur des méthodes qui incitent les contrevenants à assumer la responsabilité de leur comportement criminel et s'efforcer par la suite de faire retrouver à la victime la situation où elle était avant l'infraction et à lui témoigner un repentir sincère.

. . .

[À] moins que cela ne représente un risque disproportionné pour la société, la réadaptation du délinquant devrait se faire dans la société et [. . .] il faut avoir recours à l'incarcération le moins souvent possible.

Ainsi, il appert que même si l'emprisonnement vise les objectifs traditionnels d'isolement, de dissuasion, de dénonciation et de réinsertion sociale, il est généralement admis qu'il n'a pas réussi à réaliser certains d'entre eux. Le recours excessif à l'incarcération est un problème de longue date dont l'existence a été maintes fois reconnue sur la place publique mais que le Parlement n'a jamais abordé de façon systématique. Au cours des dernières années, le Canada, comparativement à d'autres pays, a enregistré une augmentation alar-

rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(*e*) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.

(2) The Overrepresentation of Aboriginal Canadians in Penal Institutions

If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people were about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population. In Manitoba and Saskatchewan, aboriginal people constituted something between 6 and 7 percent of the population, yet in Manitoba they represented 46 percent of the provincial admissions and in Saskatchewan 60 percent: see M. Jackson, "Locking Up Natives in Canada" (1988-89), 23 *U.B.C. L. Rev.* 215 (article originally prepared as a report of the Canadian Bar Association Committee on Imprisonment and Release in June 1988), at pp. 215-16. The situation has not improved in recent years. By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates: Solicitor General of Canada, Consolidated Report, *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act — Five Years Later* (1998), at pp. 142-55. The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia: Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada, 1995-96* (1997), at p. 30.

This serious problem of aboriginal overrepresentation in Canadian prisons is well documented.

mante des peines d'emprisonnement. Les réformes introduites en 1996 dans la partie XXIII, et l'al. 718.2*e*) en particulier, doivent être comprises comme une réaction au recours trop fréquent à l'incarcération comme sanction, et il faut par conséquent en reconnaître pleinement le caractère réparateur.

(2) La surreprésentation des autochtones canadiens dans les établissements pénitentiaires

58 Si le recours à l'incarcération constitue un problème eu égard à l'ensemble de la population, il est beaucoup plus aigu dans le cas des autochtones canadiens. Au milieu des années 80, les autochtones représentaient environ 2 p. 100 de la population du Canada, mais 10 p. 100 de la population carcérale. Au Manitoba et en Saskatchewan, les autochtones constituaient entre 6 et 7 p. 100 de la population, mais représentaient, au Manitoba, 46 p. 100 des admissions provinciales et, en Saskatchewan, 60 p. 100: voir M. Jackson, «Locking Up Natives in Canada» (1988-89), 23 *U.B.C. L. Rev.* 215 (article rédigé initialement comme rapport de l'Association du Barreau canadien, Comité spécial sur l'emprisonnement et la libération, publié en juin 1988), aux pp. 215 et 216. La situation ne s'est pas améliorée ces dernières années. En 1997, les autochtones constituaient près de 3 p. 100 de la population du Canada, mais 12 p. 100 de l'ensemble des détenus fédéraux: Solliciteur général du Canada, Rapport global, *Pour une société juste, paisible et sûre: La Loi sur le système correctionnel et la mise en liberté sous condition — Cinq ans plus tard* (1998), aux pp. 163 à 179. La situation continue d'être particulièrement préoccupante au Manitoba où, en 1995-96, ils représentaient 55 p. 100 des admissions dans les établissements correctionnels provinciaux, et en Saskatchewan, où ils représentaient jusqu'à 72 p. 100 des admissions. Une situation semblable, bien que moins dramatique, prévaut en Alberta et en Colombie-Britannique: Centre canadien de la statistique juridique, *Services correctionnels pour adultes au Canada, 1995-1996* (1997), à la p. 30.

59 Le grave problème de la surreprésentation des autochtones dans les prisons canadiennes a fait

Like the general problem of overincarceration itself, the excessive incarceration of aboriginal peoples has received the attention of a large number of commissions and inquiries: see, by way of example only, Canadian Corrections Association, *Indians and the Law* (1967); Law Reform Commission of Canada, *The Native Offender and the Law* (1974), prepared by D. A. Schmeiser; Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (1996).

60 In "Locking Up Natives in Canada", *supra*, at pp. 215-16, Jackson provided a disturbing account of the enormity of the disproportion:

> Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Native people come into contact with Canada's correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject to the damaging impacts of the criminal justice system's heaviest sanctions. Government figures — which reflect different definitions of "native" and which probably underestimate the number of prisoners who consider themselves native — show that almost 10% of the federal penitentiary population is native (including 13% of the federal women's prisoner population) compared to about 2% of the population nationally. . . . Even more disturbing, the disproportionality is growing. In 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate in native communities.

Bad as this situation is within the federal system, it is even worse in a number of the western provincial correctional systems. . . . A study reviewing admissions to

l'objet de nombreuses études. Tout comme le problème en soi du trop grand nombre d'incarcérations, l'incarcération excessive des autochtones a reçu l'attention d'un grand nombre de commissions et d'enquêtes: voir, à titre d'exemples seulement, Société canadienne de criminologie, *Les Indiens et la loi* (1967); Commission de réforme du droit du Canada, *La délinquance chez les autochtones et la loi* (1974), préparé par D. A. Schmeiser; Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991); Commission royale sur les peuples autochtones, *Par-delà les divisions culturelles* (1996).

Dans «Locking Up Natives in Canada», *loc. cit.*, aux pp. 215 et 216, Jackson fait un exposé troublant de l'énormité de la disproportion:

> [TRADUCTION] Les statistiques sur la criminalité sont souvent mal comprises par le public et sujettes à différentes interprétations des spécialistes en la matière. Dans le cas des statistiques relatives aux effets du système de justice pénale sur les autochtones, les chiffres sont si clairs et consternants qu'on ne peut ni méconnaître ni mésestimer l'ampleur du problème. Le nombre d'autochtones qui viennent en contact avec le système correctionnel canadien est grossièrement disproportionné par rapport à leur représentation dans la communauté. Plus que tout autre groupe au Canada, ils subissent les effets dommageables des plus lourdes sanctions du système de justice pénale. Les statistiques gouvernementales, qui s'appuient sur différentes définitions du terme «autochtone» et qui sous-estiment vraisemblablement le nombre de détenus qui se considèrent comme autochtones, montrent que près de 10 % de la population des pénitenciers fédéraux est autochtone (y compris environ 13 % de la population des prisons fédérales pour femmes) comparativement à 2 % de la population canadienne. [. . .] Fait encore plus troublant, la disproportion s'accentue. Ainsi, en 1965, quelque 22 % des prisonniers du pénitencier de Stony Mountain étaient autochtones; en 1984, leur proportion était passée à 33 %. Il n'est pas irréaliste de croire qu'en l'absence de changements radicaux, le problème s'aggravera encore en raison de la forte croissance démographique des autochtones.

Si alarmante que puisse être la situation au sein du système fédéral, elle l'est encore plus dans un certain nombre de systèmes correctionnels provinciaux de

Saskatchewan's correctional system in 1976-77 appropriately titled "Locking Up Indians in Saskatchewan", contains findings that should shock the conscience of everyone in Canada. In comparison to male non-natives, male treaty Indians were 25 times more likely to be admitted to a provincial correctional centre while non-status Indians or Métis were 8 times more likely to be admitted. If only the population over fifteen years of age is considered (the population eligible to be admitted to provincial correctional centres in Saskatchewan), then male treaty Indians were 37 times more likely to be admitted, while male non-status Indians were 12 times more likely to be admitted. For women the figures are even more extreme: a treaty Indian woman was 131 times more likely to be admitted and a non-status or Métis woman 28 times more likely than a non-native.

l'Ouest. [. . .] Une étude des admissions dans le système correctionnel de la Saskatchewan en 1976-77, pertinemment intitulée «Locking Up Indians in Saskatchewan», contient des conclusions qui ne peuvent manquer de heurter la conscience de tous les Canadiens. Comparativement aux hommes non-autochtones, les Indiens inscrits étaient 25 fois plus susceptibles d'être admis dans un centre correctionnel provincial, alors que les Indiens non inscrits ou les Métis l'étaient 8 fois plus. Si l'on considère uniquement la population âgée de plus de quinze ans (soit la population admissible dans les centres correctionnels de la Saskatchewan), les Indiens inscrits étaient 37 fois plus susceptibles d'être admis, alors que les Indiens non inscrits l'étaient 12 fois plus. Pour les femmes, les chiffres sont encore plus criants: une Indienne inscrite était 131 fois plus susceptibles qu'une non-Indienne d'être admise dans un centre correctionnel, et une Indienne non inscrite ou une Métis l'était 28 fois plus qu'une non-autochtone.

The Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25 (that age range being the one with the highest risk of imprisonment). The corresponding figure for non-status or Métis was 34%. For a non-native Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents. [Emphasis added; footnotes omitted.]

L'étude faite en Saskatchewan concrétise l'incidence de ses conclusions en signalant que pour un Indien inscrit âgé de 16 ans en 1976, la probabilité d'être incarcéré au moins une fois avant l'âge de 25 ans était de 70 % (ce groupe d'âge est celui du plus haut risque d'incarcération). La probabilité correspondante pour les Indiens non inscrits ou les Métis était de 34 %; pour un jeune garçon non-autochtone de la Saskatchewan, elle était de 8 %. Autrement dit, en Saskatchewan, la prison symbolise pour les adolescents autochtones l'avenir que leur réserve la société, au même titre que l'école secondaire et le collège pour tous les autres Canadiens. Dans un contexte historique, la prison est, pour bon nombre de jeunes autochtones, l'équivalent de ce que les pensionnats étaient pour leurs parents. [Nous soulignons; notes omises.]

Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".

61

Il ne faut pas s'en surprendre, mais le recours excessif à l'emprisonnement dans le cas des autochtones n'est que la pointe de l'iceberg en ce qui concerne la marginalisation des autochtones au sein du système de justice pénale au Canada. Les autochtones sont surreprésentés dans virtuellement tous les aspects du système. Notre Cour a souligné récemment dans *R. c. Williams*, [1998] 1 R.C.S. 1128, au par. 58, que les préjugés contre les autochtones sont largement répandus au Canada, et qu'«[i]l y a une preuve que ce racisme largement répandu s'est traduit par une discrimination systémique dans le système de justice pénale».

62 Statements regarding the extent and severity of this problem are disturbingly common. In *Bridging the Cultural Divide*, *supra*, at p. 309, the Royal Commission on Aboriginal Peoples listed as its first "Major Findings and Conclusions" the following striking yet representative statement:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

63 To the same effect, the Aboriginal Justice Inquiry of Manitoba described the justice system in Manitoba as having failed aboriginal people on a "massive scale", referring particularly to the substantially different cultural values and experiences of aboriginal people: *The Justice System and Aboriginal People*, *supra*, at pp. 1 and 86.

64 These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(*e*), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

Les propos touchant l'étendue et la gravité de ce problème sont d'une fréquence troublante. Dans *Par-delà les divisions culturelles*, *op. cit.*, à la p. 336, la Commission royale sur les peuples autochtones a placé en tête de liste de ses «Constatations et conclusions» l'énoncé suivant, aussi frappant que représentatif:

> Le système canadien de justice pénale n'a pas su répondre aux besoins des peuples autochtones du Canada — Premières nations, Inuit et Métis habitant en réserve ou hors réserve, en milieu urbain ou en milieu rural —, peu importe le territoire où ils vivent ou le gouvernement dont ils relèvent. Ce lamentable échec découle surtout de ce qu'autochtones et non-autochtones affichent des conceptions extrêmement différentes à l'égard de questions fondamentales comme la nature de la justice et la façon de l'administrer.

Dans le même sens, la Commission d'enquête sur la justice autochtone du Manitoba a qualifié de [TRADUCTION] «massive» la faillite du système de justice au Manitoba à l'égard des autochtones, compte tenu en particulier des valeurs culturelles et des expériences fort différentes des peuples autochtones: *The Justice System and Aboriginal People*, *op. cit.*, aux pp. 1 et 86.

Ces constatations exigent qu'on reconnaisse l'ampleur et la gravité du problème, et qu'on s'y attaque. Les chiffres sont criants et reflètent ce qu'on peut à bon droit qualifier de crise dans le système canadien de justice pénale. La surreprésentation critique des autochtones au sein de la population carcérale comme dans le système de justice pénale témoigne d'un problème social attristant et urgent. Il est raisonnable de présumer que le Parlement, en prévoyant spécifiquement à l'al. 718.2*e*) la possibilité de traiter différemment les délinquants autochtones dans la détermination de la peine, a voulu tenter d'apporter une certaine solution à ce problème social. On peut légitimement voir dans cette disposition une directive que le Parlement adresse à la magistrature, l'invitant à se pencher sur les causes du problème et à s'efforcer d'y remédier, dans la mesure où cela est possible dans le cadre du processus de détermination de la peine.

It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

Il est évident que des pratiques innovatrices dans la détermination de la peine ne peuvent à elles seules faire disparaître les causes de la criminalité autochtone et le problème plus large de l'aliénation des autochtones par rapport au système de justice pénale. La proportion anormale d'emprisonnement chez les délinquants autochtones découle de nombreuses sources, dont la pauvreté, la toxicomanie, le manque d'instruction et le manque de possibilités d'emploi. Elle découle également de préjugés contre les autochtones et d'une tendance institutionnelle déplorable à refuser les cautionnements et à infliger des peines d'emprisonnement plus longues et plus fréquentes aux délinquants autochtones. Plusieurs aspects de cette triste réalité sont hors du champ des présents motifs. Mais ce qu'on peut et doit examiner, c'est le rôle limité que joueront les juges chargés d'infliger les peines dans le redressement des injustices subies par les autochtones au Canada. Les juges qui prononcent les peines comptent parmi les décideurs qui ont le pouvoir d'influer sur le traitement des délinquants autochtones dans le système de justice. Ce sont eux qui décident le plus directement si un délinquant autochtone ira en prison, ou s'il est possible d'envisager des solutions de rechange qui permettront peut-être davantage de restaurer un certain équilibre entre le délinquant, la victime et la collectivité, et de prévenir d'autres crimes. 65

E. *A Framework of Analysis for the Sentencing Judge*

(1) What Are the "Circumstances of Aboriginal Offenders"?

How are sentencing judges to play their remedial role? The words of s. 718.2(*e*) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

E. *Cadre d'analyse proposé au juge prononçant la peine*

(1) Qu'entend-on par «circonstances» en ce qui concerne les délinquants autochtones?

Comment le juge qui prononce la peine doit-il jouer son rôle réparateur? Le texte de l'al. 718.2*e*) lui enjoint d'accorder une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones, étant sous-entendu que ces circonstances sont substantiellement différentes dans le cas des délinquants non-autochtones. Les considérations générales entrant en jeu dans l'examen de la situation distincte des autochtones au Canada comprennent un large éventail de circonstances particulières dont notamment: 66

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

(a) *Systemic and Background Factors*

67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."

68 It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are sub-

(A) les facteurs systémiques ou historiques distinctifs qui peuvent être une des raisons pour lesquelles le délinquant autochtone se retrouve devant les tribunaux;

(B) les types de procédures de détermination de la peine et de sanctions qui, dans les circonstances, peuvent être appropriées à l'égard du délinquant en raison de son héritage ou attaches autochtones.

a) *Facteurs systémiques et historiques*

Les facteurs historiques qui jouent un rôle de premier plan dans la criminalité des délinquants autochtones sont aujourd'hui bien connus. Des années de bouleversements et de développement économique se sont traduites, pour nombre d'autochtones, par de faibles revenus, un fort taux de chômage, un manque de débouchés et d'options, une instruction insuffisante ou inadéquate, l'abus de drogue et d'alcool, l'isolement et la fragmentation des communautés. Ces facteurs et d'autres encore contribuent à l'incidence élevée du crime et de l'incarcération. Le professeur Tim Quigley brosse un tableau sombre de ces facteurs dans «Some Issues in Sentencing of Aboriginal Offenders», dans *Continuing Poundmaker and Riel's Quest* (1994), aux pp. 269 et 300. Quigley décrit fort bien le processus par lequel ces divers facteurs conduisent à l'incarcération excessive des délinquants autochtones, aux pp. 275 et 276: [TRADUCTION] «Les chômeurs, les personnes sans domicile fixe, celles qui ont peu d'instruction sont les meilleurs candidats à l'emprisonnement. Lorsque les facteurs sociaux, politiques et économiques de notre société placent un nombre disproportionné d'autochtones dans les rangs de ces personnes, cela revient littéralement pour notre société à en condamner un plus grand nombre à la prison.»

Il est vrai que certains des facteurs systémiques et historiques expliquent aussi en partie l'incidence du crime et du récidivisme chez les délinquants non-autochtones. Il faut toutefois reconnaître que la situation des délinquants autochtones diffère de celle de la majorité puisque de nombreux autochtones sont victimes de discrimination directe ou systémique, beaucoup souffrent des séquelles de la

stantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

(b) *Appropriate Sentencing Procedures and Sanctions*

Closely related to the background and systemic factors which have contributed to an excessive aboriginal incarceration rate are the different conceptions of appropriate sentencing procedures and sanctions held by aboriginal people. A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. The aims of restorative justice as now expressed in paras. (*d*), (*e*), and (*f*) of s. 718 of the *Criminal*

relocalisation, et beaucoup sont dans une situation économique et sociale défavorables. De plus, comme l'ont fréquemment souligné les études et rapports de commissions, les délinquants autochtones, en raison de ces facteurs systémiques et historiques particuliers, sont plus fortement touchés par l'incarcération et ont moins de chances de réinsertion sociale car le milieu carcéral est souvent culturellement inadapté et malheureusement un lieu de discrimination patente à leur égard.

69 En l'espèce, nous analysons bien sûr les facteurs que le juge prononçant la peine d'un délinquant autochtone doit prendre en considération. Si les facteurs historiques et systémiques ont aussi leur importance dans la détermination de la peine applicable aux délinquants non-autochtones, le juge chargé de prononcer la peine d'un délinquant autochtone doit prêter attention aux facteurs historiques et systémiques particuliers qui ont pu contribuer à ce que ce délinquant soit traduit devant les tribunaux. Dans les cas où de tels facteurs ont joué un rôle important, il incombe au juge de la peine d'en tenir compte pour déterminer si l'incarcération aurait réellement un effet de dissuasion et de dénonciation du crime qui aurait un sens dans la communauté à laquelle le délinquant appartient. Dans bien des cas, les principes correctifs de détermination de la peine deviendront les plus pertinents pour la raison précise qu'il n'y a aucun autre moyen d'assurer la prévention du crime et la guérison individuelle et sociale.

b) *Les procédures de détermination de la peine et les sanctions appropriées*

70 En étroite relation avec les facteurs historiques et systémiques qui ont contribué au taux excessif d'incarcération des autochtones, il existe aussi des conceptions différentes chez les autochtones des procédures de détermination de la peine et des sanctions appropriées. Un problème important pour les autochtones qui font face au système de justice pénale tient à ce que les idéaux traditionnels de dissuasion, d'isolement et de dénonciation sont souvent très éloignés de la vision qu'ont ces délinquants et leur communauté de la détermination de la peine. Les valeurs de justice corrective, exprimées aujourd'hui aux al. *d*), *e*) et *f*) de l'art. 718 du

Code apply to all offenders, and not only aboriginal offenders. However, most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(*e*).

71 The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context. In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime. See generally, e.g., *Bridging the Cultural Divide*, *supra*, at pp. 12-25; *The Justice System and Aboriginal People*, *supra*, at pp. 17-46; Kwochka, *supra*; M. Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", [1992] *U.B.C. L. Rev. (Special Edition)* 147.

72 The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focussed on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence. See Kwochka, *supra*, who writes at p. 165:

> At this point there is some divergence among proponents of restorative justice. Some seek to abandon the punishment paradigm by focusing on the differing goals of a restorative system. Others, while cognizant of the differing goals, argue for a restorative system in terms

Code criminel, s'appliquent à tous les délinquants, et non seulement aux délinquants autochtones. Cependant les notions traditionnelles de sanction chez les autochtones accordent pour la plupart une importance primordiale aux idéaux de justice corrective. Cette tradition est extrêmement importante pour l'analyse de l'al. 718.2*e*).

La jurisprudence sera nécessairement appelée, avec le temps, à développer le concept et les principes d'une approche corrective, à mesure que se poseront différentes questions et que s'affronteront différentes conceptions de la détermination de la peine dans le contexte approprié. En termes généraux, la justice corrective peut se définir comme une conception de la réponse au crime selon laquelle, tout étant interrelié, le crime vient rompre l'harmonie qui existait avant sa perpétration, ou du moins l'harmonie souhaitée. L'adéquation d'une sanction donnée est alors largement déterminée par les besoins des victimes et de la communauté, ainsi que par ceux du délinquant. L'accent est mis sur les êtres humains touchés de près par le crime. Voir de façon générale, *Par-delà les divisions culturelles*, *op. cit.*, aux pp. 13 à 28; *The Justice System and Aboriginal People*, *op. cit.*, aux pp. 17 à 46; Kwochka, *loc. cit.*; M. Jackson, «In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities», [1992] *U.B.C. L. Rev. (Special Edition)* 147.

Il se peut que le recours excessif à l'incarcération au Canada résulte en partie de l'idée que l'approche corrective est moins sévère à l'égard du crime et que l'emprisonnement est le plus grand châtiment. À notre avis cependant une peine axée sur l'approche corrective n'est pas nécessairement un châtiment moins sévère. Certains tenants de la justice corrective soutiennent que, combinée à des conditions de probation, elle peut imposer dans certains cas un fardeau plus lourd au délinquant qu'une peine d'emprisonnement. Voir Kwochka, *loc. cit.*, qui dit à la p. 165:

> [TRADUCTION] À ce stade, il y a des divergences parmi les partisans de la justice corrective. Certains préconisent l'abandon du paradigme du châtiment en mettant l'accent sur les objectifs différents d'un système correctif. D'autres, quoique conscients des objectifs dif-

of a punishment model. They argue that non-custodial sentences can have an equivalent punishment value when produced and administered by a restorative system and that the healing process can be more intense than incarceration. Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.

férents, préconisent le système correctif en termes de modèle de châtiment. Ils soutiennent que les peines non privatives de liberté peuvent avoir une valeur punitive équivalente quand elles sont appliquées et administrées selon un modèle correctif et que le processus de régénération peut être plus intense que l'incarcération. La justice corrective suppose un mode de restitution et de réinsertion dans la communauté. Dans ce processus il est indispensable que les délinquants assument la responsabilité de leurs actes. Comparativement, l'incarcération n'exige pas l'acceptation de la responsabilité. Il est plus terrifiant pour certains d'avoir à confronter la victime ou la communauté que de risquer une période d'emprisonnement, et cette démarche a des effets plus profitables en ce sens que le délinquant peut se ressourcer et devenir un participant fonctionnel de la communauté au lieu d'un délinquant plein de rancœur à sa sortie de prison.

In describing in general terms some of the basic tenets of traditional aboriginal sentencing approaches, we do not wish to imply that all aboriginal offenders, victims, and communities share an identical understanding of appropriate sentences for particular offences and offenders. Aboriginal communities stretch from coast to coast and from the border with the United States to the far north. Their customs and traditions and their concept of sentencing vary widely. What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.

73 En décrivant en termes généraux quelques préceptes fondamentaux des modèles autochtones traditionnels de détermination de la peine, nous ne disons pas que tous les délinquants autochtones, toutes les victimes et toutes les communautés partagent une conception identique des peines adaptées à des infractions et des délinquants donnés. On trouve des collectivités autochtones d'un océan à l'autre et de la frontière américaine au Grand Nord. Leurs coutumes, leurs traditions et leur conception du processus de détermination de la peine varient grandement. Ce qu'il importe de reconnaître, c'est que, pour beaucoup sinon la plupart des délinquants autochtones, les concepts actuels de la détermination de la peine sont inadaptés parce que, souvent, ces concepts n'ont pas permis de répondre aux besoins, à l'expérience et à la façon de voir des peuples et communautés autochtones.

It is unnecessary to engage here in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects, which are available especially to aboriginal offenders. What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions. Sentencing judges should not conclude that the absence of alternatives specific to an aboriginal community eliminates their ability

74 Il n'est pas nécessaire de s'engager ici dans un examen approfondi de l'évolution relativement récente des pratiques novatrices en matière de détermination de la peine, tels la cérémonie du cercle de guérison et les conseils de détermination de la peine, ainsi que les projets des conseils autochtones, offerts spécialement aux délinquants autochtones. Ce qu'il importe de noter, c'est que les conceptions différentes que bon nombre d'autochtones ont de la détermination de la peine ont en commun le principe sous-jacent de l'importance des sanctions rattachées à la communauté. Les juges déter-

to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved. Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.

(2) The Search for a Fit Sentence

75 The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community. Nothing in Part XXIII of the *Criminal Code* alters this fundamental duty as a general matter. However, the effect of s. 718.2(*e*), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(*e*) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

76 In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at p. 567, Lamer C.J. restated the long-standing principle of Canadian sentencing law that the appropriateness of a sentence will depend on the particular circumstances of the offence, the offender, and the community in which the offence took place. Disparity of sentences for similar crimes is a natural consequence of this individualized focus. As he stated:

minant les peines ne devraient pas conclure que l'absence de solutions de rechange spécifiques à une communauté autochtone réduit à néant leur capacité d'infliger une sanction qui tienne compte des principes de justice corrective et des besoins des parties en cause. Au contraire, l'une des circonstances particulières des délinquants autochtones tient à ce que les sanctions rattachées à la communauté coïncident avec la conception autochtone de la détermination de la peine et avec les besoins des autochtones et de leurs communautés. Lorsque ces sanctions sont raisonnables vu les circonstances, elles devraient être appliquées. Il arrive souvent que l'incarcération ne soit pas la bonne solution pour les délinquants autochtones et leur communauté, surtout dans le cas d'infractions mineures ou sans violence. Dans tous les cas, il convient de s'efforcer d'adapter le processus de détermination de la peine et les sanctions infligées à la façon de voir autochtone.

(2) La recherche de la peine appropriée

Le rôle du juge chargé d'infliger une peine à un délinquant autochtone, comme pour chaque délinquant, consiste à déterminer une peine qui tienne compte de toutes les circonstances entourant l'infraction, le délinquant, les victimes et la communauté. Rien dans la partie XXIII du *Code criminel* ne change la généralité de cette obligation fondamentale. Toutefois dans le contexte de l'ensemble de la partie XXIII, l'al. 718.2*e*) a pour effet de modifier la méthode d'analyse que les juges doivent utiliser pour déterminer la peine appropriée pour des délinquants autochtones. L'alinéa 718.2*e*) exige que ces décisions tiennent compte des circonstances particulières dans lesquelles se trouvent les autochtones.

Dans *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, à la p. 567, le juge en chef Lamer a réitéré le principe bien établi en droit canadien de la détermination de la peine selon lequel l'adéquation d'une peine est fonction des circonstances particulières entourant l'infraction, le délinquant et la collectivité dans laquelle l'infraction a été perpétrée. La disparité des peines pour des crimes similaires est la conséquence naturelle de cet accent mis sur l'individu. Il s'est exprimé en ces termes:

It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

On a à maintes reprises souligné qu'il n'existe pas de peine uniforme pour un crime donné. [. . .] La détermination de la peine est un processus intrinsèquement individualisé, et la recherche d'une peine appropriée applicable à tous les délinquants similaires, pour des crimes similaires, sera souvent un exercice stérile et théorique. De même, il faut s'attendre que les peines infligées pour une infraction donnée varient jusqu'à un certain point dans les différentes communautés et régions du pays, car la combinaison «juste et appropriée» des divers objectifs reconnus de la détermination de la peine dépendra des besoins de la communauté où le crime est survenu et des conditions qui y règnent.

The comments of Lamer C.J. are particularly apt in the context of aboriginal offenders. As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors. Further, an aboriginal offender's community will frequently understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight. Through its reform of the purpose of sentencing in s. 718, and through its specific directive to judges who sentence aboriginal offenders, Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.

77 Les remarques du juge en chef Lamer sont particulièrement pertinentes en ce qui concerne les délinquants autochtones. Comme nous l'expliquons en l'espèce, les circonstances dans lesquelles ils se trouvent sont nettement différentes de celles d'autres délinquants, et sont caractérisées par des facteurs systémiques et historiques qui leur sont propres. De plus, la communauté à laquelle appartient un délinquant autochtone perçoit la justesse de la sanction d'une manière différente de celle de nombreuses communautés non-autochtones. Dans les cas qui s'y prêtent, certains des objectifs traditionnels de détermination de la peine seront relativement moins pertinents dans le choix d'une peine justifiée dans les circonstances, et les buts de la justice corrective auront, à juste titre, davantage de poids. En réformant l'objectif de la détermination de la peine à l'art. 718, et en donnant une directive expresse aux juges chargés d'infliger des peines aux délinquants autochtones, le Parlement, plus que jamais auparavant, a habilité ces juges à adapter les sanctions d'une manière porteuse de sens pour les peuples autochtones.

In describing the effect of s. 718.2(*e*) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for

78 En décrivant ainsi l'effet de l'al. 718.2*e*), nous n'affirmons pas que, en règle générale, il faille toujours déterminer la peine des délinquants autochtones de façon à accorder le plus de poids aux principes de justice corrective, au détriment des buts tels la dissuasion, la dénonciation et l'isolement. Il est déraisonnable de présumer que les autochtones eux-mêmes ne croient pas en l'importance de ces buts, et même s'ils n'y croient pas, que ces buts ne doivent pas avoir préséance dans les cas qui l'exigent. À l'évidence, il existe des infractions graves et des délinquants pour lesquels

whom separation, denunciation, and deterrence are fundamentally relevant.

79 Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

80 As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

81 The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of

l'isolement, la dénonciation et la dissuasion sont fondamentalement pertinents.

Cependant, même lorsque l'infraction est jugée grave, il faut prendre en considération la durée de la peine d'emprisonnement. Dans certaines circonstances, la durée de la peine infligée à un délinquant autochtone pourra être inférieure à celle de tout autre délinquant, alors que dans d'autres, elle pourra être identique. De façon générale, plus violente et grave sera l'infraction, plus grande sera la probabilité que la durée des peines d'emprisonnement des autochtones et des non-autochtones soit en pratique proche ou identique, même compte tenu de leur conception différente de la détermination de la peine.

Comme pour toutes les décisions concernant la peine, la détermination de la peine à infliger aux délinquants autochtones doit se faire sur une base individuelle (ou au cas par cas): Pour cette infraction, commise par ce délinquant, ayant causé du tort à cette victime, dans cette communauté, quelle est la sanction appropriée au regard du *Code criminel*? Quelle perception la communauté a-t-elle des sanctions pénales? Quelle est la nature des rapports entre le délinquant et sa communauté? Quelle combinaison de facteurs systémiques ou historiques a fait en sorte que ce délinquant particulier est traduit devant les tribunaux pour cette infraction particulière? Quelle incidence l'abus de drogue ou d'alcool dans la communauté, la pauvreté, le racisme manifeste, l'éclatement de la famille ou de la communauté, par exemple, ont-ils eu sur le délinquant dont il faut déterminer la peine? L'emprisonnement serait-il effectivement un moyen de dissuasion ou de dénonciation significatif pour le délinquant et la communauté, ou pourrait-on mieux parvenir à prévenir la criminalité et à atteindre les autres buts par les cercles de guérison? Y a-t-il d'autres options dans les circonstances?

Dans la détermination de la peine à infliger à un délinquant autochtone, comme pour tout autre délinquant, l'analyse doit être holistique et viser à déterminer la peine indiquée dans les circonstances. Il n'existe pas de critère unique qui guidera le juge qui prononce la peine. Le juge est tenu de

the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(*e*), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

prendre en considération toutes les circonstances entourant l'infraction, le délinquant, les victimes et la communauté, y compris les circonstances particulières dans lesquelles se trouve le délinquant en tant qu'autochtone. La détermination de la peine exige la sensibilisation aux difficultés auxquelles les autochtones ont fait face dans le système de justice pénale et dans la société en général. Procédant à l'examen de ces circonstances au regard des buts et des principes de détermination de la peine énoncés à la partie XXIII du *Code criminel* et reconnus par la jurisprudence, le juge doit s'efforcer d'en arriver à une peine juste et appropriée dans les circonstances. Sous le régime de l'al. 718.2*e*), les juges ont la latitude et le pouvoir discrétionnaire voulus pour examiner, dans les circonstances qui s'y prêtent, les peines substitutives appropriées pour le délinquant autochtone et la communauté, tout en respectant l'objectif et les principes énoncés de détermination de la peine. De cette façon, il est possible de conserver l'accent que mettent les peuples autochtones sur la guérison et le rétablissement tant de la victime que du délinquant.

(3) The Duty of the Sentencing Judge

(3) L'obligation du juge chargé d'infliger la peine

The foregoing discussion of guidelines for the sentencing judge has spoken of that which a judge must do when sentencing an aboriginal offender. This element of duty is a critical component of s. 718.2(*e*). The provision expressly provides that a court that imposes a sentence should consider all available sanctions other than imprisonment that are reasonable in the circumstances, and should pay particular attention to the circumstances of aboriginal offenders. There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.

82 L'examen qui précède des lignes directrices destinées aux juges chargés d'infliger des peines vise ce que le juge doit faire dans le cas d'un délinquant autochtone. Cet élément contraignant est une composante cruciale de l'al. 718.2*e*). La disposition prévoit expressément que le tribunal détermine la peine à infliger en examinant toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, et plus particulièrement en ce qui concerne les délinquants autochtones. Le tribunal n'a pas le pouvoir discrétionnaire d'examiner ou de ne pas examiner la situation particulière du délinquant autochtone; son seul pouvoir discrétionnaire réside dans la détermination d'une peine juste et appropriée.

How then is the consideration of s. 718.2(*e*) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the

83 Comment l'examen que requiert l'al. 718.2*e*) se fera-t-il dans le fonctionnement quotidien des tribunaux? La manière dont le juge chargé d'infliger la peine s'acquittera de l'obligation que lui impose la loi pourra varier d'un cas à l'autre. Dans tous les

judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

84 However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.

85 Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(*e*) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. In the same vein, it should be noted that, although s. 718.2(*e*) does not impose a statutory duty upon the sentencing judge to provide reasons,

cas, il faudra prendre connaissance d'office des facteurs systémiques ou historiques et de la conception de la peine pertinents dans le cas des délinquants autochtones. Toutefois, pour chaque infraction et chaque délinquant donné, il se peut que certains éléments de preuve soient nécessaires pour assister le juge dans la détermination de la peine appropriée. Quand un délinquant ne veut pas présenter ce type de preuve, il peut renoncer à son droit à un examen des circonstances particulières dans lesquelles il se trouve en tant qu'autochtone. En l'absence d'une telle renonciation, il sera extrêmement utile au juge que les avocats des deux parties présentent des éléments pertinents. D'ailleurs, on doit s'attendre à ce que les avocats remplissent leur rôle et assistent le juge de cette manière.

Cependant, même dans les cas où cette preuve n'est pas soumise par un avocat, par exemple lorsque le délinquant n'est pas représenté, il incombe au juge prononçant la peine de s'efforcer de se renseigner sur les circonstances dans lesquelles se trouve le délinquant en tant qu'autochtone. Que le délinquant réside en milieu rural, dans une réserve ou en milieu urbain, le juge doit être mis au fait des solutions de rechange à l'incarcération existant à l'intérieur ou à l'extérieur de la communauté autochtone à laquelle appartient le délinquant. Il faut aussi examiner, bien sûr, les solutions de rechange existant en milieu urbain. À l'évidence, la présence d'un délinquant autochtone requerra une attention particulière dans les rapports présentenciels. Au-delà de l'utilisation du rapport présentenciel, le juge prononçant la peine pourra et devrait, lorsque les circonstances s'y prêtent et que cela est concrètement possible, demander qu'on appelle des témoins en mesure de témoigner sur les solutions de rechange raisonnables.

De la même manière, dans les cas où le juge chargé de déterminer la peine en première instance ne s'est pas acquitté aussi complètement que requis de l'obligation que lui impose l'al. 718.2*e*), il incombe à la cour saisie d'un appel de la sentence sur ce point d'examiner tout nouvel élément de preuve pertinent et admissible dans le cadre de la détermination de la peine. Dans la même veine, il faut souligner que, même si l'al. 718.2*e*) n'im-

it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.

pose pas au juge prononçant la peine l'obligation de motiver sa décision, il sera plus facile pour la cour de révision de déterminer si et dans quelle mesure il a porté attention aux circonstances dans lesquelles se trouve le délinquant en tant qu'autochtone s'il a fourni, à tout le moins, de brefs motifs.

(4) The Issue of "Reverse Discrimination"

(4) La question de la «discrimination à rebours»

Something must also be said as to the manner in which s. 718.2(*e*) should not be interpreted. The appellant and the respondent diverged significantly in their interpretation of the appropriate role to be played by s. 718.2(*e*). While the respondent saw the provision largely as a restatement of existing sentencing principles, the appellant advanced the position that s. 718.2(*e*) functions as an affirmative action provision justified under s. 15(2) of the *Charter*. The respondent cautioned that, in his view, the appellant's understanding of the provision would result in "reverse discrimination" so as to favour aboriginal offenders over other offenders.

86 Il convient également de dire un mot sur la façon dont l'al. 718.2*e*) ne devrait pas être interprété. L'appelante et l'intimée ont donné des interprétations très divergentes du rôle de l'al. 718.2*e*). Alors que l'intimée y voyait avant tout une reformulation de principes de détermination de la peine existants, l'appelante a fait valoir qu'il s'agissait d'une disposition de promotion sociale justifiée en vertu du par. 15(2) de la *Charte*. L'intimée, pour sa part, a fait la mise en garde qu'à son avis, l'interprétation donnée par l'appelante entraînerait une «discrimination à rebours» favorisant les délinquants autochtones par rapport aux autres délinquants.

There is no constitutional challenge to s. 718.2(*e*) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the *Charter*. We would note, though, that the aim of s. 718.2(*e*) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(*e*) is to treat aboriginal offenders fairly by taking into account their difference.

87 L'alinéa 718.2*e*) n'est pas contesté sur le plan constitutionnel en l'espèce et nous n'abordons pas spécifiquement l'applicabilité de l'art. 15 de la *Charte*. Nous soulignons cependant que l'objectif de l'al. 718.2*e*) est de réduire le niveau tragique de la surreprésentation des autochtones dans la population carcérale. Son but est d'améliorer la situation actuelle et il vise la façon de traiter une infraction, un délinquant et une communauté donnés. Le fait qu'un tribunal soit appelé à tenir compte des circonstances particulières dans lesquelles se trouvent ces différentes parties n'est pas inéquitable envers les non-autochtones. L'objet essentiel de l'al. 718.2*e*) est plutôt d'assurer un traitement équitable des délinquants autochtones compte tenu de leur différence.

But s. 718.2(*e*) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. To the extent that the appellant's submission on affirmative action means that s. 718.2(*e*) requires an automatic reduction in sentence for an aboriginal offender,

88 Toutefois, l'al. 718.2*e*) ne doit pas être interprété comme exigeant une réduction automatique de la peine, ou la remise d'une période justifiée d'incarcération, pour la simple raison que le délinquant est autochtone. Dans la mesure où l'argumentation de l'appelante sur la promotion sociale signifie que l'al. 718.2*e*) exige la réduction automatique de la

we reject that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as a part of the task of weighing the multitude of factors which must be taken into account in striving to impose a fit sentence. It cannot be forgotten that s. 718.2(*e*) must be considered in the context of that section read as a whole and in the context of s. 718, s. 718.1, and the overall scheme of Part XXIII. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.

peine pour un délinquant autochtone, nous rejetons ce point de vue. Cette disposition est une directive donnée aux juges chargés d'infliger des peines d'examiner certaines circonstances particulières en ce qui concerne les délinquants autochtones dans le cadre de leur appréciation des multiples facteurs dont il faut tenir compte pour en arriver à une peine indiquée. N'oublions pas que l'al. 718.2*e*) doit être examiné dans le contexte de l'ensemble de cet article ainsi que dans le contexte de l'art. 718, de l'art. 718.1 et de l'économie générale de la partie XXIII. Ce n'est qu'une des considérations dont le juge chargé d'infliger la peine doit obligatoirement tenir compte. Cela ne signifiera pas toujours une peine moins sévère pour le délinquant autochtone. La peine infligée dépendra de tous les facteurs dont il doit être tenu compte dans chaque cas individuel. Le poids devant être accordé à ces différents facteurs variera dans chaque cas. Dans le même temps, il faudra se rappeler dans chaque cas que cette directive de tenir compte de ces circonstances particulières découle des injustices criantes dont les autochtones sont actuellement victimes dans le système de justice pénale. Elle traduit la réalité de l'aliénation vécue par bon nombre d'autochtones par rapport à un système qui, souvent, ne reflète pas leurs besoins ou leur perception de ce que serait une peine appropriée.

(5) Who Comes Within the Purview of Section 718.2(*e*)?

(5) À qui l'al. 718.2*e*) s'applique-t-il?

89 The question of whether s. 718.2(*e*) applies to all aboriginal persons, or only to certain classes thereof, is raised by this appeal. The following passage of the reasons of the judge at trial appears to reflect some ambiguity as to the applicability of the provision to aboriginal people who do not live in rural areas or on a reserve:

Le présent pourvoi soulève la question de savoir si l'al. 718.2*e*) s'applique à tous les autochtones, ou seulement à certaines catégories d'entre eux. L'extrait suivant des motifs du juge du procès paraît refléter une certaine ambiguïté quant à l'applicabilité de cette disposition à des délinquants autochtones ne vivant pas en milieu rural ou dans une réserve:

The factor that is mentioned in the *Criminal Code* is that particular attention to the circumstances of aboriginal offenders should be considered. In this case both the deceased and the accused were aboriginals, but they are not living within the aboriginal community as such. They are living off a reserve and the offence occurred in an urban setting. They [*sic*] do not appear to have been any special circumstances because of their aboriginal

[TRADUCTION] Le facteur mentionné dans le *Code criminel* est l'attention particulière qu'il faut porter aux circonstances dans lesquelles se trouvent les délinquants autochtones. En l'espèce, la victime et l'accusé étaient autochtones mais ne vivaient pas au sein de la communauté autochtone comme telle. Ils vivaient à l'extérieur d'une réserve et l'infraction a été commise en milieu urbain. Il ne semble pas y avoir de circonstances parti-

status and so I am not giving any special consideration to their background in passing this sentence.

It could be understood from that passage that, in this case, there were no special circumstances to warrant the application of s. 718.2(*e*), and the fact that the context of the offence was not in a rural setting or on a reserve was only one of those missing circumstances. However, this passage was interpreted by the majority of the Court of Appeal as implying that, "as a matter of principle, s. 718.2(*e*) can have no application to aboriginals 'not living within the aboriginal community'" (p. 137). This understanding of the provision was unanimously rejected by the members of the Court of Appeal. With respect to the trial judge, who was given little assistance from counsel on this issue, we agree with the Court of Appeal that such a restrictive interpretation of the provision would be inappropriate.

The class of aboriginal people who come within the purview of the specific reference to the circumstances of aboriginal offenders in s. 718.2(*e*) must be, at least, all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*. The numbers involved are significant. National census figures from 1996 show that an estimated 799,010 people were identified as aboriginal in 1996. Of this number, 529,040 were Indians (registered or non-registered), 204,115 Metis and 40,220 Inuit.

Section 718.2(*e*) applies to all aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area. Indeed it has been observed that many aboriginals living in urban areas are closely attached to their culture. See the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (1996), at p. 521:

Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity

culières résultant de leur statut d'autochtones et je n'accorderai donc aucune considération particulière à leur situation dans le prononcé de la peine.

On pourrait penser que ces observations indiquent que, en l'espèce, il n'y avait pas de circonstances particulières justifiant l'application de l'al. 718.2*e*), et que le fait que l'infraction n'avait pas été commise en milieu rural ou sur une réserve n'était qu'une des circonstances manquantes. Toutefois la majorité à la Cour d'appel a interprété ce passage comme signifiant que, [TRADUCTION] «en principe, l'al. 718.2*e*) ne s'applique aucunement à des autochtones "ne viva[nt] pas au sein dans la communauté autochtone"» (p. 137). Les juges de la Cour d'appel ont unanimement rejeté cette interprétation. En toute déférence pour le juge du procès, que les avocats ne l'ont pas beaucoup assisté sur ce point, nous sommes d'accord avec la Cour d'appel pour dire qu'une telle interprétation restrictive serait inappropriée.

90 Doivent entrer dans la catégorie des autochtones visés par le renvoi exprès à l'al. 718.2*e*), au minimum, tous les autochtones auxquels s'appliquent l'art. 25 de la *Charte* et l'art. 35 de la *Loi constitutionnelle de 1982*. Le nombre de personnes visées est substantiel. Les chiffres du recensement national de 1996 estiment à 799 010 le nombre de personnes identifiées comme autochtones en 1996. De ce nombre, 529 040 étaient des Indiens (inscrits ou non inscrits), 204 115 des Métis et 40 220 des Inuits.

91 L'alinéa 718.2*e*) s'applique à tous les délinquants autochtones où qu'ils résident, à l'intérieur comme à l'extérieur d'une réserve, dans une grande ville ou dans une zone rurale. On a observé que nombre d'autochtones vivant en milieu urbain sont fortement attachés à leur culture. Voir la Commission royale sur les peuples autochtones, *Rapport de la Commission royale sur les peuples autochtones*, vol. 4, *Perspectives et réalités* (1996), à la p. 586:

Tout au long des audiences, les autochtones ont rappelé à la Commission qu'il est essentiel pour eux de préserver et d'enrichir leur identité culturelle quand ils vivent en milieu urbain. L'identité autochtone est l'essence de l'existence des peuples autochtones. La préser-

is an essential and self-validating pursuit for Aboriginal people in cities.

And at p. 525:

> Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable . . . . Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

92 Section 718.2(*e*) requires the sentencing judge to explore reasonable alternatives to incarceration in the case of all aboriginal offenders. Obviously, if an aboriginal community has a program or tradition of alternative sanctions, and support and supervision are available to the offender, it may be easier to find and impose an alternative sentence. However, even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative. For all purposes, the term "community" must be defined broadly so as to include any network of support and interaction that might be available in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

VI. Summary

93 Let us see if a general summary can be made of what has been discussed in these reasons.

1. Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.

vation de cette identité est donc un objectif fondamental et valorisant pour les autochtones citadins.

Et aux pages 589 et 590:

> De plus, les autochtones citadins associent l'identité culturelle à la notion d'assise territoriale ou de territoire ancestral. Pour nombre d'entre eux, ces deux concepts sont indissociables. [. . .] Il est important pour les autochtones citadins de pouvoir s'identifier à un lieu ancestral, en raison des rituels, des cérémonies et des traditions qui y sont associés, des gens qui y vivent, du sentiment d'appartenance, du lien avec une communauté ancestrale et de la possibilité d'accéder à la famille, à la communauté et aux anciens.

L'alinéa 718.2*e*) exige que le juge chargé d'infliger la peine envisage les sanctions raisonnables autres que l'incarcération en ce qui concerne les délinquants autochtones. De toute évidence, s'il existe un programme ou une tradition de sanctions substitutives dans une communauté autochtone, et que le délinquant pourra obtenir soutien et surveillance, il sera peut-être plus facile de trouver et d'imposer une mesure de rechange. Toutefois, même en l'absence de soutien dans la collectivité, il y a lieu de faire tous les efforts, lorsque les circonstances s'y prêtent, pour trouver une solution de rechange adaptée et utile. À toutes fins pratiques, le terme «collectivité» devrait recevoir une définition assez large pour inclure tout réseau de soutien et d'interaction qui pourrait exister en milieu urbain. En même temps, le fait que le délinquant autochtone habite dans un milieu urbain qui ne possède aucun réseau de soutien ne relève pas le juge qui inflige la peine de son obligation de s'efforcer de trouver une solution de rechange à l'emprisonnement.

VI. Résumé

Voyons comment nous pouvons faire un résumé général de l'analyse qui précède.

1. La partie XXIII du *Code criminel* codifie l'objet et les principes essentiels de détermination de la peine ainsi que les facteurs dont le juge doit tenir compte pour fixer une peine appropriée eu égard au délinquant et à l'infraction.

2. Section 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.

3. Section 718.2(*e*) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.

4. Section 718.2(*e*) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(*e*), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.

5. Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(*e*) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.

6. Section 718.2(*e*) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

(A) The unique systemic or background factors which may have played a part in

2. L'alinéa 718.2*e*) impose au juge de la détermination de la peine d'examiner toutes les sanctions substitutives applicables et de porter attention aux circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

3. L'alinéa 718.2*e*) n'est pas une simple codification de la jurisprudence existante. Il a un caractère réparateur. Il a pour objet de remédier au grave problème de la surreprésentation des autochtones dans les prisons et d'encourager le juge à aborder la détermination de la peine selon une approche corrective. Le juge est tenu de donner une force réelle à l'objet réparateur de la disposition.

4. L'alinéa 718.2*e*) doit être interprété et examiné dans le contexte des autres facteurs mentionnés dans cette disposition et à la lumière de l'ensemble de la partie XXIII. Tous les principes et facteurs énoncés dans la partie XXIII doivent être pris en considération dans la détermination de la peine. Il faut porter attention au fait que la partie XXIII, par l'art. 718, l'al. 718.2*e*) et l'art. 742.1 notamment, a réaffirmé l'importance de la réduction du recours à l'incarcération.

5. La détermination de la peine est un processus individualisé, et, dans chaque cas, il faut continuer de se demander quelle est la peine appropriée pour tel accusé, telle infraction dans telle communauté. Toutefois l'al. 718.2*e*) a l'effet de modifier la méthode d'analyse que les juges doivent suivre lorsqu'ils déterminent la peine appropriée pour des délinquants autochtones.

6. L'alinéa 718.2*e*) impose aux juges d'aborder la détermination de la peine à infliger à des délinquants autochtones d'une façon individualisée, mais différente parce que la situation des autochtones est particulière. En déterminant la peine à infliger à un délinquant autochtone, le juge doit examiner:

(A) les facteurs systémiques ou historiques distinctifs qui peuvent être une des rai-

bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.

8. If there is no alternative to incarceration the length of the term must be carefully considered.

9. Section 718.2(*e*) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.

10. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

11. Section 718.2(*e*) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal commu-

sons pour lesquelles le délinquant autochtone se retrouve devant les tribunaux;

(B) les types de procédures de détermination de la peine et de sanctions qui, dans les circonstances, peuvent être appropriées à l'égard du délinquant en raison de son héritage ou attaches autochtones.

7. Aux fins de l'examen de ces considérations, le juge du procès aura besoin de renseignements concernant l'accusé. Les juges peuvent prendre connaissance d'office des facteurs systémiques et historiques généraux touchant les autochtones, et de la priorité donnée dans les cultures autochtones à une approche corrective de la détermination de la peine. Normalement, des renseignements spécifiques à l'affaire proviendront des avocats et d'un rapport présentenciel qui tiendra compte des facteurs énumérés au point 6, pouvant aussi provenir d'observations présentées par la communauté autochtone intéressée, habituellement celle du délinquant. Le délinquant peut renoncer à réunir ces renseignements.

8. En l'absence de solution de rechange à l'incarcération, la durée de la peine devra être soigneusement examinée.

9. L'alinéa 718.2*e*) ne doit pas être considéré comme un moyen de réduire automatiquement la peine d'emprisonnement des délinquants autochtones. Il ne faut pas présumer non plus que le délinquant reçoit une peine plus légère du simple fait que l'incarcération n'est pas imposée.

10. L'absence de programme de peines substitutives spécifique à une communauté autochtone n'élimine pas la possibilité pour le juge d'imposer une peine qui tienne compte des principes de la justice corrective et des besoins des parties en cause.

11. L'alinéa 718.2*e*) s'applique à tous les délinquants autochtones où qu'ils résident, à l'intérieur comme à l'extérieur d'une réserve, dans une grande ville ou dans une zone

nity for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

12. Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.

13. It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

rurale. Aux fins de déterminer la collectivité autochtone pertinente en vue de fixer une peine efficace, le terme «collectivité» devrait recevoir une définition assez large pour inclure tout réseau de soutien et d'interaction qui pourrait exister, y compris en milieu urbain. En même temps, le fait que le délinquant autochtone habite dans un milieu urbain qui ne possède aucun réseau de soutien ne relève pas le juge qui inflige la peine de son obligation d'essayer de trouver une solution de rechange à l'emprisonnement.

12. Compte tenu de ce qui précède, la période d'emprisonnement imposée à un délinquant autochtone pourra dans certaines circonstances être moins longue que celle imposée à un délinquant non-autochtone pour la même infraction.

13. Il n'est pas raisonnable de présumer que les peuples autochtones ne croient pas en l'importance des objectifs traditionnels de la détermination de la peine, tels la dissuasion, la dénonciation et l'isolement, quand ils sont justifiés. Dans ce contexte, en règle générale, plus grave et violent sera le crime, plus grande sera la probabilité d'un point de vue pratique que la période d'emprisonnement soit la même pour des infractions et des délinquants semblables, que le délinquant soit autochtone ou non-autochtone.

VII. Was There an Error Made in This Case?

From the foregoing analysis it can be seen that the sentencing judge, who did not have the benefit of these reasons, fell into error. He may have erred in limiting the application of s. 718.2(*e*) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, and perhaps as a consequence of the first error, he does not appear to have considered the systemic or background factors which may have influenced the appellant to engage in criminal conduct, or the possibly distinct conception of sentencing held by the appellant, by the victim Beaver's family, and by their community. However, it should be emphasized that the sentencing judge did take active steps to obtain at least some information regarding the appellant's

VII. Une erreur a-t-elle été commise en l'espèce?

94

De l'analyse qui précède, il ressort que le juge qui a prononcé la peine, sans bénéficier des présents motifs, a commis une erreur. Il s'est trompé s'il a limité l'application de l'al. 718.2*e*) aux délinquants autochtones vivant en milieu rural ou dans une réserve. De plus, et peut-être à cause de cette première erreur, il paraît ne pas avoir examiné les facteurs systémiques ou historiques qui ont pu influer sur la conduite criminelle de l'appelante, ou la conception distincte de la sanction pénale que pouvaient avoir l'appelante, la famille de Beaver et leur communauté. Soulignons toutefois que le juge a pris des initiatives précises pour obtenir à tout le moins quelques informations sur la culture autochtone de l'appelante. À cet égard, les avocats, qui

aboriginal heritage. In this regard he received little if any assistance from counsel on this issue although they too were acting without the benefit of these reasons.

95 The majority of the Court of Appeal, in dismissing the appellant's appeal, also does not appear to have considered many of the factors referred to above. However, the dissenting reasons of Rowles J.A. discuss the relevant factors in some detail. The majority also appears to have dismissed the appellant's application to adduce fresh evidence. The majority of the Court of Appeal may or may not have erred in ultimately deciding to dismiss the fresh evidence application. The correctness of its ultimate decision depends largely upon the admissibility of the fresh evidence and its relevance to the weighing of the various sentencing goals. However, assuming admissibility and relevance, it was certainly incumbent upon the majority to consider the evidence, and especially so given the failure of the trial judge to do so. Moreover, if the fresh evidence before the Court of Appeal was itself insufficient to inform the court adequately regarding the circumstances of the appellant as an aboriginal offender, the proper remedy would have been to remit the matter to the trial judge with instructions to make all the reasonable inquiries necessary for the sentencing of this aboriginal offender.

96 In most cases, errors such as those in the courts below would be sufficient to justify sending the matter back for a new sentencing hearing. It is difficult for this Court to determine a fit sentence for the appellant according to the suggested guidelines set out herein on the basis of the very limited evidence before us regarding the appellant's aboriginal background. However, as both the trial judge and all members of the Court of Appeal acknowledged, the offence in question is a most serious one, properly described by Esson J.A. as a "near murder". Moreover, the offence involved domestic violence and a breach of the trust inherent in a spousal relationship. That aggravating factor must be taken into account in the sentencing of the

n'ont pas bénéficié non plus des présents motifs, ne lui ont apporté que peu sinon aucune aide.

En rejetant l'appel de l'appelante, les juges majoritaires de la Cour d'appel paraissent eux aussi ne pas avoir examiné plusieurs des facteurs mentionnés précédemment. Les facteurs pertinents sont toutefois examinés de façon assez détaillée dans les motifs dissidents du juge Rowles. Les juges majoritaires semblent également avoir rejeté la demande de l'appelante de présenter de nouveaux éléments de preuve. Le rejet final de cette demande peut avoir ou ne pas avoir été une erreur. La justesse de cette décision finale dépend largement de la recevabilité de la nouvelle preuve et de sa pertinence dans la pondération des divers objectifs de la détermination de la peine. Toutefois, à supposer que la preuve ait été recevable et pertinente, il incombait certainement aux juges de la majorité d'examiner la preuve, d'autant plus que le juge du procès ne l'avait pas fait. En outre, si les nouveaux éléments de preuve présentés à la Cour d'appel ne suffisaient pas en soi à la renseigner adéquatement sur les circonstances dans lesquelles se trouvait l'appelante en tant que délinquante autochtone, la réparation appropriée aurait été de renvoyer l'affaire au juge du procès avec la directive de prendre toutes les mesures raisonnables pour obtenir les informations nécessaires à la détermination de la peine.

Dans la plupart des cas, des erreurs comme celles des tribunaux d'instance inférieure suffiraient à justifier le renvoi de l'affaire pour une nouvelle audience de détermination de la peine. Il est difficile pour notre Cour de déterminer une peine indiquée pour l'appelante conformément aux lignes directrices exposées précédemment, en se fondant sur les éléments de preuve très limités dont nous disposons en ce qui concerne l'origine autochtone de l'appelante. Toutefois, comme le juge du procès et tous les juges de la Cour d'appel l'ont reconnu, l'infraction en cause est très grave, le juge Esson ayant même à juste titre parlé de «quasi-meurtre». De plus l'infraction comportait de la violence familiale et la rupture des relations de confiance

aboriginal appellant as it would be for any offender. For that offence by this offender a sentence of three years' imprisonment was not unreasonable.

More importantly, the appellant was granted day parole on August 13, 1997, after she had served six months in the Burnaby Correctional Centre for Women. She was directed to reside with her father, to take alcohol and substance abuse counselling and to comply with the requirements of the Electronic Monitoring Program. On February 25, 1998, the appellant was granted full parole with the same conditions as the ones applicable to her original release on day parole.

In this case, the results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the appellant and society. In these circumstances, we do not consider that it would be in the interests of justice to order a new sentencing hearing in order to canvass the appellant's circumstances as an aboriginal offender.

In the result, the appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: Gil D. McKinnon, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.

Solicitor for the intervener the Attorney General for Alberta: Alberta Justice, Calgary.

Solicitors for the intervener the Aboriginal Legal Services of Toronto Inc.: Kent Roach and Kimberly R. Murray, Toronto.

inhérentes à une situation de conjoints. Ces circonstances aggravantes doivent être considérées dans la détermination de la peine de l'appelante, comme elles le seraient pour tout autre délinquant. Pour cette infraction commise par cette délinquante, une peine de trois ans d'emprisonnement n'était pas déraisonnable.

97 De façon plus importante, l'appelante a obtenu une libération conditionnelle de jour le 13 août 1997, après avoir purgé une peine de six mois au Centre correctionnel pour femmes de Burnaby. Les conditions lui imposaient d'habiter avec son père, de suivre une thérapie pour alcoolisme et toxicomanie et de se conformer aux exigences du programme de télésurveillance. Le 25 février 1998, l'appelante a obtenu une libération conditionnelle totale aux mêmes conditions que celles qui s'appliquaient à sa libération conditionnelle de jour.

98 Dans la présente affaire, les résultats de la peine imposée, avec une incarcération de six mois suivie d'une libération contrôlée, étaient dans l'intérêt de l'appelante et dans celui de la société. Dans les circonstances, nous estimons qu'il ne serait pas dans l'intérêt de la justice d'ordonner une nouvelle audience de détermination de la peine pour examiner les circonstances dans lesquelles se trouve l'appelante en tant que délinquante autochtone.

99 En définitive, le pourvoi est rejeté.

Pourvoi rejeté.

Procureur de l'appelante: Gil D. McKinnon, Vancouver.

Procureur de l'intimée: Le ministère du Procureur général, Vancouver.

Procureur de l'intervenant le procureur général du Canada: Le ministère de la Justice, Ottawa.

Procureur de l'intervenant le procureur général de l'Alberta: Alberta Justice, Calgary.

Procureurs de l'intervenante Aboriginal Legal Services of Toronto Inc.: Kent Roach et Kimberly R. Murray, Toronto.

Manasie Ipeelee *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions and Aboriginal Legal Services of Toronto Inc. *Interveners*

- and -

Her Majesty The Queen *Appellant*

v.

Frank Ralph Ladue *Respondent*

and

British Columbia Civil Liberties Association and Canadian Civil Liberties Association *Interveners*

Indexed as: R. *v.* Ipeelee

2012 SCC 13

File Nos.: 33650, 34245.

2011: October 17; 2012: March 23.

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

ON APPEAL FROM THE COURTS OF APPEAL FOR ONTARIO AND BRITISH COLUMBIA

Criminal law — Sentencing — Aboriginal offenders — Breach of condition of long-term supervision order — Principles governing sentencing of Aboriginal offenders — Whether principles outlined in R. v. Gladue apply to breach of long-term supervision order — Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(e).

Manasie Ipeelee *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Directeur des poursuites pénales et Aboriginal Legal Services of Toronto Inc. *Intervenants*

- et -

Sa Majesté la Reine *Appelante*

c.

Frank Ralph Ladue *Intimé*

et

Association des libertés civiles de la Colombie-Britannique et Association canadienne des libertés civiles *Intervenantes*

Répertorié : R. *c.* Ipeelee

2012 CSC 13

N^{os} du greffe : 33650, 34245.

2011 : 17 octobre; 2012 : 23 mars.

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

EN APPEL DES COURS D'APPEL DE L'ONTARIO ET DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Détermination de la peine — Délinquants autochtones — Manquement à une condition d'une ordonnance de surveillance de longue durée — Principes régissant la détermination de la peine à infliger à un délinquant autochtone — Les principes formulés dans R. c. Gladue s'appliquent-ils à la violation d'une ordonnance de surveillance de longue durée? — Code criminel, L.R.C. 1985, ch. C-46, art. 718.2e).

These two appeals involve Aboriginal offenders with long criminal records. Both Aboriginal offenders were declared long-term offenders and had long-term supervision orders ("LTSOs") imposed. The offender I is an alcoholic with a history of committing violent offences when intoxicated. He was sentenced to six years' imprisonment followed by an LTSO after being designated a long-term offender. After his release from prison, I committed an offence while intoxicated thereby breaching a condition of his LTSO. He was sentenced to three years' imprisonment, less six months of pre-sentence custody at a 1:1 credit rate. The Court of Appeal dismissed the appeal brought by I. The offender L is addicted to drugs and alcohol and has a history of committing sexual assaults when intoxicated. L was sentenced to three years' imprisonment followed by an LTSO after being designated a long-term offender. After his release from prison, he failed a urinalysis test; thereby breaching a condition of his LTSO. L was sentenced to three years' imprisonment, less five months of pre-sentence custody at a 1.5:1 rate. A majority of the Court of Appeal allowed L's appeal and reduced the sentence to one year's imprisonment.

Les deux pourvois mettent en cause des délinquants autochtones au casier judiciaire chargé. Les deux délinquants autochtones concernés ont été déclarés délinquants à contrôler et se sont vu imposer des ordonnances de surveillance de longue durée (« OSLD »). Le délinquant I est un alcoolique qui a commis par le passé des infractions avec violence sous l'effet de l'alcool. Il a été condamné à une peine de six ans d'emprisonnement suivis d'une surveillance de longue durée après avoir été déclaré délinquant à contrôler. Après sa libération, I a commis une infraction alors qu'il était en état d'ébriété, manquant ainsi à une condition de son OSLD. I a été condamné à une peine d'emprisonnement de trois ans, à laquelle six mois ont été retranchés pour sa période d'incarcération présentencielle, selon un ratio de 1:1. La Cour d'appel a rejeté le pourvoi de I. Le délinquant L souffre d'une dépendance aux drogues et à l'alcool et a commis par le passé des agressions sexuelles sous l'effet de ces substances. L a été condamné à une peine de trois ans d'emprisonnement suivie d'une surveillance de longue durée après avoir été déclaré délinquant à contrôler. Après sa libération, L a échoué à un test d'analyse d'urine, manquant par le fait même à une condition de son OSLD. L a été condamné à trois ans d'emprisonnement, dont 1,5 jour a été retranché pour chaque jour de ses cinq mois de détention présentencielle. Les juges majoritaires de la Cour d'appel ont accueilli son appel et réduit sa peine à un an d'emprisonnement.

Held (Rothstein J. dissenting in part): The appeal should be allowed in *Ipeelee*. The appeal should be dismissed in *Ladue*.

Arrêt (le juge Rothstein est dissident en partie) : Le pourvoi est accueilli dans l'affaire *Ipeelee*. Le pourvoi est rejeté dans l'affaire *Ladue*.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ.: The central issue in these appeals is how to determine a fit sentence for a breach of an LTSO in the case of an Aboriginal offender in particular. Trial judges enjoy a broad discretion in the sentencing process. A sentencing judge has a duty to apply all of the principles mandated by ss. 718.1 and 718.2 of the *Criminal Code* in order to devise a fit and proper sentence which respects the well-established principles and objectives of sentencing set out in Part XXIII of the *Criminal Code*. Proportionality is the *sine qua non* of a just sanction. Proportionality, the fundamental principle of sentencing, is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. An appellate court must be satisfied that the sentence under review is proportionate to both the gravity of the offence and the degree of responsibility of the offender.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish et Abella : La principale question que soulèvent les pourvois est de savoir comment déterminer une peine appropriée pour la violation d'une OSLD dans le cas d'un délinquant autochtone en particulier. Les juges de première instance jouissent d'un large pouvoir discrétionnaire dans la détermination de la peine. Le juge chargé d'imposer la peine doit appliquer tous les principes prescrits par les art. 718.1 et 718.2 du *Code criminel* pour concevoir une peine juste et appropriée qui respecte les principes et objectifs bien établis de détermination de la peine énoncés à la partie XXIII du *Code criminel*. La proportionnalité est la condition *sine qua non* d'une sanction juste. La proportionnalité — le principe fondamental de la détermination de la peine — est intimement liée à son objectif essentiel — le maintien d'une société juste, paisible et sûre par l'imposition de sanctions justes. La cour d'appel doit être convaincue que la peine contestée est proportionnelle à la fois à la gravité de l'infraction et au degré de responsabilité du délinquant.

The purpose of an LTSO is two-fold: to protect the public and to rehabilitate offenders and reintegrate them into the community. It is the sentencing judge's duty, adopting a contextual approach, to determine which sentencing options will be proportionate to both the gravity of the offence and the degree of responsibility of the offender. Sentencing is an individual process. The severity of a given breach will ultimately depend on all of the circumstances, including the nature of the condition breached, how that condition is tied to managing the particular offender's risk of reoffence, and the circumstances of the breach.

Section 718.2(*e*) of the *Criminal Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(*e*). Section 718.2(*e*) does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. The enactment of s. 718.2(*e*) is a specific direction by Parliament to pay particular attention to the circumstances of Aboriginal offenders during the sentencing process because those circumstances are unique and different from those of non-Aboriginal offenders. To the extent that current sentencing practices do not further the objectives of deterring criminality and rehabilitating offenders, those practices must change so as to meet the needs of Aboriginal offenders and their communities. Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination. Just sanctions are those that do not operate in a discriminatory manner.

When sentencing an Aboriginal offender, a judge must consider the factors outlined in *R. v. Gladue*, [1999] 1 S.C.R. 688: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness.

L'OSLD poursuit un double objectif : la protection du public ainsi que la réadaptation des délinquants et leur réinsertion dans la collectivité. Il appartient au juge de la peine de déterminer, en adoptant une approche contextuelle, laquelle des sanctions possibles est proportionnelle à la fois à la gravité de l'infraction et au degré de responsabilité du délinquant. La détermination de la peine est un processus individualisé. La gravité d'un manquement donné dépend en dernière analyse de toutes les circonstances, dont la nature de la condition violée, le lien entre cette condition et la gestion du risque de récidive du délinquant et les circonstances de la violation.

L'alinéa 718.2*e*) du *Code criminel* est une disposition réparatrice destinée à remédier au grave problème de la surreprésentation des Autochtones dans les prisons canadiennes et à encourager le juge à aborder la détermination de la peine dans une perspective corrective. Les tribunaux doivent veiller à ce qu'une application formaliste du principe de parité dans l'imposition des peines ne fasse pas échec à l'objectif réparateur de l'al. 718.2*e*). L'alinéa 718.2*e*) ne se borne pas à confirmer les principes existants de détermination de la peine; elle invite les juges à utiliser une méthode d'analyse différente pour déterminer la peine appropriée dans le cas d'un délinquant autochtone. En adoptant l'al. 718.2*e*), le législateur donne aux juges chargés de déterminer la peine une directive précise les invitant à porter une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones, parce qu'elles sont particulières et différentes de celles dans lesquelles se trouvent les non-Autochtones. Dans la mesure où elles ne favorisent par la réalisation des objectifs de prévention de la criminalité et de réadaptation des délinquants, les pratiques actuelles de détermination de la peine doivent être modifiées de façon à répondre aux besoins des délinquants autochtones et de leurs collectivités. Intervenants de première ligne dans le système de justice pénale, les juges de détermination de la peine sont les mieux placés pour réévaluer ces critères de façon qu'ils ne contribuent pas à la persistance de la discrimination raciale systémique. Des sanctions justes ne sont pas discriminatoires.

Le juge qui détermine la peine à infliger à un délinquant autochtone doit tenir compte des facteurs énoncés dans *R. c. Gladue*, [1999] 1 R.C.S. 688 : a) les facteurs systémiques ou historiques distinctifs qui peuvent être une des raisons pour lesquelles le délinquant autochtone se retrouve devant les tribunaux; et b) les types de procédures de détermination de la peine et de sanctions qui, dans les circonstances, peuvent être appropriées à l'égard du délinquant en raison de son héritage ou de ses attaches autochtones. Les facteurs systémiques et historiques peuvent influer sur la culpabilité du délinquant,

Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community. The principles from *Gladue* are entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples.

When sentencing an Aboriginal offender, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters provide the necessary context for understanding and evaluating the case-specific information presented by counsel. However, these matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. The parity principle which is contained in s. 718.2(*b*) means that any disparity between sanctions for different offenders needs to be justified. To the extent that the application of the *Gladue* principles lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances which are rationally related to the sentencing process. Counsel has a duty to bring individualized information before the court in every case, unless the offender expressly waives his right to have it considered. A *Gladue* report, which contains case-specific information, is tailored to the specific circumstances of the Aboriginal offender.

dans la mesure où ils mettent en lumière son degré de culpabilité morale. Ne pas tenir compte de ces circonstances contreviendrait au principe fondamental de détermination de la peine — la proportionnalité de la peine à la gravité de l'infraction et au degré de responsabilité du délinquant. Les principes énoncés dans *Gladue* obligent les juges, lorsqu'ils déterminent la peine, à éviter de présumer que tous les délinquants et toutes les collectivités partagent les mêmes valeurs, et à reconnaître que, compte tenu de la présence de conceptions du monde foncièrement différentes, l'imposition de sanctions différentes ou substitutives peut permettre d'atteindre plus efficacement les objectifs de détermination de la peine dans une collectivité donnée. Les principes formulés dans *Gladue* respectent entièrement l'exigence selon laquelle ces juges doivent examiner tous les facteurs et toutes les circonstances propres à la personne qui se trouve devant eux, y compris sa situation et son vécu. Dans l'arrêt *Gladue*, la Cour a réaffirmé cette exigence et a reconnu que les tribunaux canadiens n'avaient jusqu'alors pas tenu compte des circonstances particulières propres aux délinquants autochtones, malgré leur pertinence dans l'imposition de la peine. L'alinéa 718.2*e*) vise à remédier à ce défaut en prescrivant aux juges d'adapter les sanctions à la situation des peuples autochtones.

Lorsqu'ils déterminent la peine à infliger à un délinquant autochtone, les tribunaux doivent prendre connaissance d'office de questions telles que l'histoire de la colonisation, des déplacements de populations et des pensionnats et la façon dont ces événements se traduisent encore aujourd'hui chez les peuples autochtones par un faible niveau de scolarisation, des revenus peu élevés, un taux de chômage important, des abus graves d'alcool ou d'autres drogues, un taux élevé de suicide et, bien entendu, un taux élevé d'incarcération. Ces facteurs établissent le cadre contextuel nécessaire à la compréhension et à l'évaluation des renseignements propres à l'affaire fournis par les avocats. Ces facteurs ne justifient cependant pas nécessairement à eux seuls l'imposition d'une peine différente aux délinquants autochtones. De plus, rien dans l'arrêt *Gladue* n'indique que les facteurs historiques et systémiques ne devraient pas également être pris en considération dans le cas d'autres délinquants, non autochtones. Le principe de parité énoncé à l'al. 718.2*b*) exige que toute disparité entre les sanctions imposées à différents délinquants soit justifiée. Dans la mesure où l'application des principes formulés dans *Gladue* mène à l'imposition de sanctions différentes aux délinquants autochtones, ces sanctions se justifieront en raison des circonstances particulières dans lesquelles ils se trouvent — des circonstances rationnellement liées au processus de détermination de la peine. Il est de la responsabilité de l'avocat de fournir

A *Gladue* report is an indispensable sentencing tool to be provided at a sentencing hearing for an Aboriginal offender and it is also indispensable to a judge in fulfilling his duties under s. 718.2(*e*) of the *Criminal Code*.

The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. If the sentencing judge fails to apply the *Gladue* principles in any case involving an Aboriginal offender this would run afoul of this statutory obligation. Furthermore, the failure to apply the *Gladue* principles in any case would also result in a sentence that is not fit and is not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including the breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

In the instant case of I, the courts below made several errors in principle warranting appellate intervention. The courts below erred in concluding that rehabilitation was not a relevant sentencing objective. As a result of this error, the courts below gave only attenuated consideration to I's circumstances as an Aboriginal offender. A sentence of one year's imprisonment should be substituted. In the instant case of L, the decision of the majority of the Court of Appeal is well founded and adequately reflects the principles and objectives of sentencing. The appeal is dismissed and the sentence of one year's imprisonment is affirmed.

Per Rothstein J. (dissenting in part): In sentencing for the breach of a condition of an LTSO, which is central to the risk of the long-term offender violently reoffending, the protection of the public, more so than the rehabilitation or reintegration of the offender, must be the dominant consideration of the sentencing judge in the determination of a fit and proper sentence. The majority in this case does not specifically address the issue of the sentencing of Aboriginal offenders who have been found to be long-term offenders and have been found guilty of breaching a condition of an LTSO. They have not taken account of the difference between the objectives and requirements of LTSOs for long-term offenders who abide by the conditions of their LTSOs

les renseignements propres à l'affaire dans tous les cas, à moins que le délinquant ne renonce expressément à son droit à l'examen de cette information. Un rapport semblable à celui décrit dans *Gladue*, qui contient des renseignements propres à l'affaire, est adapté à la situation particulière du délinquant autochtone. Ce rapport est un outil essentiel de détermination de la peine qu'on doit présenter à l'audience de détermination de la peine d'un délinquant autochtone et il est aussi indispensable au juge pour l'exécution des obligations que lui impose l'al. 718.2*e*) du *Code criminel*.

Le juge chargé d'imposer la peine a l'obligation légale de tenir compte des circonstances particulières propres aux délinquants autochtones, comme l'al. 718.2*e*) du *Code criminel* le prévoit. Le défaut du juge d'appliquer les principes établis par *Gladue* dans une affaire mettant en cause un délinquant autochtone contrevient à cette obligation. En outre, ce défaut entraînerait aussi l'imposition d'une peine injuste et incompatible avec le principe fondamental de la proportionnalité. En conséquence, l'application des principes établis dans *Gladue* est requise dans tous les cas où un délinquant autochtone est en cause, y compris dans le contexte d'un manquement à une OSLD, et le non-respect de cette exigence constitue une erreur justifiant une intervention en appel.

Dans le cas de I, les cours d'instance inférieure ont commis plusieurs erreurs de principe justifiant une intervention en appel. Elles ont conclu à tort que la réadaptation ne constituait pas un objectif pertinent dans la détermination de la peine. En raison de cette erreur, les cours d'instance inférieure n'ont accordé qu'une importance atténuée à la situation de I en tant que délinquant autochtone. Il convient de remplacer la peine imposée par un an d'emprisonnement. Dans le cas de L, l'arrêt majoritaire de la Cour d'appel est bien fondé et reflète adéquatement les principes et les objectifs de détermination de la peine. Le pourvoi est rejeté, et la peine de un an d'emprisonnement confirmée.

Le juge Rothstein (dissident en partie) : Lorsqu'un juge détermine la peine à infliger pour défaut de se conformer à une condition d'une OSLD se rapportant à un élément central du risque de récidive violente du délinquant à contrôler, la protection du public — plus encore que la réadaptation ou la réinsertion du délinquant — doit constituer le critère dominant dans la détermination d'une peine juste et appropriée. Les juges majoritaires en l'espèce ne traitent pas expressément de la question de la détermination de la peine à infliger aux Autochtones qui ont été déclarés délinquants à contrôler et reconnus coupables d'un manquement à une condition d'une OSLD. Ils n'ont pas tenu compte de la différence entre, d'une part, les objectifs et les exigences des OSLD

and the objectives and requirements of sentencing long-term offenders who have breached a condition of their LTSOs.

The breach of an LTSO raises serious concerns that rehabilitation and reintegration are not being achieved and calls into doubt whether, despite supervision, the long-term offender has demonstrated that the substantial risk of reoffending in a violent manner in the community by the long-term offender can be adequately managed. Section 753.3(1) of the *Criminal Code* provides that a breach of an LTSO constitutes an indictable offence, as opposed to a hybrid offence, with a maximum sentence of 10 years. The maximum term is for the breach of the LTSO exclusively and is not dependent on the long-term offender having been found guilty of another substantive offence, violent or otherwise. The necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time. Where a breach is central to the substantial risk of reoffending, such as where alcohol or substance consumption has been found to be the trigger for violent offences by the long-term offender, the breach must be considered to be very serious.

Section 718.2(*e*) of the *Criminal Code* requires a sentencing judge to consider background and systemic factors in crafting a sentence, and all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to Aboriginal offenders, including long-term Aboriginal offenders. As with all sentencing, this must be done with regard to the particular individual, the threat they pose, and their chances of rehabilitation and reintegration. Evaluating these options lies within the discretion of the sentencing judge. In the case of long-term offenders, the paramount consideration is the protection of society. This applies to all long-term offenders, including Aboriginal long-term offenders who have compromised the management of their risk of reoffending by breaching a condition of their LTSOs.

Once an Aboriginal individual is found to be a long-term offender, and the offender has breached one or more conditions of his or her LTSO, alternatives to a significant prison term will be limited. The alternatives to imprisonment must be viable and the sentencing

pour les délinquants à contrôler qui respectent les conditions de leur OSLD et, d'autre part, les objectifs et les exigences applicables dans la détermination de la peine à infliger aux délinquants à contrôler qui ont enfreint une condition de leur OSLD.

Le défaut de se conformer à une OSLD permet de douter sérieusement de la réalisation des objectifs de réadaptation et de réinsertion et soulève la question de savoir si, bien que sous surveillance, le délinquant à contrôler a démontré que le risque élevé de récidive violente qu'il représente au sein de la collectivité peut être maîtrisé adéquatement. Aux termes du par. 753.3(1) du *Code criminel*, le défaut de se conformer à une OSLD constitue un acte criminel, et non une infraction mixte, et est punissable d'un emprisonnement maximal de 10 ans. Le seul défaut de se conformer à l'OSLD rend le délinquant à contrôler passible de cette peine maximale, sans qu'il soit nécessaire qu'il ait été déclaré coupable d'une autre infraction substantielle, violente ou autre. Cela signifie nécessairement que, pour le législateur, les délinquants à contrôler qui font défaut de se conformer à une OSLD présentent un tel risque pour la protection de la société qu'ils peuvent devoir être isolés de la société pendant une période assez longue. Si le manquement concerne un élément central du risque élevé de récidive, par exemple lorsqu'il a été jugé que la consommation d'alcool ou de drogues amène le délinquant à contrôler à commettre des infractions avec violence, on doit considérer qu'il s'agit d'un manquement très grave.

L'alinéa 718.2*e*) du *Code criminel* oblige le juge chargé de la détermination de la peine à tenir compte des facteurs historiques et systémiques, et de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones, y compris les délinquants autochtones à contrôler. Comme c'est toujours le cas en matière de détermination de la peine, il faut tenir compte, à cet égard, du délinquant en cause, du risque qu'il représente et de ses chances de réadaptation et de réinsertion. L'évaluation de ces solutions de rechange relève du pouvoir discrétionnaire du juge chargé d'infliger la peine. Le critère déterminant dans le cas des délinquants à contrôler est la protection de la société. Ce critère s'applique à tous délinquants à contrôler, y compris aux délinquants autochtones à contrôler qui ont compromis la gestion de leur risque de récidive en ne respectant pas une condition de leur OSLD.

Lorsqu'un Autochtone déclaré délinquant à contrôler a manqué à une ou à plusieurs conditions de son OSLD, les solutions autres qu'une période d'emprisonnement importante seront limitées. Les solutions de rechange à l'emprisonnement doivent être valables et le juge

judge must be satisfied that they are consistent with protection of society. Alternatives may include returning Aboriginal offenders to their communities. However, as in all cases, this must be done with protection of the public as the paramount concern; Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal. Where the breach of an LTSO goes to the control of the Aboriginal offender in the community, rehabilitation and reintegration into society will have faltered, if not failed. In such case, the sentencing judge may have no alternative but to separate the Aboriginal long-term offender from society for a significant period of time. Nevertheless, during the period of incarceration, the Aboriginal status of the long-term offender should be taken into account for the purpose of providing appropriate programs that are intended to rehabilitate the offender so that upon release, the substantial risk of reoffending may be controlled.

In this case, it has not been shown that the sentence imposed on the offender I was demonstrably unfit and the appeal should be dismissed. The sentencing judge's findings demonstrate a thorough appreciation of the circumstances. He properly recognized that protection of the public was the paramount concern in breaches of LTSOs. As a long-term offender, I has been found to show a pattern of repetitive behaviour with a likelihood of causing death or physical or psychological injury or a likelihood of causing injury, pain or other evil to other persons in the future through failure to control his sexual impulses. His alcohol consumption is central to such behaviour.

With respect to the offender L, one year's imprisonment was a fit and proper sentence and the appeal should be dismissed. The sentencing judge did not err in focussing on protection of society as the paramount consideration in her sentencing decision. The sentencing judge found that the only way to protect the community, given L's high risk of reoffending sexually and moderate to high risk of reoffending violently, was to emphasize the objective of isolation. She noted that even if L did not commit a substantive offence, his breach was serious. But this was a case where there was a realistic opportunity for rehabilitation that was denied L because of a "bureaucratic error". The sentencing judge does not appear to have considered that it was this error that caused L to be sent to a residential halfway

chargé d'infliger la peine doit être convaincu qu'elles sont compatibles avec la protection de la société. L'une des solutions de rechange possibles pourrait consister à renvoyer le délinquant autochtone dans sa collectivité. Cependant, comme c'est toujours le cas, le critère déterminant dans le choix de cette sanction doit demeurer la protection du public; les collectivités autochtones ne forment pas une catégorie distincte qui aurait droit à une protection moindre du fait que le délinquant est un Autochtone. Lorsque le manquement à une OSLD touche à la maîtrise du risque que représente le délinquant autochtone dans la collectivité, sa réadaptation et sa réinsertion sociale seront compromises, sinon condamnées à l'échec. En pareil cas, il se peut que le juge chargé d'infliger la peine n'ait d'autre choix que d'isoler le délinquant autochtone à contrôler de la société pendant une période assez longue. Durant son incarcération, il faudrait néanmoins prendre en considération le statut d'Autochtone du délinquant à contrôler afin de lui offrir des programmes appropriés favorisant sa réadaptation, de sorte que le risque élevé de récidive qu'il présente puisse être maîtrisé au moment de sa libération.

En l'espèce, il n'a pas été démontré que la peine infligée au délinquant I n'était manifestement pas indiquée et le pourvoi doit être rejeté. Les conclusions du juge ayant prononcé la peine témoignent d'un examen approfondi des circonstances. Il a reconnu à bon droit que la protection du public était le facteur déterminant en cas de manquement à une OSLD. Si I a été déclaré délinquant à contrôler, c'est qu'il a été établi soit qu'il avait accompli des actes répétitifs permettant de croire qu'il causerait vraisemblablement la mort de quelque autre personne, ou des sévices ou des dommages psychologiques à d'autres personnes, soit que son incapacité de maîtriser ses impulsions sexuelles laissait prévoir que vraisemblablement il causerait à l'avenir des sévices ou autres maux à d'autres personnes. Sa consommation d'alcool est un élément essentiel de ces comportements.

Une peine d'emprisonnement de un an constitue une peine juste et appropriée dans le cas du délinquant L et il faut rejeter le pourvoi. La juge de détermination de la peine n'a pas commis d'erreur en insistant sur la protection de la société qui constituait, selon elle, le critère déterminant dans sa décision. Selon la juge de détermination de la peine, comme L présente un risque élevé de récidive sexuelle et un risque modéré à élevé de récidive violente, la seule façon de protéger la société était de privilégier l'objectif d'isolement. Elle a souligné que, bien que L n'ait pas commis d'infraction substantielle, son manquement était grave. Toutefois, en l'espèce, L a été privé d'une possibilité réaliste de réadaptation à cause d'une « erreur administrative ». La juge de détermination de la peine ne semble pas avoir pris

house, which apparently tolerates serious drug abusers and does not provide programs for Aboriginal offenders. This failure meant that L's moral blameworthiness was not properly assessed.

en considération le fait que c'est cette erreur qui était à l'origine du transfert de L à une maison de transition qui tolère apparemment les grands toxicomanes et qui n'offre pas de programmes pour les délinquants autochtones. La culpabilité morale de L n'a donc pas été évaluée correctement.

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By LeBel J.

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Jurisprudence

Citée par le juge LeBel

Arrêt appliqué : *R. c. Gladue*, [1999] 1 R.C.S. 688; **arrêts mentionnés :** *R. c. Wilmott* (1966), 58 D.L.R. (2d) 33; *R. c. Solowan*, 2008 CSC 62, [2008] 3 R.C.S. 309; *R. c. Nasogaluak*, 2010 CSC 6, [2010] 1 R.C.S. 206; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500; *R. c. Lyons*, [1987] 2 R.C.S. 309; *R. c. L.M.*, 2008 CSC 31, [2008] 2 R.C.S. 163; *R. c. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20; *R. c. Nelson*, [2007] O.J. No. 5704 (QL); *R. c. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228; *R. c. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190; *R. c. Wells*, 2000 CSC 10, [2000] 1 R.C.S. 207; *R. c. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120; *R. c. Skani*, 2002 ABQB 1097, 331 A.R. 50; *R. c. Poucette*, 1999 ABCA 305, 250 A.R. 55; *R. c. Gladue*, 1999 ABCA 279, 46 M.V.R. (3d) 183; *R. c. Andres*, 2002 SKCA 98, 223 Sask. R. 121; *R. c. Collins*, 2011 ONCA 182, 277 O.A.C. 88; *R. c. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245; *R. c. Carrière* (2002), 164 C.C.C. (3d) 569; *R. c. Kakekagamick* (2006), 214 O.A.C. 127; *R. c. Jensen* (2005), 196 O.A.C. 119; *R. c. Abraham*, 2000 ABCA 159, 261 A.R. 192.

By Rothstein J. (dissenting in part)

R. v. W. (H.P.), 2003 ABCA 131, 18 Alta. L.R. (4th) 20; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

Citée par le juge Rothstein (dissident en partie)

R. c. W. (H.P.), 2003 ABCA 131, 18 Alta. L.R. (4th) 20; *R. c. Gladue*, [1999] 1 R.C.S. 688; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500; *R. c. Nasogaluak*, 2010 CSC 6, [2010] 1 R.C.S. 206.

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Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof, S.C. 1995, c. 22, s. 718.
Canadian Charter of Rights and Freedoms, ss. 7, 12.
Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 3, 4, 100, 101, 134.1, 134.2, 135.1(1).
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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Sharpe and Cronk JJ.A.), 2009 ONCA 892, 99 O.R. (3d) 419, 264 O.A.C. 392, [2009] O.J. No. 5402 (QL), 2009 CarswellOnt 7783, affirming a sentence imposed by Megginson J., [2009] O.J. No. 6413 (QL), 2009 CarswellOnt 7864. Appeal allowed, Rothstein J. dissenting.

APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Chiasson and Bennett JJ.A.), 2011 BCCA 101, 302 B.C.A.C. 93, 511 W.A.C. 93, 271 C.C.C. (3d) 90, [2011] 2 C.N.L.R. 277, [2011] B.C.J. No. 366 (QL), 2011 CarswellBC 428, varying a sentence imposed by Bagnall Prov. Ct. J., 2010 BCPC 410 (CanLII), [2010] B.C.J. No. 2824 (QL), 2010 CarswellBC 3822. Appeal dismissed.

Fergus J. (Chip) O'Connor, for the appellant Manasie Ipeelee.

Gillian Roberts, for the respondent Her Majesty The Queen.

Susanne Boucher and *François Lacasse*, for the intervener the Director of Public Prosecutions.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Laskin, Sharpe et Cronk), 2009 ONCA 892, 99 O.R. (3d) 419, 264 O.A.C. 392, [2009] O.J. No. 5402 (QL), 2009 CarswellOnt 7783, qui a confirmé la peine infligée par le juge Megginson, [2009] O.J. No. 6413 (QL), 2009 CarswellOnt 7864. Pourvoi accueilli, le juge Rothstein est dissident.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Levine, Chiasson et Bennett), 2011 BCCA 101, 302 B.C.A.C. 93, 511 W.A.C. 93, 271 C.C.C. (3d) 90, [2011] 2 C.N.L.R. 277, [2011] B.C.J. No. 366 (QL), 2011 CarswellBC 428, qui a modifié la peine infligée par la juge Bagnall, 2010 BCPC 410 (CanLII), [2010] B.C.J. No. 2824 (QL), 2010 CarswellBC 3822. Pourvoi rejeté.

Fergus J. (Chip) O'Connor, pour l'appelant Manasie Ipeelee.

Gillian Roberts, pour l'intimée Sa Majesté la Reine.

Susanne Boucher et *François Lacasse*, pour l'intervenant le directeur des poursuites pénales.

Jonathan Rudin and *Amanda Driscoll*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Mary T. Ainslie, for the appellant Her Majesty The Queen.

Hovan M. Patey, *Lawrence D. Myers*, *Q.C.*, and *Kristy L. Neurauter*, for the respondent Frank Ralph Ladue.

Kelly Doctor, for the intervener the British Columbia Civil Liberties Association.

Written submissions only by *Clayton C. Ruby*, *Nader R. Hasan* and *Gerald J. Chan*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ. was delivered by

LeBel J. —

I. Introduction

[1] These two appeals raise the issue of the principles governing the sentencing of Aboriginal offenders for breaches of long-term supervision orders ("LTSOs"). Both appeals concern Aboriginal offenders with long criminal records. They provide an opportunity to revisit and reaffirm the judgment of this Court in *R. v. Gladue*, [1999] 1 S.C.R. 688. I propose to allow the offender's appeal in *Ipeelee* and to dismiss the Crown's appeal in *Ladue*.

II. Manasie Ipeelee

A. *Background and Criminal History*

[2] Mr. Manasie Ipeelee is an Inuk man who was born and raised in Iqaluit, Nunavut. His life story is far removed from the experience of most Canadians. His mother was an alcoholic. She froze to death when Manasie Ipeelee was five years

Jonathan Rudin et *Amanda Driscoll*, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

Mary T. Ainslie, pour l'appelante Sa Majesté la Reine.

Hovan M. Patey, *Lawrence D. Myers*, *c.r.*, et *Kristy L. Neurauter*, pour l'intimé Frank Ralph Ladue.

Kelly Doctor, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Argumentation écrite seulement par *Clayton C. Ruby*, *Nader R. Hasan* et *Gerald J. Chan*, pour l'intervenante l'Association canadienne des libertés civiles.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Fish et Abella rendu par

Le juge LeBel —

I. Introduction

[1] Les deux pourvois font intervenir les principes régissant la détermination de la peine à infliger à des délinquants autochtones pour défaut de se conformer à une ordonnance de surveillance de longue durée (« OSLD »). Les deux affaires mettent en cause des délinquants autochtones au casier judiciaire chargé. Elles donnent à la Cour l'occasion de réexaminer et de confirmer son arrêt *R. c. Gladue*, [1999] 1 R.C.S. 688. Je propose d'accueillir le pourvoi du délinquant dans *Ipeelee* et de rejeter celui du ministère public dans *Ladue*.

II. Manasie Ipeelee

A. *Histoire personnelle et antécédents criminels*

[2] Manasie Ipeelee est un Inuit qui est né et a grandi à Iqaluit, au Nunavut. Son vécu n'a rien à voir avec celui de la plupart des Canadiens. Sa mère était alcoolique. Elle est morte de froid lorsque M. Ipeelee avait cinq ans. Il a été élevé par ses

old. He was raised by his maternal grandmother and grandfather, both of whom are now deceased. Mr. Ipeelee began consuming alcohol when he was 11 years old and quickly developed a serious alcohol addiction. He dropped out of school shortly thereafter. His involvement with the criminal justice system began in 1985, when he was only 12 years old.

[3] Mr. Ipeelee is presently 39 years old. He has spent a significant proportion of his life in custody or under some form of community supervision. His youth record contains approximately three dozen convictions. The majority of those offences were property-related, including breaking and entering, theft, and taking a vehicle without consent (joyriding). There were also convictions for failure to comply with an undertaking, breach of probation, and being unlawfully at large. Mr. Ipeelee's adult record contains another 24 convictions, many of which are for similar types of offences. He has also committed violent crimes. His record includes two convictions for assault causing bodily harm and one conviction each for aggravated assault, sexual assault, and sexual assault causing bodily harm. I will describe these offences in greater detail, as they provided the basis for his eventual designation as a long-term offender.

[4] In December 1992, Mr. Ipeelee pleaded guilty to assault causing bodily harm. He and a friend assaulted a man who was refusing them entry to his home. Mr. Ipeelee was intoxicated at the time. During the fight, he hit the victim over the head with an ashtray and with a chair. He was sentenced to 21 days' imprisonment and one year's probation.

[5] In December 1993, Mr. Ipeelee again pleaded guilty to assault causing bodily harm. The incident took place outside a bar in Iqaluit and both Mr. Ipeelee and the victim were intoxicated. Witnesses saw Mr. Ipeelee kicking the victim in the face

grands-parents maternels, qui sont maintenant tous deux décédés. M. Ipeelee a commencé à consommer de l'alcool à l'âge de 11 ans et a rapidement développé une grave dépendance à l'alcool. Il a quitté l'école peu de temps après. Ses démêlés avec le système de justice pénale ont commencé en 1985, alors qu'il n'avait que 12 ans.

[3] M. Ipeelee est actuellement âgé de 39 ans. Il a été détenu ou a fait l'objet d'une forme quelconque de surveillance au sein de la collectivité durant une grande partie de sa vie. Son dossier de jeune contrevenant compte environ 36 condamnations. Il s'agissait, dans la majorité des cas, d'infractions relatives à des biens, notamment d'entrée par effraction, de vol et de prise d'un véhicule sans le consentement du propriétaire. Il a aussi été reconnu coupable de ne pas avoir respecté un engagement, de ne pas s'être conformé à une ordonnance de probation et de s'être trouvé illégalement en liberté. Son dossier de criminel d'adulte compte 24 autres déclarations de culpabilité, dont une bonne partie portent sur des infractions semblables. Toutefois, il a également commis des crimes violents. Son dossier inclut notamment deux déclarations de culpabilité pour voies de fait causant des lésions corporelles et une déclaration de culpabilité pour chacune des infractions suivantes : voies de fait graves, agression sexuelle et agression sexuelle causant des lésions corporelles. Je décrirai plus en détail ces infractions, car elles constituent le fondement de sa désignation subséquente à titre de délinquant à contrôler.

[4] En décembre 1992, M. Ipeelee a reconnu sa culpabilité à une accusation de voies de fait causant des lésions corporelles. Un ami et lui ont agressé un homme qui refusait de les laisser entrer dans sa demeure. M. Ipeelee était alors en état d'ébriété. Durant la bagarre, il a frappé la victime à la tête avec un cendrier et une chaise. Il a été condamné à 21 jours d'emprisonnement et à un an de probation.

[5] En décembre 1993, M. Ipeelee s'est de nouveau reconnu coupable d'une accusation de voies de fait causant des lésions corporelles. L'incident était survenu à l'extérieur d'un bar d'Iqaluit. M. Ipeelee et la victime étaient en état d'ébriété. Des témoins

at least 10 times, and the assault continued after the victim lost consciousness. The victim was hospitalized for his injuries. At the time of the offence, Mr. Ipeelee was on probation. He received a sentence of five months' imprisonment.

[6] In November 1994, Mr. Ipeelee pleaded guilty to aggravated assault. The incident involved another altercation outside the same bar in Iqaluit. Once more, both Mr. Ipeelee and the victim were intoxicated. During the fight, Mr. Ipeelee hit and kicked the victim. After the victim lost consciousness, Mr. Ipeelee continued to hit him and stomp on his face. The victim suffered a broken jaw and had to be sent to Montréal for treatment. Mr. Ipeelee was once again on probation at the time of the offence. He was sentenced to 14 months' imprisonment.

[7] Mr. Ipeelee received an early release from that sentence in the fall of 1995. Approximately three weeks later, while still technically serving his sentence, he committed a sexual assault. The female victim had been drinking in her apartment in Iqaluit with Mr. Ipeelee and others, and was passed out from intoxication. Witnesses observed Mr. Ipeelee and another man carrying the victim into her room. Mr. Ipeelee was later seen having sex with the unconscious woman on her bed. Mr. Ipeelee was sentenced to two years' imprisonment. He remained in custody until his warrant expiry date in February 1999, as Corrections Canada officials deemed him to be a high risk to reoffend.

[8] After serving his sentence, Mr. Ipeelee moved to Yellowknife. He began drinking within one half-hour of his arrival and was arrested for public intoxication that evening, and again 24 hours later. In the six months leading up to his next conviction, he was arrested at least nine more times for public intoxication.

l'ont vu donner au moins 10 coups de pied au visage à un homme et poursuivre l'agression après que la victime eut perdu connaissance. La victime a été hospitalisée en raison de ses blessures. M. Ipeelee, qui était alors en probation, a été condamné à cinq mois d'emprisonnement.

[6] En novembre 1994, M. Ipeelee a plaidé coupable à une accusation de voies de fait graves, à la suite d'une autre altercation avec un autre homme survenue à l'extérieur du même bar d'Iqaluit. Encore une fois, M. Ipeelee et sa victime étaient ivres. Durant la bagarre, M. Ipeelee a frappé la victime et lui a asséné des coups de pied. M. Ipeelee a continué de la frapper et de lui marteler le visage même après qu'elle ait perdu connaissance. La victime a subi une fracture de la mâchoire et a dû être transportée à Montréal pour y recevoir des soins. M. Ipeelee, qui se trouvait à nouveau en probation au moment de l'infraction, a été condamné à 14 mois d'emprisonnement.

[7] M. Ipeelee a bénéficié d'une mise en liberté anticipée à l'automne 1995. Environ trois semaines plus tard, alors qu'il purgeait toujours sa peine, en principe, il a commis une agression sexuelle. La victime était une femme qui avait bu dans son appartement d'Iqaluit en compagnie de M. Ipeelee et d'autres personnes, et qui était devenue inconsciente sous l'effet de l'alcool. Des témoins ont vu M. Ipeelee et un autre homme porter la victime dans sa chambre. Plus tard, des témoins ont vu M. Ipeelee en train d'avoir des rapports sexuels avec la femme inconsciente sur le lit de celle-ci. Il a été condamné à deux ans d'emprisonnement. Il est resté en détention jusqu'à la date d'expiration de son mandat de dépôt, en février 1999, parce que les autorités correctionnelles estimaient qu'il risquait fortement de récidiver.

[8] Après avoir purgé sa peine, M. Ipeelee a déménagé à Yellowknife. Il a recommencé à boire moins d'une demi-heure après son arrivée et il a été arrêté le soir même pour s'être trouvé en état d'ébriété en public. Vingt-quatre heures plus tard, il était arrêté de nouveau pour ivresse publique. Au cours des six mois précédant sa déclaration de culpabilité suivante, il a été arrêté au moins neuf autres fois pour s'être trouvé en état d'ébriété en public.

[9] On August 21, 1999, Mr. Ipeelee committed another sexual assault, this one causing bodily harm, which led to his designation as a long-term offender. Mr. Ipeelee, while intoxicated, entered an abandoned van that homeless persons frequented. Inside, a 50-year-old woman was sleeping. She awoke to find Mr. Ipeelee removing her pants. She struggled and Mr. Ipeelee began punching her in the face. When she called out for help, he told her to shut up or he would kill her. He then sexually assaulted her. The victim was finally able to escape when Mr. Ipeelee fell asleep. He was arrested and the victim was taken to the hospital to be treated for her injuries.

[10] At the sentencing hearing for this offence, Richard J. of the Northwest Territories Supreme Court noted that Mr. Ipeelee's criminal record "shows a consistent pattern of Mr. Ipeelee administering gratuitous violence against vulnerable, helpless people while he is in a state of intoxication" (*R. v. Ipeelee*, 2001 NWTSC 33, [2001] N.W.T.J. No. 30 (QL), at para. 34). The expert evidence produced at the sentencing hearing indicated that Mr. Ipeelee did not suffer from any major mental illness and had average to above average intelligence. However, he was diagnosed as having both an antisocial personality disorder and a severe alcohol abuse disorder. The expert evidence also indicated that Mr. Ipeelee presented a high-moderate to high risk for violent reoffence, and a high-moderate risk for sexual reoffence. After evaluating all of the evidence, Richard J. concluded that there was a substantial risk that Mr. Ipeelee would reoffend and designated him a long-term offender under s. 753.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. Mr. Ipeelee was sentenced to six years' imprisonment for the sexual assault, to be followed by a 10-year LTSO.

B. *The Current Offence*

[11] Mr. Ipeelee was detained until his warrant expiry date for the 1999 sexual assault causing

[9] M. Ipeelee a commis une nouvelle agression sexuelle, ayant causé cette fois des lésions corporelles, le 21 août 1999. Cette agression se situe à l'origine de sa désignation à titre de délinquant à contrôler. Alors qu'il était ivre, M. Ipeelee s'est introduit dans une fourgonnette abandonnée que des sans-abri fréquentaient. Une femme de 50 ans dormait à l'intérieur. Elle s'est réveillée et a constaté que M. Ipeelee lui enlevait son pantalon. Elle s'est débattue. M. Ipeelee a commencé à lui donner des coups de poing au visage. Quand elle a appelé à l'aide, il lui a ordonné de se taire, sinon il la tuerait. Il l'a ensuite agressée sexuellement. La victime a finalement réussi à s'échapper lorsque M. Ipeelee s'est endormi. Il a été arrêté et on a amené la victime à l'hôpital pour y faire soigner ses blessures.

[10] À l'audience de détermination de la peine relative à cette infraction, le juge Richard, de la Cour suprême des Territoires du Nord-Ouest, a souligné que le casier judiciaire de M. Ipeelee [TRADUCTION] « démontre une tendance constante chez M. Ipeelee à commettre des actes de violence gratuite à l'endroit de personnes vulnérables et sans défense lorsqu'il est en état d'ivresse » (*R. c. Ipeelee*, 2001 NWTSC 33, [2001] N.W.T.J. No. 30 (QL), par. 34). Selon la preuve d'expert produite à cette audience, M. Ipeelee ne souffrait d'aucune maladie mentale grave et était doté d'une intelligence moyenne ou supérieure à la moyenne. On a cependant diagnostiqué chez lui à la fois un trouble de la personnalité antisociale et un grave problème d'alcoolisme. Toujours selon la preuve d'expert, M. Ipeelee présentait un risque modéré-élevé à élevé de récidive violente et un risque modéré-élevé de récidive sexuelle. Après avoir évalué toute la preuve, le juge Richard a conclu que M. Ipeelee présentait un risque important de récidive et il l'a déclaré délinquant à contrôler en vertu du par. 753.1(1) du *Code criminel*, L.R.C. 1985, ch. C-46. Pour cette agression sexuelle, M. Ipeelee a été condamné à une peine de six ans d'emprisonnement, suivis d'une surveillance de longue durée pour une période de 10 ans.

B. *L'infraction en cause dans le pourvoi*

[11] M. Ipeelee a été incarcéré jusqu'à l'expiration de son mandat de dépôt pour l'agression sexuelle

bodily harm. His LTSO came into effect on March 14, 2007, when he was released from Kingston Penitentiary to the Portsmouth Community Correctional Centre in Kingston. One of the conditions of Mr. Ipeelee's LTSO is that he abstain from using alcohol.

[12] Mr. Ipeelee's LTSO was suspended on four occasions: from June 13 to July 5, 2007, for deteriorating performance and behaviour, and attitude problems; from July 23 to September 14, 2007, for sleeping in the living room and the kitchen, contrary to house rules; from September 24 to October 24, 2007, for being agitated and noncompliant, and for refusing urinalysis; and from October 25, 2007, to May 20, 2008, as a result of a fraud charge being laid against him (the charge was subsequently withdrawn). Mr. Ipeelee served those periods of suspension at the Kingston Penitentiary.

[13] On August 20, 2008, the police found Mr. Ipeelee riding his bicycle erratically in downtown Kingston. He was obviously intoxicated and had two bottles of alcohol in his possession. He was charged with breaching a condition of his LTSO, contrary to s. 753.3(1) of the *Criminal Code*. Mr. Ipeelee pleaded guilty to that offence on November 14, 2008.

C. *Judicial History*

(1) Ontario Court of Justice, [2009] O.J. No. 6413 (QL)

[14] On February 24, 2009, Megginson J. of the Ontario Court of Justice sentenced Mr. Ipeelee to three years' imprisonment, less six months of presentence custody at a 1:1 credit rate. He emphasized the serious nature of the offence, stating:

> On its facts, this was a serious and not at all trivial breach of a very fundamental condition of the offender's [LTSO]. It is a very central and essential condition, because alcohol abuse was involved, not

causant des lésions corporelles commise en 1999. Son OSLD a pris effet le 14 mars 2007, quand il a été transféré du Pénitencier de Kingston au Centre correctionnel communautaire Portsmouth, situé lui aussi à Kingston. Entre autres conditions, l'OSLD visant M. Ipeelee lui interdit de consommer de l'alcool.

[12] L'OSLD visant M. Ipeelee a été suspendue à quatre reprises : du 13 juin au 5 juillet 2007 pour détérioration de son rendement et de son comportement et pour une attitude problématique; du 23 juillet au 14 septembre 2007 pour avoir dormi dans le salon et la cuisine en contravention des règles de la maison; du 24 septembre au 24 octobre 2007 pour avoir été agité et indiscipliné et pour avoir refusé de se soumettre à une analyse d'urine; et du 25 octobre 2007 au 20 mai 2008, par suite du dépôt d'une accusation de fraude contre lui (l'accusation a plus tard été retirée). Pendant ces suspensions, M. Ipeelee a purgé sa peine au Pénitencier de Kingston.

[13] Le 20 août 2008, la police a vu M. Ipeelee conduire sa bicyclette de façon irrégulière au centre-ville de Kingston. Il était manifestement ivre et avait deux bouteilles d'alcool en sa possession. Il a été accusé de défaut de se conformer à une condition de l'OSLD à laquelle il était soumis, en violation du par. 753.3(1) du *Code criminel*. M. Ipeelee s'est reconnu coupable de cette infraction le 14 novembre 2008.

C. *Historique judiciaire*

(1) Cour de justice de l'Ontario, [2009] O.J. No. 6413 (QL)

[14] Le 24 février 2009, le juge Megginson, de la Cour de justice de l'Ontario, a condamné M. Ipeelee à une peine d'emprisonnement de trois ans, à laquelle il a retranché six mois pour sa période d'incarcération présentencielle, selon un ratio de 1:1. Il a insisté ainsi sur la gravité de l'infraction :

> [TRADUCTION] Au vu des faits, il s'agit d'un manquement grave, et absolument pas d'un manquement anodin, à une condition très fondamentale de l'[OSLD] visant le délinquant. Il s'agit d'une condition primordiale

only in the "predicate" offence, but also in most of the offences on the offender's criminal record. On his history, Mr. Ipeelee becomes violent when he abuses alcohol, and he was assessed as posing a significant risk of re-offending sexually. Defence counsel argued that the facts of the present breach disclose no movement toward committing another sexual offence, but I think that is beside the point. [para. 10]

[15] Megginson J. held that, when sentencing an offender for breach of an LTSO, the paramount consideration is the protection of the public and rehabilitation plays only a small role. With that in mind, he addressed the requirement imposed by s. 718.2(*e*) of the *Criminal Code* that he consider Mr. Ipeelee's unique circumstances as an Aboriginal offender. He began by noting that Mr. Ipeelee's Aboriginal status had already been considered during sentencing for the 1999 offence giving rise to the LTSO. He went on to conclude that, when protection of the public is the paramount concern, an offender's Aboriginal status is of "diminished importance" (para. 15).

(2) Ontario Court of Appeal, 2009 ONCA 892, 99 O.R. (3d) 419

[16] Mr. Ipeelee appealed his sentence on the grounds that it was demonstrably unfit, and that the sentencing judge did not give adequate consideration to his circumstances as an Aboriginal offender. The Court of Appeal dismissed the appeal.

[17] Sharpe J.A., writing for the court, was not convinced that the sentence was demonstrably unfit. He agreed with the sentencing judge's characterization of the offence as a serious breach of a vital condition of the LTSO. Sharpe J.A. found that, despite the sentencing judge's comments, Mr. Ipeelee's Aboriginal status had not factored into the sentencing decision. He did not, however, think this was an error:

et essentielle parce que la consommation excessive d'alcool a joué un rôle dans la perpétration non seulement de l'infraction « sous-jacente », mais aussi de la plupart des infractions figurant au casier judiciaire du délinquant. Selon ses antécédents, M. Ipeelee devient violent lorsqu'il abuse de l'alcool, et on a jugé qu'il présentait un risque important de récidive sexuelle. L'avocat de la défense a soutenu que les faits relatifs au manquement en cause maintenant n'indiquent aucunement qu'il s'apprêtait à commettre une autre infraction de nature sexuelle, mais cela est, selon moi, hors de propos. [par. 10]

[15] Le juge Megginson a affirmé que, lors de la détermination de la peine pour défaut de se conformer à une OSLD, la protection du public constitue le critère déterminant et la réadaptation ne joue qu'un rôle mineur. En gardant ce principe à l'esprit, il a examiné l'obligation que lui imposait l'al. 718.2*e*) du *Code criminel* de prendre en considération la situation propre à M. Ipeelee en tant que délinquant autochtone. Il a d'abord souligné que le statut d'Autochtone de M. Ipeelee avait déjà été pris en considération dans la détermination de sa peine pour l'infraction commise en 1999 qui était à l'origine de l'OSLD. Il a ensuite conclu que, lorsque la protection du public est le critère déterminant, le statut d'Autochtone du délinquant revêt [TRADUCTION] « moins d'importance » (par. 15).

(2) Cour d'appel de l'Ontario, 2009 ONCA 892, 99 O.R. (3d) 419

[16] M. Ipeelee a fait appel de sa peine. Selon ses moyens d'appel, cette peine était manifestement inappropriée et le juge qui la lui avait imposée n'avait pas suffisamment tenu compte de sa situation de délinquant autochtone. La Cour d'appel a rejeté le pourvoi.

[17] S'exprimant au nom de la Cour d'appel, le juge Sharpe n'était pas convaincu du caractère manifestement inapproprié de la peine. Il a convenu avec le juge qui l'avait imposée que l'infraction constituait un manquement grave à une condition essentielle de l'OSLD. Le juge Sharpe a conclu que, malgré les commentaires du juge qui avait prononcé la sentence, le statut d'Autochtone de M. Ipeelee n'avait pas été pris en compte dans la détermination de sa peine. Cependant, à son avis, cette omission ne représentait pas une erreur :

It is not at all clear to me, however, that in the circumstances of this case, consideration of his aboriginal status should lead to a reduction in his sentence for breach of the long-term offender condition. The appellant's commission of violent offences and the risk he poses for re-offending when under the influence of alcohol make the principles of denunciation, deterrence and protection of the public paramount. This is one of those cases where "the appropriate sentence will . . . not differ as between aboriginal and non-aboriginal offenders": *R. v. Carrière*, [2002] O.J. No. 1429, 164 C.C.C. (3d) 569 (C.A.), at para. 17. As the appellant has been declared a long-term offender, "consideration of restorative justice and other features of aboriginal offender sentencing . . . play little or no role": *R. v. W. (H.P.)*, [2003] A.J. No. 479, 327 A.R. 170 (C.A.), at para. 50. [para. 13]

[18] Sharpe J.A. did concede that Mr. Ipeelee's Aboriginal background and the disadvantages he had suffered provided some insight into his repeated involvement with the criminal justice system. He concluded, however, that these considerations should not affect the sentence. He ended his reasons with a plea to correctional authorities to make every effort to provide Mr. Ipeelee with appropriate Aboriginal-oriented assistance.

III. Frank Ralph Ladue

A. *Background and Criminal History*

[19] Mr. Frank Ralph Ladue, now 49 years old, is a member of the Ross River Dena Council Band, a small community of approximately 500 people located 400 kilometres northeast of Whitehorse in the Yukon Territory. Mr. Ladue's parents had severe alcohol abuse problems, so he was raised by his grandparents. His mother and father both died when Mr. Ladue was still very young, and records indicate that his mother may have been murdered. When Mr. Ladue was five years old, he was removed from his community and sent to residential school, where he alleges he suffered serious physical, sexual, emotional and spiritual abuse.

[20] When Mr. Ladue was nine years old, he returned to Ross River to resume living with his grandparents. The effects of his residential school

[TRADUCTION] Cependant, il n'est pas du tout clair pour moi, dans les circonstances de l'espèce, que la prise en compte de son statut d'Autochtone devrait entraîner une réduction de sa peine pour manquement à la condition qui lui a été imposée en sa qualité de délinquant à contrôler. Compte tenu des infractions avec violence commises par l'appelant et du risque qu'il récidive sous l'effet de l'alcool, les principes de dénonciation, de dissuasion et de protection du public sont primordiaux. C'est l'un des cas où « la peine appropriée ne différera pas [. . .] selon qu'il s'agit d'un délinquant autochtone ou d'un délinquant non autochtone » : *R. c. Carrière*, [2002] O.J. No. 1429, 164 C.C.C. (3d) 569 (C.A.), par. 17. Comme l'appelant a été déclaré délinquant à contrôler, « la justice corrective et les autres caractéristiques propres à la détermination de la peine d'un délinquant autochtone n'entre[nt] presque pas, sinon pas du tout en ligne de compte » : *R. c. W. (H.P.)*, [2003] A.J. No. 479, 327 A.R. 170 (C.A.), par. 50. [par. 13]

[18] Le juge Sharpe a reconnu que les origines autochtones de M. Ipeelee et sa situation défavorisée expliquaient en partie ses démêlés répétés avec le système de justice pénale. Il a néanmoins conclu que ces considérations ne pouvaient pas influer sur la peine. Il a terminé ses motifs en demandant aux autorités correctionnelles de prendre toutes les mesures possibles pour que M. Ipeelee reçoive une aide adéquate en tant qu'Autochtone.

III. Frank Ralph Ladue

A. *Histoire personnelle et antécédents criminels*

[19] Maintenant âgé de 49 ans, Frank Ralph Ladue est membre du Conseil de la bande dénée de Ross River, une petite collectivité d'environ 500 habitants située à 400 kilomètres au nord-est de Whitehorse, dans le territoire du Yukon. Comme les parents de M. Ladue avaient un grave problème d'alcool, il a été élevé par ses grands-parents. Son père et sa mère sont décédés quand il était encore très jeune et, selon les dossiers, sa mère a peut-être été assassinée. À l'âge de cinq ans, M. Ladue a été retiré de sa collectivité et envoyé au pensionnat, où il dit avoir subi une grave violence physique, sexuelle, psychologique et spirituelle.

[20] À l'âge de neuf ans, M. Ladue est retourné vivre chez ses grands-parents à Ross River. Les répercussions de son séjour au pensionnat ne

experience were readily apparent. He could no longer speak his traditional language, having been forbidden to do so in residential school. Unable to communicate his painful experiences to his family, he began drinking and acting out. Before long, he was living with foster families and spending time in juvenile detention. Mr. Ladue continued to drink heavily throughout his life (with the exception of a six-year period of sobriety in the 1990s which coincided with a period free from criminal convictions). Mr. Ladue also began using heroin, cocaine and morphine while in a federal penitentiary.

[21] Mr. Ladue's life experiences may seem foreign to most Canadians, but they are all too common in Ross River. The community suffered a number of abuses in the 1940s when the United States Army was building a pipeline through the region. There were reports of community members being assaulted or raped by members of the army. The community was further traumatized through the residential school experience. The effects of that collective experience continue to be evident in the high rates of alcohol abuse and violence in the community.

[22] The first offence on Mr. Ladue's criminal record occurred in 1978 when he was 16 years old. His record lists over 40 convictions since that time, approximately 10 of which were as a young offender. Some of the offences are property-related, including taking a vehicle without consent, mischief, breaking and entering, and theft. Mr. Ladue also has a series of alcohol-related offences and convictions for failure to comply with various court orders. His violent offences include robbery convictions in 1978 and 1980, and common assault convictions in 1979 and 1982. Mr. Ladue has also been convicted of a number of sexual assaults. These sexual assaults will be described in some detail, as they ultimately led to his designation as a long-term offender.

faisaient aucun doute. Il ne pouvait plus parler sa langue traditionnelle, car on lui avait interdit de le faire au pensionnat. Incapable de relater ses expériences pénibles à sa famille, il a commencé à boire et à avoir des problèmes de comportement. Il s'est vite retrouvé dans des familles d'accueil et a fait des séjours en établissement pour jeunes contrevenants. M. Ladue a continué de boire beaucoup toute sa vie (sauf durant six ans de sobriété au cours des années 1990, période où il n'a été déclaré coupable d'aucune infraction criminelle). M. Ladue a aussi commencé à consommer de l'héroïne, de la cocaïne et de la morphine durant son incarcération dans un pénitencier fédéral.

[21] L'histoire de M. Ladue peut sembler inusitée à la plupart des Canadiens, mais elle n'est que trop banale à Ross River. Plusieurs cas de violence sont survenus dans la collectivité pendant les années 1940, à l'époque où l'armée américaine construisait un pipeline dans la région. On a signalé alors des agressions ou des viols commis par des militaires contre des membres de la collectivité. L'expérience des pensionnats s'est ajoutée aux autres traumatismes subis par la collectivité. Les taux élevés d'alcoolisme et de violence observés dans la communauté témoignent des conséquences de cette expérience collective.

[22] M. Ladue a commis la première infraction figurant à son casier judiciaire en 1978, à l'âge de 16 ans. Depuis, il a accumulé plus de 40 déclarations de culpabilité, dont une dizaine à titre de jeune contrevenant. Dans certains cas, il s'agissait d'infractions concernant des biens qui comprenaient, par exemple, prise d'un véhicule sans le consentement du propriétaire, méfait, entrée par effraction ou vol. M. Ladue a également commis plusieurs infractions liées à l'alcool et a été reconnu coupable plusieurs fois de manquements à diverses ordonnances judiciaires. Ses condamnations pour des infractions commises avec violence portaient notamment sur des accusations de vol qualifié, en 1978 et en 1980, et de voies de fait simples, en 1979 et en 1982. M. Ladue a aussi été condamné à plusieurs reprises pour des agressions sexuelles que je décrirai plus en détail, parce qu'elles ont finalement mené à sa désignation en tant que délinquant à contrôler.

[23] In 1987, Mr. Ladue entered a woman's bedroom following a party. He sexually assaulted the victim while she was either sleeping or passed out from intoxication. In 1997, Mr. Ladue sexually assaulted another woman who was passed out from intoxication. When she awoke, the bottom half of her clothing was removed and Mr. Ladue was sexually assaulting her. Another incident took place in 1998, although it did not lead to a conviction for sexual assault. Mr. Ladue entered the home of a woman who was sleeping and placed a sleeping bag over her head and shoulders. He was interrupted by the woman's daughter and he fled the residence. Mr. Ladue's sentences for these convictions ranged from four months' imprisonment (for the 1998 offence) to 30 months' imprisonment.

[24] Mr. Ladue committed the offence giving rise to his LTSO on October 6, 2002. On that date, he entered a dwelling house without permission from the occupants. The 22-year-old victim had passed out from alcohol consumption and was lying in the living room. She awoke to find Mr. Ladue touching her breasts over her clothing and attempting to unbutton her pants. She was unable to resist due to her state of intoxication. Fortunately, other residents of the house were awakened by what was going on and Mr. Ladue fled from the home. Mr. Ladue was convicted of breaking and entering and sexual assault.

[25] At the sentencing hearing (2003 YKTC 100 (CanLII)), Judge Faulkner of the Yukon Territorial Court noted the similarity surrounding the circumstances of each sexual assault. The psychological assessment prepared for the court indicated that Mr. Ladue was incapable of refraining from the use of alcohol and was unable to control his sexual impulses. He was also diagnosed as a sexual sadist and as having an antisocial personality disorder. Faulkner Terr. Ct. J. nevertheless concluded that there was some prospect for eventual management in the community, given Mr. Ladue's lengthy period of successful sobriety in the 1990s, which coincided with a period free from criminal activity. Defence counsel conceded that

[23] D'abord, en 1987, M. Ladue est entré dans la chambre d'une femme à la suite d'une fête. Il l'a agressée sexuellement pendant qu'elle se trouvait endormie ou inconsciente en raison de sa consommation d'alcool. Plus tard, en 1997, M. Ladue a agressé une autre femme que l'alcool avait rendue inconsciente. Lorsqu'elle est revenue à elle, elle était dévêtue de la taille aux pieds et M. Ladue était en train de l'agresser sexuellement. Un autre incident, survenu en 1998, n'a pas entraîné de déclaration de culpabilité pour agression sexuelle. M. Ladue s'est introduit chez une femme qui dormait et lui a mis un sac de couchage sur la tête et les épaules. Il a été surpris par la fille de la femme et a pris la fuite. Ces infractions ont valu à M. Ladue des peines allant de quatre mois (pour l'infraction de 1998) à 30 mois d'emprisonnement.

[24] M. Ladue a commis l'infraction à l'origine de son OSLD le 6 octobre 2002. Ce jour-là, il a pénétré dans une maison d'habitation sans l'autorisation des occupants. La victime de 22 ans avait perdu connaissance sous l'effet de l'alcool et était étendue sur le plancher du salon. À son réveil, elle a constaté que M. Ladue lui touchait les seins par-dessus ses vêtements et essayait de déboutonner son pantalon. Elle était incapable de se défendre en raison de son état d'ébriété. Heureusement, d'autres résidants de la maison ont été réveillés par ce qui se passait et M. Ladue s'est enfui de la maison. Il a été reconnu coupable d'entrée par effraction et d'agression sexuelle.

[25] À l'audience de détermination de la peine (2003 YKTC 100 (CanLII)), le juge Faulkner de la Cour territoriale du Yukon a souligné la similitude des circonstances de chacune des agressions sexuelles. L'évaluation psychologique préparée à la demande de la cour concluait que M. Ladue ne pouvait ni s'empêcher de consommer de l'alcool ni maîtriser ses pulsions sexuelles. Le diagnostic établi conclut qu'il était aussi un sadique sexuel et qu'il souffrait d'un trouble de la personnalité antisociale. Le juge Faulkner a néanmoins reconnu la possibilité que le risque présenté par M. Ladue puisse être maîtrisé au sein de la collectivité, en raison de sa longue période de sobriété au cours des années 1990, durant laquelle il s'était abstenu

the requirements of s. 753.1 of the *Criminal Code* were met, and Mr. Ladue was designated as a long-term offender. Faulkner Terr. Ct. J. sentenced Mr. Ladue to three years' imprisonment for breaking and entering and committing sexual assault, after taking into account the 14 months he had spent in custody prior to sentencing. He also imposed a seven-year LTSO.

B. *The Current Offence*

[26] Mr. Ladue's LTSO began on December 1, 2006, when he was released from prison for the 2002 offence giving rise to the LTSO. The LTSO has been suspended on numerous occasions. In addition, Mr. Ladue's criminal record includes two previous convictions for breaching a condition of the LTSO. On June 5, 2007, he was convicted of two counts of breaching the condition in the LTSO that he abstain from intoxicants. He received concurrent six-month sentences of imprisonment with credit for four and a half months of pre-sentence custody. On June 19, 2008, he was convicted of breaching the same condition and was sentenced to one day of imprisonment after being credited for one year of pre-sentence custody.

[27] On August 12, 2009, Mr. Ladue was released from prison following a suspension of his LTSO. He was supposed to be released to Linkage House in Kamloops, British Columbia, where he anticipated receiving considerable culturally relevant support from an Aboriginal Elder. Instead, Mr. Ladue was arrested at the prison gate on an outstanding DNA warrant. The warrant had been ordered months earlier but, as a result of an administrative error by Crown officials, it was not executed during Mr. Ladue's period of detention. Furthermore, the warrant may have been superfluous as it appears Mr. Ladue had already provided his DNA under a previous warrant. Mr. Ladue was detained until the warrant was executed and, as a result of that delay, he lost his placement at Linkage House. Instead, he was released to Belkin House in downtown Vancouver, despite his concerns over the propriety

de toute activité criminelle. L'avocat de la défense a reconnu que les conditions énumérées à l'art. 753.1 du *Code criminel* étaient réunies, et M. Ladue a été déclaré délinquant à contrôler. Le juge Faulkner a condamné M. Ladue à trois ans d'emprisonnement pour l'entrée par effraction et l'agression sexuelle, compte tenu des 14 mois qu'il avait passés en détention présentencielle. Il lui a également imposé une OSLD d'une durée de sept ans.

B. *L'infraction en cause dans le pourvoi*

[26] L'OSLD visant M. Ladue a pris effet le 1er décembre 2006, lorsqu'il a été libéré après avoir purgé sa peine d'emprisonnement pour l'infraction de 2002 à l'origine de l'OSLD. L'OSLD a été suspendue à maintes reprises. De plus, il a été déclaré coupable de deux violations de l'OSLD. D'abord, le 5 juin 2007, il a été déclaré coupable de deux chefs de manquement à la condition de l'OSLD lui interdisant de consommer des substances intoxicantes. Il s'est vu infliger des peines concurrentes de six mois d'emprisonnement, desquelles ont été retranchés les quatre mois et demi mois qu'il avait passés en détention avant de recevoir sa sentence. Ensuite, le 19 juin 2008, il a été reconnu coupable d'un manquement à la même condition et il a été condamné à un jour d'emprisonnement compte tenu de sa détention présentencielle d'un an.

[27] Le 12 août 2009, M. Ladue a été libéré après une autre suspension de l'OSLD. À sa libération, il devait être envoyé à la Linkage House, à Kamloops, en Colombie-Britannique, où il s'attendait à recevoir un soutien considérable adapté à sa culture auprès d'un aîné autochtone. Il a plutôt été arrêté dès sa sortie de la prison en vertu d'un mandat d'analyse génétique non exécuté. Le mandat avait été délivré plusieurs mois auparavant, mais n'avait pas été exécuté au cours de la détention de M. Ladue à cause d'une erreur administrative commise par des représentants du ministère public. En outre, le mandat était peut-être inutile, car M. Ladue avait semble-t-il déjà fourni un échantillon d'ADN en exécution d'un mandat antérieur. M. Ladue a été détenu jusqu'à l'exécution du mandat et il a perdu sa place à la Linkage House en raison de ce délai. Il a été envoyé plutôt à la Belkin House, au

of the placement due to the accessibility of drugs both in the residence and in the neighbourhood. Once at Belkin House, Mr. Ladue began associating with another offender who was a known drug user. Mr. Ladue was asked to provide a urine sample on August 19. On August 24, he advised the staff that the urinalysis would come back positive for cocaine, which it did. Mr. Ladue provided a second urine sample on August 27, which also returned positive for cocaine. He was charged with breaching a condition of his LTSO, contrary to s. 753.3(1) of the *Criminal Code* and pleaded guilty to that offence on February 10, 2010.

C. *Judicial History*

(1) Provincial Court of British Columbia, 2010 BCPC 410 (CanLII)

[28] At the sentencing hearing, the Crown requested a sentence in the range of 18 months to two years. Bagnall Prov. Ct. J. concluded that this range was inadequate in the circumstances. She emphasized the serious nature of the offence:

> Once released from custody, even under close supervision, Mr. Ladue's pattern is to relapse very quickly back into drug or alcohol use. He cannot be managed, nor can he manage himself in the community at the present time. The harm that is likely for another member of the community, or members of the community, if Mr. Ladue consumes intoxicants is very serious. This can be seen from the history that I have detailed. [para. 31]

Bagnall Prov. Ct. J. therefore held that isolation was the most important sentencing objective in the circumstances and imposed a three-year term of imprisonment, less five months of pre-sentence custody at a 1.5:1 credit rate. Bagnall Prov. Ct. J. referred to the tragic aspects of Mr. Ladue's history, but apparently concluded that they should not impact on his sentence.

centre-ville de Vancouver, malgré ses réserves sur l'opportunité d'y être envoyé, à cause de la facilité de l'accès aux drogues à la fois dans la résidence et dans le quartier environnant. À la Belkin House, M. Ladue a commencé à fréquenter un autre délinquant connu pour consommer de la drogue. Le 19 août, on a demandé à M. Ladue de fournir un échantillon d'urine. Le 24 août, il a informé le personnel de la Belkin House que les résultats de l'analyse révéleraient la présence de cocaïne dans son urine, ce qui arriva. Il a fourni un deuxième échantillon d'urine le 27 août et les résultats de son analyse ont aussi révélé la présence de cocaïne. En conséquence, il a été accusé de manquement à une condition de l'OSLD rendue à son égard, en violation du par. 753.3(1) du *Code criminel*. Il a reconnu sa culpabilité à cette infraction le 10 février 2010.

C. *Historique judiciaire*

(1) Cour provinciale de la Colombie-Britannique, 2010 BCPC 410 (CanLII)

[28] À l'audience de détermination de la peine, le ministère public a demandé une peine de 18 mois à deux ans d'emprisonnement. La juge Bagnall de la Cour provinciale a estimé que cette fourchette était inappropriée dans les circonstances. Elle a insisté en ces termes sur la gravité de l'infraction :

> [TRADUCTION] Une fois sorti de prison, M. Ladue a l'habitude de se remettre très rapidement à consommer de la drogue ou de l'alcool, même s'il fait l'objet d'une étroite surveillance. Le risque qu'il présente ne peut pas être maîtrisé, et il n'arrive pas non plus pour l'instant à se maîtriser au sein de la collectivité. Le danger que M. Ladue représente pour un autre membre ou l'ensemble de la collectivité s'il consomme des substances intoxicantes est très grave. C'est ce qui ressort des antécédents que j'ai exposés en détail. [par. 31]

La juge Bagnall a donc conclu que l'isolement était le plus important objectif de la détermination de la peine dans les circonstances et a condamné M. Ladue à trois ans d'emprisonnement, dont elle a retranché 1,5 jour pour chaque jour de sa détention présentencielle qui avait duré cinq mois. La juge Bagnall a mentionné les aspects tragiques de la vie de M. Ladue, mais elle a apparemment décidé qu'ils ne devaient avoir aucun effet sur la peine à lui infliger.

(2) Court of Appeal for British Columbia, 2011 BCCA 101, 302 B.C.A.C. 93

[29] Mr. Ladue appealed his sentence on the grounds that the sentencing judge failed to adequately consider his circumstances as an Aboriginal offender, and that the ultimate sentence was unfit. The majority of the Court of Appeal allowed his appeal and reduced the sentence to one year's imprisonment. Chiasson J.A., dissenting, would have allowed the appeal and imposed a two-year sentence.

[30] Bennett J.A., writing for the majority, began by reviewing the principles and objectives of sentencing set out in the *Criminal Code*. She discussed, in detail, s. 718.2(*e*) of the *Code* and this Court's decision in *Gladue*. Bennett J.A. concluded that, although the sentencing judge was alive to Mr. Ladue's unique circumstances as an Aboriginal offender, she did not give any tangible consideration to those circumstances in determining the appropriate sentence. As a result, the sentencing judge had overemphasized the objective of isolation of the offender at the expense of rehabilitation and failed to meet the requirements of s. 718.2(*e*): "If effect is to be given to Parliament's direction in s. 718.2(e), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed" (para. 64).

[31] Bennett J.A. concluded that a three-year sentence was not proportionate to the gravity of the offence and the degree of responsibility of the offender, especially considering Mr. Ladue's background and how he came to be at Belkin House. At para. 63, she states:

> Mr. Ladue desires to succeed, as exhibited by his request not to be sent to Belkin House. However, he is addicted to drugs and alcohol, which can directly be related to how he was treated as an Aboriginal person. He has not reoffended in a manner which threatens the safety of the public. He will ultimately be released into the community without supervision. Unless he can manage his alcohol and drug addiction in the community he

(2) Cour d'appel de la Colombie-Britannique, 2011 BCCA 101, 302 B.C.A.C. 93

[29] M. Ladue a interjeté appel de la sentence. Selon ses prétentions, la juge de première instance n'avait pas tenu suffisamment compte de sa situation de délinquant autochtone et la peine qu'elle lui a finalement infligée était inappropriée. Les juges majoritaires de la Cour d'appel ont accueilli son appel et réduit sa peine à un an d'emprisonnement. Le juge Chiasson, dissident, était d'avis d'accueillir l'appel et de condamner M. Ladue à deux ans d'emprisonnement.

[30] S'exprimant au nom de la majorité, la juge Bennett a d'abord examiné les principes et objectifs de la détermination de la peine énoncés dans le *Code criminel*. Elle a analysé en détail l'al. 718.2*e*) du *Code* et l'arrêt *Gladue* de notre Cour. Selon la juge Bennett, la juge qui avait prononcé la sentence était consciente de la situation particulière de M. Ladue en tant que délinquant autochtone, mais elle ne l'avait pas prise en compte concrètement dans la détermination de la peine appropriée. En conséquence, elle avait trop privilégié l'objectif de l'isolement du délinquant du reste de la société aux dépens de celui de la réadaptation et n'avait pas respecté l'al. 718.2*e*) : [TRADUCTION] « Pour donner effet à la directive donnée par le législateur à l'al. 718.2e), il ne suffit pas de mentionner cette disposition. On doit lui attribuer un poids appréciable, ce qui influera, dans bien des cas, sur la nature et la durée de la peine » (par. 64).

[31] La juge Bennett a conclu qu'une peine de trois ans d'emprisonnement n'était pas proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant, surtout compte tenu de l'histoire personnelle de M. Ladue et des circonstances dans lesquelles il s'était retrouvé à la Belkin House. Voici ce qu'elle a affirmé au par. 63 :

> [TRADUCTION] M. Ladue souhaite réussir, comme en témoigne sa demande de ne pas être renvoyé à la Belkin House. Il souffre toutefois d'une dépendance aux drogues et à l'alcool, qui peut avoir un lien direct avec la façon dont il a été traité à titre d'Autochtone. Il n'a pas récidivé de manière à compromettre la sécurité de la population. Il finira par être libéré sans surveillance dans la collectivité. S'il ne réussit pas à maîtriser sa

will very likely be a threat to the public. Repeated efforts at abstinence are not unusual for those dealing with addiction. Indeed, Mr. Ladue demonstrated that he is capable of abstinence as shown by his conduct a number of years ago.

Bennett J.A. therefore reduced the sentence to one year's imprisonment.

[32] Chiasson J.A. would have allowed the appeal and reduced the sentence to two years' imprisonment. He did not agree with the majority that the sentencing judge had erred in her consideration of Mr. Ladue's Aboriginal circumstances. However, in Chiasson J.A.'s view, the sentencing judge had been wrong in failing to consider that the present breach did not place Mr. Ladue on the path to reoffending. In Chiasson J.A.'s view, a sentence of two years was a sufficient step-up from Mr. Ladue's previous sentence to reflect the severity of the offence. Imposing a sentence of three years, on the other hand, would risk placing Mr. Ladue beyond hope of redemption.

IV. Issues

[33] These two appeals raise issues concerning the application of the principles and objectives of sentencing set out in Part XXIII of the *Criminal Code*. Specifically, the Court must determine the principles governing the sentencing of Aboriginal offenders, including the proper interpretation and application of this Court's judgment in *Gladue*, and the application of those principles to the breach of an LTSO. Finally, given those principles, the Court must determine whether either of the decisions under appeal contains an error in principle or imposes an unfit sentence warranting appellate intervention.

V. Analysis

A. *The Principles of Sentencing*

[34] The central issue in these appeals is how to determine a fit sentence for a breach of an LTSO in

dépendance à l'alcool et aux drogues dans la collectivité, il représentera fort probablement une menace pour la population. Les tentatives répétées d'abstinence ne sont pas inhabituelles chez les personnes aux prises avec une dépendance. En fait, M. Ladue a démontré qu'il était capable d'abstinence, comme en fait foi son comportement d'il y a plusieurs années.

La juge Bennett a donc réduit la peine à un an d'emprisonnement.

[32] Le juge Chiasson était d'avis d'accueillir l'appel et de réduire la peine à deux ans d'emprisonnement. Il ne s'est pas rallié à l'opinion de la majorité que la juge de première instance avait commis une erreur dans sa prise en compte du statut d'Autochtone de M. Ladue en prononçant sa sentence. Toutefois, selon le juge Chiasson, elle avait omis à tort de prendre en considération le fait que le manquement en cause n'avait pas amené M. Ladue à récidiver. Toujours selon lui, la sévérité accrue d'une peine de deux ans d'emprisonnement par rapport à la peine précédente purgée par M. Ladue était suffisante pour tenir compte de la gravité de l'infraction. Par contre, une peine de trois ans d'emprisonnement risquerait de lui faire perdre tout espoir de se racheter.

IV. Les questions en litige

[33] Les deux pourvois soulèvent des questions concernant l'application des principes et objectifs de la détermination de la peine énoncés dans la partie XXIII du *Code criminel*. Plus précisément, la Cour doit établir les principes qui régissent la détermination de la peine dans le cas des délinquants autochtones, y compris l'interprétation et l'application correctes de l'arrêt *Gladue* de notre Cour, et statuer sur l'application de ces principes à la violation d'une OSLD. Enfin, compte tenu de ces principes, la Cour doit décider si l'une ou l'autre des décisions portées en appel comporte une erreur de principe ou impose une peine inappropriée justifiant une intervention en appel.

V. Analyse

A. *Les principes de la détermination de la peine*

[34] La principale question que soulèvent les pourvois est de savoir comment déterminer une

the case of an Aboriginal offender. In particular, the Court must address whether, and how, the *Gladue* principles apply to these sentencing decisions. But first, it is important to review the principles that guide sentencing under Canadian law generally.

[35] In 1996, Parliament amended the *Criminal Code* to specifically codify the objectives and principles of sentencing (*An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22 (Bill C-41)). According to s. 718, the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society". This is accomplished by imposing "just sanctions" that reflect one or more of the traditional sentencing objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community.

[36] 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

peine appropriée pour la violation d'une OSLD dans le cas d'un délinquant autochtone. Plus particulièrement, la Cour doit décider si, et de quelle façon, les principes de détermination de la peine formulés dans *Gladue* s'appliquent dans ce contexte. Mais d'abord, il importe d'examiner les principes qui régissent la détermination de la peine de façon générale en droit canadien.

[35] En 1996, le législateur a modifié le *Code criminel* pour y codifier explicitement les objectifs et principes de détermination de la peine (*Loi modifiant le Code criminel (détermination de la peine) et d'autres lois en conséquence*, L.C. 1995, ch. 22 (projet de loi C-41)). Selon l'art. 718, le prononcé des peines a pour objectif essentiel de contribuer au « respect de la loi et au maintien d'une société juste, paisible et sûre ». Cet objectif est réalisé par l'infliction de « sanctions justes » qui reflètent un ou plusieurs des objectifs traditionnels de la détermination de la peine : la dénonciation, la dissuasion générale et spécifique, l'isolement des délinquants du reste de la société, la réinsertion sociale, la réparation des torts causés aux victimes et la conscientisation des délinquants quant à leurs responsabilités, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

[36] Le *Code criminel* énumère ensuite un certain nombre de principes pour guider les juges dans la détermination de la peine. Le principe fondamental de détermination de la peine exige que la peine soit proportionnelle à la fois à la gravité de l'infraction et au degré de responsabilité du délinquant. Comme notre Cour l'a déjà affirmé, ce principe ne découle pas des modifications apportées au *Code* en 1996; il s'agit depuis longtemps d'un précepte central de la détermination de la peine (voir notamment *R. c. Wilmott* (1966), 58 D.L.R. (2d) 33 (C.A. Ont.), et, plus récemment, *R. c. Solowan*, 2008 CSC 62, [2008] 3 R.C.S. 309, par. 12, et *R. c. Nasogaluak*, 2010 CSC 6, [2010] 1 R.C.S. 206, par. 40-42). Ce principe possède aussi une dimension constitutionnelle, puisque l'art. 12 de la *Charte canadienne des droits et libertés* interdit l'infliction d'une peine qui serait exagérément disproportionnée au point de ne pas être compatible avec le

described as a principle of fundamental justice under s. 7 of the *Charter*.

[37] 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.

[38] Despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process. The determination of a fit sentence is, subject to any specific statutory rules that have survived *Charter*

principe de la dignité humaine propre à la société canadienne. Dans le même ordre d'idées, on peut décrire à juste titre la proportionnalité de la peine comme un principe de justice fondamentale au sens de l'art. 7 de la *Charte*.

[37] Le principe fondamental de la détermination de la peine — la proportionnalité — est intimement lié à son objectif essentiel — le maintien d'une société juste, paisible et sûre par l'imposition de sanctions justes. Quel que soit le poids qu'un juge souhaite accorder aux différents objectifs et aux autres principes énoncés dans le *Code*, la peine qu'il inflige doit respecter le principe fondamental de proportionnalité. La proportionnalité représente la condition *sine qua non* d'une sanction juste. Premièrement, la reconnaissance de ce principe garantit que la peine reflète la gravité de l'infraction et crée ainsi un lien étroit avec l'objectif de dénonciation. La proportionnalité favorise ainsi la justice envers les victimes et assure la confiance du public dans le système de justice. La juge Wilson a exprimé ce principe de la manière suivante dans ses motifs concordants, dans le *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, p. 533 :

> Il est essentiel, dans toute théorie des peines, que la sentence imposée ait un certain rapport avec l'infraction. Il faut que la sentence soit appropriée et proportionnelle à la gravité de l'infraction. Ce n'est que dans ce cas que le public peut être convaincu que le contrevenant « méritait » la punition qui lui a été infligée et avoir confiance dans l'équité et la rationalité du système.

Deuxièmement, le principe de proportionnalité garantit que la peine n'excède pas ce qui est approprié compte tenu de la culpabilité morale du délinquant. En ce sens, il joue un rôle restrictif et assure la justice de la peine envers le délinquant. En droit pénal canadien, une sanction juste prend en compte les deux optiques de la proportionnalité et n'en privilégie aucune par rapport à l'autre.

[38] Malgré les contraintes imposées par le principe de proportionnalité, les juges de première instance jouissent d'un large pouvoir discrétionnaire dans la détermination de la peine. Sous réserve des dispositions législatives particulières dont la

scrutiny, a highly individualized process. Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. Appellate courts have recognized the scope of this discretion and granted considerable deference to a judge's choice of sentence. As Lamer C.J. stated in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. [Emphasis in original.]

[39] There are limits, however, to the deference that will be afforded to a trial judge. Appellate courts have a duty to ensure that courts properly apply the legal principles governing sentencing. In every case, an appellate court must be satisfied that the sentence under review is proportionate to both the gravity of *the offence* and the degree of responsibility of *the offender*. I will now turn to an assessment of these factors as they pertain to the present appeals.

B. *The Offence — Sentencing for Breach of a Long-Term Supervision Order*

[40] These two appeals involve persons designated as long-term offenders who are charged with breaching a condition of their LTSOs. This is the first time the Court has had the opportunity to discuss this particular offence. In order to weigh the various principles and objectives of sentencing and reach a conclusion regarding a fit sentence, it is important to understand the long-term offender regime.

conformité à la *Charte* a été reconnue, le prononcé d'une peine appropriée reste un processus fortement individualisé. Les juges chargés d'imposer les peines doivent disposer d'une latitude suffisante pour les adapter aux circonstances de l'infraction et à la situation du contrevenant en cause. Les cours d'appel reconnaissent la portée de ce pouvoir discrétionnaire et font preuve d'une retenue considérable à l'égard de la peine fixée par le juge. Comme l'a souligné le juge en chef Lamer dans *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 90 :

> Plus simplement, sauf erreur de principe, omission de prendre en considération un facteur pertinent ou insistance trop grande sur les facteurs appropriés, une cour d'appel ne devrait intervenir pour modifier la peine infligée au procès que si elle n'est manifestement pas indiquée. Le législateur fédéral a conféré expressément aux juges chargés de prononcer les peines le pouvoir discrétionnaire de déterminer le genre de peine qui doit être infligée en vertu du *Code criminel* et l'importance de celle-ci. [Souligné dans l'original.]

[39] Cependant, la retenue envers le juge de première instance comporte des limites. En effet, il incombe aux cours d'appel de s'assurer que les tribunaux appliquent correctement les principes régissant la détermination de la peine qui ont été établis par la loi. Dans tous les cas, la cour d'appel doit être convaincue que la peine contestée est proportionnelle à la fois à la gravité de *l'infraction* et au degré de responsabilité *du délinquant*. J'examinerai maintenant le rôle de ces facteurs dans les présents pourvois.

B. *L'infraction — La peine à infliger pour manquement à une ordonnance de surveillance de longue durée*

[40] Les deux pourvois mettent en cause des personnes déclarées délinquants à contrôler qui sont accusées de manquement à une condition de l'OSLD rendue à leur endroit. Pour la première fois, la Cour a l'occasion d'analyser cette infraction précise. Pour soupeser les différents principes et objectifs de la détermination de la peine et décider quelle peine est appropriée, il est important de bien comprendre le régime applicable aux délinquants à contrôler.

[41] Part XXIV of the *Criminal Code* sets out the process for designating offenders as either dangerous or long-term offenders. Special provisions to deal with the unique circumstances of habitual repeat offenders have existed in Canada since the first half of the twentieth century. In 1938, the Archambault Commission recommended that legislation be enacted to provide for the indeterminate detention of hardened criminals (*Report of the Royal Commission to Investigate the Penal System of Canada*). The purpose of this detention, according to the Commission, was to be "neither punitive nor reformative but primarily segregation from society" (cited in *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 321-22).

[42] In 1947, Canada acted on the recommendations of the Archambault Commission and introduced its first piece of legislation authorizing the indeterminate detention of "habitual criminals" (*An Act to amend the Criminal Code*, S.C. 1947, c. 55, s. 18). Amendments made in 1977 narrowed the scope of the provision to specifically target "dangerous offenders" — those convicted of serious personal injury offences (*Criminal Law Amendment Act, 1977*, S.C. 1977, c. 53, s. 14). La Forest J. described the rationale of the legislation in *Lyons*, at p. 329:

> It is thus important to recognize the precise nature of the penological objectives embodied in Part XXI [now Part XXIV]. It is clear that the indeterminate detention is intended to serve both punitive and preventive purposes. Both are legitimate aims of the criminal sanction. Indeed, when society incarcerates a robber for, say, ten years, it is clear that its goal is both to punish the person and prevent the recurrence of such conduct during that period. Preventive detention in the context of Part XXI, however, simply represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased. Part XXI merely enables the court to accommodate its sentence to the common sense reality that the present condition of the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be

[41] La partie XXIV du *Code criminel* établit la procédure à suivre pour déclarer qu'un délinquant est un délinquant dangereux ou un délinquant à contrôler. Au Canada, il existe des dispositions spéciales traitant de la situation particulière des récidivistes chroniques depuis la première moitié du XX^{e} siècle. La Commission Archambault a recommandé en 1938 l'adoption d'une loi prévoyant la détention des criminels endurcis pour une durée indéterminée (*Rapport de la Commission royale d'enquête sur le système pénal du Canada*). Selon la Commission, cette détention avait pour but non « pas de punir ni de réformer les détenus mais avant tout de les isoler de la société » (cité dans *R. c. Lyons*, [1987] 2 R.C.S. 309, p. 321-322).

[42] En 1947, le Canada a donné suite aux recommandations de la Commission Archambault et adopté la première mesure législative autorisant la détention des « repris de justice » pour une durée indéterminée (*Loi modifiant le Code criminel*, S.C. 1947, ch. 55, art. 18). Les modifications apportées en 1977 ont restreint la portée de cette disposition pour qu'elle vise explicitement les « délinquants dangereux » — ceux reconnus coupables d'infractions constituant des sévices graves à la personne (*Loi de 1977 modifiant le droit pénal*, L.C. 1977, ch. 53, art. 14). Le juge La Forest a décrit en ces termes la raison d'être de cette mesure législative dans *Lyons*, p. 329 :

> D'où l'importance de reconnaître la nature précise des objectifs pénologiques de la partie XXI [maintenant la partie XXIV]. Il est clair que la détention pour une période indéterminée répond à des fins à la fois punitives et préventives. L'une et l'autre constituent des buts légitimes de la sanction pénale. De fait, lorsque la société incarcère un voleur pendant dix ans, par exemple, il est évident que le but visé est double : punir l'auteur du crime et empêcher la récidive pendant cette période. Toutefois, la détention préventive dans le contexte de la partie XXI représente simplement un jugement que l'importance relative des objectifs de réinsertion sociale, de dissuasion et de châtiment peut diminuer sensiblement dans un cas particulier et celle de la prévention s'accroître proportionnellement. La partie XXI ne fait que permettre à la cour d'adapter la peine à la réalité bien évidente que la situation actuelle du délinquant est telle que sa conduite n'est pas soumise aux contraintes normales, de sorte qu'on peut s'attendre avec un grand

expected of that person. In such circumstances it would be folly not to tailor the sentence accordingly. [Emphasis in original.]

[43] The rationale for the dangerous offender designation can be contrasted with that of the long-term offender provisions, which were not introduced to the *Criminal Code* until 1997. That year, extensive amendments were made to Part XXIV of the *Criminal Code* by Bill C-55 (*An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act*, *the Prisons and Reformatories Act and the Department of the Solicitor General Act*, S.C. 1997, c. 17). These amendments, following the recommendations of the Federal/Provincial/Territorial Task Force on High-Risk Violent Offenders ("Task Force"), introduced the long-term offender designation and the availability of LTSOs. The Task Force noted that a lacuna existed in the law whereby serious offenders were denied the support of extended community supervision, except through the parole process. LTSOs were designed to fill this gap and supplement the all-or-nothing alternatives of definite or indefinite detention (Report of the Federal/Provincial/Territorial Task Force on High-Risk Violent Offenders, *Strategies for Managing High-Risk Offenders* (1995)).

[44] Section 753.1(1) of the *Criminal Code* now directs when a court may designate an offender as a long-term offender. The section states:

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

(*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

degré de certitude à ce que cette personne commette des actes de violence dans l'avenir. Il serait donc insensé que de ne pas fixer la peine en conséquence. [Souligné dans l'original.]

[43] Il est utile de comparer la raison d'être de la déclaration de délinquant dangereux avec celle des dispositions visant les délinquants à contrôler, qui n'ont été incorporées au *Code criminel* qu'en 1997. Cette année-là, des modifications considérables furent apportées à la partie XXIV du *Code criminel* au moyen du projet de loi C-55 (*Loi modifiant le Code criminel (délinquants présentant un risque élevé de récidive), la Loi sur le système correctionnel et la mise en liberté sous condition, la Loi sur le casier judiciaire, la Loi sur les prisons et les maisons de correction et la Loi sur le ministère du Solliciteur général*, L.C. 1997, ch. 17). Ces modifications, qui donnaient effet à la recommandation du Groupe de travail fédéral/provincial/territorial sur les délinquants à risque élevé de violence (« Groupe de travail »), ont instauré la déclaration de délinquant à contrôler et créé la possibilité de rendre des OSLD. Le Groupe de travail a souligné que la loi souffrait d'une lacune : les auteurs d'infractions graves étaient privés du soutien que comporte une surveillance prolongée dans la collectivité, sauf par la libération conditionnelle. Les OSLD visaient à combler cette lacune et à compléter les solutions du tout ou rien que représentaient la détention à durée déterminée et la détention à durée indéterminée (Rapport du Groupe de travail fédéral/provincial/territorial sur les délinquants violents à risque élevé, *Stratégies pour la gestion des délinquants à risque élevé* (1995)).

[44] Le paragraphe 753.1(1) du *Code criminel* précise les circonstances dans lesquelles le tribunal peut déclarer que le délinquant est un délinquant à contrôler :

753.1 (1) Sur demande faite, en vertu de la présente partie, postérieurement au dépôt du rapport d'évaluation visé au paragraphe 752.1(2), le tribunal peut déclarer que le délinquant est un délinquant à contrôler, s'il est convaincu que les conditions suivantes sont réunies :

a) il y a lieu d'imposer au délinquant une peine minimale d'emprisonnement de deux ans pour l'infraction dont il a été déclaré coupable;

(*b*) there is a substantial risk that the offender will reoffend; and

(*c*) there is a reasonable possibility of eventual control of the risk in the community.

If the court finds an offender to be a long-term offender, it must impose a sentence of two years or more for the predicate offence and order that the offender be subject to long-term supervision for a period not exceeding 10 years (*Criminal Code*, s. 753.1(3)).

[45] LTSOs are administered in accordance with the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"). LTSOs must include the conditions set out in s. 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620. In addition, the National Parole Board ("NPB") may include any other condition "that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender" (*CCRA*, s. 134.1(2)). A member of the NPB may suspend an LTSO when an offender breaches any of the LTSO conditions, or where the NPB is satisfied that suspension is necessary and reasonable to prevent such a breach or to protect society (*CCRA*, s. 135.1(1)). Offenders serve the duration of the period of suspension in a federal penitentiary. Failure or refusal to comply with an LTSO is also an indictable offence under s. 753.3(1) of the *Criminal Code*, punishable by up to 10 years' imprisonment.

[46] According to the *CCRA*, "[t]he purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens" (s. 100). The *CCRA* also sets out a number of principles that shall guide the NPB in achieving the purpose of conditional release. These include, *inter alia*, "that the protection of society be the paramount consideration in the determination of any case"

b) celui-ci présente un risque élevé de récidive;

c) il existe une possibilité réelle que ce risque puisse être maîtrisé au sein de la collectivité.

Si le tribunal déclare que le délinquant est un délinquant à contrôler, il doit lui imposer une peine minimale d'emprisonnement de deux ans pour l'infraction sous-jacente et ordonner qu'il soit soumis à une surveillance de longue durée pour une période maximale de 10 ans (*Code criminel*, par. 753.1(3)).

[45] Les OSLD sont exécutées conformément à la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, ch. 20 (« *LSCMLSC* »). L'OSLD doit contenir les conditions prévues au par. 161(1) du *Règlement sur le système correctionnel et la mise en liberté sous condition*, DORS/92-620. De plus, la Commission nationale des libérations conditionnelles (« CNLC ») peut y insérer toutes les autres conditions « qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant » (*LSCMLSC*, par. 134.1(2)). Un membre de la CNLC peut suspendre une OSLD en cas de manquement à l'une de ses conditions, ou s'il est convaincu que la suspension de l'ordonnance est raisonnable et nécessaire pour éviter la violation de l'OSLD ou pour protéger la société (*LSCMLSC*, par. 135.1(1)). Pendant la suspension de l'OSLD, le délinquant purge sa peine dans un pénitencier fédéral. Selon le par. 753.3(1) du *Code criminel*, le défaut ou le refus de se conformer à une OSLD constitue aussi un acte criminel punissable d'un emprisonnement maximal de 10 ans.

[46] La *LSCMLSC* précise que « [l]a mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois » (art. 100). La *LSCMLSC* énonce aussi plusieurs principes destinés à guider la CNLC dans la réalisation de l'objet de la mise en liberté sous condition. Elle dispose notamment que « la protection de la société est le critère déterminant dans tous

and "that parole boards make the least restrictive determination consistent with the protection of society" (*CCRA*, ss. 101(*a*) and 101(*d*)). These principles are intended to guide the NPB in its decision making, whereas courts must adhere to the principles set out in the *Criminal Code* when sentencing for breach of an LTSO.

[47] The legislative purpose of an LTSO, a form of conditional release governed by the *CCRA*, is therefore to contribute to the maintenance of a just, peaceful and safe society by facilitating the rehabilitation and reintegration of long-term offenders. This direction is consistent with this Court's discussion at para. 42 of *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, on the distinction between the dangerous offender designation (which does not include a period of conditional release) and the long-term offender designation.

Although they both contribute to assuring public safety, the dangerous offender and long-term offender designations have different objectives. Unlike a *dangerous* offender (s. 753 *Cr. C.*), who will continue to be deprived of liberty, since such offenders are kept in prison to separate them from society (s. 718.1), a *long-term* offender serves a sentence of imprisonment of two years or more and is then subject to an order of supervision in the community for a period not exceeding 10 years for the purpose of assisting in his or her rehabilitation (s. 753.1(3) *Cr. C.*). This measure, which is less restrictive than the indeterminate period of incarceration that applies to dangerous offenders, protects society and is at the same time consistent with [TRANSLATION] "the principles of proportionality and moderation in the recourse to sentences involving a deprivation of liberty" (Dadour, at p. 228). [Emphasis in original.]

[48] Reading the *Criminal Code*, the *CCRA* and the applicable jurisprudence together, we can therefore identify two specific objectives of long-term supervision as a form of conditional release: (1) protecting the public from the risk of reoffence, and (2) rehabilitating the offender and reintegrating him or her into the community. The latter objective may properly be described as the ultimate purpose of an LTSO, as indicated by s. 100 of the *CCRA*,

les cas » et que « le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible » (*LSCMLSC*, al. 101*a*) et *d*)). Ces principes guident la CNLC lorsqu'elle rend ses décisions. Cependant, les tribunaux doivent déterminer la peine à infliger pour un manquement à une OSLD en appliquant les principes énoncés dans le *Code criminel*.

[47] Aux termes de la loi, l'OSLD, qui représente une forme de mise en liberté sous condition régie par la *LSCMLSC*, a donc pour objet de contribuer au maintien d'une société juste, paisible et sûre en favorisant la réadaptation et la réinsertion des délinquants à contrôler. Ce principe directeur demeure en harmonie avec l'analyse faite par notre Cour — au par. 42 de l'arrêt *R. c. L.M.*, 2008 CSC 31, [2008] 2 R.C.S. 163 — de la distinction entre la déclaration de délinquant dangereux (qui ne comporte pas de mise en liberté sous condition) et la déclaration de délinquant à contrôler.

Bien qu'elles concourent toutes les deux à protéger la sécurité publique, les mesures de déclaration de délinquant dangereux et de délinquant à contrôler correspondent à des objectifs différents. En effet, à la différence du délinquant *dangereux* (art. 753 *C. cr.*) qui continuera à subir une privation de liberté puisqu'on le gardera incarcéré pour être isolé du reste de la société (art. 718.1), le délinquant *à contrôler* subit une peine d'emprisonnement d'au moins deux ans, après quoi on le soumet à une ordonnance de surveillance dans la collectivité pour une période maximale de 10 ans afin de favoriser sa réinsertion sociale (par. 753.1(3) *C. cr.*). Moins contraignante que l'incarcération pour une durée indéterminée réservée aux délinquants dangereux, cette mesure permet d'assurer la protection de la société tout en respectant « les principes de proportionnalité et de modération dans le recours aux peines privatives de liberté » (Dadour, p. 228). [En italique dans l'original.]

[48] L'examen simultané du *Code criminel*, de la *LSCMLSC* et de la jurisprudence permet d'identifier deux objectifs particuliers de la surveillance de longue durée, comme forme de libération conditionnelle : (1) la protection du public contre le risque de récidive et (2) la réadaptation et la réinsertion sociale du délinquant. Le second objectif peut être décrit à juste titre comme l'objectif ultime d'une OSLD, comme l'indique l'art. 100 de la

though it is inextricably entwined with the former. Unfortunately, provincial and appellate courts have tended to emphasize the protection of the public at the expense of the rehabilitation of offenders. This, in turn, has affected their determinations of what is a fit sentence for breaching a condition of an LTSO.

[49] *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20, is the leading appellate court decision to consider the matter. In that case, the Alberta Court of Appeal canvassed the purpose of the long-term offender regime and how it bears on the sentencing process for breach of an LTSO. Ritter J.A. summarized the view of the court, at para. 46, stating:

> Because the protection of society is the paramount goal when sentencing an offender who has breached a condition of his long-term offender supervision order, sentencing principles respecting specific and general deterrence together with separation of the offender from the community are called into play. Rehabilitation has a limited role to play as the status of long-term offender is such that rehabilitation has already been determined to be extremely difficult or impossible to achieve.

Subsequent provincial and appellate court cases have generally adhered to this approach. For example, in *R. v. Nelson*, [2007] O.J. No. 5704 (QL), Masse J. of the Ontario Court of Justice held, at paras. 14 and 21, that "[t]he main consideration in sentencing these offenders is the protection of the public" and that "significant sentences must be imposed even for slight breaches of a long-term supervision order".

[50] The foregoing characterization of the long-term offender regime is incorrect. The purpose of an LTSO is two-fold: to protect the public *and* to rehabilitate offenders and reintegrate them into the community. In fact, s. 100 of the *CCRA* singles out rehabilitation and reintegration as the purpose of community supervision including LTSOs. As this Court indicated in *L.M.*, rehabilitation is

LSCMLSC, bien qu'il soit inextricablement lié au premier. Toutefois, les cours provinciales et les cours d'appel ont eu malheureusement tendance à mettre l'accent sur la protection du public aux dépens de la réadaptation des délinquants. Cette tendance les a influencées dans la détermination de ce qui constitue une peine appropriée pour le défaut de se conformer à une condition d'une OSLD.

[49] *R. c. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20, demeure l'arrêt de principe rendu par une cour d'appel en la matière. La Cour d'appel de l'Alberta y a étudié l'objet du régime applicable aux délinquants à contrôler et l'incidence de ce régime sur la détermination de la peine à infliger pour violation d'une OSLD. Le juge Ritter a résumé en ces termes l'avis de la Cour d'appel, au par. 46 :

> [TRADUCTION] Puisque la protection de la société constitue le critère déterminant dans la détermination de la peine à infliger à un délinquant qui a manqué à une condition de son ordonnance de surveillance de longue durée, les principes de détermination de la peine qui touchent la dissuasion spécifique et générale ainsi que l'isolement du délinquant de la collectivité entrent en jeu. La réadaptation a un rôle limité à jouer, car le statut de délinquant à contrôler est tel que l'on a déjà jugé la réadaptation extrêmement difficile ou impossible à réaliser.

Un certain nombre de jugements prononcés par les cours de première instance et les cours d'appel provinciales ont suivi cette approche. Par exemple, le juge Masse, de la Cour de justice de l'Ontario, a dit aux par. 14 et 21 de la décision *R. c. Nelson*, [2007] O.J. No. 5704 (QL), que [TRADUCTION] « [l]a protection du public constitue la principale considération lorsqu'il s'agit de déterminer la peine à infliger à ces délinquants » et qu'« il faut infliger de lourdes peines même en cas de violation mineure d'une ordonnance de surveillance de longue durée ».

[50] Cette perception du régime applicable aux délinquants à contrôler est inexacte. L'OSLD poursuit un double objectif : la protection du public *et* la réadaptation des délinquants et leur réinsertion dans la collectivité. En fait, l'art. 100 de la *LSCMLSC* désigne la réadaptation et la réinsertion comme l'objectif de la surveillance dans la collectivité, et notamment des OSLD. Comme l'a affirmé notre Cour

the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime. To suggest, therefore, that rehabilitation has been determined to be impossible to achieve in the long-term offender context is simply wrong. Given this context, it would be contrary to reason to conclude that rehabilitation is not an appropriate sentencing objective and should therefore play "little or no role" (as stated in *W. (H.P.)*, at para. 50), in the sentencing process.

[51] This is not to say that rehabilitation will always be the foremost consideration when sentencing for breach of an LTSO. The duty of a sentencing judge is to apply all of the principles mandated by ss. 718.1 and 718.2 of the *Criminal Code* in order to devise a sentence that furthers the overall objectives of sentencing. The foregoing simply demonstrates that there is nothing in the provisions of the *Criminal Code* or the *CCRA* to suggest that any of those principles or objectives will not apply to the breach of an LTSO. As with any sentencing decision, the relative weight to be accorded to each sentencing principle or objective will vary depending on the circumstances of the particular offence. In all instances, the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender.

[52] It would be imprudent to attempt to determine in the abstract the gravity of the offence of breaching a condition of an LTSO. The severity of a given breach will ultimately depend on all of the circumstances, including the nature of the condition breached, how that condition is tied to managing the particular offender's risk of reoffence, and the circumstances of the breach. However, a few comments may be instructive.

[53] Breach of an LTSO is an indictable offence punishable by up to 10 years' imprisonment. This

dans *L.M.*, la réadaptation constitue l'élément clé du régime applicable aux délinquants à contrôler, l'élément qui le distingue du régime applicable aux délinquants dangereux. L'affirmation selon laquelle il a été établi que la réadaptation pourrait représenter un objectif irréalisable dans le cas de la mise en œuvre des OSLD est tout simplement erronée. Il serait illogique de conclure que la réadaptation ne constitue pas un objectif valable de la détermination de la peine et, par conséquent, qu'elle [TRADUCTION] « n'entre presque pas, sinon pas du tout en ligne de compte » (pour reprendre les termes utilisés dans *W. (H.P.)*, par. 50), dans la détermination de la peine.

[51] Ce constat ne signifie pas que la réadaptation s'avèrera toujours la considération la plus importante lors de la détermination de la peine pour un manquement à une OSLD. Le juge chargé d'imposer la peine doit appliquer tous les principes prescrits par les art. 718.1 et 718.2 du *Code criminel* pour concevoir une peine qui favorise la réalisation des objectifs généraux de la détermination de la peine. Les observations faites plus haut soulignent simplement que rien dans le *Code criminel* ou les dispositions applicables de la *LSCMLSC* ne permet de penser que l'un quelconque de ces principes ou objectifs ne s'appliquerait pas à la violation d'une OSLD. Comme pour toute décision concernant la peine, le poids relatif qu'il convient d'attribuer à chaque principe ou objectif de détermination de la peine variera selon les circonstances de l'infraction. Dans tous les cas, la peine doit demeurer proportionnelle à la fois à la gravité de l'infraction et au degré de responsabilité du délinquant.

[52] Il serait imprudent de tenter de mesurer dans l'abstrait la gravité de l'infraction de manquement à une condition d'une OSLD. La gravité d'un manquement donné dépend en dernière analyse de toutes les circonstances, dont la nature de la condition violée, le lien entre cette condition et la gestion du risque de récidive du délinquant et les circonstances de la violation. Cependant, il peut être utile d'ajouter quelques commentaires sur le sujet.

[53] La violation d'une OSLD constitue un acte criminel punissable d'un emprisonnement maximal

can be contrasted with breach of probation which is a hybrid offence with a maximum sentence of either 18 months or two years' imprisonment. In each of the present appeals, the Crown places significant emphasis on this distinction, suggesting that the high maximum penalty indicates that breach of an LTSO is a particularly serious offence warranting a significant sentence. My colleague, Rothstein J., reiterates this point at para. 123, concluding that the "necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time".

[54] The lengthy maximum penalty certainly indicates that Parliament views the breach of an LTSO differently (and more seriously) than the breach of a probation order. However, it would be too much to suggest that the mere existence of a high statutory maximum penalty dictates that a significant period of imprisonment should be imposed for any breach of an LTSO. Breaches can occur in an infinite variety of circumstances. Parliament did not see fit to impose a mandatory minimum sentence. Where no minimum sentence is mandated by the *Criminal Code*, the entire range of sentencing options is open to a sentencing judge, including non-carceral sentences where appropriate. In its recommendations, the Task Force specifically stated that a key factor to the success of a long-term offender regime is "a speedy and flexible mechanism for enforcing the orders which does not result in lengthy re-incarceration in the absence of the commission of a new crime" (p. 19 (emphasis added)).

[55] It is the sentencing judge's duty to determine, within this open range of sentencing options, which sentence will be proportionate to both the gravity of the offence and the degree of responsibility of the offender. The severity of a particular breach of an LTSO will depend, in large part, on the

de 10 ans. Cette infraction peut être distinguée de la violation d'une ordonnance de probation, une infraction mixte punissable d'une peine maximale de 18 mois ou de deux ans d'emprisonnement. Dans les deux pourvois qui nous occupent, le ministère public insiste sur cette distinction, affirmant que la sévérité de la peine maximale démontre que la violation d'une OSLD est une infraction particulièrement grave appelant une lourde peine. Mon collègue, le juge Rothstein, reprend ce point de vue au par. 123 et conclut : « Cela signifie nécessairement que, pour le législateur, les délinquants à contrôler qui font défaut de se conformer à une OSLD présentent un tel risque pour la protection de la société qu'ils peuvent devoir être isolés de la société pendant une période assez longue. »

[54] Cette longue peine maximale indique assurément que le législateur considère différemment (et plus sévèrement) la violation d'une OSLD que celle d'une ordonnance de probation. Toutefois, on ne peut conclure que l'édiction d'une longue peine d'emprisonnement maximal par le législateur commande l'infliction une longue peine d'emprisonnement pour tout manquement à une OSLD. Le défaut de se conformer à une ordonnance survient dans des circonstances infiniment variées. Par ailleurs, le législateur n'a pas jugé bon d'édicter une peine minimale obligatoire. Lorsque le *Code criminel* ne prévoit pas de peine minimale obligatoire, le juge peut choisir la peine à infliger parmi toutes les sanctions possibles, y compris une peine substitutive qui serait appropriée dans les circonstances. Dans ses recommandations, le Groupe de travail a explicitement affirmé que le succès du régime des délinquants à contrôler repose principalement sur « un mécanisme souple et d'application rapide permettant d'assurer l'exécution des ordonnances sans entraîner une longue incarcération dans les cas où le délinquant n'a pas commis d'autre crime » (p. 21 (je souligne)).

[55] Il appartient au juge de la peine de déterminer, parmi toutes les sanctions possibles, celle qui est proportionnelle à la fois à la gravité de l'infraction et au degré de responsabilité du délinquant. La gravité d'un manquement à une ordonnance dépend en grande partie des circonstances de la

circumstances of the breach, the nature of the condition breached, and the role that condition plays in managing the offender's risk of reoffence in the community. This requires a contextual analysis. As Smith J.A. states in *R. v. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228, at para. 51, "the gravity of an offence under s. 753.3 must be measured with reference not only to the conduct that gave rise to the offence, but also with regard to what it portends in light of the offender's entire history of criminal conduct". Breach of an LTSO is not subject to a distinct sentencing regime or system. In any given case, the best guides for determining a fit sentence are the well-established principles and objectives of sentencing set out in the *Criminal Code*.

C. *The Offender — Sentencing Aboriginal Offenders*

[56] Section 718.2(*e*) of the *Criminal Code* directs that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". This provision was introduced into the *Code* as part of the 1996 Bill C-41 amendments to codify the purpose and principles of sentencing. According to the then-Minister of Justice, Allan Rock, "the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada" (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl., November 17, 1994, at p. 15).

[57] Aboriginal persons were sadly overrepresented indeed. Government figures from 1988 indicated that Aboriginal persons accounted for 10 percent of federal prison inmates, while making up only 2 percent of the national population. The figures were even more stark in the Prairie provinces, where Aboriginal persons accounted for 32 percent of prison inmates compared to 5 percent of the population. The situation was generally

violation, de la nature de la condition enfreinte et du rôle que joue cette condition dans la gestion du risque de récidive que présente le délinquant pour la société. D'où la nécessité d'une analyse contextuelle. Comme l'affirme le juge Smith dans *R. c. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228, par. 51, [TRADUCTION] « il faut mesurer la gravité d'une infraction prévue à l'art. 753.3 au regard, non seulement de la conduite à l'origine de l'infraction, mais aussi de ce qu'elle présage compte tenu de l'ensemble des antécédents criminels du délinquant ». La violation d'une OSLD n'est pas régie par un code ou système distinct de détermination de la peine. Dans tous les cas, les meilleurs guides à suivre pour fixer une peine appropriée sont les principes et objectifs bien établis de détermination de la peine énoncés dans le *Code criminel*.

C. *Le délinquant — La détermination de la peine d'un délinquant autochtone*

[56] L'alinéa 718.2*e*) du *Code criminel* prévoit « l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones ». Cette disposition a été ajoutée au *Code* dans le cadre de modifications législatives apportées en 1996 par le projet de loi C-41 visant à codifier les objectifs et les principes de détermination de la peine. Selon le ministre de la Justice de l'époque, Allan Rock, « si l'on mentionne expressément les délinquants autochtones, c'est parce qu'ils sont malheureusement surreprésentés dans la population carcérale du Canada » (Chambre des communes, *Procès-verbaux et témoignages du Comité permanent de la Justice et des questions juridiques*, n^{o} 62, 1re sess., 35^{e} lég., 17 novembre 1994, p. 15).

[57] Les Autochtones étaient en effet malheureusement surreprésentés. Selon les statistiques gouvernementales de 1988, les Autochtones représentaient 10 p. 100 des détenus dans les pénitenciers fédéraux, alors qu'ils ne constituaient que 2 p. 100 de la population canadienne. Les chiffres étaient encore plus frappants dans les Prairies, où les Autochtones représentaient 32 p. 100 des détenus alors qu'ils ne constituaient que 5 p. 100 de la

worse in provincial institutions. For example, Aboriginal persons accounted for fully 60 percent of the inmates detained in provincial jails in Saskatchewan (M. Jackson, "Locking Up Natives in Canada" (1989), 23 *U.B.C. L. Rev.* 215, at pp. 215-16). There was also evidence to indicate that this overrepresentation was on the rise. At Stony Mountain penitentiary, the only federal prison in Manitoba, the Aboriginal inmate population had been climbing steadily from 22 percent in 1965 to 33 percent in 1984, and up to 46 percent just five years later in 1989 (Commissioners A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), at p. 394). The foregoing statistics led the Royal Commission on Aboriginal Peoples ("RCAP") to conclude, at p. 309 of its Report, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996):

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

[58] The overrepresentation of Aboriginal people in the Canadian criminal justice system was the impetus for including the specific reference to Aboriginal people in s. 718.2(*e*). It was not at all clear, however, what exactly the provision required or how it would affect the sentencing of Aboriginal offenders. In 1999, this Court had the opportunity to address these questions in *Gladue*. Cory and Iacobucci JJ., writing for the unanimous Court, reviewed the statistics and concluded, at para. 64:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what

population. La situation était généralement pire dans les établissements provinciaux. À titre d'exemple, les Autochtones représentaient au moins 60 p. 100 des détenus dans les établissements provinciaux de la Saskatchewan (M. Jackson, « Locking Up Natives in Canada » (1989), 23 *U.B.C. L. Rev.* 215, p. 215-216). Certains éléments de preuve indiquaient également que cette surreprésentation était en hausse. À l'Établissement Stony Mountain, le seul pénitencier fédéral au Manitoba, la population carcérale autochtone s'était accrue de façon constante, passant de 22 p. 100 en 1965 à 33 p. 100 en 1984, pour atteindre 46 p. 100 en 1989, seulement cinq ans plus tard (les commissaires A. C. Hamilton et C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), p. 394). À la lumière de ces statistiques, la Commission royale sur les peuples autochtones (« CRPA ») a conclu dans *Par-delà les divisions culturelles : Un rapport sur les autochtones et la justice pénale au Canada* (1996), p. 336 :

> Le système canadien de justice pénale n'a pas su répondre aux besoins des peuples autochtones du Canada — Premières nations, Inuit et Métis habitant en réserve ou hors réserve, en milieu urbain ou en milieu rural —, peu importe le territoire où ils vivent ou le gouvernement dont ils relèvent. Ce lamentable échec découle surtout de ce qu'autochtones et non-autochtones affichent des conceptions extrêmement différentes à l'égard de questions fondamentales comme la nature de la justice et la façon de l'administrer.

[58] C'est en raison de la surreprésentation des Autochtones dans le système de justice pénale canadien que le législateur a mentionné expressément les Autochtones à l'al. 718.2*e*). La rédaction de cette disposition laissait toutefois planer une grande incertitude sur ses exigences et ses effets à l'égard de la détermination de la peine pour les délinquants autochtones. En 1999, la Cour a eu l'occasion de traiter de ces questions dans *Gladue*. Avec l'accord de l'ensemble de la Cour, les juges Cory et Iacobucci ont revu les statistiques et conclu, au par. 64 :

> Ces constatations exigent qu'on reconnaisse l'ampleur et la gravité du problème, et qu'on s'y attaque. Les chiffres sont criants et reflètent ce qu'on peut à bon droit

may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(*e*), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

[59] The Court held, therefore, that s. 718.2(*e*) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(*e*) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

qualifier de crise dans le système canadien de justice pénale. La surreprésentation critique des autochtones au sein de la population carcérale comme dans le système de justice pénale témoigne d'un problème social attristant et urgent. Il est raisonnable de présumer que le Parlement, en prévoyant spécifiquement à l'al. 718.2*e*) la possibilité de traiter différemment les délinquants autochtones dans la détermination de la peine, a voulu tenter d'apporter une certaine solution à ce problème social. On peut légitimement voir dans cette disposition une directive que le Parlement adresse à la magistrature, l'invitant à se pencher sur les causes du problème et à s'efforcer d'y remédier, dans la mesure où cela est possible dans le cadre du processus de détermination de la peine.

[59] Selon la Cour, l'al. 718.2*e*) du *Code* doit être considéré comme une disposition réparatrice destinée à remédier au grave problème de la surreprésentation des Autochtones dans les prisons canadiennes et à encourager le juge à aborder la détermination de la peine dans une perspective corrective (*Gladue*, par. 93). Cette disposition ne se borne pas à confirmer les principes existants de détermination de la peine; elle invite les juges à utiliser une méthode d'analyse différente pour déterminer la peine appropriée dans le cas d'un délinquant autochtone. En effet, l'al. 718.2*e*) demande aux juges chargés de déterminer la peine de porter une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones, parce qu'elles sont particulières et différentes de celles dans lesquelles se trouvent les non-Autochtones (*Gladue*, par. 37). Le juge qui détermine la peine à infliger à un délinquant autochtone doit tenir compte des circonstances suivantes : a) les facteurs systémiques ou historiques distinctifs qui peuvent être une des raisons pour lesquelles le délinquant autochtone se retrouve devant les tribunaux; et b) les types de procédures de détermination de la peine et de sanctions qui, dans les circonstances, peuvent être appropriées à l'égard du délinquant en raison de son héritage ou de ses attaches autochtones (*Gladue*, par. 66). Les juges peuvent prendre connaissance d'office des facteurs systémiques et historiques généraux touchant les Autochtones de façon générale, mais les renseignements additionnels propres à l'affaire devront leur être fournis par les avocats et le rapport présentenciel (*Gladue*, par. 83-84).

[60] Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(*e*) of the *Criminal Code*.

[60] Les tribunaux ont parfois hésité à prendre connaissance d'office des facteurs systémiques et historiques touchant les Autochtones dans la société canadienne (voir, p. ex., *R. c. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). En clair, les tribunaux doivent prendre connaissance d'office de questions telles que l'histoire de la colonisation, des déplacements de populations et des pensionnats et la façon dont ces événements se traduisent encore aujourd'hui chez les peuples autochtones par un faible niveau de scolarisation, des revenus peu élevés, un taux de chômage important, des abus graves d'alcool ou d'autres drogues, un taux élevé de suicide et, bien entendu, un taux élevé d'incarcération. Ces facteurs ne justifient pas nécessairement à eux seuls l'imposition d'une peine différente aux délinquants autochtones. Ils établissent plutôt le *cadre contextuel* nécessaire à la compréhension et à l'évaluation des renseignements propres à l'affaire fournis par les avocats. Il est de la responsabilité des avocats de fournir ces renseignements personnels dans tous les cas, à moins que le délinquant ne renonce expressément à son droit à l'examen de cette information. Selon la pratique actuelle, il semble que les renseignements propres à l'affaire soient souvent fournis à la cour au moyen d'un rapport semblable à celui décrit dans *Gladue*. Ce document représente une forme de rapport présentenciel adapté aux circonstances particulières des délinquants autochtones. La présentation au juge, en temps opportun, d'un exposé complet de ces renseignements est assurément utile à toutes les parties à l'audience de détermination de la peine d'un délinquant autochtone, et indispensable au juge pour l'exécution des obligations que lui impose l'al. 718.2*e*) du *Code criminel*.

[61] It would have been naive to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely. In *Gladue*, Cory and Iacobucci JJ. were mindful of this fact, yet retained a degree of optimism, stating, at para. 65:

[61] Il aurait été naïf de prétendre qu'infliger des peines différentes aux Autochtones, sans s'attaquer aux causes fondamentales de la criminalité, éliminerait complètement leur surreprésentation dans le système de justice pénale. Conscients de ce fait, les juges Cory et Iacobucci ont néanmoins affiché un certain optimisme dans *Gladue* en affirmant, au par. 65 :

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending

> Il est évident que des pratiques innovatrices dans la détermination de la peine ne peuvent à elles seules faire

and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

disparaître les causes de la criminalité autochtone et le problème plus large de l'aliénation des autochtones par rapport au système de justice pénale. La proportion anormale d'emprisonnement chez les délinquants autochtones découle de nombreuses sources, dont la pauvreté, la toxicomanie, le manque d'instruction et le manque de possibilités d'emploi. Elle découle également de préjugés contre les autochtones et d'une tendance institutionnelle déplorable à refuser les cautionnements et à infliger des peines d'emprisonnement plus longues et plus fréquentes aux délinquants autochtones. Plusieurs aspects de cette triste réalité sont hors du champ des présents motifs. Mais ce qu'on peut et doit examiner, c'est le rôle limité que joueront les juges chargés d'infliger les peines dans le redressement des injustices subies par les autochtones au Canada. Les juges qui prononcent les peines comptent parmi les décideurs qui ont le pouvoir d'influer sur le traitement des délinquants autochtones dans le système de justice. Ce sont eux qui décident le plus directement si un délinquant autochtone ira en prison, ou s'il est possible d'envisager des solutions de rechange qui permettront peut-être davantage de restaurer un certain équilibre entre le délinquant, la victime et la collectivité, et de prévenir d'autres crimes.

[62] This cautious optimism has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent (J. V. Roberts and R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003), 45 *Can. J. Crim. & Crim. Just.* 211, at p. 226). From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent (J. Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009), 54 *Crim. L.Q.* 447, at p. 452). As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when *Gladue* was decided, they accounted for 17 percent of federal admissions in 2005 (J. Rudin, "Aboriginal Overrepresentation and *R. v. Gladue*: Where We Were,

[62] Cet optimisme prudent s'est révélé injustifié. En fait, selon les statistiques, la surreprésentation et l'aliénation des Autochtones dans le système de justice pénale n'a fait qu'augmenter. Immédiatement après l'adoption du projet de loi C-41, soit de 1996 à 2001, les incarcérations d'Autochtones se sont accrues de 3 p. 100, alors que les incarcérations de non-Autochtones ont diminué de 22 p. 100 (J. V. Roberts et R. Melchers, « The Incarceration of Aboriginal Offenders : Trends from 1978 to 2001 » (2003), 45 *Rev. can. crim. & jus. pénale* 211, p. 226). De 2001 à 2006, on a constaté une baisse générale des incarcérations de 9 p. 100. Durant la même période, les incarcérations d'Autochtones ont augmenté de 4 p. 100 (J. Rudin, « Addressing Aboriginal Overrepresentation Post-*Gladue* : A Realistic Assessment of How Social Change Occurs » (2009), 54 *Crim. L.Q.* 447, p. 452). La surreprésentation des Autochtones dans le système de justice pénale atteint donc des niveaux jamais vus. Lors du prononcé de l'arrêt *Gladue* en 1999, 12 p. 100 de tous les détenus fédéraux étaient autochtones; en 2005, les détenus autochtones représentaient 17 p. 100 des admissions dans les établissements pénitentiaires fédéraux

Where We Are and Where We Might Be Going", in J. Cameron and J. Stribopoulos, eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (2008), 687, at p. 701). As Professor Rudin asks: "If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?" ("Addressing Aboriginal Overrepresentation Post-*Gladue*", at p. 452).

[63] Over a decade has passed since this Court issued its judgment in *Gladue*. As the statistics indicate, s. 718.2(*e*) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system. Granted, the *Gladue* principles were never expected to provide a panacea. There is some indication, however, from both the academic commentary and the jurisprudence, that the failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(*e*) and this Court's decision in *Gladue*. The following is an attempt to resolve these misunderstandings, clarify certain ambiguities, and provide additional guidance so that courts can properly implement this sentencing provision.

(1) Making Sense of Aboriginal Sentencing

[64] Section 718.2(*e*) of the *Criminal Code* and this Court's decision in *Gladue* were not universally well received. Three interrelated criticisms have been advanced: (1) sentencing is not an appropriate means of addressing overrepresentation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental

(J. Rudin, « Aboriginal Over-representation and *R. v. Gladue* : Where We Were, Where We Are and Where We Might Be Going », dans J. Cameron et J. Stribopoulos, dir., *The Charter and Criminal Justice : Twenty-Five Years Later* (2008), 687, p. 701). Pour reprendre la question posée par le professeur Rudin : [TRADUCTION] « Si la surreprésentation des Autochtones représentait une crise en 1999, comment peut-on qualifier la situation aujourd'hui? » (« Addressing Aboriginal Overrepresentation Post-*Gladue* », p. 452).

[63] Plus d'une décennie s'est écoulée depuis le prononcé de l'arrêt *Gladue*. Comme le montrent les statistiques, l'al. 718.2*e*) du *Code criminel* n'a pas eu d'effet perceptible sur le problème de surreprésentation des Autochtones dans le système de justice pénale. Certes, les principes énoncés dans *Gladue* n'ont jamais été envisagés comme une panacée. La doctrine et la jurisprudence semblent toutefois indiquer que cet échec pourrait découler dans une certaine mesure de problèmes fondamentaux d'interprétation et d'application tant de l'al. 718.2*e*) que de notre décision dans l'affaire *Gladue*. Nous tenterons donc maintenant de résoudre ces problèmes d'interprétation, de clarifier certaines ambiguïtés et de fournir des directives additionnelles aux tribunaux pour qu'ils puissent mettre en œuvre, avec un regain de vigueur, cette disposition relative à la détermination de la peine.

(1) Comprendre la détermination de la peine d'un délinquant autochtone

[64] L'alinéa 718.2*e*) du *Code criminel* et l'arrêt *Gladue*, dans lequel la Cour a interprété et appliqué cette disposition, n'ont pas reçu un accueil unanimement favorable. Trois critiques interreliées ont été formulées : (1) la détermination de la peine n'est pas un moyen valable de lutte contre la surreprésentation; (2) les principes établis dans *Gladue* offrent essentiellement aux délinquants autochtones une réduction de peine fondée sur la race; et (3) réserver un traitement spécial et des peines moins sévères aux délinquants autochtones est en soi inéquitable parce que ce régime crée des distinctions injustifiées entre des délinquants qui se trouvent

misunderstanding of the operation of s. 718.2(*e*) of the *Criminal Code*.

[65] Professors Stenning and Roberts describe the sentencing provision as an "empty promise" to Aboriginal peoples because it is unlikely to have any significant impact on levels of overrepresentation (P. Stenning and J. V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001), 64 *Sask. L. Rev.* 137, at p. 167). As we have seen, the direction to pay particular attention to the circumstances of Aboriginal offenders was included in light of evidence of their overrepresentation in Canada's prisons and jails. This overrepresentation led the Aboriginal Justice Inquiry of Manitoba to ask in its Report: "Why, in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system" (p. 85; see also RCAP, at p. 33). The available evidence indicates that both phenomena are contributing to the problem (RCAP). Contrary to Professors Stenning and Roberts, addressing these matters does not lie beyond the purview of the sentencing judge.

[66] First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their

dans une situation analogue et contrevient ainsi au principe de parité dans l'imposition des peines. À mon avis, ces critiques reposent sur une incompréhension profonde du fonctionnement de l'al. 718.2*e*) du *Code criminel*.

[65] Pour les professeurs Stenning et Roberts, cette disposition relative à la détermination de la peine constitue une [TRADUCTION] « promesse illusoire » faite aux peuples autochtones, parce qu'elle n'aura vraisemblablement aucun effet important sur les taux de surreprésentation (P. Stenning et J. V. Roberts, « Empty Promises : Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders » (2001), 64 *Sask. L. Rev.* 137, p. 167). Comme nous l'avons vu, la directive d'interprétation invitant les juges à porter une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones a été ajoutée en réaction au constat de leur surreprésentation dans les établissements carcéraux au Canada. Cette surreprésentation a amené les commissaires chargés de l'Enquête publique sur l'administration de la justice et les peuples autochtones au Manitoba à se poser la question suivante dans leur rapport : [TRADUCTION] « Comment se fait-il que, dans une société où la justice est censée être aveugle, les détenus proviennent dans une si forte proportion d'un seul groupe ethnique? Deux réponses s'imposent d'emblée : ou bien les Autochtones commettent un nombre disproportionné de crimes, ou bien ils sont victimes d'un système de justice discriminatoire » (p. 85; voir aussi CRPA, p. 37). Selon la preuve disponible, les deux phénomènes contribuent au problème (CRPA). Toutefois, contrairement à ce qu'affirment les professeurs Stenning et Roberts, le traitement de ces questions n'excède pas les limites de la compétence du juge chargé de déterminer la peine.

[66] D'abord, les juges chargés de déterminer la peine peuvent s'appliquer à réduire le taux de criminalité dans les collectivités autochtones en imposant des peines qui contribuent effectivement à la prévention de la criminalité et à la réadaptation des délinquants. Ces objectifs de détermination de la peine ont été codifiés. Dans la mesure où elles ne favorisent par la réalisation de ces objectifs, les

communities. As Professors Rudin and Roach ask, "[if an innovative] sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?" (J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002), 65 *Sask. L. Rev.* 3, at p. 20).

[67] Second, judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing. Professor Quigley aptly describes how this occurs:

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.

(T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in R. Gosse, J. Y. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, at pp. 275-76)

Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they

pratiques actuelles de détermination de la peine doivent être modifiées de façon à répondre aux besoins des délinquants autochtones et de leurs collectivités. Pour reprendre la question soulevée par les professeurs Rudin et Roach, [TRADUCTION] « [p]ourquoi faudrait-il écarter [une peine innovatrice] qui peut réellement aider une personne à assumer la responsabilité de ses actes et à réduire la probabilité d'une récidive, pour la seule raison que d'autres personnes qui commettent la même infraction sont envoyées en prison? » (J. Rudin et K. Roach, « Broken Promises : A Response to Stenning and Roberts' "Empty Promises" » (2002), 65 *Sask. L. Rev.* 3, p 20).

[67] Ensuite, les juges peuvent faire en sorte que les facteurs systémiques ne créent pas, par mégarde, de la discrimination dans la détermination de la peine. Le professeur Quigley décrit avec justesse comment cela se produit :

> [TRADUCTION] Les facteurs socio-économiques comme la situation d'emploi, le niveau d'instruction, la situation familiale, etc., semblent à première vue des critères neutres. Le système juridique les considère comme tels. Ils peuvent toutefois dissimuler un parti pris extrêmement fort lors du processus de détermination de la peine. Les personnes reconnues coupables d'infractions qui pourraient, à la limite, leur valoir une peine d'emprisonnement sont beaucoup moins susceptibles d'être envoyées en prison lorsqu'elles occupent un emploi stable et mènent une vie stable, ou qu'elles peuvent à tout le moins espérer y parvenir. Les chômeurs, les personnes sans domicile fixe, celles qui ont peu d'instruction sont les meilleurs candidats à l'emprisonnement. Lorsque les facteurs sociaux, politiques et économiques de notre société font entrer un nombre disproportionné d'Autochtones dans ces catégories de personnes, notre société en condamne littéralement un plus grand nombre à la prison. C'est ce qu'on appelle la discrimination systémique.

(T. Quigley, « Some Issues in Sentencing of Aboriginal Offenders », dans R. Gosse, J. Y. Henderson et R. Carter, dir., *Continuing Poundmaker and Riel's Quest : Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, p. 275-276).

Intervenants de première ligne dans le système de justice pénale, les juges de détermination de la peine sont les mieux placés pour réévaluer ces critères

are not contributing to ongoing systemic racial discrimination.

[68] Section 718.2(*e*) is therefore properly seen as a "direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process" (*Gladue*, at para. 64 (emphasis added)). Applying the provision does not amount to "hijacking the sentencing process in the pursuit of other goals" (Stenning and Roberts, at p. 160). The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(*e*), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.

[69] Certainly sentencing will not be the sole — or even the primary — means of addressing Aboriginal overrepresentation in penal institutions. But that does not detract from a judge's fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim. Nor does it turn s. 718.2(*e*) into an empty promise. The sentencing judge has an admittedly limited, yet important role to play. As the Aboriginal Justice Inquiry of Manitoba put it, at pp. 110-11:

> To change this situation will require a real commitment to ending social inequality in Canadian society, something to which no government in Canada has committed itself to date. This will be a far-reaching endeavour and involve much

de façon qu'ils ne contribuent pas à la persistance de la discrimination raciale systémique.

[68] On voit donc légitimement dans l'al. 718.2*e*) une « directive que le Parlement adresse à la magistrature, l'invitant à se pencher sur les causes du problème et à s'efforcer d'y remédier, dans la mesure où cela est possible dans le cadre du processus de détermination de la peine » (*Gladue*, par. 64 (je souligne)). Appliquer cette disposition n'équivaut pas à [TRADUCTION] « détourner de sa fonction initiale le processus de détermination de la peine pour poursuivre d'autres objectifs » (Stenning et Roberts, p. 160). La détermination de la peine vise à promouvoir une société juste, paisible et sûre par l'imposition de sanctions justes qui contribuent notamment à la prévention de la criminalité et à la réadaptation des délinquants, le tout conformément au principe fondamental de la proportionnalité. Des sanctions justes ne sont pas discriminatoires. En adoptant l'al. 718.2*e*), le législateur a manifestement conclu à la nécessité d'une directive précise invitant les juges à porter une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones pour leur permettre de s'acquitter correctement de leurs fonctions dans ce domaine.

[69] Bien sûr, le processus de détermination de la peine ne constituera pas le seul — ni même le principal — moyen de résoudre le problème de surreprésentation des Autochtones dans les établissements carcéraux. Cet état de choses n'atténue toutefois en rien l'obligation fondamentale du juge d'infliger une peine juste et appropriée eu égard à l'infraction commise, au délinquant et à la victime. Il ne fait pas non plus de l'al. 718.2*e*) une promesse illusoire. Le juge chargé de déterminer la peine joue un rôle certes limité, mais important. Les commissaires chargés de l'Enquête publique sur l'administration de la justice et les peuples autochtones au Manitoba se sont exprimés en ces termes, aux p. 110-111 de leur rapport :

> [TRADUCTION] Pour que les choses changent, il va falloir un engagement véritable à mettre fin aux inégalités sociales dans la société canadienne, engagement qu'aucun gouvernement au Canada n'a pris à ce jour. Il s'agira d'une entreprise d'envergure qui mettra en cause

more than the justice system as it is understood currently. . . .

Despite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation.

Cory and Iacobucci JJ. were equally cognizant of the limits of the sentencing judge's power to effect change. Paragraph 65 of *Gladue* bears repeating here:

It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. . . . What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

[70] The sentencing process is therefore an appropriate forum for addressing Aboriginal overrepresentation in Canada's prisons. Despite being theoretically sound, critics still insist that, in practice, the direction to pay particular attention to the circumstances of Aboriginal offenders invites sentencing judges to impose more lenient sentences simply because an offender is Aboriginal. In short, s. 718.2(*e*) is seen as a race-based discount on sentencing, devoid of any legitimate tie to traditional principles of sentencing. A particularly stark example of this view was expressed by Bloc Québécois M.P. Pierrette Venne at the second reading for Bill C-41 when she asked: "Why should an Aboriginal convicted of murder, rape, assault or of uttering threats not be liable to imprisonment like any other citizen of this country? Can we replace all this with a parallel justice, an ethnic

bien plus que le système de justice tel qu'on le conçoit aujourd'hui. . .

Malgré l'ampleur des problèmes, le système de justice peut contribuer de beaucoup à la réduction de la délinquance chez les Autochtones. Il peut réduire les formes de discrimination qu'il opère à l'encontre des Autochtones et les façons dont il accroît leur aliénation.

Les juges Cory et Iacobucci étaient également conscients des limites du pouvoir de réaliser des changements conféré aux juges chargés d'infliger la peine. Il convient de reproduire ici le par. 65 de l'arrêt *Gladue* :

Il est évident que des pratiques innovatrices dans la détermination de la peine ne peuvent à elles seules faire disparaître les causes de la criminalité autochtone et le problème plus large de l'aliénation des autochtones par rapport au système de justice pénale. [. . .] Mais ce qu'on peut et doit examiner, c'est le rôle limité que joueront les juges chargés d'infliger les peines dans le redressement des injustices subies par les autochtones au Canada. Les juges qui prononcent les peines comptent parmi les décideurs qui ont le pouvoir d'influer sur le traitement des délinquants autochtones dans le système de justice. Ce sont eux qui décident le plus directement si un délinquant autochtone ira en prison, ou s'il est possible d'envisager des solutions de rechange qui permettront peut-être davantage de restaurer un certain équilibre entre le délinquant, la victime et la collectivité, et de prévenir d'autres crimes.

[70] Le processus de détermination de la peine offre une occasion valable pour tenter de trouver des solutions au problème de la surreprésentation des Autochtones dans les prisons canadiennes. Bien qu'ils en admettent la validité, certains critiques maintiennent l'opinion que, d'un point de vue pratique, le principe selon lequel une attention particulière doit être portée aux circonstances dans lesquelles se trouvent les délinquants autochtones invite les juges chargés d'infliger la peine à imposer des peines plus légères du simple fait qu'un délinquant est un Autochtone. En bref, ces critiques considèrent l'al. 718.2*e*) comme une disposition autorisant une réduction de peine fondée sur la race, dénuée de tout lien légitime avec les principes traditionnels de détermination de la peine. La question posée par la députée du Bloc Québécois Pierrette Venne à la deuxième lecture du projet de

justice, a cultural justice? Where would it stop? Where does this horror come from?" (*House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., September 20, 1994, at p. 5876).

loi C-41 fournit un exemple particulièrement éloquent de ce point de vue : « Pourquoi l'emprisonnement ne serait-il pas imposé à l'autochtone coupable de meurtre, de viol, de voies de fait ou de menaces comme y serait passible tout autre citoyen du pays? Peut-on remplacer tout cela par une justice parallèle, une justice ethnique, une justice culturelle? Où cela devrait-il s'arrêter? D'où vient cette horreur? » (*Débats de la Chambre des communes*, vol. 133, 1re sess., 35e lég., 20 septembre 1994, p. 5876).

[71] In *Gladue*, this Court rejected Ms. Gladue's argument that s. 718.2(*e*) was an affirmative action provision or, as the Crown described it, an invitation to engage in "reverse discrimination" (para. 86). Cory and Iacobucci JJ. were very clear in stating that "s. 718.2(*e*) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal" (para. 88 (emphasis added)). This point was reiterated in *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 30. There is nothing to suggest that subsequent decisions of provincial and appellate courts have departed from this principle. In fact, it is usually stated explicitly. For example, in *R. v. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120, the Manitoba Court of Appeal stated, at para. 39:

> The section does not mandate better treatment for aboriginal offenders than non-aboriginal offenders. It is simply a recognition that the sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgment that to achieve real equality, sometimes different people must be treated differently.

[71] Pourtant, dans l'arrêt *Gladue*, la Cour a rejeté l'argument de Mlle Gladue selon lequel l'al. 718.2*e*) était une disposition de promotion sociale ou, selon la description qu'en avait donnée le ministère public, une invitation à pratiquer une « discrimination à rebours » (par. 86). Les juges Cory et Iacobucci ont affirmé très clairement que « l'al. 718.2*e*) ne doit pas être interprété comme exigeant une réduction automatique de la peine, ou la remise d'une période justifiée d'incarcération, pour la simple raison que le délinquant est autochtone » (par. 88 (je souligne)). La Cour a réitéré ce point de vue dans l'arrêt *R. c. Wells*, 2000 CSC 10, [2000] 1 R.C.S. 207, par. 30. Rien n'indique que les cours provinciales et les juridictions d'appel aient dérogé à ce principe dans leurs décisions subséquentes. En fait, ce principe est habituellement énoncé explicitement. À titre d'exemple, dans l'arrêt *R. c. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120, la Cour d'appel du Manitoba a affirmé, au par. 39 :

> [TRADUCTION] Cette disposition n'oblige pas les juges à accorder aux délinquants autochtones un traitement plus favorable que celui réservé aux délinquants non autochtones. Elle ne fait que reconnaître le principe selon lequel les peines doivent être individualisées et que de graves problèmes sociaux vécus par les Autochtones exigent des solutions plus créatives et innovatrices. Il ne s'agit pas d'une discrimination à rebours. Cette disposition reconnaît uniquement que, pour assurer une véritable égalité, des personnes différentes doivent parfois être traitées différemment.

[72] While the *purpose* of s. 718.2(*e*) may not be to provide "a remission of a warranted period of incarceration", critics argue that the *methodology* set out in *Gladue* will inevitably have this effect. As Professors Stenning and Roberts state: ". . . the practical effect of this alternate methodology

[72] Bien que l'al. 718.2*e*) n'ait peut-être pas pour *objet* « la remise d'une période justifiée d'incarcération », certains de ses critiques soutiennent que la *méthode* énoncée dans l'arrêt *Gladue* produira inévitablement cet effet. Ainsi, les professeurs Stenning et Roberts affirment que [TRADUCTION]

is predictable: the sentencing of an Aboriginal offender is less likely to result in a term of custody and, if custody is imposed, it is likely to be shorter in some cases than it would have been had the offender been non-Aboriginal" (p. 162). These criticisms are unwarranted. The methodology set out by this Court in *Gladue* is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. *Gladue* directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

« l'effet concret de cette méthode différente est prévisible : un délinquant autochtone est moins susceptible de se voir imposer une peine d'emprisonnement et, si une telle peine lui est imposée, elle pourrait dans certains cas être plus courte qu'elle ne l'aurait été si le délinquant n'avait pas été un Autochtone » (p. 162). Ces critiques ne sont pas fondées. En effet, la méthode établie par la Cour dans l'arrêt *Gladue* a été conçue de manière à inciter à examiner les circonstances particulières dans lesquelles sont placés les Autochtones, lorsqu'on peut conclure sur une base raisonnable et justifiée qu'elles sont susceptibles d'affecter la peine à imposer. L'arrêt *Gladue* oblige le juge chargé de déterminer la peine à tenir compte des circonstances suivantes : (1) les facteurs systémiques et historiques distinctifs qui peuvent être une des raisons pour lesquelles le délinquant se retrouve devant les tribunaux; et (2) les types de procédures de détermination de la peine et de sanctions qui, dans les circonstances, peuvent être appropriées à l'égard du délinquant en raison de son héritage ou de ses liens autochtones. Ces deux catégories de circonstances se rapportent à la question ultime de déterminer une peine juste et appropriée.

[73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in *Wells* where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R.

[73] Enfin, les facteurs systémiques et historiques peuvent influer sur la culpabilité du délinquant, dans la mesure où ils mettent en lumière son degré de culpabilité morale. L'arrêt *Wells* souligne plus clairement, peut-être, l'importance de cette influence lorsque le juge Iacobucci décrit ces circonstances comme « des facteurs systémiques ou historiques distinctifs qui peuvent être considérés comme des circonstances atténuantes parce qu'ils peuvent avoir contribué à la conduite du délinquant autochtone » (par. 38 (je souligne)). On se rappellera que le droit pénal canadien repose sur la prémisse selon laquelle seule une conduite volontaire entraîne la responsabilité criminelle. Or, de nombreux délinquants autochtones se trouvent placés dans des situations économique et sociale défavorables et confrontés à un manque de débouchés et des possibilités limitées de développement harmonieux. Bien qu'on ne puisse que rarement — sinon jamais — affirmer à bon droit que leurs actes n'étaient pas *volontaires* et ne sont donc pas passibles de sanction criminelle, leur situation difficile

50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender.* The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se*. As Cory and Iacobucci JJ. state in *Gladue*, at para. 69:

In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

[74] The second set of circumstances — the types of sanctions which may be appropriate — bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: "What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities." As the RCAP indicates, at p. 309, the "crushing failure" of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to "the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice". The *Gladue* principles direct sentencing judges to

peut, en fait, atténuer leur culpabilité morale. Par exemple, dans l'arrêt *R. c. Skani*, 2002 ABQB 1097, 331 A.R. 50, après avoir décrit les facteurs contextuels ayant mené à l'inculpation de M. Skani, la juge Greckol de la Cour du Banc de la Reine de l'Alberta s'est exprimée en ces termes, au par. 60 : [TRADUCTION] « Peu d'êtres humains peuvent vivre une telle enfance et une telle jeunesse sans développer de graves problèmes. » Ne pas tenir compte de ces circonstances contreviendrait au principe fondamental de détermination de la peine — la proportionnalité de la peine à la gravité de l'infraction *et au degré de responsabilité du délinquant*. Par ailleurs, dans de telles circonstances, une sanction visant à traiter les causes sous-jacentes de la conduite criminelle peut se révéler plus appropriée qu'une sanction de nature punitive. Les juges Cory et Iacobucci ont d'ailleurs souligné la pertinence de ces considérations au par. 69 de l'arrêt *Gladue* :

Dans les cas où de tels facteurs ont joué un rôle important, il incombe au juge de la peine d'en tenir compte pour déterminer si l'incarcération aurait réellement un effet de dissuasion et de dénonciation du crime qui aurait un sens dans la communauté à laquelle le délinquant appartient. Dans bien des cas, les principes correctifs de détermination de la peine deviendront les plus pertinents pour la raison précise qu'il n'y a aucun autre moyen d'assurer la prévention du crime et la guérison individuelle et sociale.

[74] La deuxième catégorie de circonstances — les types de sanctions susceptibles d'être appropriés — a trait non pas au degré de culpabilité du délinquant, mais bien à l'efficacité de la peine elle-même. Comme le soulignent les juges Cory et Iacobucci au par. 73 de l'arrêt *Gladue*, « [c]e qu'il importe de reconnaître, c'est que, pour beaucoup sinon la plupart des délinquants autochtones, les concepts actuels de la détermination de la peine sont inadaptés parce que, souvent, ces concepts n'ont pas permis de répondre aux besoins, à l'expérience et à la façon de voir des peuples et communautés autochtones. » Comme l'affirme la CRPA, à la p. 336 de son rapport, le « lamentable échec » du système canadien de justice pénale à l'endroit des peuples autochtones découle de ce qu'« autochtones et non-autochtones affichent des conceptions extrêmement différentes à l'égard de questions

abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

[75] Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[76] A third criticism, intimately related to the last, is that the Court's direction to utilize a method of analysis when sentencing Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are otherwise similarly situated. This, in turn, violates the principle of sentence parity. This criticism is premised on the argument that the circumstances

fondamentales comme la nature de la justice et la façon de l'administrer ». Les principes énoncés dans l'arrêt *Gladue* obligent le juge, lorsqu'il détermine la peine, à éviter de présumer que tous les délinquants et toutes les collectivités partagent les mêmes valeurs, et à reconnaître que, compte tenu de la présence de conceptions du monde foncièrement différentes, l'imposition de sanctions différentes ou substitutives peut permettre d'atteindre plus efficacement les objectifs de détermination de la peine dans une collectivité donnée.

[75] L'alinéa 718.2*e*) n'autorise pas une réduction de peine fondée sur la race. Cette disposition n'invite pas les tribunaux à remédier au problème de surreprésentation des Autochtones dans les prisons par une réduction artificielle des taux d'incarcération. Les juges chargés d'infliger la peine doivent plutôt accorder une attention particulière aux circonstances dans lesquelles se trouvent les délinquants autochtones pour fixer une peine véritablement adaptée et appropriée au contexte d'un cas donné. Il s'agissait, et il s'agit toujours, de leur obligation fondamentale. L'arrêt *Gladue* respecte entièrement l'exigence selon laquelle ces juges doivent examiner tous les facteurs et toutes les circonstances propres à la personne qui se trouve devant eux, y compris sa situation et son vécu. Dans l'arrêt *Gladue*, la Cour a réaffirmé cette exigence et a reconnu que les tribunaux canadiens n'avaient jusqu'alors pas tenu compte des circonstances particulières propres aux délinquants autochtones, malgré leur pertinence dans l'imposition de la peine. L'alinéa 718.2*e*) vise à remédier à ce défaut en prescrivant aux juges d'adapter les sanctions à la situation des peuples autochtones. La violation de cette obligation contrevient aux exigences fondamentales du processus de détermination de la peine.

[76] Selon une troisième critique, intimement liée à la précédente, la recommandation adressée aux tribunaux d'utiliser une méthode différente pour la détermination de la peine à infliger à un délinquant autochtone serait intrinsèquement inéquitable. En effet, elle établirait des distinctions injustifiées entre des délinquants placés dans une situation analogue, en violation du

of Aboriginal offenders are not, in fact, unique. As Professors Stenning and Roberts put it, at p. 158:

> If the kinds of factors that place many Aboriginal people at a disadvantage *vis-à-vis* the criminal justice system also affect many members of other minority or similarly marginalized non-Aboriginal offender groups, how can it be fair to give such factors more particular attention in sentencing Aboriginal offenders than in sentencing offenders from those other groups who share a similar disadvantage?

[77] This critique ignores the distinct history of Aboriginal peoples in Canada. The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP, at p. 309). As Professor Carter puts it, "poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's" (M. Carter, "Of Fairness and Faulkner" (2002), 65 *Sask. L. Rev.* 63, at p. 71). Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. Quite the opposite. Cory and Iacobucci JJ. specifically state, at para. 69, in *Gladue*, that "background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender".

[78] The interaction between ss. 718.2(*e*) and 718.2(*b*) — the parity principle — merits specific attention. Section 718.2(*b*) states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar

principe de parité dans l'imposition des peines. Cette critique repose sur l'argument selon lequel la situation des délinquants autochtones ne serait pas, dans les faits, particulière. Pour reprendre les propos des professeurs Stenning et Roberts, à la p. 158 :

> [TRADUCTION] Si les types de facteurs désavantageant les Autochtones par rapport au système de justice pénale touchent également de nombreux délinquants d'autres groupes non autochtones minoritaires ou marginalisés de façon analogue, comment peut-il être juste que le juge chargé d'infliger la peine accorde à ces facteurs une attention plus particulière lorsque le délinquant est un Autochtone que lorsque celui-ci appartient à l'un de ces autres groupes désavantagés de façon analogue?

[77] Cette critique ne tient aucun compte de l'histoire particulière des peuples autochtones au Canada. Le message essentiel transmis par les divers rapports et commissions sur les peuples autochtones et le système de justice pénale souligne que les niveaux actuels de criminalité sont intimement liés à l'héritage du colonialisme (voir, p. ex., CRPA, p. 336). Pour reprendre les termes utilisés par le professeur Carter, [TRADUCTION] « la pauvreté et les autres cas de marginalisation sociale ne sont peut-être pas uniques; ce qui l'est toutefois, c'est la façon dont des personnes se retrouvent dans de telles situations. Personne au pays n'a un passé comparable à celui des peuples autochtones » (M. Carter, « Of Fairness and Faulkner » (2002), 65 *Sask. L. Rev.* 63, p. 71). De plus, rien dans l'arrêt *Gladue* n'indique que les facteurs historiques et systémiques ne devraient pas également être pris en considération dans le cas d'autres délinquants, non autochtones. Bien au contraire, les juges Cory et Iacobucci affirment explicitement dans *Gladue*, par. 69, que « les facteurs historiques et systémiques ont aussi leur importance dans la détermination de la peine applicable aux délinquants non-autochtones ».

[78] L'interaction entre les al. 718.2*e*) et 718.2*b*) — le principe de la parité — mérite une attention particulière. L'alinéa 718.2*b*) prévoit « l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à

circumstances". Similarity, however, is sometimes an elusory concept. As Professor Brodeur describes ("On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts" (2002), 65 *Sask. L. Rev.* 45, at p. 49):

> . . . "high unemployment" has a different meaning in the context of an Aboriginal reservation where there are simply no job opportunities and in an urban context where the White majority exclude Blacks from segments of the labour-market; "substance abuse" is not the same when it refers to young men smoking crack cocaine and to kids committing suicide by sniffing gasoline; "loneliness" is not experienced in a similar way in bush reservations and urban ghettoes.

[79] In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2(*b*) simply requires that any disparity between sanctions for different offenders be justified. To the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(*e*). As Professor Quigley cautions, at p. 286:

> Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy.
>
> It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society,

des délinquants pour des infractions semblables commises dans des circonstances semblables ». Or, la similarité constitue parfois une notion difficile à définir. Le professeur Brodeur (« On the Sentencing of Aboriginal Offenders : A Reaction to Stenning and Roberts » (2002), 65 *Sask. L. Rev.* 45, p. 49) décrit cette notion en ces termes :

> [TRADUCTION] . . . un « taux de chômage élevé » a une signification différente dans le contexte d'une réserve autochtone où il n'y a tout simplement aucune possibilité d'emploi et dans un contexte urbain où la majorité blanche exclut les Noirs de certains secteurs du marché du travail; la notion d'« abus d'alcool ou d'autres drogues » diffère lorsqu'elle se rapporte à de jeunes hommes fumant du crack et à des enfants qui se suicident en inhalant de l'essence; la « solitude » n'est pas vécue de la même façon dans les réserves isolées et dans les ghettos urbains.

[79] En pratique, la similarité demeure une question de degré. Les tribunaux ne verront sans doute jamais deux délinquants partageant une expérience de vie identique, qui auraient commis le même crime dans exactement les mêmes circonstances. L'alinéa 718.2*b*) exige simplement que toute disparité entre les sanctions imposées à différents délinquants soit justifiée. Dans la mesure où l'arrêt *Gladue* mène à l'imposition de sanctions différentes aux délinquants autochtones, ces sanctions se justifieront en raison des circonstances particulières dans lesquelles ils se trouvent — des circonstances rationnellement liées au processus de détermination de la peine. De plus, les tribunaux doivent veiller à ce qu'une application formaliste du principe de parité dans l'imposition des peines ne fasse pas échec à l'objectif réparateur de l'al. 718.2*e*). À ce propos, le professeur Quigley formule la mise en garde suivante, à la p. 286 :

> [TRADUCTION] L'uniformité occulte l'injustice, fait obstacle à l'innovation et coince le système dans une philosophie d'emprisonnement. Elle nous empêche également de reconsidérer la valeur de nos objectifs de détermination de la peine et leur efficacité.
>
> Certes, il n'est que juste à priori d'imposer la même peine pour une infraction presque identique. Ce point de vue se rapprocherait peut-être davantage de la vérité si nous vivions dans une société plus équitable, plus homogène et plus cohésive que la nôtre. Toutefois, dans une

there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the Charter. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity.

(2) Evaluating Aboriginal Sentencing Post-*Gladue*

[80] An examination of the post-*Gladue* jurisprudence applying s. 718.2(*e*) reveals several issues with the implementation of the provision. These errors have significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*.

[81] First, some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge. The decision of the Alberta Court of Appeal in *R. v. Poucette*, 1999 ABCA 305, 250 A.R. 55, provides one example. In that case, the court concluded, at para. 14:

> It is not clear how Poucette, a 19 year old, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. While it may be argued that all aboriginal persons have been affected by systemic and background factors, *Gladue* requires that their influences be traced to the particular offender. Failure to link the two is an error in principle.

(See also *R. v. Gladue*, 1999 ABCA 279, 46 M.V.R. (3d) 183; *R. v. Andres*, 2002 SKCA 98, 223 Sask. R. 121.)

[82] This judgment displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden

société diversifiée sur les plans ethnique et culturel, un même traitement peut avoir un effet différent. C'est ce que reconnaît en fait la jurisprudence sur les droits à l'égalité garantis par la Charte. Éviter de se préoccuper exagérément de la disparité entre les sanctions imposées constitue donc un impératif constitutionnel.

(2) Évaluation de la détermination de la peine des délinquants autochtones depuis l'arrêt *Gladue*

[80] Un examen de la jurisprudence postérieure à l'arrêt *Gladue*, dans laquelle les tribunaux ont appliqué l'al. 718.2*e*), démontre la présence de plusieurs problèmes relatifs à la mise en œuvre de cette disposition. En commettant ces erreurs, les tribunaux ont considérablement restreint la portée et le potentiel réparateur de cette disposition. Ils ont ainsi compromis la réalisation des objectifs recherchés dans l'arrêt *Gladue*.

[81] Premièrement, certaines décisions laissent entendre à tort que le délinquant doit établir un lien de causalité entre les facteurs historiques et la perpétration de l'infraction pour que le juge de la peine puisse tenir compte de ces facteurs. L'arrêt *R. c. Poucette*, 1999 ABCA 305, 250 A.R. 55, représente un exemple de cette tendance. En effet, dans cette affaire, la Cour d'appel de l'Alberta a conclu, au par. 14 :

> [TRADUCTION] On ne voit pas clairement comment Poucette, âgé de 19 ans, pourrait avoir été touché par les facteurs historiques mentionnés par le juge de détermination de la peine, soit les politiques d'assimilation, la colonisation, les pensionnats et la persécution religieuse. Bien qu'on puisse prétendre que les facteurs systémiques et historiques touchent tous les Autochtones, l'arrêt *Gladue* exige que l'on en constate les répercussions sur le délinquant même. Le défaut d'établir ce lien constitue une erreur de principe.

(Voir aussi *R. c. Gladue*, 1999 ABCA 279, 46 M.V.R. (3d) 183; *R. c. Andres*, 2002 SKCA 98, 223 Sask. R. 121.)

[82] Cet arrêt reflète une mauvaise compréhension des effets intergénérationnels dévastateurs des expériences collectives vécues par les peuples autochtones. Il impose également aux délinquants

on offenders that was not intended by *Gladue*. As the Ontario Court of Appeal states in *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88, at paras. 32-33:

> There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence. . . .
>
> As expressed in *Gladue*, *Wells* and *Kakekagamick*, s. 718.2(e) requires the sentencing judge to "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": *Gladue* at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge.

(See also *R. v. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245.)

[83] As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:

> Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

Furthermore, the operation of s. 718.2(*e*) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the

un fardeau de la preuve que n'avait pas prévu l'arrêt *Gladue*. Comme l'affirme la Cour d'appel de l'Ontario dans *R. c. Collins*, 2011 ONCA 182, 277 O.A.C. 88, par. 32-33 :

> [TRADUCTION] Rien dans la jurisprudence applicable n'impose à l'accusé autochtone le fardeau d'établir l'existence d'un lien de causalité entre les facteurs systémiques et historiques et la perpétration de l'infraction. . .
>
> Comme l'indiquent les arrêts *Gladue*, *Wells* et *Kakekagamick*, l'al. 718.2e) oblige le juge chargé d'infliger la peine à « prêter attention aux facteurs historiques et systémiques particuliers qui ont pu contribuer à ce que ce délinquant soit traduit devant les tribunaux » : *Gladue*, par. 69. Il s'agit là d'une exigence beaucoup plus modeste que le lien de causalité évoqué par le juge du procès.

(Voir aussi *R. c. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245.)

[83] De plus, ainsi que le souligne la Cour d'appel de l'Ontario dans *Collins*, un délinquant autochtone devrait affronter d'extrêmes difficultés pour établir un lien de causalité direct entre sa situation et la perpétration de l'infraction. Ces corrélations sont tout simplement trop complexes. Les commissaires chargés de l'Enquête publique sur l'administration de la justice et les peuples autochtones au Manitoba l'expliquent, à la p. 86 :

> [TRADUCTION] L'oppression culturelle, les inégalités sociales, la perte de l'autonomie gouvernementale et la discrimination systémique — l'héritage du traitement accordé par le gouvernement canadien aux peuples autochtones — sont des facteurs intimement liés et interdépendants. Rares sont les cas où il est possible d'établir un lien simple et direct entre l'un de ces facteurs et les événements ayant mené un Autochtone à commettre un crime ou à être incarcéré.

De plus, l'application de l'al. 718.2*e*) n'exige pas logiquement un tel lien. Les facteurs systémiques et historiques ne constituent pas une excuse ou une justification à la conduite criminelle. Ils établissent plutôt le cadre contextuel nécessaire pour permettre au juge d'infliger une peine appropriée. Toutefois, la reconnaissance de ce rôle ne dispense pas de l'obligation d'établir un lien entre ces facteurs, le

unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[84] The second and perhaps most significant issue in the post-*Gladue* jurisprudence is the irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences. As Professor Roach has indicated, "appellate courts have attended disproportionately to just a few paragraphs in these two Supreme Court judgments — paragraphs that discuss the relevance of *Gladue* in serious cases and compare the sentencing of Aboriginal and non-Aboriginal offenders" (K. Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009), 54 *Crim. L.Q.* 470, at p. 472). The passage in *Gladue* that has received this unwarranted emphasis is the observation that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing" (para. 79; see also *Wells*, at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.)).

[85] Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear that sentencing judges have a *duty* to apply s. 718.2(*e*): "There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence" (*Gladue*, at para. 82).

délinquant et l'infraction qui a été commise. Ces facteurs n'influeront pas sur la détermination de la peine, à moins que la situation particulière de l'accusé n'ait un lien avec sa culpabilité ou ne suggère de quelle manière la mise en œuvre des objectifs de la peine devrait être adaptée au contexte actuel du prévenu.

[84] L'application irrégulière et incertaine des principes établis dans *Gladue* lorsqu'il s'agit d'imposer une peine pour un crime grave ou violent constitue le deuxième et peut-être le plus important problème que présente la jurisprudence postérieure à cet arrêt. Pour reprendre les propos du professeur Roach, [TRADUCTION] « les cours d'appel ont porté une attention excessive à seulement quelques paragraphes de ces deux arrêts de la Cour suprême — ceux portant sur la pertinence de l'arrêt *Gladue* dans les cas graves et comparant la détermination de la peine des délinquants autochtones et non autochtones » (K. Roach, « One Step Forward, Two Steps Back : *Gladue* at Ten and in the Courts of Appeal » (2009), 54 *Crim. L.Q.* 470, p. 472). La partie de l'arrêt *Gladue* sur laquelle la jurisprudence insiste indûment porte que « [d]e façon générale, plus violente et grave sera l'infraction, plus grande sera la probabilité que la durée des peines d'emprisonnement des autochtones et des non-autochtones soit en pratique proche ou identique, même compte tenu de leur conception différente de la détermination de la peine » (par. 79; voir aussi *Wells*, par. 42-44). Bien des tribunaux ont interprété à tort cette observation générale comme une affirmation selon laquelle les principes de l'arrêt *Gladue* ne s'appliquent pas aux infractions graves (voir, p. ex., *R. c. Carrière* (2002), 164 C.C.C. (3d) 569 (C.A. Ont.)).

[85] Quelles que soient les critiques possibles à propos de l'ambiguïté de son arrêt à cet égard, la Cour précise clairement que le juge chargé d'infliger la peine a l'*obligation* d'appliquer l'al. 718.2*e*) : « Le tribunal n'a pas le pouvoir discrétionnaire d'examiner ou de ne pas examiner la situation particulière du délinquant autochtone; son seul pouvoir discrétionnaire réside dans la détermination

Similarly, in *Wells*, Iacobucci J. reiterated, at para. 50, that

> [t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

This element of duty has not completely escaped the attention of Canadian appellate courts (see, e.g., *R. v. Kakekagamick* (2006), 214 O.A.C. 127; *R. v. Jensen* (2005), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159, 261 A.R. 192).

[86] In addition to being contrary to this Court's direction in *Gladue*, a sentencing judge's failure to apply s. 718.2(*e*) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 *Osgoode Hall L.J.* 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(*e*) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the

d'une peine juste et appropriée » (*Gladue*, par. 82). De même, dans l'arrêt *Wells*, le juge Iacobucci a réitéré au par. 50 que

> [l]a généralisation faite dans *Gladue*, selon laquelle plus grave et violente sera l'infraction, plus grande sera la probabilité, d'un point de vue pratique, que des peines d'emprisonnement semblables soient infligées aux délinquants autochtones et non-autochtones, ne se voulait pas un principe d'application universelle. Dans chaque affaire, le juge qui détermine la peine doit examiner les circonstances dans lesquelles se trouve le délinquant autochtone.

L'affirmation de cette obligation n'a pas complètement échappé à l'attention des cours d'appel canadiennes (voir, p. ex., *R. c. Kakekagamick* (2006), 214 O.A.C. 127; *R. c. Jensen* (2005), 196 O.A.C. 119; *R. c. Abraham*, 2000 ABCA 159, 261 A.R. 192).

[86] En plus de contredire la directive d'interprétation et d'application énoncée par la Cour dans *Gladue*, la non-application de l'al. 718.2*e*) dans le contexte d'infractions graves soulève plusieurs questions. Premièrement, quelles infractions doivent être considérées comme « graves » à cet égard? Comme le souligne M^me^ Pelletier, [TRADUCTION] « [l]a notion d'infractions "graves" n'existe pas dans les textes de loi. Le *Code* n'établit pas de distinction entre les crimes graves et ceux qui ne le sont pas. De plus, aucun critère juridique ne permet de déterminer quelles infractions devraient être considérées comme "graves" » (R. Pelletier, « The Nullification of Section 718.2(e) : Aggravating Aboriginal Over-representation in Canadian Prisons » (2001), 39 *Osgoode Hall L.J.* 469, p. 479). Toute tentative d'établir une exception pour les infractions graves à partir du principe de l'arrêt *Gladue* provoquerait l'apparition de courants jurisprudentiels contradictoires, compte tenu de « la facilité relative avec laquelle les juges de détermination de la peine pourraient considérer un certain nombre d'infractions comme "graves" » (Pelletier, p. 479). L'alinéa 718.2*e*) perdrait aussi une bonne partie de son pouvoir réparateur, étant donné l'accent mis dans cette disposition sur l'atténuation du recours excessif à l'incarcération. Par ailleurs, la deuxième question qui se pose est

sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

[87] The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

VI. Application

A. *Manasie Ipeelee*

[88] Megginson J. sentenced Mr. Ipeelee to three years' imprisonment, less credit for pre-sentence custody. The Court of Appeal upheld that sentence. Both courts emphasized the serious nature of the breach, given the documented link between Mr. Ipeelee's use of alcohol and his propensity to engage in violence. As a result, both courts emphasized the objectives of denunciation, deterrence, and protection of the public.

[89] In my view, the courts below made several errors in principle warranting appellate intervention. First, the courts reached the erroneous conclusion that protection of the public is the

la suivante : à qui le tribunal impose-t-il une peine si ce n'est au délinquant qui se trouve devant lui? Si le délinquant est un Autochtone, le tribunal doit tenir compte de sa situation dans son ensemble, y compris les circonstances particulières décrites dans l'arrêt *Gladue*. Il serait illogique de comparer la peine à infliger au délinquant autochtone avec celle que se verrait imposer un délinquant hypothétique non autochtone, parce qu'un seul délinquant se trouve devant le tribunal.

[87] Le juge chargé d'imposer la peine a l'obligation légale de tenir compte des circonstances particulières propres aux délinquants autochtones, comme l'al. 718.2*e*) du *Code criminel* le prévoit. Le défaut d'appliquer les principes établis par l'arrêt *Gladue* dans une affaire mettant en cause un délinquant autochtone contrevient à cette obligation. Comme nous l'avons expliqué dans les présents motifs, ce défaut entraînerait aussi l'imposition d'une peine injuste et incompatible avec le principe fondamental de la proportionnalité. En conséquence, l'application des principes établis dans *Gladue* est requise dans tous les cas où un délinquant autochtone est en cause, y compris dans le contexte d'un manquement à une OSLD, et le non-respect de cette exigence constitue une erreur justifiant une intervention en appel.

VI. Application

A. *Manasie Ipeelee*

[88] Le juge Megginson a condamné M. Ipeelee à trois ans d'emprisonnement, moins le temps passé en détention présentencielle. La Cour d'appel a confirmé cette peine. Les deux cours d'instance inférieure ont insisté sur la gravité du manquement, compte tenu du lien documenté entre la consommation d'alcool de M. Ipeelee et sa propension à la violence. En conséquence, elles ont toutes les deux mis l'accent sur les objectifs de dénonciation, de dissuasion et de protection du public.

[89] À mon avis, les cours d'instance inférieure ont commis plusieurs erreurs de principe justifiant une intervention en appel. D'abord, elles ont conclu à tort que la protection du public

paramount objective when sentencing for breach of an LTSO and that rehabilitation plays only a small role. As discussed, while protection of the public is important, the legislative purpose of an LTSO as a form of conditional release set out in s. 100 of the *CCRA* is to rehabilitate offenders and reintegrate them into society. The courts therefore erred in concluding that rehabilitation was not a relevant sentencing objective.

[90] As a result of this error, the courts below gave only attenuated consideration to Mr. Ipeelee's circumstances as an Aboriginal offender. Relying on *Carrière*, the Court of Appeal concluded that this was the kind of offence where the sentence will not differ as between Aboriginal and non-Aboriginal offenders, and relying on *W. (H.P.)*, held that features of Aboriginal sentencing play little or no role when sentencing long-term offenders. Given certain trends in the jurisprudence discussed above, it is easy to see how the court reached this conclusion. Nonetheless, they erred in doing so. These errors justify the Court's intervention.

[91] It is therefore necessary to consider what sentence is warranted in the circumstances. Mr. Ipeelee breached the alcohol abstention condition of his LTSO. His history indicates a strong correlation between alcohol use and violent offending. As a result, abstaining from alcohol is critical to managing his risk in the community. That being said, the conduct constituting the breach was becoming intoxicated, not becoming intoxicated and engaging in violence. The Court must focus on the actual incident giving rise to the breach. A fit sentence should seek to manage the risk of reoffence he continues to pose to the community in a manner that addresses his alcohol abuse, rather than punish him for what might have been. To

constituait l'objectif primordial de la détermination de la peine pour un manquement à une OSLD et que la réadaptation ne joue qu'un rôle mineur. Rappelons que, malgré l'importance de la protection du public, l'objectif législatif d'une OSLD, comme forme de libération conditionnelle, énoncé à l'art. 100 de la *LSCMLSC* est la réadaptation et la réinsertion sociale des délinquants. Les juridictions inférieures ont donc commis une erreur en concluant que la réadaptation ne constituait pas un objectif pertinent dans la détermination de la peine.

[90] De plus, en raison de cette erreur, les cours d'instance inférieure n'ont accordé qu'une importance atténuée à la situation de M. Ipeelee en tant que délinquant autochtone. La Cour d'appel s'est fondée sur l'arrêt *Carrière* pour conclure qu'il s'agissait en l'espèce du type d'infraction pour laquelle la peine imposée ne différait pas entre les délinquants autochtones et les délinquants non autochtones, et elle a statué, en s'appuyant sur l'arrêt *W. (H.P.)*, que les particularités du processus de détermination de la peine applicable aux délinquants autochtones n'entraient presque pas, sinon pas du tout en ligne de compte dans le cas d'un délinquant à contrôler. Compte tenu de certaines tendances jurisprudentielles mentionnées précédemment, on comprend facilement comment une telle conclusion a été tirée en l'espèce. Néanmoins, cette conclusion est erronée. La Cour doit donc intervenir.

[91] Par conséquent, il devient nécessaire de déterminer quelle peine est justifiée dans les circonstances. M. Ipeelee a contrevenu à l'interdiction de consommer de l'alcool établie dans son OSLD. Ses antécédents dénotent un lien étroit entre sa consommation d'alcool et la perpétration d'infractions avec violence. L'abstention de consommer de l'alcool est donc essentielle à la gestion du risque qu'il représente dans la collectivité. Cela dit, le manquement qu'on lui reproche consiste à s'être enivré, et non à avoir commis des actes de violence alors qu'il était en état d'ébriété. La Cour doit centrer son attention sur l'incident qui a effectivement constitué un manquement. Une peine juste en l'espèce visera à contrôler le risque qu'il continue de représenter

engage in the latter would certainly run afoul of the principles of fundamental justice.

[92] At the time of the offence, Mr. Ipeelee was 18 months into his LTSO. He was living in Kingston, where there were few culturally relevant support systems in place. There is no evidence, other than one isolated instance of refusing urinalysis, that he consumed alcohol on any occasion prior to this breach. Mr. Ipeelee's history indicates that he has been drinking heavily since the age of 11. Relapse is to be expected as he continues to address his addiction.

[93] Taking into account the relevant sentencing principles, the fact that this is Mr. Ipeelee's first breach of his LTSO and that he pleaded guilty to the offence, I would substitute a sentence of one year's imprisonment. Given the circumstances of his previous convictions, abstaining from alcohol is crucial to Mr. Ipeelee's rehabilitation under the long-term offender regime. Consequently, this sentence is designed to denounce Mr. Ipeelee's conduct and deter him from consuming alcohol in the future. In addition, it provides a sufficient period of time without access to alcohol so that Mr. Ipeelee can get back on track with his alcohol treatment. Finally, the sentence is not so harsh as to suggest to Mr. Ipeelee that success under the long-term offender regime is simply not possible.

B. *Frank Ralph Ladue*

[94] Bagnall Prov. Ct. J. sentenced Mr. Ladue to three years' imprisonment, less credit for pre-sentence custody. The majority of the Court of Appeal intervened and substituted a sentence of one year's imprisonment. Bennett J.A., writing for

pour la collectivité en s'attaquant à sa consommation excessive d'alcool, plutôt qu'à le punir pour ce qui aurait pu arriver. S'engager dans cette dernière voie contredirait certainement les principes de justice fondamentale.

[92] Au moment de l'infraction, M. Ipeelee était assujetti à l'OSLD depuis 18 mois. Il vivait à Kingston, où peu de ressources offrant un soutien pertinent adapté à sa culture étaient disponibles. Aucun élément de preuve, hormis le refus de fournir un échantillon d'urine à une occasion, ne démontre que M. Ipeelee aurait consommé de l'alcool avant le manquement qu'on lui reproche en l'espèce. L'histoire personnelle de M. Ipeelee révèle qu'il boit beaucoup depuis l'âge de 11 ans. Des rechutes sont prévisibles dans la poursuite de sa lutte contre sa dépendance.

[93] Compte tenu des principes applicables de détermination de la peine, du fait qu'il s'agit de son premier manquement à l'OSLD et que M. Ipeelee a plaidé coupable à l'infraction, je suis d'avis de remplacer la peine initiale par un an d'emprisonnement. En raison des circonstances entourant ses condamnations antérieures, il est crucial que M. Ipeelee s'abstienne de consommer de l'alcool pour que le régime applicable aux délinquants à contrôler mène à sa réadaptation. Par conséquent, cette peine est conçue pour dénoncer la conduite reprochée à M. Ipeelee et le dissuader de consommer de l'alcool à l'avenir. Elle impose aussi à M. Ipeelee une période de sobriété suffisamment longue pour le remettre sur la voie de la désintoxication. Cependant, elle n'est pas sévère au point de porter M. Ipeelee à croire qu'il n'est tout simplement pas possible que le régime applicable aux délinquants à contrôler donne des résultats positifs dans son cas.

B. *Frank Ralph Ladue*

[94] La juge Bagnall de la cour provinciale a condamné M. Ladue à trois ans d'emprisonnement, compte tenu du temps qu'il avait passé en détention présentencielle. La Cour d'appel à la majorité est intervenue et a réduit la peine d'emprisonnement à

the majority, held that the sentencing judge made two errors warranting appellate intervention.

[95] First, the majority of the Court of Appeal held that the sentencing judge failed to give sufficient weight to Mr. Ladue's circumstances as an Aboriginal offender. Although she acknowledged Mr. Ladue's Aboriginal status in her reasons for sentence, she failed to give it any "tangible consideration" (para. 64). In my view, the Court of Appeal was right to intervene on this basis. The sentencing judge described Mr. Ladue's history in great detail, but she failed to consider whether and how that history ought to impact on her sentencing decision. As a result, she failed to give effect to Parliament's direction in s. 718.2(*e*) of the *Criminal Code*. As the Court of Appeal rightly concluded, this was a case in which the unique circumstances of the Aboriginal offender indicated that the objective of rehabilitation ought to have been given greater emphasis:

> Mr. Ladue desires to succeed, as exhibited by his request not to be sent to Belkin House. However, he is addicted to drugs and alcohol, which can directly be related to how he was treated as an Aboriginal person. He has not reoffended in a manner which threatens the safety of the public. He will ultimately be released into the community without supervision. Unless he can manage his alcohol and drug addiction in the community he will very likely be a threat to the public. Repeated efforts at abstinence are not unusual for those dealing with addiction. Indeed, Mr. Ladue demonstrated that he is capable of abstinence as shown by his conduct a number of years ago. [para. 63]

[96] Second, the majority of the Court of Appeal held that a sentence of three years' imprisonment was not proportionate to the gravity of the offence and the degree of responsibility of the offender. The Court of Appeal placed particular emphasis on the manner in which Mr. Ladue came to arrive at Belkin House rather than Linkage House. In my view, this emphasis was entirely warranted. Mr. Ladue is addicted to opiates — incidentally, a form of the

un an. S'exprimant au nom de la majorité, la juge Bennett a conclu que la juge de détermination de la peine avait commis deux erreurs qui justifiaient une intervention en appel.

[95] D'abord, les juges majoritaires de la Cour d'appel ont conclu que la juge de détermination de la peine n'avait pas accordé suffisamment d'importance à la situation de M. Ladue en tant que délinquant autochtone. Bien qu'elle ait reconnu le statut d'Autochtone de M. Ladue dans ses motifs, elle n'en avait pas [TRADUCTION] « tenu compte concrètement » (par. 64). Selon moi, l'intervention de la Cour d'appel à cet égard était justifiée. La juge de détermination de la peine a décrit l'histoire personnelle de M. Ladue de façon très détaillée, mais elle ne s'est pas demandé si cette histoire devait influer sur la sentence ni, le cas échéant, de quelle façon. Elle n'a donc pas respecté la directive donnée par le législateur à l'al. 718.2*e*) du *Code criminel*. La Cour d'appel a conclu à bon droit qu'il s'agissait d'un cas où la situation propre au délinquant autochtone indiquait qu'il fallait accorder plus d'importance à l'objectif de réadaptation :

> [TRADUCTION] M. Ladue souhaite réussir, comme en témoigne sa demande de ne pas être renvoyé à la Belkin House. Il souffre toutefois d'une dépendance aux drogues et à l'alcool, qui peut avoir un lien direct avec la façon dont il a été traité à titre d'Autochtone. Il n'a pas récidivé de manière à compromettre la sécurité de la population. Il finira par être libéré sans surveillance dans la collectivité. S'il ne réussit pas à maîtriser sa dépendance à l'alcool et aux drogues dans la collectivité, il représentera fort probablement une menace pour la population. Les tentatives répétées d'abstinence ne sont pas inhabituelles chez les personnes aux prises avec une dépendance. En fait, M. Ladue a démontré qu'il était capable d'abstinence, comme en fait foi son comportement d'il y a plusieurs années. [par. 63]

[96] Ensuite, les juges majoritaires de la Cour d'appel ont conclu qu'une peine de trois ans d'emprisonnement n'était pas proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant. Ils ont accordé une importance particulière à la façon dont M. Ladue s'est retrouvé à la Belkin House plutôt qu'à la Linkage House. À mon avis, cette importance était entièrement justifiée. M. Ladue souffre d'une dépendance aux opiacés — soit

same drug he first began using while incarcerated in a federal penitentiary. He had arranged to be released to Linkage House where he would have access to culturally relevant programming and the resources of an Elder. Instead, as a result of errors made by correctional officials, he was released to Belkin House where he was immediately tempted by drugs. The Court of Appeal was therefore justified in reaching the following conclusion:

> I acknowledge that Mr. Ladue's repeated failure to abstain from substances while on release required some time back in prison. However, in my respectful opinion, a sentence of one year would properly reflect the principles and purpose of sentencing. I say this because it is enough time for Mr. Ladue to achieve sobriety, and enough time for the correctional staff to find an appropriate placement for him, preferably Linkage House or another halfway house which emphasizes Aboriginal culture and healing. In addition, a one-year sentence is more reflective of and more proportionate to the nature of his offence and his circumstances. . . .
>
> . . . the circumstances of Mr. Ladue's background played an instrumental part in his offending over his lifetime and his rehabilitation is critical to the protection of the public. [paras. 81-82]

[97] The judgment of the Court of Appeal is well founded. Bennett J.A. cogently analysed this Court's decisions in *Gladue* and *L.M.* and correctly applied those principles to the facts of the specific case. A sentence of one year's imprisonment adequately reflects the principles and objectives of sentencing set out in the *Criminal Code*. As a result, I would dismiss the Crown's appeal and affirm the sentence of one year's imprisonment imposed by the majority of the Court of Appeal.

VII. Conclusion

[98] For the foregoing reasons, I would allow the offender's appeal in *Ipeelee* and substitute a sentence of one year's imprisonment. I would dismiss the Crown's appeal in *Ladue*.

dit en passant, un type de drogue qu'il a commencé à consommer pendant un séjour dans un pénitencier fédéral. Il avait pris des mesures pour être placé à la Linkage House, où il aurait eu accès à un programme adapté à sa culture et au soutien d'un aîné. En raison d'erreurs commises par le personnel des services correctionnels, il a été envoyé à la Belkin House, où il a été immédiatement tenté de consommer de la drogue. C'est donc à bon droit que la Cour d'appel a tiré la conclusion suivante :

> [TRADUCTION] Je reconnais que l'échec répété des tentatives de M. Ladue de s'abstenir de consommer des substances intoxicantes pendant ses périodes de liberté exigeait qu'il retourne en prison quelque temps. Toutefois, à mon sens, une peine de un an d'emprisonnement refléterait adéquatement les principes et les objectifs de détermination de la peine. Il s'agit en effet d'une période suffisante pour que M. Ladue réussisse à devenir sobre et pour que le personnel des services correctionnels lui trouve un endroit approprié où rester, de préférence la Linkage House ou une autre maison de transition où l'accent est mis sur la culture autochtone et la guérison. En outre, une peine de un an d'emprisonnement correspond davantage à la nature de l'infraction commise et aux circonstances propres à M. Ladue. . .
>
> . . . les circonstances relatives à l'histoire personnelle de M. Ladue ont joué un rôle important dans les infractions qu'il a commises au fils des ans et sa réadaptation est essentielle pour la protection du public. [par. 81-82]

[97] L'arrêt de la Cour d'appel est bien fondé. La juge Bennett a fait une analyse convaincante des décisions prononcées par la Cour dans *Gladue* et dans *L.M.* et elle a correctement appliqué ces principes aux faits de l'espèce. Une peine de un an d'emprisonnement reflète adéquatement les principes et les objectifs de détermination de la peine énoncés dans le *Code criminel*. En conséquence, je suis d'avis de rejeter l'appel et de confirmer la peine de un an d'emprisonnement imposée par les juges majoritaires de la Cour d'appel.

VII. Conclusion

[98] Pour les motifs exposés ci-dessus, je suis d'avis d'accueillir le pourvoi du délinquant dans l'affaire *Ipeelee* et de réduire la peine d'emprisonnement à un an. Je suis d'avis de rejeter l'appel du ministère public dans l'affaire *Ladue*.

The following are the reasons delivered by

ROTHSTEIN J. (dissenting in part) —

I. Introduction

[99] I have had the opportunity of reading the reasons of my colleague Justice LeBel. While I am in agreement with much of what my colleague has written in the context of general sentencing principles and application of those principles to Aboriginal offenders, I am of the respectful opinion that he does not specifically address the issue of the sentencing of Aboriginal offenders who have been found to be long-term offenders and have been found guilty of breaching a condition of a long-term supervision order ("LTSO").

[100] I believe that LeBel J.'s reasons conflate the purpose and objective of LTSOs with the purpose and objective of sentencing for breaches of such orders. My concern is that the message they send to sentencing judges as to the weight to be given to considerations relevant to the sentencing for breaches in such cases is not consistent with Parliamentary intent. In my opinion, Parliament has said that protection of society is the paramount consideration when it comes to such sentencing. Elevating rehabilitation and reintegration into society to a more significant factor diverts the sentencing judge from adhering to the expressed intention of Parliament.

[101] With respect to sentencing of Aboriginal offenders, I agree that s. 718.2(*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to Aboriginal offenders, is mandatory and must be applied in all cases, including the case of long-term Aboriginal offenders. However, once an Aboriginal individual is found to be a long-term offender, and the offender has breached one or more conditions of his or her LTSO, alternatives to a significant prison term will be limited. The risk the Aboriginal offender poses in the community is substantial and the management of that risk has been compromised. That is the reality facing the

Version française des motifs rendus par

LE JUGE ROTHSTEIN (dissident en partie) —

I. Introduction

[99] J'ai pris connaissance des motifs de mon collègue le juge LeBel. Bien que je souscrive en bonne partie à ses motifs en ce qui concerne les principes généraux de détermination de la peine et l'application de ces principes aux délinquants autochtones, j'estime que mon collègue ne traite pas expressément de la question de la détermination de la peine à infliger aux Autochtones qui ont été déclarés délinquants à contrôler et reconnus coupables d'un manquement à une condition d'une ordonnance de surveillance de longue durée (« OSLD »).

[100] À mon avis, les motifs du juge LeBel confondent l'objectif des OSLD avec l'objectif de la détermination de la peine en cas de manquement à de telles ordonnances. Je crains que le message qu'ils envoient aux juges — en ce qui concerne le poids à accorder aux considérations applicables dans la détermination de la peine pour de tels manquements — ne soit pas compatible avec l'intention du législateur. À mon avis, le législateur a affirmé que la protection de la société constitue le critère déterminant lorsqu'il s'agit d'imposer une peine pour de tels manquements. Considérer la réadaptation et la réinsertion sociale comme un facteur plus important peut détourner le juge qui détermine la peine de la réalisation de l'intention expresse du législateur.

[101] Lorsqu'il s'agit d'imposer une peine à des délinquants autochtones, je conviens que l'al. 718.2*e*) du *Code criminel*, L.R.C. 1985, ch. C-46, qui les vise directement, est une disposition impérative qui doit être appliquée dans tous les cas, y compris aux délinquants autochtones à contrôler. Toutefois, lorsqu'un Autochtone déclaré délinquant à contrôler a manqué à une ou à plusieurs conditions de son OSLD, les solutions autres qu'une période d'emprisonnement importante seront limitées. Le risque que le délinquant autochtone présente pour la société est élevé et la gestion de ce risque a été compromise. Il s'agit là de la réalité à laquelle doit

judge charged with fixing an appropriate sentence in such circumstances.

II. Facts

A. *Manasie Ipeelee*

[102] Manasie Ipeelee, an Inuk, was born on December 28, 1972, in Iqaluit and grew up in that community. He suffered a tragic upbringing, which saw the death of his alcoholic mother when he was a child and the development of his own serious alcohol addiction by the time he was 12 years old. His life is marked by an ever-present alcohol addiction coupled with a propensity to inflict brutal violence on those with whom he comes into contact while intoxicated.

[103] From the age of 12 to 18, he accumulated a record of 36 convictions, mostly property-related. As an adult, Mr. Ipeelee continued to commit property offences, but added to them a series of increasingly violent crimes. The series of violent offences began in September 1992, when he was 19. On this occasion, he attacked a man with an ashtray and chair when he was refused entry into the victim's home. He pled guilty to assault causing bodily harm and was sentenced to 21 days' imprisonment followed by one year's probation.

[104] In August 1993, he committed a second assault causing bodily harm when, while on probation for the prior offence, he beat an individual unconscious outside a bar in Iqaluit, kicking him in the face at least 10 times and continuing the assault after the individual had lost consciousness. This attack left the victim hospitalized. Less than one year later he pled guilty to yet another aggravated assault. This time the victim was hospitalized after being beaten to unconsciousness by Mr. Ipeelee, who then continued to stomp on his face. Mr. Ipeelee was sentenced to 5 months' imprisonment for the August 1993 offence and 14 months for the subsequent offence.

faire face le juge chargé d'établir une peine appropriée en pareilles circonstances.

II. Les faits

A. *Manasie Ipeelee*

[102] Manasie Ipeelee, un Inuit, est né le 28 décembre 1972 à Iqaluit, ville où il a grandi. Il a vécu une enfance tragique, voyant sa mère alcoolique mourir alors qu'il était jeune enfant et ayant déjà développé lui-même, à l'âge de 12 ans, une grave dépendance à l'alcool. Sa vie est marquée par une dépendance omniprésente à l'alcool combinée à une propension à commettre des actes de brutalité envers les personnes avec lesquelles il entre en contact quand il est en état d'ébriété.

[103] De l'âge de 12 ans à l'âge de 18 ans, il a accumulé 36 déclarations de culpabilité, principalement pour des infractions relatives aux biens. À l'âge adulte, M. Ipeelee a continué de commettre ce type d'infractions, mais s'est mis à commettre également une série de crimes de plus en plus violents. Ces infractions avec violence ont commencé en septembre 1992, lorsqu'il était âgé de 19 ans. Il a alors agressé, avec un cendrier et une chaise, un homme qui refusait de le laisser entrer dans sa demeure. Il a plaidé coupable à une accusation de voies de fait causant des lésions corporelles et a été condamné à 21 jours d'emprisonnement, suivis d'un an de probation.

[104] Au mois d'août 1993, alors qu'il était en probation pour l'infraction précédente, il a commis une deuxième agression causant des lésions corporelles. Dans cette affaire, il a battu une personne à l'extérieur d'un bar d'Iqaluit, lui donnant au moins 10 coups de pied au visage et poursuivant l'agression après que la victime eut perdu connaissance. La victime a dû être hospitalisée en raison de cette agression. Moins d'un an plus tard, il a plaidé coupable à une autre accusation de voies de fait graves. Cette fois, la victime avait été hospitalisée après avoir été battue et piétinée au visage, même après avoir perdu connaissance. M. Ipeelee a été condamné à 5 mois d'emprisonnement pour l'infraction du mois d'août 1993 et à 14 mois d'emprisonnement pour l'infraction subséquente.

[105] Three weeks after receiving early release from prison for this attack, he committed a sexual assault in which he and another man raped a woman who had passed out from intoxication at a party. He pled guilty and received a sentence of two years in prison. A consecutive eight-month sentence was added for his escape from prison two days before the plea and sentencing hearing. In the six months after his release for this offence, he was arrested at least nine times for public intoxication.

[105] Trois semaines après avoir bénéficié d'une mise en liberté anticipée relativement à cette dernière agression, il a commis une agression sexuelle. Un autre homme et lui ont alors violé une femme qui était inconsciente sous l'effet de l'alcool à l'occasion d'une fête. Il a plaidé coupable à une accusation d'agression sexuelle et il a été condamné à deux ans d'emprisonnement. Il a été condamné également à une peine consécutive de huit mois d'emprisonnement pour s'être évadé de prison deux jours avant l'audience relative au plaidoyer de culpabilité et à la détermination de la peine. Dans les six mois qui ont suivi sa mise en liberté relative à cette infraction, il a été arrêté au moins neuf fois pour s'être trouvé en état d'ébriété en public.

[106] In August 1999, he committed a sexual assault causing bodily harm when he raped a homeless woman, during the course of which he threatened to kill her, and punched her repeatedly in the face. The woman required treatment in hospital for her injuries. It was this crime that led to his designation as a long-term offender. At the hearing the sentencing judge noted (2001 NWTSC 33, [2001] N.W.T.J. No. 30 (QL)):

> This summary of Mr. Ipeelee's crimes of violence shows a consistent pattern of Mr. Ipeelee administering gratuitous violence against vulnerable, helpless people while he is in a state of intoxication. [para. 34]

Mr. Ipeelee was sentenced to six years' imprisonment for this offence to be followed by a 10-year LTSO.

[106] Au mois d'août 1999, il a commis une agression sexuelle causant des lésions corporelles. Dans cette affaire, il a violé une femme sans abri en menaçant de la tuer et en lui donnant plusieurs coups de poing au visage. La victime a dû être amenée à l'hôpital pour faire soigner ses blessures. C'est ce crime qui est à l'origine de sa désignation à titre de délinquant à contrôler. À l'audience, le juge chargé de prononcer la peine a souligné (2001 NWTSC 33, [2001] N.W.T.J. No. 30 (QL)) :

> [TRADUCTION] Ce résumé des crimes violents commis par M. Ipeelee démontre une tendance constante chez M. Ipeelee à commettre des actes de violence gratuite à l'endroit de personnes vulnérables et sans défense lorsqu'il est en état d'ivresse. [par. 34]

M. Ipeelee a été condamné à six ans d'emprisonnement, suivis d'une OSLD de 10 ans, pour cette infraction.

[107] The offence that led to this appeal occurred in August 2008 after Mr. Ipeelee had been on release for 17 months. On this occasion, police found Mr. Ipeelee intoxicated in downtown Kingston and he was charged with breaching the abstention from intoxicants condition of his LTSO. He pled guilty on November 14, 2008, and received a sentence of three years in prison.

[107] L'infraction à l'origine du présent pourvoi a été commise au mois d'août 2008, alors que M. Ipeelee était en liberté depuis 17 mois. Cette fois-là, la police a vu M. Ipeelee ivre au centre-ville de Kingston et l'a accusé de défaut de se conformer à la condition de son OSLD lui interdisant de consommer des substances intoxicantes. Il a plaidé coupable le 14 novembre 2008 et a été condamné à trois ans d'emprisonnement.

B. *Frank Ralph Ladue*

[108] Frank Ladue is a member of the Ross River Dena Council, an Aboriginal community of approximately 500 individuals located 400 kilometres northeast of Whitehorse. He was born in 1962 and, like Mr. Ipeelee, suffered a tragic childhood, with both alcoholic parents dying while he was quite young. At the age of five, he was sent to a residential school and on his return, he lived with his grandparents. It was then, at the age of nine, that he began drinking. He has continued to have serious problems with alcohol and drugs throughout his life, with the exception of a six-year period of sobriety in the 1990s, a time when he was also free of convictions.

[109] Mr. Ladue has a criminal record of 40 convictions. It includes a lengthy list of property and impaired driving offences. He has two convictions for robbery, and two convictions for common assault. His most serious convictions stem from a series of sexual assaults. The first occurred in 1987 when he sexually assaulted an unconscious woman at a party. In 1998, he was convicted of breaking and entering. During the break and enter, he placed a sleeping bag over a sleeping woman's head and shoulders, but fled when her daughter interrupted him. Although he was not convicted of sexual assault, the sentencing judge at Mr. Ladue's 2003 hearing, where he was designated a long-term offender, found the incident "eerily similar" to the previous sexual assaults (2003 YKTC 100 (CanLII), at para. 7). In June of 1999, he was found guilty of sexually assaulting yet another unconscious woman. For the 1987 conviction, he was sentenced to imprisonment for 23 months, for the 1998 conviction 4 months and for the 1999 conviction 30 months.

[110] His most recent sexual assault occurred in 2002. On this occasion he entered a dwelling house

B. *Frank Ralph Ladue*

[108] Frank Ladue est membre du Conseil de la bande dénée de Ross River, une collectivité autochtone d'environ 500 habitants située à 400 kilomètres au nord-est de Whitehorse. Il est né en 1962 et, tout comme M. Ipeelee, il a vécu une enfance tragique, perdant ses deux parents alcooliques alors qu'il était très jeune. À l'âge de cinq ans, on l'a envoyé dans un pensionnat et, à son retour, il a vécu chez ses grands-parents. C'est à ce moment, soit à l'âge de neuf ans, qu'il a commencé à boire. Il a continué d'avoir un grave problème d'alcoolisme et de toxicomanie toute sa vie, sauf durant une période de six ans au cours des années 1990, où il est demeuré sobre et n'a été déclaré coupable d'aucune infraction.

[109] Quarante déclarations de culpabilité ont été inscrites contre M. Ladue. Son dossier renferme une longue liste d'infractions relatives aux biens et de conduite avec facultés affaiblies. Il compte deux déclarations de culpabilité pour vol et deux déclarations de culpabilité pour voies de fait simples. Ses déclarations de culpabilité les plus graves découlent d'une série d'agressions sexuelles. Il a commis sa première agression sexuelle en 1987, lorsqu'il a violé une femme inconsciente à l'occasion d'une fête. En 1998, il a été déclaré coupable d'introduction par effraction. Dans cette affaire, il avait placé un sac de couchage sur la tête et les épaules d'une femme qui dormait, mais il avait pris la fuite lorsque la fille de celle-ci l'avait interrompu. Bien qu'il n'ait pas été déclaré coupable d'agression sexuelle, le juge présidant l'audience de détermination de la peine lorsque M. Ladue a été déclaré délinquant à contrôler en 2003 a conclu que cet incident présentait une [TRADUCTION] « similarité inquiétante » avec les agressions sexuelles antérieures (2003 YKTC 100 (CanLII), par. 7). En juin 1999, il a été déclaré coupable d'avoir agressé sexuellement une autre femme inconsciente. Ses déclarations de culpabilité de 1987, 1998 et 1999 lui ont valu, respectivement, des peines de 23 mois, 4 mois et 30 mois d'emprisonnement.

[110] Son agression sexuelle la plus récente remonte à 2002. Cette fois-là, il a pénétré dans une maison

without permission from the occupants and found a 22-year-old woman in the living room unconscious due to alcohol consumption. When she awoke, Mr. Ladue was assaulting her and attempting to remove her pants. She was unable to resist due to her intoxication, but the attack was interrupted when other residents of the house were awakened by what was happening and Mr. Ladue escaped from the home. He was convicted following a trial for break and enter and sexual assault and sentenced to three years' imprisonment. It was this offence that caused him to be found a long-term offender.

[111] Mr. Ladue was released under a seven-year LTSO in December 2006. During the time between his release and the breach in question in this appeal, he was convicted for breaching his LTSO by consuming intoxicants on three occasions and sentenced in total to two years in prison, with 16 and a half months credited for pre-sentence custody. On May 23, 2009, he had his LTSO suspended for the tenth time between December 2006 and May 2009 and remained in custody until August 12, 2009.

[112] Upon release he was designated by the Correctional Service of Canada ("CSC") to be sent to Linkage House in Kamloops, British Columbia, where he would receive culturally specific support from an Aboriginal Elder. However, an outstanding warrant requiring Mr. Ladue to submit to a DNA test was discovered at the time of his release. Apparently, due to a bureaucratic error, the warrant had not been executed during his period of detention and, according to counsel for Mr. Ladue in this Court, may have been altogether unnecessary, as a DNA sample may have been provided under a previous warrant. The warrant required that he appear in Surrey, B.C. This resulted in Mr. Ladue being sent to Belkin House, in downtown Vancouver, which did not offer the specialized support of Linkage House in Kamloops. Upon arrival, he was informed that his residency status did not allow an immediate transfer to Linkage House and that he would have to remain at Belkin House until the National Parole Board made the

d'habitation sans l'autorisation des occupants. Il a alors vu, dans le salon, une femme de 22 ans qui était inconsciente sous l'effet de l'alcool. À son réveil, la victime a constaté que M. Ladue l'agressait sexuellement et essayait de lui enlever son pantalon. Elle était incapable de se défendre en raison de son état d'ébriété, mais d'autres résidants de la maison ont été réveillés par ce qui se passait et M. Ladue s'est enfui. Il a été reconnu coupable d'introduction par effraction et d'agression sexuelle à l'issue d'un procès, et il a été condamné à trois ans d'emprisonnement. C'est cette infraction qui est à l'origine de sa désignation à titre de délinquant à contrôler.

[111] En décembre 2006, M. Ladue a été libéré dans le cadre d'une OSLD d'une durée de sept ans. Entre sa mise en liberté et le manquement en cause en l'espèce, il a été déclaré coupable à trois reprises de manquement à son OSLD parce qu'il avait consommé des substances intoxicantes. Il s'est vu infliger une peine totale de deux ans d'emprisonnement et les 16 mois et demi qu'il avait passés en détention présentencielle ont été portés à son actif. Le 23 mai 2009, son OSLD a été suspendue pour la dixième fois depuis décembre 2006 et il est resté en détention jusqu'au 12 août 2009.

[112] À sa mise en liberté, il était désigné par le Service correctionnel du Canada (« SCC ») pour être envoyé à la Linkage House, à Kamloops, en Colombie-Britannique, où il recevrait un soutien adapté à sa culture auprès d'un aîné autochtone. On a toutefois découvert au moment de sa mise en liberté qu'il faisait l'objet d'un mandat d'analyse génétique non exécuté. Le mandat n'aurait apparemment pas été exécuté au cours de sa détention en raison d'une erreur administrative et dont l'exécution n'était sans doute finalement pas nécessaire, selon l'avocat représentant M. Ladue devant la Cour, parce que son client avait peut-être déjà fourni un échantillon d'ADN en exécution d'un mandat antérieur. Selon le mandat, M. Ladue devait comparaître à Surrey, en Colombie-Britannique. M. Ladue a donc été envoyé à la Belkin House, au centre-ville de Vancouver, qui n'offrait pas le soutien spécialisé offert par la Linkage House à Kamloops. À son arrivée, on l'a informé que son statut ne permettait pas son transfert immédiat à une résidence comme

necessary change to his status. Within one week of his arrival at Belkin House, he reoffended and was subsequently charged with breaching his LTSO by consuming intoxicants. He pled guilty in February 2010 and received a sentence of three years in prison.

III. General Principles of Sentencing

[113] The statutory provisions referred to in these reasons are set out in the Appendix in full. Section 718 of the *Criminal Code* codifies the objectives and principles of sentencing. They apply to the sentencing of all offenders including long-term offenders who breach their LTSOs.

[114] I agree with Justice LeBel that a fundamental principle of sentencing must be proportionality and that the weight given to the different objectives of sentencing must respect that fundamental principle. The first question that arises in this case is how these objectives and principles are to be applied when a judge is required to fix a sentence for a long-term offender who has breached one or more conditions of his LTSO.

IV. Long-Term Offenders

[115] Section 753.1(1) of the *Criminal Code* sets out three criteria for finding an individual to be a long-term offender:

> **753.1** (1) The court may . . . find an offender to be a long-term offender if it is satisfied that
>
> (*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (*b*) there is a substantial risk that the offender will reoffend; and
>
> (*c*) there is a reasonable possibility of eventual control of the risk in the community.

la Linkage House et qu'il devrait rester à la Belkin House jusqu'à ce que la Commission nationale des libérations conditionnelles apporte les changements nécessaires à son statut. Moins d'une semaine après son arrivée à la Belkin House, il a récidivé et a ensuite été accusé de manquement à son OSLD, parce qu'il avait consommé des substances intoxicantes. Il a plaidé coupable en février 2010 et a été condamné à trois ans d'emprisonnement.

III. Les principes généraux de détermination de la peine

[113] Les dispositions législatives pertinentes sont reproduites intégralement dans l'annexe. L'article 718 du *Code criminel* codifie les objectifs et les principes de détermination de la peine. Ceux-ci s'appliquent à tous les délinquants, y compris aux délinquants à contrôler coupables d'un manquement à leur OSLD.

[114] Je suis d'accord avec le juge LeBel pour dire que la proportionnalité est un principe fondamental de détermination de la peine et que le poids accordé aux différents objectifs de détermination de la peine doit respecter ce principe fondamental. La première question à trancher en l'espèce est de savoir comment ces objectifs et principes doivent être appliqués lorsqu'un juge détermine quelle peine imposer à un délinquant à contrôler qui a manqué à une ou à plusieurs conditions de son OSLD.

IV. Les délinquants à contrôler

[115] Le paragraphe 753.1(1) du *Code criminel* énonce trois critères permettant de déclarer qu'un délinquant est un délinquant à contrôler :

> **753.1** (1) . . . le tribunal peut déclarer que le délinquant est un délinquant à contrôler, s'il est convaincu que les conditions suivantes sont réunies :
>
> *a*) il y a lieu d'imposer au délinquant une peine minimale d'emprisonnement de deux ans pour l'infraction dont il a été déclaré coupable;
>
> *b*) celui-ci présente un risque élevé de récidive;
>
> *c*) il existe une possibilité réelle que ce risque puisse être maîtrisé au sein de la collectivité.

[116] Section 753.1(1)(*b*) requires a finding that there be a substantial risk that the offender will reoffend. Section 753.1(2) provides the criteria for a finding of substantial risk of reoffending by the offender. The court must be satisfied that the offender has committed a specified sexual offence or a violent offence that involves a sexual element and a pattern of repetitious behaviour or previous conviction for a sexual offence, thereby showing a likelihood of causing death, injury, inflicting psychological damage, pain, or other evil in the future. The criminal history of these individuals and their propensity to reoffend demonstrates the extraordinary danger they pose to society.

V. Long-Term Supervision Orders

[117] The distinction between dangerous offenders, who are incarcerated indefinitely, and long-term offenders is the finding that there is a reasonable possibility for eventual control in the community of the long-term offender's substantial risk of reoffending. If the court finds an offender to be a long-term offender, it shall order that the offender be subject to long-term supervision for up to 10 years (s. 753.1(3)(*b*)), during which he or she is to be supervised in the community, by a parole supervisor (s. 753.2(1)). Thus, instead of indefinite detention, long-term offenders will return to the community under supervision and be subject to a series of conditions prescribed in s. 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620, as may be modified or supplemented by the National Parole Board under s. 134.1(2) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"). Section 134.1(2) provides that the conditions prescribed by the Board are to be reasonable and necessary for both the protection of society and the successful reintegration into society of the offender.

[116] Selon l'alinéa 753.1(1)*b*), le tribunal doit conclure que le délinquant présente un risque élevé de récidive. Le paragraphe 753.1(2) énonce les critères applicables pour conclure à l'existence d'un risque élevé de récidive. Le tribunal doit être convaincu, d'une part, que le délinquant a commis une infraction sexuelle énumérée ou une infraction avec violence de nature sexuelle et, d'autre part, qu'il a accompli des actes répétitifs ou qu'il a antérieurement été déclaré coupable d'agression sexuelle, ce qui permet ainsi de croire que vraisemblablement il causera la mort de quelque autre personne ou causera des sévices, des dommages psychologiques ou d'autres maux à d'autres personnes. Les antécédents criminels de ces délinquants et leur propension à récidiver montrent le danger considérable qu'ils représentent pour la société.

V. Les ordonnances de surveillance de longue durée

[117] La distinction entre le délinquant dangereux, qui est incarcéré pour une période indéterminée, et le délinquant à contrôler est la conclusion du tribunal qu'il existe une possibilité réelle que le risque élevé de récidive du délinquant à contrôler puisse être maîtrisé au sein de la collectivité. S'il conclut qu'un délinquant est un délinquant à contrôler, le tribunal doit ordonner qu'il soit soumis à une surveillance d'une période maximale de 10 ans (al. 753.1(3)*b*)), pendant laquelle il est surveillé au sein de la collectivité par un surveillant de liberté conditionnelle (par. 753.2(1)). Au lieu d'être incarcéré pour une période indéterminée, le délinquant à contrôler retourne donc dans la collectivité, où il est soumis à une surveillance et à une série de conditions prévues au par. 161(1) du *Règlement sur le système correctionnel et la mise en liberté sous condition*, DORS/92-620, qui peuvent être modifiées ou complétées par la Commission nationale des libérations conditionnelles en vertu du par. 134.1(2) de la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, ch. 20 (« *LSCMLSC* »). Le paragraphe 134.1(2) prévoit que les conditions imposées par la Commission doivent être raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

[118] Section 100 of the *CCRA* states:

> **100.** The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

[119] Section 100 applies to all offenders, including long-term offenders. The maintenance of a just, peaceful and safe society is the purpose of a release with conditions. Decisions on the timing and conditions of release that will best facilitate rehabilitation and reintegration into society are the means by which the purpose is to be effected. However, to achieve the purpose of conditional release, s. 101(*a*) of the *CCRA* states

> that the protection of society be the paramount consideration in the determination of any case.

The principle of protection of society is, of course, especially important in the case of long-term offenders because of their substantial risk of violently reoffending.

[120] To this point, my only difference with Justice LeBel is that I read the relevant legislation as providing that protection of the public is the paramount consideration in setting the timing and conditions for release. I do not view rehabilitation and reintegration into society as an equal consideration. Rather, if the objectives of rehabilitation and reintegration are met, they will be the most effective and permanent methods to achieve the protection of the public. However, there is no guarantee that rehabilitation and reintegration will be achieved with long-term offenders in view of their history of repetitive sexual or violent behaviour. Therefore, in accordance with s. 101(*a*), protection of the public must stand as the paramount consideration in fixing the timing and conditions of release, especially in the case of long-term offenders, who pose a threat of serious violence and harm to other members of society.

[118] L'article 100 de la *LSCMLSC* est rédigé en ces termes :

> **100.** La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

[119] L'article 100 s'applique à tous les délinquants, y compris aux délinquants à contrôler. La mise en liberté sous condition vise le maintien d'une société juste, paisible et sûre. Le moyen choisi pour réaliser cet objectif est de favoriser, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants. Toutefois, l'al. 101*a*) de la *LSCMLSC* prévoit que, pour atteindre l'objectif de la mise en liberté sous condition :

> . . . la protection de la société est le critère déterminant dans tous les cas.

Le principe de la protection de la société est, bien entendu, particulièrement important dans le cas des délinquants à contrôler en raison de leur risque élevé de récidive violente.

[120] Jusqu'à présent, mon seul désaccord avec le juge LeBel est que, selon mon interprétation des dispositions législatives pertinentes, la protection du public constitue le critère déterminant pour la prise de décisions quant au moment et aux conditions de la mise en liberté. La réadaptation et la réinsertion sociale ne constituent pas, à mon avis, un critère équivalent. S'ils sont atteints, les objectifs de réadaptation et de réinsertion constitueront plutôt la façon la plus efficace et la plus durable d'assurer la protection du public. Cependant, rien ne garantit la réadaptation et la réinsertion d'un délinquant à contrôler, compte tenu de ses antécédents d'actes répétitifs d'inconduite sexuelle ou de violence. Par conséquent, conformément à l'al. 101*a*), la protection du public doit constituer le critère déterminant lorsqu'il s'agit de fixer le moment et les conditions de la mise en liberté, plus particulièrement dans le cas des délinquants à contrôler, qui risquent de commettre des actes de violence graves et d'infliger des sévices graves à d'autres membres de la société.

VI. Breaches of Long-Term Supervision Orders

[121] Where I part serious company with my learned colleague is with respect to the proper approach to sentencing for breaches of an LTSO. In my respectful opinion, LeBel J. has not taken account of the difference between the objectives and requirements of LTSOs for long-term offenders who abide by the conditions of their LTSOs and the objectives and requirements of sentencing long-term offenders who have breached a condition of their LTSOs.

[122] The breach of the LTSO raises serious concerns that rehabilitation and reintegration are not being achieved and calls into doubt whether, despite supervision, the long-term offender has demonstrated that the substantial risk of reoffending in a violent manner in the community by the long-term offender can be adequately managed. Therefore, protection of society must be the dominant consideration in sentencing for breaches of an LTSO. Indeed, if protection of the public is the paramount consideration when setting the conditions of release, it logically must remain the paramount consideration when sentencing for a breach of those conditions.

[123] In this context, it is significant that s. 753.3(1) of the *Criminal Code* provides that a breach of an LTSO constitutes an indictable offence, as opposed to a hybrid offence, with a maximum sentence of 10 years. The maximum term is for the breach of the LTSO exclusively and is not dependent on the long-term offender having been found guilty of another substantive offence, violent or otherwise. The necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time. In effect, Parliament requires a sentencing judge not to wait until a long-term offender wounds, maims,

VI. Les manquements à une ordonnance de surveillance de longue durée

[121] Là où je diverge sérieusement d'opinion avec mon collègue, c'est relativement à la démarche à adopter pour déterminer la peine à imposer en cas de manquement à une OSLD. À mon humble avis, le juge LeBel n'a pas tenu compte de la différence entre, d'une part, les objectifs et les exigences des OSLD pour les délinquants à contrôler qui respectent les conditions de leur OSLD et, d'autre part, les objectifs et les exigences applicables dans la détermination de la peine à infliger aux délinquants à contrôler qui ont enfreint une condition de leur OSLD.

[122] Le défaut de se conformer à une telle ordonnance permet de douter sérieusement de la réalisation des objectifs de réadaptation et de réinsertion et soulève la question de savoir si, bien que sous surveillance, le délinquant à contrôler a démontré que le risque élevé de récidive violente qu'il représente au sein de la collectivité peut être maîtrisé adéquatement. La protection de la société doit donc être le critère dominant dans la détermination de la peine à infliger en cas de manquement à une OSLD. En fait, si elle constitue le critère déterminant dans l'établissement des conditions de la mise en liberté, la protection du public doit logiquement constituer le critère déterminant dans la détermination de la peine à infliger pour manquement à ces conditions.

[123] Dans ce contexte, il est important de souligner qu'aux termes du par. 753.3(1) du *Code criminel*, le défaut de se conformer à une OSLD constitue un acte criminel, et non une infraction mixte, et est punissable d'un emprisonnement maximal de 10 ans. Le seul défaut de se conformer à l'OSLD rend le délinquant à contrôler passible de cette peine maximale; il n'est pas nécessaire qu'il ait été déclaré coupable d'une autre infraction substantielle, violente ou autre, pour que cette peine puisse lui être imposée. Cela signifie nécessairement que, pour le législateur, les délinquants à contrôler qui font défaut de se conformer à une OSLD présentent un tel risque pour la protection de la société qu'ils peuvent devoir être isolés de la société pendant une

sexually assaults, or kills someone before receiving a significant sentence.

[124] Of course, while all conditions of an LTSO are intended to minimize the risk of reoffending, breach of some conditions will be more important than others. As Ritter J.A. pointed out in *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20, at para. 44:

> I also recognize that the seriousness of any breach will be greatly diminished if the breach is purely technical. For example, a breach regarding a reporting requirement should be regarded as nominal if the offender, for reasons beyond his control, was a few minutes late for a reporting appointment.

[125] On the other hand, where a breach is central to the substantial risk of reoffending, such as where alcohol or substance consumption has been found to be the trigger for violent offences by the long-term offender, the breach must be considered to be very serious. Such a breach demonstrates that management of the offender in the community has been less than effective and the substantial risk of a violent reoffence is heightened. Therefore, in sentencing for the breach of a condition of an LTSO, which is central to the risk of the long-term offender violently reoffending, the protection of the public, more so than the rehabilitation or reintegration of the offender, must be the dominant consideration of the sentencing judge in the determination of a fit and proper sentence.

VII. Sentencing Principles Applicable to Aboriginal Offenders

[126] I agree with LeBel J. that s. 718.2(*e*) requires a sentencing judge to consider background and systemic factors in crafting a sentence, and all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders,

période assez longue. En effet, le législateur oblige le juge chargé d'infliger la peine à ne pas attendre que le délinquant à contrôler blesse, mutile, agresse sexuellement ou tue quelqu'un avant de lui imposer une lourde peine.

[124] Bien entendu, bien que toutes les conditions d'une OSLD visent à minimiser le risque de récidive, certains manquements seront plus importants que d'autres. Comme le juge Ritter, de la Cour d'appel de l'Alberta, l'a souligné dans l'arrêt *R. c. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20, par. 44 :

> [TRADUCTION] Je reconnais également que la gravité du manquement sera grandement réduite s'il s'agit d'un manquement purement technique. À titre d'exemple, un manquement à l'obligation de se présenter à une autorité publique devrait être considéré comme mineur si le délinquant est arrivé quelques minutes en retard au rendez-vous pour des raisons indépendantes de sa volonté.

[125] Par contre, si le manquement concerne un élément central du risque élevé de récidive, par exemple lorsqu'il a été jugé que la consommation d'alcool ou de drogues amène le délinquant à contrôler à commettre des infractions avec violence, on doit considérer qu'il s'agit d'un manquement très grave. Un tel manquement démontre que la gestion du risque que le délinquant représente pour la société s'est révélée inefficace et que le risque élevé de récidive violente s'est accru. En conséquence, lorsqu'un juge est appelé à déterminer la peine à infliger pour défaut de se conformer à une condition d'une OSLD se rapportant à un élément central du risque de récidive violente du délinquant à contrôler, la protection du public — plus encore que la réadaptation ou la réinsertion du délinquant — doit constituer le critère dominant dans la détermination d'une peine juste et appropriée.

VII. Les principes de détermination de la peine applicables aux délinquants autochtones

[126] Je suis d'accord avec le juge LeBel pour dire que l'al. 718.2*e*) oblige le juge chargé de la détermination de la peine à tenir compte des facteurs historiques et systémiques, et de toutes les sanctions substitutives applicables qui sont justifiées

with particular attention to Aboriginal offenders. These factors operate, not as an excuse or justification for criminal conduct, but rather as context for the sentencing judge to determine an appropriate sentence. They do not create a race-based discount in sentencing and do not mandate remedying over-representation by artificially reducing incarceration rates.

dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones. Ces facteurs constituent non pas une excuse ou une justification à la conduite criminelle, mais ils établissent plutôt le contexte permettant au juge d'infliger une peine appropriée. Ils ne créent pas une réduction de peine fondée sur la race et ils n'obligent pas les tribunaux à remédier au problème de la surreprésentation par une réduction artificielle des taux d'incarcération.

[127] Cory and Iacobucci JJ. pointed out in *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 65, that sentencing judges have only a limited role in remedying injustice against Aboriginal peoples in Canada. This limited role, however, does not mean they do not have an important role. Sentencing judges must guard against racial discrimination in sentencing. I do not go so far as to endorse the academic commentary cited by my colleague, but I do agree that racial discrimination in sentencing, such as the propensity of Aboriginal offenders to receive unjustifiably longer sentences than non-Aboriginals or imprisonment when non-Aboriginals would not be imprisoned, is something for which sentencing judges must remain vigilant.

[127] Les juges Cory et Iacobucci ont souligné dans *R. c. Gladue*, [1999] 1 R.C.S. 688, par. 65, que les juges chargés d'infliger les peines n'ont qu'un rôle limité à jouer dans le redressement des injustices subies par les Autochtones au Canada. Ce rôle limité n'en est pas moins important. Les juges doivent éviter toute discrimination raciale dans la détermination de la peine. Je n'irai pas jusqu'à souscrire au point de vue de l'auteur de doctrine cité par mon collègue. Je conviens toutefois que la discrimination raciale dans la détermination de la peine — comme la propension à infliger aux délinquants autochtones des peines plus longues que celles imposées aux délinquants non autochtones ou à les condamner à des peines d'emprisonnement dans des cas où des non-Autochtones ne seraient pas incarcérés — appelle la vigilance du juge chargé d'imposer la peine.

[128] The role of a sentencing judge in remedying such injustice may most effectively be carried out through alternative sentencing. However, this requires that they be presented with viable sentencing alternatives to imprisonment that may play a stronger role "in restoring a sense of balance to the offender, victim, and community, and in preventing future crime" (*Gladue*, at para. 65). As with all sentencing, this must be done with regard to the particular individual, the threat they pose, and their chances of rehabilitation and reintegration. Evaluating these options lies within the discretion of the sentencing judge.

[128] C'est par l'imposition de sanctions substitutives que le juge chargé de prononcer la peine peut s'acquitter le plus efficacement de son rôle dans le redressement de telles injustices. Il faut toutefois pour cela qu'on lui propose des solutions de rechange à l'emprisonnement qui sont valables et qui permettent peut-être davantage « de restaurer un certain équilibre entre le délinquant, la victime et la collectivité, et de prévenir d'autres crimes » (*Gladue*, par. 65). Comme c'est toujours le cas en matière de détermination de la peine, il faut tenir compte, à cet égard, du délinquant en cause, du risque qu'il représente et de ses chances de réadaptation et de réinsertion. L'évaluation de ces solutions de rechange relève du pouvoir discrétionnaire du juge chargé d'infliger la peine.

VIII. The Application of Section 718.2(*e*) and *Gladue* to Long-Term Offenders

[129] The particular circumstances of long-term offenders leads me to disagree with my colleague when it comes to sentencing Aboriginal long-term offenders for breaches of conditions of their LTSOs. At para. 79 of *Gladue*, Cory and Iacobucci JJ. observed:

> Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

I agree with LeBel J. that these comments are not to be read by sentencing judges as a justification not to apply s. 718.2(*e*) or to ignore the unique situation of Aboriginal offenders (paras. 84-85). But, in the context of s. 718.2(*e*), sentencing judges are obliged to exercise their discretion as to the appropriate sentence, having regard to all relevant considerations. Obviously, the substantial risk a long-term offender poses to the community is a relevant consideration in sentencing for the breach of an LTSO.

[130] I have set out my views above that in the case of long-term offenders, the paramount consideration is the protection of society. This applies to all long-term offenders, including Aboriginal long-term offenders who have compromised the management of their risk of reoffending by breaching a condition of their LTSOs. In these circumstances, the alternatives to imprisonment become very limited.

[131] I do not rule out alternatives. However, the alternative must be viable. The sentencing judge must be satisfied that they are consistent with protection of society. Alternatives may

VIII. L'application de l'al. 718.2*e*) et de l'arrêt *Gladue* aux délinquants à contrôler

[129] Eu égard aux circonstances particulières dans lesquelles se trouvent les délinquants à contrôler, je ne partage pas l'avis de mon collègue en ce qui concerne la peine à infliger aux délinquants autochtones qui font défaut de se conformer à des conditions de leur OSLD. Au paragraphe 79 de l'arrêt *Gladue*, les juges Cory et Iacobucci ont fait observer :

> De façon générale, plus violente et grave sera l'infraction, plus grande sera la probabilité que la durée des peines d'emprisonnement des autochtones et des non-autochtones soit en pratique proche ou identique, même compte tenu de leur conception différente de la détermination de la peine.

Je suis d'accord avec le juge LeBel pour dire que les juges chargés d'infliger les peines ne doivent pas interpréter ce passage comme une justification leur permettant de ne pas appliquer l'al. 718.2*e*) ou de ne tenir aucun compte de la situation particulière des délinquants autochtones (par. 84-85). Cependant, dans le contexte de l'al. 718.2*e*), les juges chargés d'infliger les peines sont tenus d'exercer leur pouvoir discrétionnaire dans la détermination de la peine appropriée, en tenant compte de tous les facteurs pertinents. Le risque élevé que le délinquant représente pour la société constitue de toute évidence un facteur pertinent dans la détermination de la peine à infliger pour défaut de se conformer à une OSLD.

[130] Comme je l'ai expliqué ci-dessus, je suis d'avis que le critère déterminant dans le cas des délinquants à contrôler est la protection de la société. Ce critère s'applique à tous délinquants à contrôler, y compris aux délinquants autochtones à contrôler qui ont compromis la gestion de leur risque de récidive en ne respectant pas une condition de leur OSLD. Dans ces circonstances, les solutions de rechange à l'emprisonnement sont très limitées.

[131] Je n'exclus pas les sanctions substitutives. Celles-ci doivent toutefois être valables. Le juge chargé d'infliger la peine doit être convaincu qu'elles sont compatibles avec la protection de la

include returning Aboriginal offenders to their communities. However, as in all cases, this must be done with protection of the public as the paramount concern; Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal. Where the breach of an LTSO goes to the control of the Aboriginal offender in the community, rehabilitation and reintegration into society will have faltered, if not failed. In such a case, the sentencing judge may have no alternative but to separate the Aboriginal long-term offender from society for a significant period of time. Nevertheless, during the period of incarceration, the Aboriginal status of the long-term offender should be taken into account for the purpose of providing appropriate programs that are intended to rehabilitate the offender so that upon release, the substantial risk of reoffending may be controlled.

IX. Application

A. *Ipeelee*

[132] The sentencing judge, Justice Megginson, sentenced Mr. Ipeelee to three years' imprisonment ([2009] O.J. No. 6413 (QL)). The Court of Appeal upheld Justice Megginson's decision (2009 ONCA 892, 99 O.R. (3d) 419). The question is whether this is a fit and proper sentence.

[133] In my opinion, Justice Megginson's findings demonstrate a thorough appreciation of the circumstances. He considered Mr. Ipeelee's circumstances, his personal and criminal history, and his efforts at rehabilitation and reintegration while in the community. He acknowledged that Mr. Ipeelee was Inuit and entitled to consideration of his Aboriginal status. He noted that crafting an alternative sentence would be difficult, as Mr. Ipeelee had been refused residency at a facility in Iqaluit. In my view, he properly recognized that protection of the public was the paramount concern in breaches of LTSOs.

société. L'une des solutions de rechange possibles pourrait consister à renvoyer le délinquant autochtone dans sa collectivité. Cependant, comme c'est toujours le cas, le critère déterminant dans le choix de cette sanction doit demeurer la protection du public; les collectivités autochtones ne forment pas une catégorie distincte qui aurait droit à une protection moindre du fait que le délinquant est un Autochtone. Lorsque le manquement à une OSLD touche à la maîtrise du risque que représente le délinquant autochtone dans la collectivité, sa réadaptation et sa réinsertion sociale seront compromises, sinon condamnées à l'échec. En pareil cas, il se peut que le juge chargé d'infliger la peine n'ait d'autre choix que d'isoler le délinquant autochtone à contrôler de la société pendant une période assez longue. Durant la période d'incarcération, il faudrait néanmoins prendre en considération le statut d'Autochtone du délinquant à contrôler afin de lui offrir des programmes appropriés favorisant sa réadaptation, de sorte que le risque élevé de récidive qu'il présente puisse être maîtrisé au moment de sa libération.

IX. Application

A. *Ipeelee*

[132] Le juge Megginson a imposé à M. Ipeelee une peine d'emprisonnement de trois ans ([2009] O.J. No. 6413 (QL)). La Cour d'appel a confirmé la décision du juge Megginson (2009 ONCA 892, 99 O.R. (3d) 419). La question est de savoir s'il s'agit d'une peine juste et appropriée.

[133] À mon avis, les conclusions du juge Megginson témoignent d'un examen approfondi des circonstances. Il a pris en considération la situation de M. Ipeelee, son histoire personnelle et ses antécédents criminels, ainsi que ses efforts de réadaptation et de réinsertion pendant qu'il était dans la collectivité. Il a reconnu que M. Ipeelee était un Inuit et qu'il avait donc droit à ce qu'on prenne son statut d'Autochtone en considération. Il a souligné qu'il serait difficile d'établir une sanction substitutive, parce qu'on avait refusé à M. Ipeelee la résidence dans un établissement d'Iqaluit. À mon avis, il a reconnu à bon droit que la protection du public était le facteur déterminant en cas de manquement à une OSLD.

[134] LeBel J. finds at paras. 89 and 95 that in this appeal and in *Ladue*, the courts erred in concluding that rehabilitation was not a relevant factor in their sentencing decisions. I do not read their decisions or the decision of the Ontario Court of Appeal in that way. On my reading of those decisions, all judges considered the principle of rehabilitation in sentencing, only to ultimately find that it should play a small role given that Mr. Ipeelee and Mr. Ladue are long-term offenders and as both had breached conditions of their LTSOs.

[135] In *Ipeelee*, the Crown requested a sentence of three to five years, while Mr. Ipeelee requested a sentence not exceeding 12 months. Justice Megginson imposed a sentence of three years, at the low end of the range proposed by the Crown, which, in his opinion, adequately reflected Mr. Ipeelee's Aboriginal status and the mitigating effect of his guilty plea.

[136] Justice LeBel minimizes the significance of Mr. Ipeelee's breach because it only involved intoxication, not becoming intoxicated and engaging in violence. With respect, this ignores the basic fact that Mr. Ipeelee's intoxication is the precursor to his engaging in violence and it is the management of the high risk of a violent reoffence that has been compromised by his alcohol consumption.

[137] As a long-term offender, Mr. Ipeelee has been found to show a pattern of repetitive behaviour with a likelihood of causing death or physical or psychological injury or a likelihood of causing injury, pain or other evil to other persons in the future through failure to control his sexual impulses. His alcohol consumption is central to such behaviour. I emphasize that s. 753.3(1) provides that breach of an LTSO is an indictable offence with a maximum sentence of up to 10 years

[134] Le juge LeBel conclut, aux par. 89 et 95, que les tribunaux ont commis une erreur dans le présent dossier et dans l'affaire *Ladue* en statuant que la réadaptation ne constituait pas un facteur pertinent dans leur décision concernant la détermination de la peine. Je ne partage pas cette interprétation de leurs décisions et de celle de la Cour d'appel de l'Ontario. Après les avoir lues, j'estime que tous les juges ont pris en considération le principe de la réadaptation pour la détermination de la peine, mais qu'ils ont conclu en définitive que ce principe ne devait jouer qu'un rôle mineur étant donné que M. Ipeelee et M. Ladue étaient des délinquants à contrôler et qu'ils avaient tous deux violé les conditions de leur OSLD.

[135] Dans l'affaire *Ipeelee*, le ministère public a réclamé une peine de trois à cinq ans d'emprisonnement, alors que M. Ipeelee a demandé une peine d'au plus 12 mois d'emprisonnement. Le juge Megginson l'a condamné à trois ans d'emprisonnement, soit la peine la moins sévère proposée par le ministère public. Il était d'avis que cette peine tenait dûment compte du statut d'Autochtone de M. Ipeelee et de l'effet atténuant de son plaidoyer de culpabilité.

[136] Le juge LeBel minimise l'importance du manquement de M. Ipeelee parce qu'il s'est simplement enivré, sans commettre d'actes de violence alors qu'il était en état d'ébriété. Avec égards, ce point de vue ne tient pas du tout compte du fait fondamental que l'état d'ébriété de M. Ipeelee est l'élément précurseur de la perpétration par celui-ci d'actes de violence et que sa consommation d'alcool a compromis la gestion de son risque élevé de récidive violente.

[137] Si M. Ipeelee a été déclaré délinquant à contrôler, c'est qu'il a été établi soit qu'il avait accompli des actes répétitifs permettant de croire qu'il causerait vraisemblablement la mort de quelque autre personne, ou des sévices ou des dommages psychologiques à d'autres personnes, soit que son incapacité de maîtriser ses impulsions sexuelles laissait prévoir que vraisemblablement il causera à l'avenir des sévices ou autres maux à d'autres personnes. Sa consommation d'alcool est un élément

and no substantive offence, violent or otherwise, need have also been committed. Parliament obviously considered the breach of an LTSO, by itself, a serious offence. That is what the sentencing judge considered relevant, and I can find no fault in his so doing.

[138] The exercise of discretion by a sentencing judge is entitled to significant deference from an appellate court. Deference is appropriate as sentencing judges have important advantages over appellate courts in crafting a particular sentence. Those advantages were well set out by Lamer C.J. in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500:

> A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly. [para. 91]

[139] Lamer C.J. outlined the limited role of appellate courts in matters of sentencing:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only

essentiel de ces comportements. Je souligne que, selon le par. 753.3(1), le défaut de se conformer à une OSLD constitue un acte criminel punissable d'un emprisonnement maximal de 10 ans et qu'il n'est pas nécessaire qu'une infraction substantielle, violente ou autre, ait été commise pour que cette peine maximale soit imposée. De toute évidence, le défaut de se conformer à une OSLD constitue en soi une infraction grave pour le législateur. C'est ce que le juge ayant prononcé la peine a considéré pertinent et je ne vois rien d'erroné dans cette conclusion.

[138] La cour d'appel doit faire preuve d'une grande déférence à l'égard de l'exercice du pouvoir discrétionnaire du juge chargé d'infliger la peine. La déférence s'impose car ces juges jouissent d'avantages importants par rapport aux cours d'appel dans l'établissement d'une peine en particulier. Le juge en chef Lamer a bien décrit ces avantages dans l'arrêt *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500 :

> Le juge qui inflige la peine jouit d'un autre avantage par rapport au juge d'appel en ce qu'il peut apprécier directement les observations présentées par le ministère public et le contrevenant relativement à la détermination de la peine. Du fait qu'il sert en première ligne de notre système de justice pénale, il possède également une qualification unique sur le plan de l'expérience et de l'appréciation. Fait peut-être le plus important, le juge qui impose la peine exerce normalement sa charge dans la communauté qui a subi les conséquences du crime du délinquant ou à proximité de celle-ci. De ce fait, il sera à même de bien évaluer la combinaison particulière d'objectifs de détermination de la peine qui sera « juste et appropriée » pour assurer la protection de cette communauté. La détermination d'une peine juste et appropriée est un art délicat, où l'on tente de doser soigneusement les divers objectifs sociétaux de la détermination de la peine, eu égard à la culpabilité morale du délinquant et aux circonstances de l'infraction, tout en ne perdant jamais de vue les besoins de la communauté et les conditions qui y règnent. Il ne faut pas intervenir à la légère dans l'exercice du pouvoir discrétionnaire du juge chargé de la détermination de la peine. [par. 91]

[139] Le juge en chef Lamer a décrit brièvement le rôle limité des cours d'appel en matière de détermination de la peine :

> Plus simplement, sauf erreur de principe, omission de prendre en considération un facteur pertinent ou insistance trop grande sur les facteurs appropriés, une

intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. [*M. (C.A.)*, at para. 90]

[140] I find no error in principle, no failure to consider relevant factors or an overemphasis on the appropriate factors by Justice Megginson. I cannot say the sentence he imposed was demonstrably unfit. I would dismiss this appeal.

B. *Ladue*

[141] In this case, Judge Bagnall sentenced Mr. Ladue to three years' imprisonment (2010 BCPC 410 (CanLII)). The majority of the Court of Appeal reduced the three-year sentence to one year. Chiasson J.A., dissenting in the Court of Appeal, would have ordered a sentence of two years (2011 BCCA 101, 302 B.C.A.C. 93).

[142] The sentencing judge commented on Mr. Ladue's particular background. She quoted from his pre-sentence report which referenced his "horrible and tragic" experience in a residential school and commented on his bleak future (para. 22). She also referred to his appraisal report, which further documented his residential school experience and that he had been the victim of abuse.

[143] With regard to his LTSO, she observed that Mr. Ladue had been previously convicted three times for breaching the order by consuming intoxicants. She noted that he was initially scheduled to be released to Linkage House, in Kamloops, but, because of an outstanding DNA warrant, was sent to Belkin House in downtown Vancouver to have it attended to. She acknowledged Mr. Ladue's submission that being placed at Belkin House minimized his chance for successful rehabilitation, but did not accept it. She said that, upon arrival at Belkin House, he was warned not to associate with a particular offender, but did so and slipped almost immediately back into drug and alcohol use. He was given a second chance at Belkin House, but to no avail, and eventually admitted to using cocaine and morphine since his

cour d'appel ne devrait intervenir pour modifier la peine infligée au procès que si elle n'est manifestement pas indiquée. [*M. (C.A.)*, par. 90]

[140] À mon avis, le juge Megginson n'a commis aucune erreur de principe, n'a pas omis de prendre en considération des facteurs pertinents et n'a pas trop insisté sur les facteurs appropriés. Je ne peux pas dire que la peine infligée n'était manifestement pas indiquée. Je suis d'avis de rejeter ce pourvoi.

B. *Ladue*

[141] Dans cette affaire, la juge Bagnall a condamné M. Ladue à trois ans d'emprisonnement (2010 BCPC 410 (CanLII)). La Cour d'appel à la majorité a réduit cette peine à un an d'emprisonnement. Dissident, le juge Chiasson aurait réduit la peine à deux ans d'emprisonnement (2011 BCCA 101, 302 B.C.A.C. 93).

[142] La juge de détermination de la peine a commenté l'histoire personnelle particulière de M. Ladue. Elle a cité des extraits de son rapport présentenciel faisant état de son expérience [TRADUCTION] « horrible et tragique » dans un pensionnat et commenté son avenir sombre (par. 22). Elle a également fait référence à son rapport d'évaluation, qui rendait compte plus en détail de son expérience dans un pensionnat et des mauvais traitements qu'il avait subis.

[143] Elle a fait remarquer que M. Ladue avait été déclaré coupable à trois reprises de manquement à son OSLD parce qu'il avait consommé des substances intoxicantes. Elle a souligné qu'il devait au départ être envoyé à la Linkage House, à Kamloops, mais qu'en raison d'un mandat d'analyse génétique non exécuté, il avait été envoyé à la Belkin House, au centre-ville de Vancouver en vue de l'analyse génétique. Elle a pris acte de l'argument de M. Ladue selon lequel le fait de l'envoyer à la Belkin House réduisait au minimum ses chances de réadaptation, mais elle ne l'a pas accepté. Selon elle, malgré la mise en garde qui lui avait été faite à son arrivée à la Belkin House relativement à un détenu en particulier, il a fréquenté cette personne et ses problèmes de consommation de drogue et d'alcool sont presque immédiatement réapparus. On lui a

arrival. This led to the charge of breaching his LTSO.

[144] A community assessment report compiled by a parole officer in September 2009 for the benefit of the Kamloops Parole Office was critical of Mr. Ladue's placement at Belkin House.

> [Mr. Ladue] desperately needs to get away from downtown Vancouver. He requires the onsite resources of an Elder and ceremony. He needs to get immediately in touch with a residential school trauma counsellor. . . .
>
> . . .
>
> The purpose of this report is to re-screen Mr. Ladue into Linkage House for potential residence while serving his Long-Term Supervision Order (LTSO). . . .
>
> . . .
>
> Mr. Wolkosky continues to believe Mr. Ladue could be managed at Linkage House. It is expected that Mr. Ladue's negative associates will not be located in the Kamloops region. Substance abuse is not tolerated at Linkage and consequences can be expected if this were to occur. Mr. Wolkosky feels CSC, JHS and RCMP can work together to assist Mr. Ladue with successful reintegration. [A.R., at pp. 139-40]

[145] An appraisal report dated September 2009 noted that Mr. Ladue had participated in Aboriginal programs to address "his need areas", but none were sufficient to address his risk. In the end, the report found that his "risk to the community is high and currently unmanageable" (A.R., at p. 136).

[146] The Crown sought a sentence of 18 months to two years. Mr. Ladue asked for a much shorter sentence. The sentencing judge found that the only way to protect the community, given Mr. Ladue's

donné une seconde chance à la Belkin House, mais en vain, et il a fini par reconnaître avoir consommé de la cocaïne et de la morphine depuis son arrivée. C'est ce qui a mené à l'inculpation de M. Ladue pour violation de son OSLD.

[144] En septembre 2009, un surveillant du bureau de libération conditionnelle de Kamloops a établi un rapport d'évaluation communautaire critiquant la décision de placer M. Ladue à la Belkin House.

> [TRADUCTION] [M. Ladue] a désespérément besoin de s'éloigner du centre-ville de Vancouver. Il lui faut, sur place, le soutien d'un aîné et de cérémonies rituelles. Il doit immédiatement prendre contact avec un conseiller pour les victimes d'expériences traumatisantes dans les pensionnats. . .
>
> . . .
>
> Le présent rapport vise à évaluer de nouveau M. Ladue en vue d'un placement possible à la Linkage House pendant la durée de son ordonnance de surveillance de longue durée (OSLD). . .
>
> . . .
>
> M. Wolkosky continue de croire que le risque que représente M. Ladue pourrait être maîtrisé à la Linkage House. On prévoit que M. Ladue ne retrouvera pas ses mauvaises fréquentations dans la région de Kamloops. La toxicomanie n'est pas tolérée à Linkage et les contrevenants peuvent s'attendre à se voir imposer des sanctions. M. Wolkosky estime que le SCC, la SJH et la GRC peuvent travailler en ensemble pour aider M. Ladue à réussir sa réadaptation. [d.a., p. 139-140]

[145] Dans un rapport d'évaluation daté de septembre 2009, on souligne que M. Ladue a participé à des programmes autochtones pour répondre [TRADUCTION] « à ses besoins », mais aucun de ces programmes n'a permis de maîtriser le risque qu'il représente. L'auteur du rapport conclut en définitive que le « risque pour la société est élevé et actuellement impossible à maîtriser » (d.a., p. 136).

[146] Le ministère public a réclamé une peine de 18 mois à deux ans d'emprisonnement. M. Ladue a proposé une peine beaucoup plus courte. Selon la juge de détermination de la peine, comme M. Ladue

high risk of reoffending sexually and moderate to high risk of reoffending violently, was to emphasize the objective of isolation. She found that in spite of successful completion of treatment, he was unable or unwilling to abstain from the consumption of intoxicants and that he was much more likely to reoffend in such circumstances. She noted that the indictable nature of the breach and the maximum sentence of 10 years indicate Parliament's view that this is a serious offence and that, even if Mr. Ladue did not commit a substantive offence, his breach was serious. The judge found the 18 to 24 month range recommended by the Crown inadequate and sentenced Mr. Ladue to three years' imprisonment.

présente un risque élevé de récidive sexuelle et un risque modéré à élevé de récidive violente, la seule façon de protéger la société était de privilégier l'objectif d'isolement. Elle a conclu que, bien qu'il ait terminé avec succès son traitement, il n'avait pas la capacité ou la volonté de s'abstenir de consommer des substances intoxicantes et qu'il était donc très nettement susceptible de récidiver. Elle a souligné que le fait que le manquement en question constitue un acte criminel punissable d'un emprisonnement maximal de 10 ans montre qu'il s'agit pour le législateur d'une infraction grave; elle a ajouté que, bien que M. Ladue n'ait pas commis d'infraction substantielle, son manquement était grave. La juge a conclu que la fourchette de 18 à 24 mois d'emprisonnement recommandée par le ministère public était inappropriée et a condamné M. Ladue à trois ans d'emprisonnement.

[147] In reducing Mr. Ladue's sentence to one year, the majority of the Court of Appeal found that the sentencing judge did not give sufficient weight to the circumstances of Mr. Ladue as an Aboriginal offender, overemphasized the principle of separating the offender and gave insufficient weight to the principle of rehabilitation. The majority said that the sentencing judge did not give Mr. Ladue's Aboriginal heritage tangible consideration "which will often impact the length and type of sentence imposed. . . . There was nothing to indicate that [Mr. Ladue] had come close to engaging in the violent sexual behaviour . . . . [T]he role of rehabilitation will depend on the circumstances of the offender and is not dependent on his or her designation" (paras. 64, 68 and 71).

[147] En réduisant la peine de M. Ladue à un an d'emprisonnement, les juges majoritaires de la Cour d'appel ont conclu que la juge de détermination de la peine n'avait pas accordé suffisamment d'importance à la situation de M. Ladue en tant que délinquant autochtone, avait trop insisté sur le principe de l'isolement du délinquant et n'avait pas accordé de poids suffisant au principe de la réadaptation. Selon eux, la juge n'avait pas tenu compte concrètement de l'héritage autochtone de M. Ladue, [TRADUCTION] « qui aura souvent une incidence sur le type de peine imposée et sur sa durée. [. . .] Rien n'indiquait que [M. Ladue] ait failli se livrer à des actes d'inconduite sexuelle violente [. . .] [L]e rôle de la réadaptation dépendra de la situation du délinquant et non de sa désignation à titre de délinquant à contrôler » (par. 64, 68 et 71).

[148] The majority also observed that the corrections report found that Linkage House in Kamloops offered the best chance at rehabilitation for Mr. Ladue. However,

[148] Les juges majoritaires ont également fait remarquer que, selon le rapport des services correctionnels, c'est la Linkage House à Kamloops qui offrait à M. Ladue les meilleures chances de réadaptation. Cependant,

> [b]ecause of a bureaucratic error, he was not sent there following his last release. Instead, he was sent to Belkin House, which placed him back into a milieu where he was sorely tempted by drugs. [para. 76]

> [TRADUCTION] [e]n raison d'une erreur administrative, il n'a pas été envoyé à cet endroit lors de sa dernière mise en liberté. On l'a plutôt envoyé à la Belkin House, soit un milieu où il a été fortement tenté de consommer des drogues. [par. 76]

[149] In the opinion of the majority, a one-year sentence would be enough time for Mr. Ladue to deal with his substance abuse problem and for the CSC to find an appropriate placement for him, preferably Linkage House or another halfway house which emphasizes Aboriginal culture and healing. They observed that his prior sentence for violation of his LTSO was based on time served on remand. An increase to three years was found to be excessive.

[150] In dissent, Chiasson J.A. was of the opinion that the sentencing judge did not err in her consideration of the Aboriginal circumstances of Mr. Ladue but did fail to recognize that his breach of condition did not lead him on a path of reoffending. He would have imposed a sentence of two years.

[151] I agree with Chiasson J.A. that Mr. Ladue's Aboriginal background was considered and weighed in the sentencing judge's decision. As I noted in the case of Mr. Ipeelee, it is not open to an appellate court to interfere with a sentence simply because it would have weighed the relevant factors differently. It is only when it can be said that the exercise of discretion was unreasonable that the appeal court may interfere with the sentence.

[152] While I do not entirely agree with the reasoning of the majority of the Court of Appeal, nonetheless, in my respectful opinion, there is another reason to agree with the one-year sentence they imposed.

[153] The distinguishing aspect of this case is what the Court of Appeal called the "bureaucratic error" (para. 76). Because of that error, Mr. Ladue was sent to Belkin House in downtown Vancouver rather than Linkage House in Kamloops. The sentencing judge does not appear to have considered that it was this error that caused Mr. Ladue to be sent to Belkin House, which apparently tolerates

[149] De l'avis des juges majoritaires, une peine de un an d'emprisonnement serait suffisante pour que M. Ladue réussisse à régler son problème de toxicomanie et pour que le SCC lui trouve un endroit approprié où rester, de préférence la Linkage House ou une autre maison de transition où l'accent est mis sur la culture autochtone et la guérison. Ils ont fait remarquer que sa peine précédente pour violation de l'OSLD était fondée sur le temps qu'il avait purgé en détention préventive. L'augmentation à trois ans d'emprisonnement a été jugée excessive.

[150] Selon le juge Chiasson, dissident, la juge de détermination de la peine n'avait pas commis d'erreur dans sa prise en compte du statut d'Autochtone de M. Ladue, mais elle avait omis de prendre en considération le fait que le manquement en cause n'avait pas amené M. Ladue à récidiver. II aurait imposé une peine de deux ans d'emprisonnement.

[151] Je suis d'accord avec le juge Chiasson pour dire que la juge de détermination de la peine a pris en considération les origines autochtones de M. Ladue dans sa décision. Comme je l'ai souligné pour M. Ipeelee, la cour d'appel ne peut modifier une peine du simple fait qu'elle aurait évalué différemment les facteurs pertinents. La cour d'appel ne peut modifier la peine que s'il est possible d'affirmer que le juge a exercé son pouvoir discrétionnaire de manière déraisonnable.

[152] Bien que je ne souscrive pas entièrement au raisonnement des juges majoritaires de la Cour d'appel, il existe, à mon avis, un autre motif de confirmer leur décision d'imposer une peine d'emprisonnement de un an.

[153] L'aspect particulier de la présente affaire réside dans ce que la Cour d'appel a appelé une [TRADUCTION] « erreur administrative » (par. 76). En raison de cette erreur, M. Ladue a été envoyé à la Belkin House, au centre-ville de Vancouver, plutôt qu'à la Linkage House à Kamloops. La juge de détermination de la peine ne semble pas avoir pris en considération le fait que c'est cette erreur

serious drug abusers and does not provide programs for Aboriginal offenders.

[154] I do not absolve Mr. Ladue of responsibility for his own conduct. However, the CSC said that Linkage House was the appropriate location for Mr. Ladue. It was their error that caused him to be placed in an environment where, having regard to his known addiction, he was especially vulnerable to breaching his LTSO.

[155] The sentencing judge does not refer to the fact that the cause of Mr. Ladue being sent to Belkin House rather than Linkage House was a "bureaucratic error". In my respectful opinion, she failed to take account of this relevant consideration. Due to no fault of his own and contrary to the recommended course of rehabilitation, Mr. Ladue was sent to a facility that placed him in harm's way.

[156] Section 718.1 of the *Criminal Code* provides:

> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

This is not a situation where the offender failed to take up an opportunity that the criminal justice system had given him to rehabilitate. Rather, the system's bureaucratic error deprived him of that opportunity. The CSC must bear some "degree of responsibility" for Mr. Ladue's breach.

[157] For the reasons that I have given, the sentencing judge did not err in focussing on protection of society as the paramount consideration in her sentencing decision. But this was a case where there was a realistic opportunity for rehabilitation that was denied Mr. Ladue by the system's "bureaucratic error". This relevant consideration was not taken into account by the sentencing judge. This failure meant that Mr. Ladue's moral blameworthiness was not properly assessed (see *M. (C.A.)*, at para 79, and *R. v. Nasogaluak*, 2010

qui était à l'origine du transfert de M. Ladue à la Belkin House, qui tolère apparemment les grands toxicomanes et qui n'offre pas de programmes pour les délinquants autochtones.

[154] Je ne dégage pas M. Ladue de toute responsabilité pour sa propre conduite. Toutefois, le SCC a affirmé que la Linkage House était l'endroit approprié où envoyer M. Ladue. C'est à cause de son erreur qu'il a été envoyé dans un milieu où, étant donné sa dépendance connue, il était particulièrement susceptible de contrevenir à son OSLD.

[155] La juge de détermination de la peine n'a pas mentionné que le transfert de M. Ladue à la Belkin House plutôt qu'à la Linkage House résultait d'une « erreur administrative ». À mon humble avis, elle n'a pas tenu compte de cette considération pertinente. Sans aucune faute de sa part et contrairement à l'approche recommandée pour sa réadaptation, M. Ladue a été envoyé dans un établissement où il serait en péril.

[156] L'article 718.1 du *Code criminel* est rédigé en ces termes :

> **718.1** La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

Il ne s'agit pas d'un cas où le délinquant ne s'est pas prévalu de la possibilité de réadaptation que lui offrait le système de justice pénale. L'erreur administrative commise l'a plutôt privé d'une telle possibilité. Il faut imputer un certain « degré de responsabilité » au SCC dans le manquement reproché à M. Ladue.

[157] Pour tous ces motifs, la juge de détermination de la peine n'a pas commis d'erreur en insistant sur la protection de la société qui constituait, selon elle, le critère déterminant dans sa décision. Toutefois, en l'espèce, M. Ladue a été privé d'une possibilité réaliste de réadaptation à cause d'une « erreur administrative ». La juge de détermination de la peine n'a pas tenu compte de cette considération pertinente. La culpabilité morale de M. Ladue n'a donc pas été évaluée correctement (voir *M. (C.A.)*, par. 79, et *R. c. Nasogaluak*, 2010 CSC

SCC 6, [2010] 1 S.C.R. 206, at para. 42). In the circumstances and having regard to the fact that the CSC must bear some responsibility for Mr. Ladue's breach, I would agree with the result reached by the majority of the Court of Appeal and Justice LeBel and find that one year was a fit and proper sentence. I would dismiss this appeal.

APPENDIX

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

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

6, [2010] 1 R.C.S. 206, par. 42). Dans les circonstances, et étant donné que le SCC doit assumer une part de responsabilité dans le manquement reproché à M. Ladue, je suis d'accord avec la majorité de la Cour d'appel et le juge LeBel quant au résultat et je conclus qu'une peine d'emprisonnement de un an constitue une peine juste et appropriée. Je suis d'avis de rejeter ce pourvoi.

ANNEXE

Code criminel, L.R.C. 1985, ch. C-46

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

a) dénoncer le comportement illégal;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant :

(i) que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique ou l'orientation sexuelle,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

(*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

(*b*) there is a substantial risk that the offender will reoffend; and

(*c*) there is a reasonable possibility of eventual control of the risk in the community.

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(*a*) the offender has been convicted of an offence under section 151 (sexual interference), 152

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement de son époux ou conjoint de fait,

(ii.1) que l'infraction perpétrée par le délinquant constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iv) que l'infraction a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle;

(v) que l'infraction perpétrée par le délinquant est une infraction de terrorisme;

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

753.1 (1) Sur demande faite, en vertu de la présente partie, postérieurement au dépôt du rapport d'évaluation visé au paragraphe 752.1(2), le tribunal peut déclarer que le délinquant est un délinquant à contrôler, s'il est convaincu que les conditions suivantes sont réunies :

a) il y a lieu d'imposer au délinquant une peine minimale d'emprisonnement de deux ans pour l'infraction dont il a été déclaré coupable;

b) celui-ci présente un risque élevé de récidive;

c) il existe une possibilité réelle que ce risque puisse être maîtrisé au sein de la collectivité.

(2) Le tribunal est convaincu que le délinquant présente un risque élevé de récidive si :

a) d'une part, celui-ci a été déclaré coupable d'une infraction visée aux articles 151 (contacts sexuels),

(invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(*b*) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

(3) If the court finds an offender to be a long-term offender, it shall

(*a*) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and

(*b*) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

753.2 (1) Subject to subsection (2), an offender who is subject to long-term supervision shall be supervised in the community in accordance with the *Corrections and Conditional Release Act* when the offender has finished serving

(*a*) the sentence for the offence for which the offender has been convicted; and

(*b*) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (*a*).

152 (incitation à des contacts sexuels) ou 153 (exploitation sexuelle), aux paragraphes 163.1(2) (production de pornographie juvénile), 163.1(3) (distribution de pornographie juvénile), 163.1(4) (possession de pornographie juvénile) ou 163.1(4.1) (accès à la pornographie juvénile), à l'article 172.1 (leurre), au paragraphe 173(2) (exhibitionnisme) ou aux articles 271 (agression sexuelle), 272 (agression sexuelle armée) ou 273 (agression sexuelle grave), ou a commis un acte grave de nature sexuelle lors de la perpétration d'une autre infraction dont il a été déclaré coupable;

b) d'autre part :

(i) soit le délinquant a accompli des actes répétitifs, notamment celui qui est à l'origine de l'infraction dont il a été déclaré coupable, qui permettent de croire qu'il causera vraisemblablement la mort de quelque autre personne ou causera des sévices ou des dommages psychologiques graves à d'autres personnes,

(ii) soit sa conduite antérieure dans le domaine sexuel, y compris lors de la perpétration de l'infraction dont il a été déclaré coupable, laisse prévoir que vraisemblablement il causera à l'avenir de ce fait des sévices ou autres maux à d'autres personnes.

(3) S'il déclare que le délinquant est un délinquant à contrôler, le tribunal lui inflige une peine minimale d'emprisonnement de deux ans pour l'infraction dont il a été déclaré coupable et ordonne qu'il soit soumis, pour une période maximale de dix ans, à une surveillance de longue durée.

753.2 (1) Sous réserve du paragraphe (2), le délinquant soumis à une surveillance de longue durée est surveillé au sein de la collectivité en conformité avec la *Loi sur le système correctionnel et la mise en liberté sous condition* lorsqu'il a terminé de purger :

a) d'une part, la peine imposée pour l'infraction dont il a été déclaré coupable;

b) d'autre part, toutes autres peines d'emprisonnement imposées pour des infractions dont il est déclaré coupable avant ou après la déclaration de culpabilité pour l'infraction visée à l'alinéa *a*).

753.3 (1) An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

Corrections and Conditional Release Regulations, SOR/92-620

161. (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender

(*a*) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor;

(*b*) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;

(*c*) obey the law and keep the peace;

(*d*) inform the parole supervisor immediately on arrest or on being questioned by the police;

(*e*) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(*f*) report to the police if and as instructed by the parole supervisor;

(*g*) advise the parole supervisor of the offender's address of residence on release and thereafter report immediately

(i) any change in the offender's address of residence,

(ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,

(iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and

(iv) any change that may reasonably be expected to affect the offender's ability to

753.3 (1) Le délinquant qui, sans excuse raisonnable, omet ou refuse de se conformer à la surveillance de longue durée à laquelle il est soumis est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans.

Règlement sur le système correctionnel et la mise en liberté sous condition, DORS/92-620

161. (1) Pour l'application du paragraphe 133(2) de la Loi, les conditions de mise en liberté qui sont réputées avoir été imposées au délinquant dans tous les cas de libération conditionnelle ou d'office sont les suivantes :

a) dès sa mise en liberté, le délinquant doit se rendre directement à sa résidence, dont l'adresse est indiquée sur son certificat de mise en liberté, se présenter immédiatement à son surveillant de liberté conditionnelle et se présenter ensuite à lui selon les directives de celui-ci;

b) il doit rester à tout moment au Canada, dans les limites territoriales spécifiées par son surveillant;

c) il doit respecter la loi et ne pas troubler l'ordre public;

d) il doit informer immédiatement son surveillant en cas d'arrestation ou d'interrogatoire par la police;

e) il doit porter sur lui à tout moment le certificat de mise en liberté et la carte d'identité que lui a remis l'autorité compétente et les présenter à tout agent de la paix ou surveillant de liberté conditionnelle qui lui en fait la demande à des fins d'identification;

f) le cas échéant, il doit se présenter à la police, à la demande de son surveillant et selon ses directives;

g) dès sa mise en liberté, il doit communiquer à son surveillant l'adresse de sa résidence, de même que l'informer sans délai de :

(i) tout changement de résidence,

(ii) tout changement d'occupation habituelle, notamment un changement d'emploi rémunéré ou bénévole ou un changement de cours de formation,

(iii) tout changement dans sa situation domestique ou financière et, sur demande de son surveillant, tout changement dont il est au courant concernant sa famille,

(iv) tout changement qui, selon ce qui peut être raisonnablement prévu, pourrait affecter sa capacité de respecter les

comply with the conditions of parole or statutory release;

(*h*) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor; and

(*i*) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.

(2) For the purposes of subsection 133(2) of the Act, every offender who is released on unescorted temporary absence is subject to the following conditions, namely, that the offender

(*a*) on release, travel directly to the destination set out in the absence permit respecting the offender, report to a parole supervisor as directed by the releasing authority and follow the release plan approved by the releasing authority;

(*b*) remain in Canada within the territorial boundaries fixed by the parole supervisor for the duration of the absence;

(*c*) obey the law and keep the peace;

(*d*) inform the parole supervisor immediately on arrest or on being questioned by the police;

(*e*) at all times carry the absence permit and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(*f*) report to the police if and as instructed by the releasing authority;

(*g*) return to the penitentiary from which the offender was released on the date and at the time provided for in the absence permit;

(*h*) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor.

conditions de sa libération conditionnelle ou d'office;

h) il ne doit pas être en possession d'arme, au sens de l'article 2 du *Code criminel*, ni en avoir le contrôle ou la propriété, sauf avec l'autorisation de son surveillant;

i) s'il est en semi-liberté, il doit, dès la fin de sa période de semi-liberté, réintégrer le pénitencier d'où il a été mis en liberté à l'heure et à la date inscrites à son certificat de mise en liberté.

(2) Pour l'application du paragraphe 133(2) de la Loi, les conditions de mise en liberté qui sont réputées avoir été imposées au délinquant dans tous les cas de permission de sortir sans surveillance sont les suivantes :

a) dès sa mise en liberté, le délinquant doit se rendre directement au lieu indiqué sur son permis de sortie, se présenter à son surveillant de liberté conditionnelle selon les directives de l'autorité compétente et suivre le plan de sortie approuvé par elle;

b) il doit rester au Canada, dans les limites territoriales spécifiées par son surveillant pendant toute la durée de la sortie;

c) il doit respecter la loi et ne pas troubler l'ordre public;

d) il doit informer immédiatement son surveillant en cas d'arrestation ou d'interrogatoire par la police;

e) il doit porter sur lui à tout moment le permis de sortie et la carte d'identité que lui a remis l'autorité compétente et les présenter à tout agent de la paix ou surveillant de liberté conditionnelle qui lui en fait la demande à des fins d'identification;

f) le cas échéant, il doit se présenter à la police, à la demande de l'autorité compétente et selon ses directives;

g) il doit réintégrer le pénitencier d'où il a été mis en liberté à l'heure et à la date inscrites à ce permis;

h) il ne doit pas être en possession d'arme, au sens de l'article 2 du *Code criminel*, ni en avoir le contrôle ou la propriété, sauf avec l'autorisation de son surveillant.

Corrections and Conditional Release Act, S.C. 1992, c. 20

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

Loi sur le système correctionnel et la mise en liberté sous condition, L.C. 1992, ch. 20

3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par

(*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are

(*a*) that the protection of society be the paramount consideration in the corrections process;

(*b*) that the sentence be carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, other information from the trial or sentencing process, the release policies of, and any comments from, the National Parole Board, and information obtained from victims and offenders;

(*c*) that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public;

(*d*) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

(*e*) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

(*f*) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service;

(*g*) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(*h*) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;

des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

4. Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent :

a) la protection de la société est le critère prépondérant lors de l'application du processus correctionnel;

b) l'exécution de la peine tient compte de toute information pertinente dont le Service dispose, notamment des motifs et recommandations donnés par le juge qui l'a prononcée, des renseignements obtenus au cours du procès ou dans la détermination de la peine ou fournis par les victimes et les délinquants, ainsi que des directives ou observations de la Commission nationale des libérations conditionnelles en ce qui touche la libération;

c) il accroît son efficacité et sa transparence par l'échange, au moment opportun, de renseignements utiles avec les autres éléments du système de justice pénale ainsi que par la communication de ses directives d'orientation générale et programmes correctionnels tant aux délinquants et aux victimes qu'au grand public;

d) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible;

e) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée;

f) il facilite la participation du public aux questions relatives à ses activités;

g) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;

h) ses directives d'orientation générale, programmes et méthodes respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones et à d'autres groupes particuliers;

(*i*) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration; and

(*j*) that staff members be properly selected and trained, and be given

(i) appropriate career development opportunities,

(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and

(iii) opportunities to participate in the development of correctional policies and programs.

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(*a*) that the protection of society be the paramount consideration in the determination of any case;

(*b*) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

(*c*) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

(*d*) that parole boards make the least restrictive determination consistent with the protection of society;

(*e*) that parole boards adopt and be guided by appropriate policies and that their members be

i) il est attendu que les délinquants observent les règlements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur et des libérations conditionnelles ou d'office et qu'ils participent aux programmes favorisant leur réadaptation et leur réinsertion sociale;

j) il veille au bon recrutement et à la bonne formation de ses agents, leur offre de bonnes conditions de travail dans un milieu exempt de pratiques portant atteinte à la dignité humaine, un plan de carrière avec la possibilité de se perfectionner ainsi que l'occasion de participer à l'élaboration des directives d'orientation générale et programmes correctionnels.

100. La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent :

a) la protection de la société est le critère déterminant dans tous les cas;

b) elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;

c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;

d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;

e) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent

provided with the training necessary to implement those policies; and

(*f*) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

134.1 (1) Subject to subsection (4), every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by subsection 161(1) of the *Corrections and Conditional Release Regulations*, with such modifications as the circumstances require.

(2) The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

(3) A condition imposed under subsection (2) is valid for the period that the Board specifies.

(4) The Board may, in accordance with the regulations, at any time during the long-term supervision of an offender,

(*a*) in respect of conditions referred to in subsection (1), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or

(*b*) in respect of conditions imposed under subsection (2), remove or vary any such condition.

134.2 (1) An offender who is supervised pursuant to a long-term supervision order shall comply with any instructions given by a member of the Board or a person designated, by name or by position, by the Chairperson of the Board or by the Commissioner, or given by the offender's parole supervisor, respecting any conditions of long-term supervision in order to prevent a breach of any condition or to protect society.

(2) In this section, "parole supervisor" means

(*a*) a staff member as defined in subsection 2(1); or

(*b*) a person entrusted by the Service with the guidance and supervision of an offender who is required to be supervised by a long-term supervision order.

Appeal 33650 allowed, ROTHSTEIN J. *dissenting. Appeal 34245 dismissed.*

recevoir la formation nécessaire à la mise en œuvre de ces directives;

f) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

134.1 (1) Sous réserve du paragraphe (4), les conditions prévues par le paragraphe 161(1) du *Règlement sur le système correctionnel et la mise en liberté sous condition* s'appliquent, avec les adaptations nécessaires, au délinquant surveillé aux termes d'une ordonnance de surveillance de longue durée.

(2) La Commission peut imposer au délinquant les conditions de surveillance qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

(3) Les conditions imposées par la Commission en vertu du paragraphe (2) sont valables pendant la période qu'elle fixe.

(4) La Commission peut, conformément aux règlements, soustraire le délinquant, au cours de la période de surveillance, à l'application de l'une ou l'autre des conditions visées au paragraphe (1), ou modifier ou annuler l'une de celles visées au paragraphe (2).

134.2 (1) Le délinquant qui est surveillé aux termes d'une ordonnance de surveillance de longue durée doit observer les consignes que lui donne son surveillant de liberté conditionnelle, un membre de la Commission ou la personne que le président ou le commissaire désigne nommément ou par indication de son poste en vue de prévenir la violation des conditions imposées ou de protéger la société.

(2) Au présent article, « surveillant de liberté conditionnelle » s'entend d'un agent au sens du paragraphe 2(1) ou d'une personne chargée par le Service d'orienter et de surveiller le délinquant soumis à une ordonnance de surveillance de longue durée.

Pourvoi 33650 accueilli, le juge ROTHSTEIN *est dissident. Pourvoi 34245 rejeté.*

Solicitor for the appellant Manasie Ipeelee: Fergus J. (Chip) O'Connor, Kingston.

Solicitor for the respondent Her Majesty The Queen: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Iqaluit.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Solicitor for the appellant Her Majesty The Queen: Attorney General of British Columbia, Vancouver.

Solicitors for the respondent Frank Ralph Ladue: Myers, McMurdo & Karp, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: University of Toronto, Toronto; Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Ruby Shiller Chan, Toronto.

Procureur de l'appelant Manasie Ipeelee : Fergus J. (Chip) O'Connor, Kingston.

Procureur de l'intimée Sa Majesté la Reine : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le Directeur des poursuites pénales : Service des poursuites pénales du Canada, Iqaluit.

Procureur de l'intervenante Aboriginal Legal Services of Toronto Inc. : Aboriginal Legal Services of Toronto Inc., Toronto.

Procureur de l'appelante Sa Majesté la Reine : Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intimé Frank Ralph Ladue : Myers, McMurdo & Karp, Vancouver.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : University of Toronto, Toronto; Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Ruby Shiller Chan, Toronto.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kreko, 2016 ONCA 367
DATE: 20160516
DOCKET: C59203

Strathy C.J.O., Gillese and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Andrew Kreko

Appellant

David E. Harris, for the appellant

Eric Siebenmorgen, for the respondent

Emily Hill and Caitlyn Kasper, for the intervener Aboriginal Legal Services of Toronto

Heard: April 18, 2016

On appeal from the sentence imposed on January 7, 2014 by Justice David M. Stone of the Ontario Court of Justice.

Pardu J.A.:

[1] The sentencing judge erred in concluding that the appellant's Aboriginal heritage was irrelevant to his sentencing. This error affected the 13-year global sentence imposed on the appellant and it falls to this court to determine an appropriate sentence.

A. FACTS

[2] The offences to which the appellant pleaded guilty were very serious: possession without lawful excuse of a loaded prohibited firearm, robbery with a handgun, and intentional discharge of a firearm while being reckless as to the life or safety of another person, contrary to ss. 95(2), 343(d) and 244.2(3) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[3] The facts can be summarized briefly. The appellant followed the victim, Jason Gomes, from an LCBO to an apartment parking lot. After Mr. Gomes got out of his vehicle, the appellant, his face masked with a bandana, approached Mr. Gomes with a gun in his hand. There was a struggle. The gun went off and the bullet hit the ground. The appellant took a necklace and a cell phone belonging to Mr. Gomes before fleeing on foot. Mr. Gomes got back in his car and pursued the appellant. He drove at the appellant and struck him with his car with enough force to crack the windshield when the appellant's body hit it. The appellant then fired three bullets at the car. One of the bullets went through the driver's headrest and entered Mr. Gomes's scalp, but fortunately did not penetrate or fracture his skull and did not seriously injure him. The appellant also accidentally shot a bullet into his own leg, causing serious injury. He required surgery and hospitalization, and has been left with enduring physical problems with his leg.

B. THE APPELLANT'S ABORIGINAL HERITAGE

[4] The appellant's mother, who was Aboriginal, was only 15 years old when he was born on August 18, 1989. She could not adequately care for him, and the appellant was placed in foster care because of concerns about her lifestyle. Around the time of his first birthday, the appellant was placed for adoption with a non-Aboriginal couple.

[5] The appellant's birth mother suffered from a chaotic childhood herself. Both of her parents struggled with alcoholism. When she was four-and-a-half years old, she was admitted to hospital and placed in the care of the Children's Aid Society after consuming some of her mother's alcohol. She was placed in her grandmother's care, as well as various foster homes, before finally becoming a Crown ward at age 11. She was still a Crown ward when she gave birth to the appellant.

[6] The appellant's maternal grandmother died at age 28. She was a depressed alcoholic, unable to parent her children. The appellant's maternal grandfather was raised in a large family on a reserve in Ontario, but he and his siblings spent years in the care of the Children's Aid Society because of parental neglect and alcoholism.

[7] The adoption order was made when the appellant was nearly two years old. The next year, the appellant's adoptive mother left the family to pursue another relationship. She did not remain involved in the appellant's life.

[8] The appellant grew up not knowing he was adopted. He assumed that his heritage was Finnish and French, like his adoptive parents, but he was often challenged by other kids on this point, who suggested he had other ancestry.

[9] When the appellant was between 16 and 18 years old, his adoptive father told him of the adoption. This came as a shock to him, and the realization of the loss of both his adoptive mother and his birth mother led to feelings of abandonment, resentment, and a sense that he was unwanted.

[10] The appellant began trying to locate his birth parents in or around 2007 or 2008. Around the same time, his adoptive mother came back to live with his adoptive father, but her relationship with the appellant was difficult.

[11] As a teenager, the appellant became interested in what he called “black culture.” He listened to hip hop music and wore baggy clothes. He also developed a fascination with guns, gangs and aggression.

[12] The appellant has struggled with his identity and his adoption. However, he has now found his birth mother, and has successfully completed a number of rehabilitative Aboriginal programs. He has embraced his Aboriginal heritage.

C. SUBMISSIONS BEFORE THE SENTENCING JUDGE

[13] At the sentencing hearing, the Crown submitted that the appellant’s Aboriginal heritage was irrelevant to the appropriate sentence. In the Crown’s view, the appellant had been raised by his adoptive parents, had only recently

learned of his Aboriginal heritage, and had not faced any of the systemic disadvantages or impediments experienced by other Aboriginals. The Crown therefore submitted that there was no connection at all between the appellant's Aboriginal background and his offences.

[14] The defence submitted that the appellant's background was relevant to his moral blameworthiness, and that there were unique systemic and background factors which had played a role in the offences before the court. The defence submitted that the appellant had an identity crisis when he learned of his adoption and his Aboriginal heritage, which coincided with his involvement in the criminal justice system. The defence further submitted that the appellant's own dislocation was characteristic of the systemic disadvantage experienced by persons of Aboriginal heritage.

D. REASONS OF THE SENTENCING JUDGE

[15] The sentencing judge gave no weight to the appellant's Aboriginal background when he considered the length of the sentence to be imposed:

> Although a direct, causal link is not required, there is no such tie in this case. Mr. Kreko may very well suffer and feel abandoned by his adoptive mother and his biological mother. I can sympathize with him in this, even as his father was doing his best to raise his son to be well-educated, involved in sports, supported in music and recording, and pro-social. There was nothing tied to his Aboriginal genetic heritage, let alone considerations in *Gladue* and *Ipeelee*, that led the accused, Mr. Kreko, to the negative side of hip-hop, including its fascination with guns. Perhaps, as the *Gladue* report suggests

> implicitly, his desire to drive a Jaguar like a big shot, not turn in his drug associates, and possess a gun on behalf of a criminal associate, relates to a need to belong. These things relate to gang culture and do not relate to his Aboriginal background. [Emphasis added.]

[16] In a report given to the Court of Appeal under s. 682 of the *Criminal Code*, the sentencing judge reiterated:

> Mr. Kreko is biologically descended in part from Aboriginal [heritage]. However, he was adopted as an infant by a couple whose ethnic backgrounds were [Finnish] and French-Canadian, and was raised as a white child in Ajax.… The *Gladue* Report traced his subsequent inconsistent efforts to learn about Aboriginal values, customs, and societal supports. Meanwhile, he was gravitating toward a different group in Ajax, and became quite involved with the negative side of hip-hop, with its drugs and guns. His associates led or helped him into offences involving both.
>
> It appeared to me that his Aboriginal connection had been irrelevant to his offences, or how he got there. While his partly Aboriginal teenage mother had given him up for adoption … [t]he most important aspect of this was not some colonial treatment of the birth mother. It was his discovery that not only had he been abandoned by the woman he thought was his mother in Ajax, but that he had another mother, his birth mother, and she had abandoned him too….
>
> I ultimately held that his Aboriginal heritage could not be linked in any meaningful way to these current offences, although his hip-hop affiliations could. Aboriginal values would mirror non-Aboriginal societal values in condemning the offences before the court. [Emphasis added.]

E. ISSUES

[17] The appellant submits that the sentencing judge erred in principle by requiring a causal connection between the appellant's Aboriginal background and his offences, and that the ultimate sentence imposed was therefore unfit. He further submits that the sentencing judge improperly intervened in the appellate process through the report that he provided to this court under s. 682 of the *Criminal Code*.

F. ANALYSIS

(1) Failure to consider the appellant's Aboriginal heritage

[18] Section 718.2 of the *Criminal Code* requires consideration of the principles of sentencing, including the following principle:

> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[19] As observed in *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 93(3), s. 718.2(e) is remedial in nature: it is intended to ameliorate the serious problem of overrepresentation of Aboriginal people in prisons.

[20] The sentencing judge erred by effectively requiring a causal link between the appellant's Aboriginal heritage and the offences, as is illustrated by the following extracts from his reasons for sentence and report to the Court of Appeal:

- "There was nothing tied to his Aboriginal genetic heritage, let alone considerations in *Gladue* and *Ipeelee*, that led the accused, Mr. Kreko, to the negative side of hip-hop, including its fascination with guns."
- "These things [possession of a gun, driving a Jaguar] relate to gang culture and do not relate to his Aboriginal background."
- "It appeared to me that his Aboriginal connection had been irrelevant to his offences, or how he got there."
- "I ultimately held that his Aboriginal heritage could not be linked in any meaningful way to these current offences, although his hip-hop affiliations could."

[21] The jurisprudence makes it clear that no causal link is required. In *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, the Supreme Court held that it was an error to require an Aboriginal offender to establish a causal link between his or her background factors and the commission of the offence(s) in question before he or she is entitled to have those factors considered by the sentencing judge. The court suggested, at para. 82, that requiring a causal connection demonstrated "an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples", and also imposed an evidentiary burden on the offender that was not intended by *Gladue*.

[22] The court continued, at para. 83:

> [I]t would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:
>
> > Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.
>
> Furthermore, the operation of s. 718.2(*e*) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence.

[23] The court explained that what is required is that the factors must be tied to the particular offender and offence(s) in that they must bear on his or her culpability or indicate which types of sanctions may be appropriate in order to effectively achieve the objectives of sentencing. Finally, the court in *Ipeelee* also made it clear that s. 718.2(e) applies to serious offences: see paras. 84-86.

[24] In the present case, the appellant's dislocation and loss of identity can be traced to systemic disadvantage and impoverishment extending back to his great-grandparents. This was relevant to his moral blameworthiness for the offences. The intervener has referred to some studies suggesting that adoptions

of Aboriginal children by non-Aboriginal parents have a significantly higher failure rate than other adoptions. The appellant's Aboriginal heritage was unquestionably part of the context underlying the offences. The sentencing judge erred by failing to consider the intergenerational, systemic factors that were part of the appellant's background, and which bore on his moral blameworthiness, and by seeking instead to establish a causal link between his Aboriginal heritage and the offences.

[25] The sentencing judge also misapprehended the evidence about the appellant's efforts to reconnect with his heritage:

> I applaud any efforts by Mr. Kreko to put down any pro-social roots he can, and that includes the Aboriginal healing path in which he has dabbled to date. I note he did not participate in that path while at the Central East Correctional Centre. [Emphasis added.]

[26] The evidence was that the appellant did participate in Aboriginal programming and counseling at the Central East Correctional Centre when he was held in pre-trial custody there in 2008 and 2009.

(2) The appropriate sentence

[27] According to the Supreme Court in *Ipeelee*, at para. 87, failure to consider the unique circumstances of Aboriginal offenders, when required, is an error justifying appellate intervention:

> The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique

> circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender … and a failure to do so constitutes an error justifying appellate intervention.

[28] I turn then to the question of the appropriate sentence. The appellant was only 22 years old at the time of these offences. Although he had a criminal record, he had not received sentences imposing further custodial time in addition to pre-trial custody.

[29] The Crown opposes admission of fresh evidence of the respondent's successful reconnection with his biological mother following sentencing, and the profound impact upon him of his reconnection with his Aboriginal heritage. This evidence could not have been introduced at sentencing, is relevant and credible, and could reasonably when taken with the other evidence adduced at the hearing be expected to have affected the result. I would accordingly admit the fresh evidence.

[30] The Crown accepted at the sentencing hearing that the appellant was genuinely remorseful, based on his statements to the author of the *Gladue* report. At the hearing, the appellant apologized to the individuals affected by his acts, their families and the community of Ajax. There was a consensus that there was a real possibility of rehabilitation.

[31] On the other hand, the fact that these offences were committed in violation of two weapons prohibition orders and in violation of a conditional sentence, which included house arrest and a prohibition of possession of a weapon, is a seriously aggravating factor. There is no doubt that the seriousness of the offences requires a severe sentence. I have concluded that a global nine-year sentence would adequately serve the principles and objectives of sentencing set out in the *Criminal Code*, including giving weight to the background and systemic factors related to the appellant's Aboriginal heritage, as well as the possibility of rehabilitation.

[32] In the result, I would leave intact the three-year consecutive sentence imposed by the trial judge for the s. 95(2) offence, but I would vary the sentence on the other two counts to six years before credit for pre-sentence custody. The appellant spent 20 months in pre-sentence custody, which should be credited as 30 months, leaving the global sentence to be served, as of January 7, 2014, at 78 months or 6.5 years. The other ancillary orders made by the sentencing judge should remain.

(3) The report under s. 682

[33] Section 682(1) of the *Criminal Code* requires a trial judge, at the request of the Court of Appeal, to report on "the case or on any matter relating to the case that is specified in the request." The form letter sent to the sentencing judge in

this case asked whether there were any rulings that appeared relevant to the appeal, and if so, to attach any relevant and available transcripts.

[34] A trial judge should not use the report to supplement his or her reasons, as occurred in this case. As the Supreme Court observed in *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, at p. 173:

> It is well established that a trial judge, in furnishing the Court of Appeal with a report, must be vigilant to avoid simply expanding upon reasons or rulings previously given or providing reasons where none were given at trial. In such circumstances, a trial judge's report will be held invalid.

G. DISPOSITION

[35] I would grant leave to appeal sentence and allow the appeal to the extent of reducing the appellant's sentence to nine years, less 30 months credit for pre-sentence custody, leaving a global remaining sentence of 78 months.

Released: (GRS) May 16, 2016

"G. Pardu J.A."
"I agree G.R. Strathy C.J.O."
"I agree E.E. Gillese J.A."

SUPREME COURT OF YUKON

Citation: *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3

Date: 20190115
S.C. No. 17-A0131
Registry: Whitehorse

BETWEEN

TESLIN TLINGIT COUNCIL

PETITIONER

AND

THE ATTORNEY GENERAL OF CANADA

RESPONDENT

Before Chief Justice R.S. Veale

Appearances:

Gregory J. McDade, Q.C.	Counsel for the Petitioner
Glen Jermyn and Eden Alexander	Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case involves the interpretation of the Teslin Tlingit Council Final Agreement (the "Final Agreement") and the Teslin Tlingit Council Self-Government Agreement (the "Self-Government Agreement"), both signed May 29, 1993. Both Agreements follow the template in the Yukon-wide Umbrella Final Agreement dated May 29, 1993. Teslin Tlingit Council ("TTC") is a Yukon First Nation consisting of inland Tlingit people that occupy a traditional territory in central and southern Yukon and northern British Columbia, with its government offices in Teslin, Yukon.

[2] Teslin Tlingit Council brings an application for the following declarations:

1. *A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward a Self-Government Financial Transfer Agreement ("FTA") that has "comparability" as its objective, and has refused or failed to do so;*
2. *A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate bilaterally with TTC toward an FTA that takes into account TTC's capital and operation needs, and has refused or failed to do so;*
3. *A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward an FTA that provides funding based on TTC Citizenship, not on Citizens who are "Status Indians" under the Indian Act, and has refused or failed to do so;*
4. *A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward an FTA that considers TTC's jurisdiction and responsibilities as a Self-Governing Yukon First Nation, and has refused or failed to do so;*
5. *A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward an FTA that is structured to ensure equal treatment of TTC citizens and essential public services of reasonable quality and has refused or failed to do so;*

> 6. *A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward a progressive FTA that takes into account appropriate adjustment and has refused or failed to do so;*

[3] TTC submits that Canada has failed to negotiate the aforementioned principles as required in its Self-Government Agreement, since 2010. TTC submits that Canada does not treat the principles set out in ss. 16.1 and 16.3 of the Self-Government Agreement as legally binding and presently has no mandate to negotiate the principles with TTC.

[4] Canada submits that it is negotiating and that it would be inappropriate to make a declaration to do what it is already doing. Canada submits that it has entered into a national Collaborative Process with representatives of self-governing Indigenous governments, initially including TTC. Canada submits that the Collaborative Process has resulted in the jointly drafted 2017 Draft Policy, addressing the principles set out in s. 16.3 of the Self-Government Agreement. In fact, Canada submits that granting the six declarations would hinder or potentially disrupt the FTA renewal negotiations with TTC and other Yukon First Nations.

[5] It is Canada's submission that s. 16 of the Self-Government Agreement is an agreement to negotiate, not an agreement to conclude a FTA.

[6] TTC submits that the Collaborative Process and the 2017 Draft Policy do not replace Canada's legal obligation to negotiate a self-government FTA in accordance with ss. 16.1 and 16.3 of the Self-Government Agreement.

[7] For the reasons set out below, I declare that Canada has a legal obligation to negotiate a self-government FTA with the Teslin Tlingit Council pursuant to the Final Agreement and ss. 16.1 and16.3 of the Self-Government Agreement, that takes into account funding based on TTC Citizenship and has failed to do so. I also declare that in the negotiations with TTC, all factors in s. 16.3 may be taken into account. Accordingly, these Reasons for Judgment will address the status / non-status issue referred to in the declaration.

[8] The balance of declarations applied for by TTC are not granted.

BACKGROUND

[9] The Umbrella Final Agreement is a monumental agreement whose purpose is to provide a renewed relationship between Canada, Yukon and Yukon First Nations. The Umbrella Final Agreement was signed by Canada, Yukon and Yukon First Nations as represented by the Chairperson of the Council for Yukon Indians. The Council for Yukon Indians was formed in 1973 as an amalgamation of the Yukon Native Brotherhood (Status Indians) formed in 1968 and the Yukon Association of Non-Status Indians formed in 1971. The Council for Yukon Indians changed its name to the Council of Yukon First Nations in 1995. The unity of status and non-status Yukon Indian people was a significant achievement of Yukon First Nations, Canada and Yukon.

[10] Teslin Tlingit Council, one of the first four Yukon First Nations to settle their land claims, signed both the Final Agreement and the Self-Government Agreement, on May 29, 1993, after some 20 years of negotiation.

[11] It should be noted that in 1993, there were four First Nation Self-Government Agreements. There are now 11 Yukon First Nation Self-Government Agreements and a total of 25 in Canada.

[12] The Teslin Tlingit Council, in their Final Agreement, modelled on the Umbrella Final Agreement, relinquished their claim to title to 90% of their Traditional Territory in exchange for a number of enumerated agreements, some of which have been interpreted by the Supreme Court of Canada in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 ("*Little Salmon/Carmacks*") and *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 ("*Nacho Nyak Dun*").

[13] In the case at bar, I will focus on the following:

a) The fact that enrollment as a Citizen of Teslin Tlingit Council was not based on status or being registered under the *Indian Act* which discriminated against the so-called non-Status Indians. Rather, Chapter 3 of the Final Agreement required a person to establish that they were of 25% or more Indian ancestry, or a descendant of such person, who was ordinarily resident in the Yukon between January 1, 1800 and January 1, 1940. This definition of Citizenship was a monumental achievement because it terminated the colonial and divisive status versus non-status distinction that artificially divided Yukon First Nation members.

b) Chapter 24 of the Final Agreement created the principle of Yukon Indian Self-Government, which for the first time in Yukon history created a nation-to-nation relationship between Teslin Tlingit Council, Canada and

Yukon. Chapter 24.2.0 of the Final Agreement sets out an extensive list of subjects for negotiation.

c) Sections 16.1 and 16.2 of the Self-Government Agreement state the following:

> 16.1 Canada and the Teslin Tlingit Council shall negotiate a self-government financial transfer agreement in accordance with 16.3, with the objective of providing the Teslin Tlingit Council with resources to enable the Teslin Tlingit Council to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation.
>
> 16.2 Subject to such terms and conditions as may be agreed, the self-government financial transfer agreement shall set out:
>
> 16.2.1 the amounts of funding to be provided by Canada towards the cost of public services, where the Teslin Tlingit Council has assumed responsibility;
>
> 16.2.2 the amounts of funding to be provided by Canada towards the cost of operation of Teslin Tlingit Council government institutions; and
>
> 16.2.3 such other matters as Canada and the Teslin Tlingit Council may agree.

[14] Section 16.3 sets out 10 factors which are to be taken into account as follows:

> 16.3 In negotiating the self-government financial transfer agreement, Canada and the Teslin Tlingit Council shall take into account the following:
>
> 16.3.1 the ability and capacity of the Teslin Tlingit Council to generate revenues from its own sources;
>
> 16.3.2 diseconomies of scale which impose higher operating or administrative costs on the

> Teslin Tlingit Council, in relation to costs prevailing prior to conclusion of this Agreement;
>
> 16.3.3 due regard to economy and efficiency, including the possibilities for co-operative or joint arrangements among Yukon First Nations for the management, administration and delivery of programs or services;
>
> 16.3.4 any funding provided to the Teslin Tlingit Council through other Government transfer programs;
>
> 16.3.5 demographic features of the Teslin Tlingit Council;
>
> 16.3.6 results of reviews pursuant to 6.6;
>
> 16.3.7 existing levels of Government expenditure for services to Yukon First Nations and Yukon Indian People;
>
> 16.3.8 the prevailing fiscal policies of Canada;
>
> 16.3.9 other federal Legislation respecting the financing of aboriginal governments; and
>
> 16.3.10 such other matter as Canada and the Teslin Tlingit Council may agree.

[15] The significance of these provisions, which are mirrored in the 10 other First Nation Self-Government Agreements, cannot be underestimated.

[16] For the first time in Yukon history, Yukon First Nations could become self-governing and end the paternalistic colonial administration of Canada, as well as the discriminatory status / non-status division created by successive governments of Canada based on the *Indian Act*.

[17] Approximately 25% of TTC's 765 Citizens were non-status before the signing of the Final Agreement. However, Canada provides funding based upon those Citizens of

TTC who were Status Indians under the *Indian Act* at the time of legislating the *Yukon First Nations Land Claims Settlement Act,* S.C. 1994, c. 34.

[18] This discrepancy is no secret. Financial Transfer Agreements are negotiated for five-year terms subject to extensions. In the years following the 2000 Financial Transfer Agreement, Canada, Yukon and Yukon First Nations participated in several joint reviews; the 2006 Government Expenditures Needs Study; the 2007 Yukon First Nation Self-Government Financial Transfer Agreement Review (the "2007 Review"); the 2007 Implementation Reviews; and the 2008 Gross Expenditure Base Review. These reviews identified the problems which included:

a) Inadequate funding for programs and services and treaty implementation;

b) Insufficient funding for Yukon First Nation human resources;

c) Shortfalls in funding regarding capital, infrastructure and housing, particularly in light of significant expansion of capital needs, but funding support being tied to or dictated by the funding provided to the predecessor Indian Bands;

d) Fiscal support for governance also being derived from the predecessor "Band Support Funding", rather than consideration of expanded governance-responsibilities and authorities;

e) Funding being tied to Status Band members within a Nation, rather than all Citizens; and

f) Heavy reliance on proposal driven funding, which in principle is at odds with the SGAs [Self-Government Agreements], and practically diverts time, attention and resources away from governing.

[19] By way of example, the 2007 Review undertaken jointly by Canada and seven Yukon First Nations, including Teslin Tlingit Council, addressed the status / non-status funding discrepancy as follows:

> 2.6 Citizen-Based Funding
>
> SGYFN [Self-Governing Yukon First Nation] responsibility and authority under their SGAs now extends to all Citizens, both Status and Non-Status, resident throughout Yukon and beyond. Even without considering certain services also delivered to Citizens resident outside of the Yukon, SGYFNs must provide programs and services to, on average, more than double the number of Citizens. The funding flowing through the new SGFTAs did not account in any way for this significant increase in number of persons for whom SGYFNs are now responsible.
>
> More than three quarters of the funding SGYFNs receive through their SGFTAs is provided through PSTAs [Program and Service Transfer Agreements]. This is the same funding provided to the predecessor *Indian Act* bands. This disparity is most apparent in respect of programs transferred pursuant to PSTA 1 and PSTA 2, which provided resources for, among other things, the operation of SGYFN governing institutions, housing and capital infrastructure programs, and health programs. With the exception of an increase to account for indirect program costs provided by DIAND [Department of Indian Affairs and Northern Development], these resources were the same as or less than had been provided to the predecessor *Indian Act* bands for the benefit of status Indians resident on Reserve Land or Land Set Aside. Small subsequent adjustments have been made to include other DIAND governance programs for status Indians or to provide access to enhancements DIAND has made available to *Indian Act* bands. However, there has been no adjustment for the fundamental differences in requirements for the predecessor *Indian Act* bands and what is required to address the responsibilities of SGYFNs which now include non-status Citizens.
>
> The SGYFNs' governance institutions are operated for all Citizens equally, whether status or non-status. With respect to the programs and service delivery for which SGYFNs assume responsibility, SGYFNs read SGA 16.1 to mean that

> their SGFTAs are intended to put all their Citizens in Yukon in comparable circumstances with respect to the overall bundle of services they receive from governments (SGYFN, Canada, and Yukon).
>
> According to their Constitutions, SGYFNs are obliged to provide programs of equal quality to all Citizens, which include both status and non-status Indians. These same Constitutions were reviewed and approved by Canada prior to ratification. The funding SGYFNs received was not determined with this in mind. Accordingly, it is difficult to conclude that this funding is adequate to deliver reasonably comparable levels of services to all of their Citizens in Yukon. [footnote 19 omitted] (my emphasis)

[20] Unfortunately, the identification of these funding problems did not result in Canada addressing them in the 2010 Financial Transfer Agreement negotiations.

[21] Although Canada provided a limited increase in funding in 2010, it was not based upon s. 16.3 or the previously identified funding deficiencies. Even more aggravating, at the last minute, Canada unilaterally imposed additional changes to the definition of “own source revenues” which are deducted from the FTA funding.

[22] In 2015, the negotiations leading up to the expiry of the 2010 Financial Transfer Agreement did not address the funding gaps. The 2015 Financial Transfer Agreement was extended two more years to March 2017 and ultimately one more year to March 31, 2018. Teslin Tlingit Council filed this Petition on December 18, 2017. In March 2018, Teslin Tlingit Council entered into a third one-year interim agreement to March 31, 2019, as it had no option but to continue funding for its First Nation government even though Canada continued to fund TTC based on the number of Status Indians under the *Indian Act*. Extension Agreements commit Canada to continue negotiations to consider the factors in s. 16.3 which it has failed to do.

The 2015 Fiscal Approach to Self-Government Arrangements

[23] Canada released a new federal policy in July 2015 entitled "Canada's Fiscal Approach to Self-Government Arrangements" (the "2015 Fiscal Approach"). The parties are in agreement that the 2015 Fiscal Approach was the first time that Canada's methods and approaches to FTAs were made transparent to the public and the parties.

[24] However, the 2015 Fiscal Approach made no change to the calculation of an aboriginal population:

> 462. **Population/volume** – Population or volume adjusters are used to modify funding amounts to reflect changes in the population of an Aboriginal community or the recipients of a program. For general population data, Canada will use Indian Registry data for members/citizens of the Aboriginal Government who are registered Indians living on Aboriginal Government Lands. ...

[25] In other words, the default position of Canada using the demographic of registered Status Indians under the *Indian Act* would continue.

The Collaborative Process

[26] The Government of Canada changed in October 2015 and the new Minister of Indigenous and Northern Affairs Canada ("the Minister") received a mandate to establish a new fiscal relationship with all 25 self-governing First Nations.

[27] In March 2016, the Land Claims Agreement Coalition, a First Nation coalition, which initially included the TTC, made a recommendation to work collaboratively with Canada and other partners to fully implement modern treaties. In response, Canada has embarked on the Collaborative Process with representatives of Self-Governing Indigenous governments. In February 27, 2018, the federal budget committed $189 million for 2018 – 2019 to begin implementation of the Collaborative Process. In part,

the Collaborative Process is Canada's attempt to create a policy that can be applied to each of the 25 self-government agreements to ensure a national policy fair to all.

[28] The TTC withdrew from the Collaborative Process in the fall of 2016 to focus on the meaningful implementation of the Teslin Tlingit Council Final Agreement and Self-Government Agreement. Since then, Canada has failed to negotiate and address the major problems with the Teslin Tlingit Council Fiscal Transfer Agreement but has continued to pursue a draft policy in the Collaborative Process.

[29] The relationship between Teslin Tlingit Council and Canada with respect to the Collaborative Process is best expressed by the parties.

[30] In January 9, 2017, Teslin Tlingit Council lead negotiator wrote to the Minister as follows:

> TTC has since withdrawn from this national fiscal initiative as its imperatives prejudice the foundation of Canada's constitutional and contractual commitment to provide adequate "resources" to TTC under the terms of the TTC treaty, SGA, and the common law.

[31] The Minister responded on June 21, 2017, as follows:

> With respect to your concerns regarding the negotiations toward a renewed Financial Transfer Agreement, I can assure you that Canada's negotiating team aims to work with your team to respond comprehensively to your renewal proposal and to proceed in a timely and positive manner.
>
> We are interested in working with Teslin Tlingit Council on examining such matters as fiscal strategies to close socioeconomic gaps, existing funding transfer levels, service population, and infrastructure as part of the Financial Transfer Agreement renewal process, <u>while remaining consistent with developments on the collaborative fiscal policy process. These are substantive issues, but I remain optimistic that the collaborative process provides a venue for collective and constructive dialogue that will inform the</u>

> federal mandate to address fiscal matters or specific concern to Teslin Tlingit Council. (my emphasis)

[32] In other words, the substantive negotiation with TTC must await the completion of the collaborative fiscal policy process.

[33] In August 2017, Teslin Tlingit Council formally presented Canada with its proposal (the "August 2017 Proposal") for the 2018 Financial Transfer Agreement. Canada's negotiator did not respond to the August 2017 proposal until March 14, 2018. This was a matter of weeks before the expiry of the 2018 Financial Transfer Agreement, which asked questions about the August 2017 Proposal. The Senior Negotiator for Canada acknowledged that the March 2018 extension was not responsive to the August 2017 Proposal of Teslin Tlingit Council.

[34] In the Meantime, Canada pursued its Collaborative Process. Meetings continued throughout the fall of 2016, winter and spring of 2017 culminating in the June 17, 2017 Report co-authored by representatives from Indigenous governments and Canada, that noted:

> Service population is a prime factor in the expenditure need of all governments. In the Indian Act context, the service population is defined as status Indians on reserve. In the Self Governing Indigenous Government ("SGIG") context, Indian Band funding has often remained the default basis for funding programs and services. However, SGIG responsibilities often extend to broader populations which may be defined in the respective treaty or self-government agreement (eg. members, citizens, residents), and these definitions do not necessarily correspond to status Indians and/or on land base. The appropriate calculation for expenditure needs must address the differences.

[35] This is a repetition of the failure identified in the 2007 Review cited above.

[36] The Collaborative Process continued and on December 13, 2017, Canada and representatives from Indigenous governments produced a comprehensive policy framework proposal (the "2017 Draft Policy"). The 2017 Draft Policy has been approved by Cabinet but the Revenue Capacity annexes "as a guide for further fiscal policy development" have not been approved by Cabinet. Counsel for Canada advises that the annexes on Revenue Capacity, Governance, Culture Language and Heritage and Social well-being gaps-closing are currently in the process of seeking Cabinet approval.

[37] To be fair, the Senior Negotiator for Canada maintains that he is ready to negotiate and is optimistic that negotiations will take place. However, he acknowledges that he has no mandate and I find that he has not negotiated as of the date of this hearing. The Senior Negotiator put it this way in cross-examination at p. 81:

> Q And not be speculative. As of today you do you have a mandate to make an offer for a new FTA to TTC?
>
> A From my perspective the question of a mandate is an interesting one because I certainly have a mandate to engage in negotiations with TTC. And do I have - - if the question is, you know, for - - again, we're bleeding into an area that I'm not sure is an area that I'm comfortable with, <u>but I say that it is not yet in my instructions to be able to, on behalf of the Government of Canada, provide a financial offer to the Teslin Tlingit Council for inclusion in a new financial transfer agreement.</u> (my emphasis)

[38] So Canada's position is that it is ready to negotiate and indeed is negotiating but, in the words of the Senior Negotiator, at p. 38:

> ...
>
> And so notwithstanding the fact that the self-government agreements confer the ability – the jurisdiction, the ability to make laws over all citizens of these communities themselves, they have the power to determine their own citizenship, they have long

> argued that that is the same population that should be reflected in the fiscal arrangements. Canada to date has not shared that perspective. (my emphasis)

FACTS

[39] I make the following findings of fact:

1. The Teslin Tlingit Council Final Agreement is premised on a blood quantum definition Citizenship which may include Status Indians under the *Indian Act* and non-Status Indians who were not registered under the *Indian Act*.
2. The FTAs with Teslin Tlingit Council since 2010 have been based only on those Citizens who were registered as Status Indians under the *Indian Act*.
3. Approximately 25% of TTC's 765 Citizens are non-Status and the First Nation is obligated to provide them with the same services provided to all its Citizens.
4. Various government reviews and particularly the joint 2007 Review have confirmed the failure to fund non-status Citizens.
5. Canada's 2015 Fiscal Approach was the first time that Canada's methods and approaches to First Nation Fiscal Transfer Agreements were transparent to the First Nations and the Canadian public. It remained committed to the default position that the First Nation population was calculated on the number of Status Indians registered under the *Indian Act*.
6. The Collaborative Process is a joint process by self-governing First Nations and Canada, resulting in the 2017 Draft Policy, which has been

approved by the federal Cabinet but without Revenue Capacity annexes which have not been approved at the date of this hearing.

7. TTC presented its August 2017 Proposal to Canada for a FTA to be concluded by March 31, 2018.

8. Canada did not respond to the TTC August 2017 Proposal until its March 14, 2018 response and the March 2018 extension was not responsive to the TTC August 2017 Proposal.

9. Canada's Senior Negotiator does not have a mandate to negotiate a FTA for the 2019 year after the expiry of the 2018 FTA on March 31, 2019.

10. Canada, since the 2010 FTA, has continued to revert to its "default position" of providing funding for the Citizens of TTC based upon the Status Indians registered under the *Indian Act*.

11. There is a real disagreement between Canada and the Teslin Tlingit Council on the appropriate funding for its Citizens.

ISSUES

Issue 1: Does Canada have a legally binding obligation to negotiate a Self-Government Financial Transfer Agreement with TTC that takes into account funding based on the Citizens of TTC as defined by Chapter 3 – Eligibility and Enrollment of the TTC Final Agreement; and has it failed to do so?

[40] In my view, there is a misconception in Canada's interpretation of its legal obligation under the Final Agreement and the Self-Governing Agreement. Canada acknowledges its legal obligation to negotiate with TTC "with a view to concluding a self-government agreement appropriate to the circumstances" of TTC.

[41] Section 24.12.1 of the Final Agreement states:

> 24.12.1 Agreements entered into pursuant to this chapter and any Legislation enacted to implement such agreements shall not be construed to be treaty rights within the meaning of section 35 of the Constitution Act, 1982.

[42] With reference to s. 24.12.1, Canada submits that the Self-Governing Agreements and Financial Transfer Agreements are not constitutionally protected and shall not be construed to be treaty rights pursuant to s. 35 of the *Constitution Act, 1982*.

[43] Canada then submits that we are not addressing a treaty right under s. 35 of the *Constitution Act, 1982*, but rather a solemn obligation to negotiate pursuant to ss. 16.1 and 16.3 of the Self-Government Agreement.

[44] The implication for Canada's interpretation is that it effectively ignores or downplays the constitutional obligation that flows from Chapter 3 Eligibility and Enrollment. Canada, Yukon, and Yukon First Nations agreed to open up eligibility for First Nation citizenship based on a definition of blood quantum rather than being limited to Status Indians registered under the *Indian Act*. I have described this as a monumental achievement of the Umbrella Final Agreement because it embodied the principle that there would no longer be two classes of Indians; those with status and funding under the *Indian Act* and those without status and funding. That was the premise and the promise of the Umbrella Final Agreement. It is not honourable to agree to a blood quantum definition of TTC Citizenship and continue to apply funding based on under the *Indian Act*.

[45] In my view, Canada and TTC have a two-dimensional or hybrid agreement. On the one hand, Canada has explicitly agreed to open up citizenship to a blood quantum

definition open to all Yukon Indians. On the other hand, while Canada has not explicitly agreed to fund every Citizen of TTC, it has solemnly agreed in the Self-Government Agreement to negotiate the demographic features of TTC, among other factors "with the objective of providing the Teslin Tlingit Council with resources to enable the Teslin Tlingit Council to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation."

[46] The Supreme Court of Canada in *Nacho Nyak Dun,* in para. 1, expressed the unique significance and promise of modern treaties as follows:

> 1 As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Through s. 35 of the *Constitution Act, 1982*, they have assumed a vital place in our constitutional fabric. Negotiating modern treaties, and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10; *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at pp. 3, 10, 40-41 and 56). This case highlights the role of the courts in resolving disputes that arise in the context of modern treaty implementation.

[47] In *Little Salmon/Carmacks*, at para. 10, the Supreme Court of Canada stated:

> 10 The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is

> as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

[48] The Nunavut Court of Appeal commented on the Crown's failure to fulfill its obligations under the Nunavut Land Claims Agreement as follows in *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2, at para. 67:

> … If the Land Claims Agreement contains a covenant to do something, the appellant is obliged by that covenant to do it. It has never been a defence to breach of contract that: "Sorry, we ran out of money", or "Sorry, we never included that in our budget". If the covenant in the Land Claims Agreement requires a fixed amount of funding, that amount must be provided. If the covenant creates an obligation to fund, but without a fixed amount, the amount must be determined in accordance with the proper interpretation of the covenant (possibly, a "reasonable" amount). If the covenant in the Land Claims Agreement requires the appellant to do something, the appellant must find the necessary funds to perform. Thus, having agreed to put in place a monitoring program, the appellant must provide the necessary funding. …

[49] Successive governments of Canada have failed to negotiate a FTA based on TTC Citizenship. To be clear, Canada does not have an express legal obligation to fund every TTC Citizen, but it must negotiate the demographic features of TTC as agreed upon in Chapter 3 of the Final Agreement.

[50] I therefore answer the issue posed above in the affirmative but I do so in the context that s. 16.3 of the Self-Government Agreement requires "polycentric" negotiations. In other words, s. 16.3 requires a consideration of competing factors or as the Crown puts it, a balancing of factors that includes benefits and costs. See *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, at paras. 28, 36 and 48.

[51] However, I have not granted the balance of the applied for declarations because they involve specific factors that cannot be taken into consideration individually or in isolation.

Issue 2: Should this Court grant declaratory relief?

[52] The focus of Canada's submission in this case has been the extent to which the Collaborative Process fulfills the legal obligation to negotiate a self-government financial transfer agreement in accordance with ss. 16.1 and 16.3 of the TTC Self-Government Agreement. In my view, it is not appropriate to conflate negotiations in the Collaborative Process with Canada's legal obligation in the Final Agreement and the Self-Government Agreements.

[53] There is general agreement between TTC and the Crown that granting a declaration pursuant to Rule 5(21) of the Supreme Court of Yukon's *Rules of Court* is a discretionary exercise and must be on a principled basis as follows:

1. There must be utility in granting the declaration based on a real dispute and not a hypothetical one (*Canada v. Solosky*, [1980] 1 S.C.R. 821; *Ross River Dena Council v. Yukon*, 2012 YKCA 14).
2. There must be a cognizable threat to a legal interest before the courts will entertain the use of a declaration as a preventive measure (*Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441; *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539; and *Kaska Dena v. British Columbia (Attorney General)*, 2008 BCCA 455, at para. 13).
3. Courts have a long-standing preference for negotiated settlements and avoiding court intervention. See *Haida Nation v. British Columbia (Minister*

of Forests), 2004 SCC 73, at para. 14. Recently, in *Nacho Nyak Dun,* the Supreme Court reiterated both the principle of judicial forbearance and appropriate court scrutiny of Crown conduct as follows:

> 33 … It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of [page593] the treaty relationship. This approach recognizes the *sui generis* nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship.
>
> 34 That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine. Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

[54] Canada makes four submissions on why court intervention is not appropriate:

a. Court intervention in the fiscal negotiations is inconsistent with reconciliation, the nation-to-nation relationship, and the intended FTA negotiation process;

b. Canada's negotiation position is for the Minister to decide;

c. The declarations are TTC's interpretation of the guiding provisions, which are a subject for FTA negotiation; the declarations would have no practical effect in resolving the negotiation dispute; and

d. There is no real dispute – Canada has negotiated and still negotiates with TTC towards a renewed FTA in good faith and in accordance with the Final and Self-Government Agreements.

[55] Canada also submits that the Collaborative Process should prevail as it:

a. Shows Canada's commitments to develop a new fiscal relationship that is based upon a renewed government-to-government relationship and respect for treaties;

b. Recognizes that Indigenous governments should have government-to-government access to Canada funding initiatives, such as infrastructure money; and

c. Contains important commitments from Canada to close the current well-being gaps that exist between Indigenous and non-Indigenous communities as a result of colonialism, residential school and chronic underfunding.

[56] I will address the collaborative fiscal policy process first. This Court does not wish to diminish the achievements emerging from the Collaborative Process. First Nations and Canada are clearly on the road to a renewed government-to-government relationship.

[57] Canada relies on this Court's decision in *Taku River Tlingit First Nation v. Canada (Attorney General)*, 2016 YKSC 7 ("*Taku River*"). In *Taku River*, Canada had agreed to negotiate a Land Claims Agreement but would not proceed to negotiate the Taku River transboundary claim in the Yukon until a settlement agreement was concluded in British Columbia. In other words, Canada was prepared to negotiate but took a "not now" position despite the urgency and high priority of the transboundary claim.

[58] This Court did not declare the specific terms of Canada's duty to negotiate the Taku River transboundary claims honourably. Nor should it do so now. However, the

Court stated, at para. 122, that policies and mandates cannot trump the duty to negotiate honourably.

[59] In my view, the same reasoning applies to the TTC Final Agreement and s. 16 of the Self-Government Agreement. The national Collaborative Process cannot trump the constitutional legal obligation of Canada to negotiate honourably pursuant to the Final Agreement and ss. 16.1 and 16.3 of the Self-Government Agreement. Teslin Tlingit Council left the Collaborative Process in 2016 and Canada has continuously failed to negotiate pursuant to its legal obligation since 2010.

[60] Canada submitted that this declaration is inconsistent with reconciliation and the nation-to-nation relationship. On the contrary, this declaration promotes reconciliation by ensuring that Canada negotiates the demographic features of TTC on a timely basis which successive governments of Canada have failed to do. The hopeful wishes of Canada's Senior Negotiator notwithstanding, Canada is legally obligated to negotiate and a declaration accordingly is appropriate given the years of failing to negotiate the demographic issue.

[61] This declaration does not interfere with the Minister's negotiating position.

[62] Canada submits that the declaration will have no practical effect. I do not agree with that submission as the declaration requires Canada to address the demographic issue before the expiry of the FTA on March 31, 2019.

[63] Canada submits there is no real dispute and that it has been negotiating honourably. Canada may be negotiating the policy in the Collaborative Process but it has not negotiated the status / non-status Citizenship issue with TTC.

[64] The fact that Canada has consistently reverted to its default position indicates that there is a real dispute impacting the ability of TTC to service its Citizens. The concept of self-government for First Nations holds great promise as it is embraced by Canada and First Nations. However, self-government financing must be negotiated in an honourable way to ensure First Nations survive and thrive. It also ensures that Canada and TTC continue their journey down the road to reconciliation.

[65] The government of Canada may be on the cusp of negotiating a Financial Transfer Agreement, but this Court has an obligation to ensure that Canada negotiates honourably and in a timely manner, to fulfill the premise and the promise of the Final Agreement and the Self-Government Agreement.

CONCLUSION

[66] I declare that Canada has a legal obligation to negotiate a self-government FTA with Teslin Tlingit Council pursuant to the Final Agreement and ss. 16.1 and 16.3 of the Self-Government Agreement, that takes into account funding based on TTC Citizenship and has failed to do so.

[67] I also declare that in negotiations with TTC, all factors in s. 16.3 may be taken into account.

[68] Counsel may speak to costs, if necessary, in case management.

_____

VEALE C.J.

Roger William, on his own behalf, on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation *Appellant*

v.

Her Majesty The Queen in Right of the Province of British Columbia, Regional Manager of the Cariboo Forest Region and Attorney General of Canada *Respondents*

and

Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, Hul'qumi'num Treaty Group, Council of the Haida Nation, Office of the Wet'suwet'en Chiefs, Indigenous Bar Association in Canada, First Nations Summit, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Coalition of Union of

Roger William, en son propre nom, au nom de tous les autres membres du gouvernement de la Première Nation Xeni Gwet'in et au nom de tous les autres membres de la Nation Tsilhqot'in *Appelant*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique, chef régional de la région de Cariboo Forest et procureur général du Canada *Intimés*

et

Procureur général du Québec, procureur général du Manitoba, procureur général de la Saskatchewan, procureur général de l'Alberta, Association du traité des Te'mexw, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assemblée des Premières Nations, chefs héréditaires Gitanyow de Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon et Wii'litswx, en leur nom et au nom de tous les Gitanyow, Groupe du traité Hul'qumi'num, Conseil de la Nation haïda, Bureau des chefs Wet'suwet'en, Association du barreau autochtone au Canada, Sommet des Premières Nations, Première Nation Tsawout, Première Nation Tsartlip, Première Nation Snuneymuxw, Première Nation Kwakiutl, Coalition de l'Union des chefs

British Columbia Indian Chiefs, Okanagan Nation Alliance, Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, Amnesty International, Canadian Friends Service Committee, Gitxaala Nation, Chilko Resorts and Community Association and Council of Canadians *Interveners*

Indexed as: Tsilhqot'in Nation *v.* British Columbia

2014 SCC 44

File No.: 34986.

2013: November 7; 2014: June 26.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Aboriginal law — Aboriginal title — Land claims — Elements of test for establishing Aboriginal title to land — Rights and limitations conferred by Aboriginal title — Duties owed by Crown before and after Aboriginal title to land established — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether test for Aboriginal title requiring proof of regular and exclusive occupation or evidence of intensive and site-specific occupation — Whether trial judge erred in finding Aboriginal title established — Whether Crown breached procedural duties to consult and accommodate before issuing logging licences — Whether Crown incursions on Aboriginal interest justified under s. 35 Constitution Act, 1982 framework — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

Aboriginal law — Aboriginal title — Land claims — Provincial laws of general application — Constitutional

indiens de la Colombie-Britannique, l'Alliance des Nations de l'Okanagan, le Conseil tribal de la Nation Shuswap et leurs communautés membres, bandes indiennes d'Okanagan, d'Adams Lake, de Neskonlith et de Splatsin, Amnistie internationale, Secours Quaker canadien, Nation Gitxaala, Chilko Resorts and Community Association et Conseil des Canadiens *Intervenants*

Répertorié : Nation Tsilhqot'in *c.* Colombie-Britannique

2014 CSC 44

N° du greffe : 34986.

2013 : 7 novembre; 2014 : 26 juin.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

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

Droit des Autochtones — Titre ancestral — Revendications territoriales —Éléments du critère permettant d'établir l'existence du titre ancestral sur un territoire — Droits et restrictions rattachés au titre ancestral — Obligations de la Couronne avant et après la reconnaissance du titre ancestral — Province accordant un permis commercial de coupe de bois dans un secteur qu'une Première Nation semi-nomade considère être son territoire ancestral — Première Nation revendiquant le titre ancestral sur des terres — Le critère permettant d'établir l'existence du titre ancestral exige-t-il la preuve d'une occupation régulière et exclusive ou la preuve d'une occupation intensive d'un site spécifique? — Le juge de première instance a-t-il conclu par erreur à l'existence du titre ancestral? — La Couronne a-t-elle manqué à ses obligations procédurales de consulter et d'accommoder les Autochtones avant de délivrer les permis de coupe de bois? — Les atteintes portées par la Couronne aux intérêts des Autochtones sont-elles justifiées par le cadre d'analyse relatif à l'art. 35 de la Loi constitutionnelle de 1982? — Forest Act, R.S.B.C. 1995, ch. 157 — Loi constitutionnelle de 1982, art. 35.

Droit des Autochtones — Titre ancestral — Revendications territoriales — Lois provinciales d'application

constraints on provincial regulation of Aboriginal title land — Division of powers — Doctrine of interjurisdictional immunity — Infringement and justification framework under s. 35 Constitution Act, 1982 — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether provincial laws of general application apply to Aboriginal title land — Whether Forest Act on its face applies to Aboriginal title land — Whether application of Forest Act ousted by operation of Constitution — Whether doctrine of interjurisdictional immunity should be applied to lands held under Aboriginal title — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

générale — Contraintes constitutionnelles sur la réglementation, par la province, du territoire visé par le titre ancestral — Partage des compétences — Doctrine de l'exclusivité des compétences — Atteinte et cadre d'analyse de la justification relatif à l'art. 35 de la Loi constitutionnelle de 1982 — Province accordant un permis commercial de coupe de bois dans un secteur qu'une Première Nation semi-nomade considère être son territoire ancestral — Première Nation revendiquant le titre ancestral sur le territoire — Les lois provinciales d'application générale s'appliquent-elles au territoire visé par le titre ancestral? — La Forest Act s'applique-t-elle à première vue au territoire visé par le titre ancestral? — La Constitution a-t-elle pour effet d'écarter l'application de la Forest Act? — La doctrine de l'exclusivité des compétences devrait-elle s'appliquer à des terres grevées du titre ancestral? — Forest Act, R.S.B.C. 1995, ch. 157 — Loi constitutionnelle de 1982, art. 35.

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the Province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

Depuis des siècles, la Nation Tsilhqot'in, un regroupement de six bandes semi-nomades ayant une culture et une histoire communes, vit dans une vallée éloignée entourée de rivières et de montagnes dans le centre de la Colombie-Britannique. Ce n'est qu'un groupe autochtone parmi des centaines en Colombie-Britannique dont les revendications territoriales ne sont pas réglées. En 1983, la province a accordé un permis commercial de coupe de bois sur des terres que les Tsilhqot'in considèrent faire partie de leur territoire ancestral. La bande s'y est opposée et a sollicité un jugement déclaratoire interdisant l'exploitation forestière commerciale sur le territoire. La négociation avec la province a mené à une impasse et la revendication territoriale initiale a été modifiée de manière à inclure une revendication du titre ancestral sur le territoire en cause au nom de tous les Tsilhqot'in. Les gouvernements fédéral et provincial ont contesté la revendication du titre.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

La Cour suprême de la Colombie-Britannique a conclu que l'occupation était établie dans le but de fonder l'existence du titre par la démonstration d'une utilisation régulière et exclusive de certains sites ou du territoire revendiqué ainsi que d'un petit secteur à l'extérieur de ce territoire. Appliquant un critère plus restreint fondé sur l'occupation d'un site spécifique exigeant la preuve qu'au moment de l'affirmation de la souveraineté européenne, les ancêtres du groupe autochtone utilisaient intensément une parcelle de terrain spécifique dont les limites sont raisonnablement définies, la Cour d'appel de la Colombie-Britannique a conclu que l'existence du titre revendiqué par les Tsilhqot'in n'avait pas été établie.

Held: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact.

Arrêt : Le pourvoi est accueilli et la Cour reconnaît l'existence du titre ancestral sur le territoire que vise la revendication. La Cour déclare également que la Colombie-Britannique a manqué à son obligation de consultation envers la Nation Tsilhqot'in.

Le juge de première instance a eu raison de conclure que les Tsilhqot'in avaient établi l'existence du titre ancestral sur le territoire revendiqué en cause. Il incombe au groupe revendicateur, en l'espèce les Tsilhqot'in, d'établir l'existence du titre ancestral. Il faut déterminer la façon dont les droits et intérêts qui existaient avant l'affirmation de la souveraineté peuvent trouver leur juste expression en common law moderne. Le titre ancestral découle de l'occupation, c'est-à-dire d'une utilisation régulière et exclusive des terres. Pour fonder l'existence du titre ancestral, l'« occupation » doit être suffisante, continue (si l'occupation actuelle est invoquée) et exclusive. Pour déterminer ce qui constitue une occupation suffisante, l'exigence qui se trouve au cœur du présent pourvoi, il faut examiner la culture et les pratiques des Autochtones et les comparer, tout en tenant compte de leurs particularités culturelles, à ce qui était requis en common law pour établir l'existence d'un titre fondé sur l'occupation. L'occupation suffisante pour fonder l'existence d'un titre ancestral ne se limite pas aux lieux spécifiques d'établissement, mais s'étend aux parcelles de terre régulièrement utilisées pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation des ressources et sur lesquelles le groupe exerçait un contrôle effectif au moment de l'affirmation de la souveraineté européenne.

En concluant que l'existence du titre ancestral avait été établie en l'espèce, le juge de première instance a identifié le bon critère juridique et l'a correctement appliqué à la preuve. Le territoire était peu peuplé, mais il a relevé des éléments de preuve indiquant que les parties du territoire sur lesquelles il a conclu à l'existence du titre étaient régulièrement utilisées par les Tsilhqot'in, ce qui appuyait sa conclusion quant à la possession suffisante. La proximité géographique entre les sites à l'égard desquels une preuve d'occupation récente a été produite et ceux à l'égard desquels il existait une preuve directe d'occupation passée appuyait également l'inférence d'une occupation continue. Au vu de la preuve indiquant que les Tsilhqot'in, avant l'affirmation de la souveraineté, ont repoussé d'autres peuples de leurs terres et ont exigé que les étrangers qui désiraient passer sur leurs terres leur demandent la permission, il a conclu que les Tsilhqot'in considéraient qu'ils possédaient leurs terres en exclusivité. Les critiques de la province à l'endroit des conclusions de fait du juge de première

The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35

instance reposent principalement sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement. En outre, il appartenait au juge de première instance de faire la part des éléments de preuve contradictoires et de tirer des conclusions de fait. La présence d'éléments de preuve contradictoires ne démontre pas l'existence d'une erreur manifeste et dominante. La province n'a pas démontré que les conclusions du juge de première instance ne sont pas étayées par la preuve ou qu'elles sont autrement erronées. Elle n'a pas non plus démontré que ses conclusions étaient arbitraires ou manquaient de précision. En l'absence d'une erreur manifeste, ses conclusions ne devraient pas être modifiées.

De par sa nature, le titre ancestral confère au groupe qui le détient le droit exclusif de déterminer l'utilisation qu'il est fait des terres et de bénéficier des avantages que procure cette utilisation, pourvu que les utilisations respectent la nature collective de ce droit et préservent la jouissance des terres pour les générations futures. Avant que l'existence du titre soit établie, la Couronne est tenue de consulter de bonne foi les groupes autochtones qui revendiquent le titre sur des terres au sujet de ses projets d'utilisation des terres et, s'il y a lieu, de trouver des accommodements aux intérêts de ces groupes. Le niveau de consultation et d'accommodement requis varie en fonction de la solidité de la revendication du groupe autochtone et de la gravité de l'effet préjudiciable éventuel du projet sur l'intérêt revendiqué.

Lorsque l'existence du titre ancestral a été établie, la Couronne doit non seulement se conformer à ses obligations procédurales, mais elle doit aussi justifier toute incursion sur les terres visées par le titre ancestral en s'assurant que la mesure gouvernementale proposée est fondamentalement conforme aux exigences de l'art. 35 de la *Loi constitutionnelle de 1982*. Elle doit à cette fin démontrer l'existence d'un objectif public réel et impérieux, et la compatibilité de la mesure gouvernementale avec l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone. Le gouvernement doit donc agir d'une manière qui respecte le fait que le titre ancestral est un droit collectif inhérent aux générations actuelles et futures et que l'obligation fiduciaire de la Couronne insuffle une obligation de proportionnalité dans le processus de justification : l'atteinte doit être nécessaire pour atteindre l'objectif gouvernemental (lien rationnel); le gouvernement ne doit pas aller au-delà de ce qui est nécessaire pour atteindre cet objectif (atteinte minimale); et les effets préjudiciables sur l'intérêt autochtone ne doivent pas l'emporter sur les avantages qui devraient découler de cet objectif (proportionnalité de l'incidence).

framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the *Forest Act* applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 of the *Constitution Act, 1982* and the division of powers in the *Constitution Act, 1867*, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the *Forest Act* on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the *Forest Act* at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the *Forest Act*, is ousted by the s. 35 framework or by the limits on provincial power under the *Constitution Act, 1867*. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and

Les allégations d'atteinte aux droits ou de manquement à l'obligation de consulter adéquatement le groupe peuvent être évitées par l'obtention du consentement du groupe autochtone en question. Ce cadre d'analyse relatif à l'art. 35 permet une conciliation rationnelle des droits ancestraux et des intérêts de tous les Canadiens.

En l'espèce, le manquement allégué découle de la délivrance, par la province, de permis de coupe de bois sur les terres à compter de 1983, avant que l'existence du titre soit reconnue. Le principe de l'honneur de la Couronne obligeait la province à consulter les Tsilhqot'in à propos des utilisations des terres et à trouver des accommodements à leurs intérêts. La province n'a fait ni l'un ni l'autre et a donc manqué à son obligation envers les Tsilhqot'in.

La question de l'application de la *Forest Act* aux terres visées par un titre ancestral revêt une grande importance, et bien qu'il ne soit pas nécessaire de la trancher pour les besoins du présent pourvoi, il convient de l'examiner. Comme point de départ, sous réserve des contraintes constitutionnelles qu'imposent l'art. 35 de la *Loi constitutionnelle de 1982* et le partage des compétences prévu dans la *Loi constitutionnelle de 1867*, les lois provinciales d'application générale s'appliquent aux terres détenues en vertu d'un titre ancestral. Suivant les règles d'interprétation législative, la *Forest Act* s'appliquait, à première vue, aux terres en question à l'époque où les permis ont été délivrés. Le législateur de la Colombie-Britannique entendait clairement que les terres revendiquées demeurent des « terres publiques » pour les besoins de la *Forest Act*, du moins jusqu'à ce que le titre ancestral soit reconnu; c'est sur quoi la province s'est fondée pour accorder le permis. Cependant, maintenant que l'existence du titre a été établie, la définition de « bois des terres publiques » ne s'applique plus au bois qui se trouve sur ces terres et la *Forest Act* ne s'applique plus à ces terres. Le législateur peut toujours modifier la *Forest Act* afin qu'elle s'applique au territoire sur lequel le titre ancestral a été établi, à la condition de respecter les contraintes constitutionnelles applicables.

Cela soulève la question de savoir si le cadre d'analyse relatif à l'art. 35, ou les limites à la compétence que la *Loi constitutionnelle de 1867* accorde à la province, écartent les lois provinciales régissant l'exploitation forestière, telle la *Forest Act*, qui sont à première vue censées s'appliquer aux terres visées par un titre ancestral. Aux termes de l'art. 35, une loi portera atteinte à un droit si la restriction est déraisonnable, si elle est indûment rigoureuse ou si elle refuse aux titulaires du droit le recours à leur moyen préféré de l'exercer. Une loi de nature réglementaire de portée générale, par

no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that

exemple une loi visant la gestion des forêts en prévenant les infestations de ravageurs ou les feux de forêt, satisfera souvent à ce critère et il n'en résultera aucune atteinte. Toutefois, la délivrance de permis de coupe de bois sur des terres grevées du titre ancestral constitue un transfert direct à des tiers de droits de propriété des Autochtones et entraîne manifestement une diminution significative du droit de propriété du groupe autochtone assimilable à une atteinte qui doit être justifiée dans les cas où les Autochtones n'y ont pas consenti.

Enfin, lorsqu'il s'agit de déterminer la validité d'une atteinte causée par l'application des lois provinciales à des terres visées par un titre ancestral, le cadre d'analyse relatif à l'art. 35 écarte la doctrine de l'exclusivité des compétences. L'application de la doctrine de l'exclusivité des compétences et la notion que les droits ancestraux font partie du contenu essentiel du pouvoir fédéral sur les « Indiens » prévu au par. 91(24) de la *Loi constitutionnelle de 1867* ne sont alors d'aucune utilité. La doctrine de l'exclusivité des compétences vise à faire en sorte que les deux niveaux de gouvernement soient en mesure de fonctionner sans que l'un empiète sur le contenu essentiel des domaines de compétence exclusive de l'autre. Cet objectif n'est pas en cause dans les affaires telles que celle qui nous occupe. Les droits ancestraux constituent une limite à l'exercice des compétences tant fédérales que provinciales. Le problème dans des cas comme celui-ci ne résulte pas d'une confrontation entre le pouvoir des provinces et celui du gouvernement fédéral mais plutôt d'une tension entre le droit des titulaires du titre ancestral d'utiliser leurs terres comme ils l'entendent et la volonté de la province de réglementer ces terres au même titre que toutes les autres terres dans la province. La doctrine de l'exclusivité des compétences — fondée sur l'idée que les contextes réglementaires peuvent être divisés en compartiments étanches — va souvent à l'encontre de la réalité moderne. Notre société devient plus complexe, et pour être efficace, la réglementation exige de plus en plus la coopération des régimes fédéral et provincial interreliés. La doctrine de l'exclusivité des compétences peut contrecarrer une telle coopération.

En conséquence, la réglementation provinciale d'application générale, notamment la *Forest Act*, s'appliquera à l'exercice des droits ancestraux tels que le titre ancestral sur des terres, sous réserve de l'application du cadre d'analyse relatif à l'art. 35 qui permet de justifier une atteinte. Ce critère soigneusement conçu vise à concilier la loi d'application générale et les droits ancestraux avec la délicatesse qu'exige l'art. 35 de la *Loi constitutionnelle de 1982*, et il est plus équitable et pratique du point de vue de la politique générale que l'inapplicabilité générale

preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the *Forest Act* were inconsistent with its duties owed to the Tsilhqot'in people.

qu'impose la doctrine de l'exclusivité des compétences. Il en résulte un équilibre qui préserve le droit ancestral tout en permettant une réglementation efficace des forêts par la province. En l'espèce toutefois, le projet d'aménagement du territoire prévu par la province et les autorisations d'exploitation forestière qu'elle a accordées en vertu de la *Forest Act* étaient incompatibles avec les obligations qu'elle avait envers le peuple Tsilhqot'in.

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David M. Rosenberg, *Q.C.*, *Jay Nelson*, *David M. Robbins* and *Dominique Nouvet*, for the appellant.

Patrick G. Foy, *Q.C.*, and *Kenneth J. Tyler*, for the respondents Her Majesty The Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region.

Mark R. Kindrachuk, *Q.C.*, *Brian McLaughlin* and *Jan Brongers*, for the respondent the Attorney General of Canada.

Alain Gingras and *Hubert Noreau-Simpson*, for the intervener the Attorney General of Quebec.

Heather Leonoff, *Q.C.*, for the intervener the Attorney General of Manitoba.

P. Mitch McAdam, *Q.C.*, and *Sonia Eggerman*, for the intervener the Attorney General for Saskatchewan.

Sandra Folkins, for the intervener the Attorney General of Alberta.

Robert J. M. Janes and *Karey Brooks*, for the intervener the Te'mexw Treaty Association.

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David M. Rosenberg, *c.r.*, *Jay Nelson*, *David M. Robbins* et *Dominique Nouvet*, pour l'appelant.

Patrick G. Foy, *c.r.*, et *Kenneth J. Tyler*, pour les intimés Sa Majesté la Reine du chef de la province de la Colombie-Britannique et le chef régional de la région de Cariboo Forest.

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Sandra Folkins, pour l'intervenant le procureur général de l'Alberta.

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Diane Soroka, for the interveners the Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, and the Office of the Wet'suwet'en Chiefs.

Robert B. Morales and *Renée Racette*, for the intervener the Hul'qumi'num Treaty Group.

Written submissions only by *Louise Mandell*, *Q.C.*, *Stuart Rush*, *Q.C.*, *Michael Jackson*, *Q.C.*, *Terri-Lynn Williams-Davidson*, *David Paterson* and *Angela D'Elia*, for the intervener the Council of the Haida Nation.

David C. Nahwegahbow and *Guy Régimbald*, for the intervener the Indigenous Bar Association in Canada.

Maria Morellato, *Q.C.*, *Cheryl Sharvit* and *Stacey Edzerza Fox*, for the intervener the First Nations Summit.

Written submissions only by *John W. Gailus* and *Christopher G. Devlin*, for the interveners the Tsawout First Nation, the Tsartlip First Nation, the Snuneymuxw First Nation and the Kwakiutl First Nation.

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Charles F. Willms et *Kevin O'Callaghan*, pour les intervenants Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia et Association for Mineral Exploration British Columbia.

Joseph J. Arvay, *c.r.*, *Catherine J. Boies Parker* et *Patrick Macklem*, pour l'intervenante l'Assemblée des Premières Nations.

Diane Soroka, pour les intervenants les chefs héréditaires Gitanyow de Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon et Wii'litswx, en leur nom et au nom de tous les Gitanyow, et le Bureau des chefs Wet'suwet'en.

Robert B. Morales et *Renée Racette*, pour l'intervenant le Groupe du traité Hul'qumi'num.

Argumentation écrite seulement par *Louise Mandell*, *c.r.*, *Stuart Rush*, *c.r.*, *Michael Jackson*, *c.r.*, *Terri-Lynn Williams-Davidson*, *David Paterson* et *Angela D'Elia*, pour l'intervenant le Conseil de la Nation haïda.

David C. Nahwegahbow et *Guy Régimbald*, pour l'intervenante l'Association du barreau autochtone au Canada.

Maria Morellato, *c.r.*, *Cheryl Sharvit* et *Stacey Edzerza Fox*, pour l'intervenant le Sommet des Premières Nations.

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Louise Mandell, *c.r.*, *Michael Jackson*, *c.r.*, *Ardith Walkem* et *Nicole Schabus*, pour l'intervenante la Coalition de l'Union des chefs indiens de la Colombie-Britannique, l'Alliance des Nations de l'Okanagan, le Conseil tribal de la Nation Shuswap et leurs communautés membres, les bandes indiennes d'Okanagan, d'Adams Lake, de Neskonlith et de Splatsin.

Justin Safayeni and *Paul Joffe*, for the interveners Amnesty International and the Canadian Friends Service Committee.

Tim A. Dickson, for the intervener the Gitxaala Nation.

Gregory J. McDade, *Q.C.*, and *F. Matthew Kirchner*, for the interveners the Chilko Resorts and Community Association and the Council of Canadians.

Justin Safayeni et *Paul Joffe*, pour les intervenants Amnistie internationale et Secours Quaker canadien.

Tim A. Dickson, pour l'intervenante la Nation Gitxaala.

Gregory J. McDade, *c.r.*, et *F. Matthew Kirchner*, pour les intervenants Chilko Resorts and Community Association et le Conseil des Canadiens.

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Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

[1] Quel critère permet d'établir l'existence d'un titre ancestral sur un territoire? Si l'existence d'un titre est établie, quels droits confère-t-il? La *Forest Act*, R.S.B.C. 1996, ch. 157, de la Colombie-Britannique s'applique-t-elle aux terres visées par un titre ancestral? Quelles contraintes

Haida stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

[18] The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

IV. Pleadings in Aboriginal Land Claims Cases

[19] The Province, to its credit, no longer contends that the claim should be barred because of

titre » (par. 39). Ainsi, la notion de mise en balance proportionnée qui ressort implicitement de l'arrêt *Delgamuukw* est reprise dans *Nation haïda*. Dans ce dernier arrêt, la Cour a indiqué que la Couronne n'avait pas seulement une obligation morale, mais une obligation légale de négocier de bonne foi dans le but de régler les revendications territoriales (par. 25). Le principe directeur ne repose pas sur les intérêts opposés mais sur la conciliation.

[18] Les arrêts que nous venons d'examiner établissent un certain nombre de postulats qui touchent à des questions soulevées en l'espèce, notamment :

- Le titre absolu ou sous-jacent de la Couronne est assujetti aux droits qu'ont les Autochtones sur les terres où ils sont établis.
- Le titre ancestral confère au groupe autochtone le droit d'utiliser et de contrôler le territoire, et de bénéficier des avantages qu'il procure.
- Les gouvernements peuvent porter atteinte aux droits ancestraux que confère le titre ancestral, mais seulement dans la mesure où ils peuvent démontrer que les atteintes poursuivent un objectif impérieux et réel et qu'elles sont compatibles avec l'obligation fiduciaire qu'a la Couronne envers le groupe.
- L'exploitation des ressources sur des terres revendiquées dont le titre n'a pas été établi exige du gouvernement qu'il consulte la nation autochtone revendicatrice.
- Les gouvernements ont l'obligation légale de négocier de bonne foi dans le but de régler les revendications de terres ancestrales.

C'est dans ce contexte que j'aborde les questions soulevées dans le présent pourvoi.

IV. Les actes de procédure dans les instances relatives aux revendications territoriales des Autochtones

[19] À sa décharge, la province ne soutient plus que la revendication doive être rejetée en raison

defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

[20] I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

[21] First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

[22] Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an "all or nothing" proposition (at para. 117):

> The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. . . . [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

[23] Third, cases such as this require an approach that results in decisions based on the best

de vices qui entachent les actes de procédure. Cependant, il peut être utile de déterminer l'approche à adopter à l'égard des actes de procédure dans les revendications territoriales compte tenu de leur importance pour de futures revendications territoriales.

[20] Je suis d'accord avec la Cour d'appel pour dire qu'il convient d'adopter une approche fonctionnelle à l'égard des actes de procédure dans les affaires intéressant les Autochtones. Les actes de procédure visent à fournir aux parties et au tribunal un aperçu des allégations importantes et de la réparation sollicitée. Quand les actes de procédure permettent l'atteinte de cet objectif, en l'absence d'un préjudice évident, il ne faut pas tenir compte des vices mineurs. Un certain nombre de considérations étayent cette approche.

[21] Premièrement, dans un cas comme celui qui nous occupe, les principes juridiques sont parfois ambigus de prime abord, de sorte qu'il est difficile de formuler la demande avec exactitude.

[22] Deuxièmement, en de telles circonstances, la preuve quant à la façon dont le territoire était utilisé peut être incertaine au départ, mais à mesure que la demande progresse, des aînés se manifestent et les services d'experts sont retenus. Pendant le procès, les pratiques historiques du groupe autochtone en question sont exposées, vérifiées et précisées. La Cour d'appel a reconnu à juste titre que la question de savoir si le bien-fondé de la revendication d'un titre ancestral est établi sur un territoire n'est pas une affaire de [TRADUCTION] « tout ou rien » (par. 117) :

> [TRADUCTION] L'occupation des territoires traditionnels par les Premières Nations avant l'affirmation de la souveraineté de la Couronne n'était pas une occupation fondée sur le régime Torrens, ni sur des limites précises. Sauf dans les cas où il existait des limites naturelles infranchissables (ou quasi infranchissables), les limites d'un territoire traditionnel étaient habituellement mal définies et variables. [. . .] [Par conséquent] il serait trop exigeant de demander une preuve du titre ancestral qui reflète précisément la revendication. [par. 118]

[23] Troisièmement, les cas comme celui-ci requièrent une approche qui permet de rendre des

evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

V. Is Aboriginal Title Established?

A. *The Test for Aboriginal Title*

[24] How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

[25] As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

[26] The test was set out in *Delgamuukw*, *per* Lamer C.J., at para. 143:

> In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

décisions fondées sur la meilleure preuve disponible, et non sur ce qu'un avocat a pu envisager quand il a rédigé la demande initiale. L'enjeu n'est rien de moins que la possibilité pour le groupe autochtone et ses descendants d'obtenir justice et la conciliation des intérêts du groupe et de la société en général. Le formalisme à l'égard des actes de procédure ne servirait aucun de ces objectifs. L'intérêt public général commande que les questions relatives aux revendications territoriales et aux droits soient tranchées dans le respect du fond du litige. Ce n'est qu'ainsi que peut se réaliser la conciliation dont notre Cour a fait état dans *Delgamuukw*.

V. L'existence du titre ancestral est-elle établie?

A. *Le critère applicable en matière de titre ancestral*

[24] Comment les tribunaux devraient-ils déterminer si un groupe autochtone semi-nomade détient un titre sur des terres? Notre Cour n'a jamais répondu directement à cette question. Les tribunaux d'instance inférieure ne se sont pas entendus sur l'approche qu'il convient d'adopter. Nous devons donc maintenant préciser le critère.

[25] Je le répète, le critère relatif au titre ancestral énoncé dans l'arrêt *Delgamuukw* est fondé sur l'« occupation » antérieure à l'affirmation de la souveraineté européenne. Pour fonder le titre ancestral, l'occupation doit posséder trois caractéristiques : elle doit être *suffisante*, elle doit être *continue* (si l'occupation actuelle est invoquée) et elle doit être *exclusive*.

[26] Le critère a été énoncé par le juge en chef Lamer dans l'arrêt *Delgamuukw*, par. 143 :

> Pour établir le bien-fondé de la revendication d'un titre aborigène, le groupe autochtone qui revendique ce titre doit satisfaire aux exigences suivantes : (i) il doit avoir occupé le territoire avant l'affirmation de la souveraineté; (ii) si l'occupation actuelle est invoquée comme preuve de l'occupation avant l'affirmation de la souveraineté, il doit exister une continuité entre l'occupation actuelle et l'occupation antérieure à l'affirmation de la souveraineté; (iii) au moment de l'affirmation de la souveraineté, cette occupation doit avoir été exclusive.

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REFERENCE: G/SO 215/51 CAN (156)
MT/OI/ma 2020/2010

11 January 2019

Dear Ms. Brodsky,

I have the honour to transmit to you herewith, the (advance unedited) text of the Views, adopted by the Human Rights Committee on 1 November 2018, concerning communication No. 2020/2010, which you submitted to the Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights, on behalf of Ms. Sharon Mclvor and Mr. Jacob Grismer.

In accordance with the established practice, the text of the Views will be made public.

Yours sincerely,

Ibrahim Salama
Chief
uman Rights Treaties Branch

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United Nations CCPR/C/124/D/2020/2010

International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/2010*, **

Submitted by:	Sharon McIvor and Jacob Grismer (represented by Gwen Brodsky)
Alleged victim:	The authors
State party:	Canada
Date of communication:	24 November 2010 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 December 2010 (not issued in a document form)
Date of adoption of Views:	1 November 2018
Subject matter:	Entitlement to Indian status as First Nations descendants on the maternal line (discrimination)
Procedural issues:	Non-substantiation of claims; victim status; non-exhaustion of domestic remedies; admissibility *ratione temporis*
Substantive issues:	Protection of the law, minorities, right to enjoy own culture, indigenous peoples, gender discrimination
Articles of the Covenant:	2(1), 2(3)(a), 3, 26, 27
Article of the Optional Protocol:	1, 2, 3, 5(2)(b)

* Adopted by the Committee at its 124th session (8 October – 2 November 2018).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany, Margo Waterval and Andreas B. Zimmermann.

1. The authors of the communication are Sharon McIvor, born in 1948, and her son, Jacob Grismer, born in 1971. They are Canadian nationals and members of the First Nations residing in Merritt, British Columbia. The authors claim to be victims of violations by Canada of their rights under articles 2(1) and (3)(a), 3, 26 and 27. They are represented by Gwen Brodsky. The Optional Protocol entered into force for Canada on 19 August 1976.

Factual background

2.1 Since at least 1906, Indian status, a legal construct created and applied to regulate wide-ranging facets of the lives of First Nations, was defined by Canadian law on the basis of patrilineal descent, excluding maternal lines.

2.2 Indian status under Canadian law confers significant tangible and intangible benefits. Tangible benefits include entitlement to apply for extended health benefits and postsecondary education funding, and certain tax exemptions. Intangible benefits relate to cultural identity. They include the ability to transmit status, and a sense of identity and belonging. The authors define Indian status as a dignity-conferring benefit.

2.3 The authors are descendants of Mary Tom, born in 1888 as a First Nations woman and member of the Lower Nicola Band. Mary Tom's daughter, Susan, is Sharon McIvor's mother. Susan's father was a man of Dutch descent with no First Nations ancestors. Susan was born in 1925 and, under the Indian Act of the day, was not eligible for registration as an Indian because Indian status was transmitted through the male line, and not through matrilineal descent.

2.4 At birth, neither Sharon McIvor nor her siblings were eligible for status, as their claim would have been based on matrilineal descent. On 14 February 1970, Sharon married Charles Terry Grismer, a man with no First Nations heritage, and had three children, one of whom is Jacob Grismer, born on 3 June 1971.

2.5 Until 1985, the statutory rules which governed eligibility for registration as an Indian took status away from Indian women who married non-Indian men and denied status to children who traced their First Nations' descent through those women.

2.6 The revised Indian Act[1] came into effect on 17 April 1985. It governs current entitlement to registration status and determines the class of registration status assigned to Indian women and their descendants. Although the Act was intended to eliminate sex discrimination, the authors submit that it did not achieve this goal, and is incomplete remedial legislation, as it transferred and incorporated into the new regime the existing preference for male Indians and patrilineal descent.

2.7 Pursuant to section 6 of the 1985 Indian Act, Sharon McIvor is ineligible for full Indian status under section 6(1)(a).[2] Under the section 6(1)(c)[3] registration to which she is now entitled, she is only able to transmit partial status to her son Jacob, and is unable to transmit Indian status to her grandchildren.[4] In contrast, Sharon McIvor's brother is eligible

[1] Indian Act, RSC 1985, c I-5, available at: http://laws-lois.justice.gc.ca/eng/acts/i-5/FullText.html.

[2] "6(1) Subject to section 7, a person is entitled to be registered if (a) that person was registered or entitled to be registered immediately before April 17, 1985".

[3] "6(1) Subject to section 7, a person is entitled to be registered if (...) (c) the name of that person was omitted or deleted from the Indian Register, or from a band list before September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as any of those provisions".

[4] See statement of the authors in their initial submission dated 24 November 2010. Following the amendments introduced by Bill C-3 – see below – the authors conceded that the 1985 Act as amended by Bill C-3 improved the registration entitlement of Jacob Grismer, making him eligible for section 6(1)(c) status, and thereby able to transmit status to his children (Sharon's grandchildren) born after 17 April 1985.

for full section 6(1)(a) registration status for himself, he can transmit full status to his children, and he can transmit status to his grandchildren. This difference is based solely on sex, as Sharon McIvor's brother has the same lineage as herself, and the same pattern of marriage and parenting.

2.8 On 23 September 1985, Sharon McIvor applied for registration status for herself and her children. The Registrar of Indian and Northern Affairs Canada determined that she was entitled to registration under section 6(2) of the Indian Act, and not under section 6(1), because of her non-Indian paternity. Sharon McIvor challenged that decision, which was nonetheless confirmed by the Registrar on 28 February 1989.

2.9 On 18 July 1989, the authors filed a statutory appeal against the Registrar's decision. On 13 May 1994, they also challenged the constitutionality of section 6 of the 1985 Indian Act under the Canadian Charter of Rights and Freedoms ("the Charter"). They also invoked a violation of articles 2(1) and (2), 3, 23, 24(1) and (3), 26 and 27 of the Covenant.

2.10 On 2 April 1999, Jacob Grismer married a woman with no First Nations ancestry. Jacob has not standing to pass status to his children, and is ineligible for full section 6(1)(a) status because his entitlement to status is based on maternal descent. If Jacob's father – rather than his mother – were a status Indian, his children would have status. Jacob would also have full section 6(1)(a) status for himself.

2.11 On 8 June 2007, the British Columbia Supreme Court found that section 6 of the 1985 Act violated the Charter in that it discriminated, on grounds of sex and marital status, between matrilineal and patrilineal descendants born prior to 17 April 1985, and against Indian women who had married non-Indian men.

2.12 Canada appealed the Trial Court decision in the British Columbia Court of Appeal. In its 6 April 2009 decision, the Court of Appeal confirmed that section 6 of the 1985 Indian Act was discriminatory, but on a narrower basis: applying an approach that focused on the Government's stated objective of "preserving acquired rights", the Court found that sections 6(1)(a) and 6(1)(c) violate the Charter only to the extent that they grant individuals to whom the "double-mother rule"[5] applied greater rights than they would have had under the pre-1985 legislation. The only discrimination recognized by the Court as unjustified was thus with regard to the preferential treatment accorded by the 1985 Act to a small subset of descendants of male Indians. The Court declared sections 6(1)(a) and 6(1)(c) of the 1985 Indian Act of no force and effect, but suspended the effect of the declaration to allow time for legislative amendments.

2.13 The authors contend that the Court's declaration does not provide them with a remedy. It did not result in Sharon's grandchildren becoming eligible for status, nor did it result in the authors becoming eligible for section 6(1)(a) status for themselves. The leave to appeal was refused on 5 November 2009, without reasons.

2.14 In March 2010, the Government introduced Bill C-3 amending the 1985 Indian Act.[6] For the authors, that bill was tailored to the decision of the Court of Appeal and, given that the Supreme Court denied leave to appeal that decision, it would have been futile to seek further judicial redress. In addition, any attempt to challenge the failure of the legislature to

[5] Under the 1951 Act, where an Indian man married a non-Indian woman, any of their children was an Indian. If however, the Indian man's mother was also non-Indian prior to marriage, the child would cease to have Indian status upon the age of 21 under the double-mother rule.

[6] The Gender Equity in Indian Registration Act, previous Bill C-3, came into force on 31 January 2011. Under this amendment, individuals are eligible for status under section 6(1)(c.1) where: their mother lost Indian status upon marrying a non-Indian man; their father is a non-Indian; they were born after the mother lost Indian status and, if the individual's parents did not marry each other before 17 April 1985, were born before that date; and they had or adopted a child on or after 4 September 1951 with a person not eligible for status.

fully correct the sex discrimination embedded in Bill C-3 would have entailed an unreasonably prolonged process in court.

2.15 On 3 August 2015, the Superior Court of Quebec rendered a decision in a third party's case, in which it found that section 6(1)(a), (c) and (f) and section 6(2) of the Indian Act were an unjustifiable infringement of the Charter protection against discrimination on the basis of sex.[7] However, the Court suspended its order for an initial period of 18 months to allow Parliament to make the necessary legislative amendments. The Government filed an appeal against that decision but abandoned it and began a new process of policy development. On 25 October 2016, Bill S-3 was introduced in the Senate.[8] Sharon McIvor testified before the House of Commons Committee on behalf of the Union of B.C. Indian Chiefs, and before the Senate Committee as an individual.

2.16 On 7 November 2017, the Government introduced further amendments to Bill S-3. The majority of its provisions came into force on 22 December 2017.

The complaint[9]

3.1 The authors allege that the sex-based hierarchy for the determination of entitlement to Indian registration status contained in section 6 of the 1985 Indian Act violates article 26, and article 27 in conjunction with articles 2(1) and 3 of the Covenant, in that it discriminates on grounds of sex against matrilineal descendants born prior to 17 April 1985, and against Indian women born prior to that date who married non-Indian men. They consider that under article 2(3)(a), they are entitled to an effective remedy for the violation of their rights under articles 26 and 27 in conjunction with articles 2(1) and 3.

Article 26

3.2 As a result of the sex-based hierarchy of the status registration regime, Sharon McIvor suffered a form of social and cultural exclusion. Her experience has been that within Aboriginal communities there is a significant difference in the degree of esteem that is associated with section 6(1)(a) status. She has experienced stigma that is associated with being a "Bill C-31 woman," the label that is given to women who have been assigned to the section 6(1)(c) sub-class. The implication is that they are inferior to and "less Indian" than their male counterparts. This extended to her children, to whom she was unable to transmit status, which made her feel inferior. She was unable to access the tangible benefits of status – such as extended health benefits and post-secondary education funding – available under the 1985 Act for her children when they were growing up.

3.3 Jacob Grismer's injury from not being eligible for full section 6(1)(a) status from 1985 onwards is profound. He has lived his whole life in the ancestral territory of his Indian forebears, in Merritt, British Columbia. Throughout high school, he experienced isolation and stigmatization because he did not have Indian status. For example, while he was growing up, he wanted to participate in traditional hunting and fishing activities. He sometimes accompanied friends or relatives who had Indian status on fishing trips to the Fraser River. But because he did not have status, he could not pack the fish that others had caught. He was never taught traditional fishing and hunting skills, and accordingly feels a great sense of loss. Based on his own experience of the harmful consequences of the denial of his cultural identity, it is of serious concern to him that his children are ineligible for status. He wants

[7] *Descheneaux v. Canada (General Prosecutor)*, 2015 QCCS 3555. In particular, the Superior Court found that "[t]he 2010 Act (...) did not entirely correct the situation of increased discrimination resulting from the 1985 Act. (para. 216). For the Court, "[p]aragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the Act violate subsection 15(1) of the Canadian Charter" and the State party had not demonstrated that this discrimination was justified (para. 219).

[8] An act to amend the Indian Act (elimination of sex-based inequities in registration), available at: http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8532512.

[9] As formulated in their initial submission of 24 November 2010.

them to benefit from the State's recognition of their Aboriginal ancestry, including having access to the traditional cultural practices of the community. This is the class of status he would have, but for the fact that his Indian parent is female.

3.4 The amendments brought by the 2011 *Gender Equity in Indian Registration Act* did not accord the authors full section 6(1)(a) status, even though their counterparts in the double-mother group have section 6(1)(a) status. The Act could have made Sharon's grandchildren eligible for status, but it still left the authors without official recognition of their inherent equality.

3.5 As a result of being registered under section 6(1)(c) of the 1985 Indian Act, Sharon is entitled to receive the same tangible benefits as those registered under section 6(1)(a). However, she does not benefit from the full recognition of status associated with section 6(1)(a). The 2009 Court of Appeal decision suggested, erroneously, that discrimination based on matrilineal descent may not constitute sex discrimination if there are multiple generations involved. The Indian Act's prejudicial treatment of matrilineal descent amounts to sex discrimination even if it is against a grandchild or great-grandchild, rather than the child, of the woman who was unable to transmit status solely because of her sex.

3.6 The discrimination embodied in section 6 of the Indian Act is not pursuant to an aim which is legitimate under the Covenant, objective and reasonable. The authors disagree with the Court of Appeal's finding that preserving acquired rights was a legitimate goal justifying creation of different tiers of status. Preservation of the full status of those registered under section 6(1)(a) would in no way be diminished by extending that same registration entitlement to others.

3.7 The continued discrimination embodied in the 1985 Act results in the authors' being denied full status under section 6(1)(a). Sharon's brother and his children, in contrast, are entitled to that status. As a result, his grandchildren are entitled to status, and can transmit status to their children. The effect of the sex-based status hierarchy will thus continue for generations.

Article 27 in conjunction with articles 2(1) and 3

3.8 Capacity to transmit cultural identity is a key component of cultural identity itself. It is closely linked to personal cultural identity, and inter-generational transmission is key in light of pressing concerns about the continuity and survival of cultural traditions. Section 6 of the Indian Act denies female progenitors and their descendants the equal right to full enjoyment of their cultural identity on an equal basis between men and women, in violation of article 27, read in conjunction with articles 2(1) and 3 of the Covenant. It denies their capacity to transmit their cultural identity to the following generations on an equal basis between men and women, and deprives them of the legitimacy conferred by full status.

3.9 The right of indigenous persons to enjoy their culture has been repeatedly acknowledged in the Committee's jurisprudence as an essential aspect of their rights under article 27. A foundational aspect of the individual's right to enjoy his or her culture is the formation of a sense of identity and belonging to a group, and recognition of that belonging by others in the group. Cultural identity is shaped by complex processes and encompasses both objective and subjective elements. However, where through the legislative schemes that it introduces in that regard, the State assumes a direct role in the formation of the cultural identities of individuals and their communities.

Article 2(3)(a)

3.10 The State party has failed to provide the authors with an effective remedy for the violation of their rights under articles 26 and 27 in conjunction with articles 2(1) and 3. The 2011 Act did not eliminate the discrimination entrenched in section 6 of the Indian Act. The proposed amendment only granted section 6(2) status to the grandchildren of Aboriginal

women who married out, while grandchildren born prior to 17 April 1985 to status men who married out are eligible for section 6(1)(a) status.

3.11 The 2009 decision of the British Columbia Court of Appeal and the subsequent denial of the Supreme Court of Canada of leave to appeal that decision have deprived the authors of the remedy they obtained in the Trial Court. The only effective remedy will be one which eliminates the preference for male Indians and patrilineal descent and confirms the entitlement of matrilineal descendants, including of women who married out, to full section 6(1)(a) status.

Parties' observations on admissibility

4.1 The State party submitted observations on admissibility and merits on 29 August 2011, 28 February 2012, 28 June 2916, 28 February 2017, 29 November 2017, 31 January 2018 and 10 August 2018. In addition to their initial submission of 24 November 2010, the authors submitted further comments on admissibility and merits on 6 and 16 December 2011, 20 June 2016, 16 March 2017 and 12 May 2018.

Ratione temporis

State party

4.2 The authors' allegations rely in large part on historical discrimination of First Nations women under successive versions of the Indian Act prior to 1985. The general allegations and those relating to the application of the pre-1985 criteria to the authors are outside the competence of the Committee under the Optional Protocol. Any residual discrimination, which resulted from the 1985 amendments to the eligibility criteria, was corrected by the 2011 amendments now in force.

Authors

4.3 The claims are solely concerned with the effects of the post-1985 registration regime. The only reason that it may appear otherwise is that the post-1985 scheme incorporated and carried forward the discrimination embedded in prior regimes.

Ratione personae

State party

4.4 Certain aspects of the communication are inadmissible because the authors cannot demonstrate that the alleged harms are attributable to the Government. The impacts on the authors' social and cultural relationships that they perceive or in fact suffer because of the provisions under which they are eligible for status should be attributed to the authors' family and larger social and cultural communities, and not to the State.

Authors

4.5 The claim is not about violations by non-state actors, but about the conduct of the State party in enacting and maintaining a legislative scheme that discriminates on the basis of sex. After more than a century of living under a State-imposed regime that defines who is an Indian, Indigenous people view legal entitlement to registration status as confirmation or validation of their "Indianness", a matter separate from the capacity to transmit status and to access certain tangible benefits which are conferred by status.

Victim status

State party

4.6 In the Committee's jurisprudence, where an alleged inconsistency with the Covenant has been remedied by the State party, individuals cannot claim to be victims of a violation of the Covenant within the meaning of article 1 of the Optional Protocol.[10] The authors have successfully pursued their allegations of discrimination before Canadian tribunals, and have received a remedy that effectively answers their allegations. In light of the 2011 amendments, the authors have not substantiated their claim that they are victims of discrimination due to distinctions in the criteria for eligibility for Indian status. Therefore, the communication is inadmissible under article 1 of the Optional Protocol in respect of the allegations of discrimination based on articles 2(1), 3, 26 and 27 of the Covenant.

Authors

4.7 The 1985 Act as amended in 2011 and then in 2017 leaves intact the core of the sex discrimination embedded in the registration provisions, of which the authors successfully complained in the British Columbia Supreme Court, and categorically excludes the authors from eligibility for full section 6(1)(a) status.

Actio popularis

State party

4.8 Certain aspects of the communication related to perceived problems with the eligibility criteria in the 1985 amendments are inadmissible because the authors cannot demonstrate that they are the victims of the harm alleged.[11]

Authors

4.9 The authors' claim is that full section 6(1)(a) status is reserved for those who can establish their entitlement to registration under the prior discriminatory regime. This is not an *actio popularis* challenge to the legislation. The sex-based hierarchy embedded in the 1985 Act affects them personally and directly, and the discrimination they suffer has not been remedied by the 2011 and 2017 amendments.

Non-exhaustion of domestic remedies

State party

4.10 A number of the alleged problems with the eligibility criteria, which do not apply to the authors, are currently being examined through domestic litigation. These allegations were not properly brought before the British Columbia Supreme Court (at trial), the Court of Appeal or the Supreme Court of Canada (in the application for leave to appeal) for the simple reason that they did not arise on the authors' facts. These aspects of the communication are therefore inadmissible for non-exhaustion of domestic remedies pursuant to articles 2 and 5(2)(b) of the Optional Protocol.

Authors

4.11 The authors reiterate that they have exhausted all available domestic remedies.

[10] Inter alia, *Dranichnikov v. Australia* (CCPR/C/88/D/1291/2004).

[11] The State party refers to the exclusion from eligibility of grandchildren born prior to 4 September 1951; to descendants of Indian women who parented in common-law unions with non-Indian men; and to the illegitimate female children of male Indians.

Parties' observations on merits

Article 26 in conjunction with articles 2(1) and 3

State party

5.1 Section 6 of the 1985 Act entitles several categories of individuals to status as an Indian including section 6(1)(a), which applies to persons eligible for status immediately prior to 17 April 1985 and preserves previously acquired or vested rights; and section 6(1)(c), which applies to persons whose status was restored by the 1985 amendments – those previously removed or omitted from the status list (Indian Register) because they were, inter alia, women who had married non-Indians or their descendants.[12] Section 6(2) applies to men or women with one parent eligible for status under any paragraph of section 6(1).

5.2 In April 1985, the Indian Act was amended to include these new registration and new band membership provisions. The Court of Appeal in *McIvor* found that the 1985 legislation was a *bona fide* attempt to eliminate discrimination on the basis of sex and that the Government had acted in good faith in enacting the legislation.

5.3 The Indian Act provides only for one Indian status; persons are either eligible for it or not. The 1985 amendments did not create degrees of status or degrees of "Indianness." The rules governing eligibility for status as an Indian are found in section 6 of the Indian Act as amended. The paragraphs of section 6(1) (particularly (a), (c), (d) and (e)) are essentially transitional provisions which indicate, for persons born before 1985, how the eligibility criteria move from the 1951 Indian Act registration regime to the 1985, and now the 2011, criteria. For everyone born after 1985, the most relevant provisions are section 6(1)(f) and section 6(2).

5.4 Following the 2011 amendments, Sharon McIvor was still eligible for status under the criteria set out in section 6(1)(c). Her son was eligible for status according to the new criteria set out in section 6(1)(c.1), and his children were eligible under section 6(2). This was the same basis for eligibility that their cousins would have if those cousins were eligible for status based on having one male Indian grandparent instead of one female Indian grandparent.

5.5 The children of a person eligible for status under section 6(1) are eligible for status regardless of the eligibility of their other parent. If a person eligible for status under section 6(1) has a child with a non-Indian, the child is eligible under section 6(2) – which sets up the possibility for the operation of the so-called second generation cut-off,[13] since the child of a person eligible under section 6(2) and a non-Indian is not eligible for status, regardless of the sex of the eligible grandparent or the sex of the parent. Status as an Indian is lost upon two successive generations of parenting out.

5.6 The negative impact of the 1985 eligibility criteria on persons in a similar position as the authors was removed by placing eligibility of the children of re-instatees under the criteria in section 6(1), thereby postponing the second generation cut-off one generation in those families. This has placed the grandchildren of Sharon McIvor on par with their counterparts who also have only one eligible grandparent – and that grandparent is a man.

5.7 The 2011 amendments removed the distinction in the 1985 amendments and remedied any impact it had on the authors. Contrary to the authors' claim, there is no discrimination in

[12] Section 6(1)(c) restores status for: women who had married non-Indians; men and women whose mothers and paternal grandmothers were non-Indians prior to marriage (the "double-mother rule"); illegitimate children of Indian women who had lost status because of non-Indian paternity; and women who married Indians who lost status through enfranchisement and any children of those women.

[13] The "second generation cut-off" in the Indian Act provides that persons descending from two consecutive generations of parenting between an Indian and a non-Indian are not entitled to registration.

fact or law between section 6(1)(a) and section 6(1)(c). Individuals are either eligible to be registered as an Indian under the Indian Act or they are not. There is no "sub-class" of persons with some lesser form of Indian status. The various paragraphs of section 6 identify the various bases on which individuals are eligible for status.

5.8 All persons eligible for status under section 6 have the same legal rights, and the Government makes no distinctions – either in the treatment of any person or in the provision of any benefits – based on the provision of section 6 on which their eligibility for status is founded. When the Federal Government provides funding to Indian bands, which is linked to the number of members of the band who are status Indians, all individuals with status are included. Accordingly, there is no violation of article 26 of the Covenant.

5.9 The difference that remains in the eligibility criteria following the 2011 amendments is the difference between section 6(1) and section 6(2). This is the second generation cut-off. However, this issue has not been challenged by the authors, and the second generation cut-off does not distinguish between persons on the basis of sex.

5.10 If the Committee considers that there is a distinction between section 6(1)(a) and sections 6(1)(c) and (c.1), this distinction is not discriminatory,[14] as it is only one of legislative drafting. Each provision describes a different historical route to obtaining status. Such distinctions are required in order to bring clarity, but do not otherwise negatively impact individuals based on any listed or analogous personal characteristic.

5.11 Section 6(1)(a) includes everyone who had status prior to 1985, when the Indian Act was amended. At the time, the Government's policy choice included not only the principle that discrimination against women should be removed from the eligibility criteria going forward but also, inter alia, that no one should lose status acquired under previous eligibility criteria. Section (6)(1)(c) describes those who had previously been deprived of Indian status for a variety of reasons, including women who lost status through marriage to a non-Indian, who were re-instated under the 1985 criteria.

5.12 The preservation of acquired rights – inter alia, that no one should lose status previously acquired – is a legitimate aim and the use of separate paragraphs within section 6(1) in order to clearly elaborate the various bases for eligibility for persons born prior to 1985 was a reasonable drafting approach. The authors seek criteria that would base eligibility on "matrilineal descent" without regard for how many generations the individual was from the female ancestor in question. The authors' eligibility for status is based on the re-instatement of Sharon McIvor herself and not on the reinstatement of any of her distant ancestors – male or female.

5.13 What the authors seek would potentially involve descendants of many generations removed from the female ancestor who initially suffered discrimination based on sex. The State party is not obligated, under the Covenant, to rectify discriminatory acts that pre-dated the coming into force of the Covenant. Apart from the uneven application of the second generation cut-off, the impact of which on the authors was corrected by the 2011 amendments, the 1985 amendments did – to a very large degree – go back in time so as to deem ancestors of living persons eligible for re-instatement in order to rectify the problem in their line of descent.

5.14 On 29 November 2017, a new Bill S-3 extended eligibility for status to all descendants of women who lost status because of their marriage to a non-Indian man, who were born prior to 17 April 1985, going back to the 1869 Gradual Enfranchisement Act. This change is subject to a delayed coming-into-force clause that allows for consultation with First Nations

[14] Citing General comment No. 18 (1989) on non-discrimination, and Communications *Derksen v. Netherlands* (CCPR/C/80/D/976/2001); *Love et al. v. Australia* (CCPR/C/77/D/983/2001); and *Haraldsson and Sveinsson v. Iceland* (CCPR/C/91/D/1306/2004).

and other Indigenous groups on how and when it will be implemented.[15] Thus, the majority of the provisions in Bill S-3 came into force on 22 December 2017, but additional provisions will come into force at a date to be determined by Order-in-Council.

5.15 These amendments that are not yet in force mean that all persons in the maternal line will be entitled to the same status as persons in the paternal line, no matter how many generations removed from the woman who lost status upon marriage, and that both will have the same ability to transmit status to their children. The Bill also eliminates the differential treatment between family members as a result of being eligible for registration based on their maternal lines versus paternal lines, entitling all descendants of Indigenous women who lost Indian status upon marrying a non-Indian man between 1869 and 1985 to registration on an equal basis with the descendants of Indigenous men. The amendments will also restructure the registration provisions of the Indian Act so that persons that would previously have obtained Indian status under section 6(1)(c) of the Act, will be eligible for registration under a new section 6(1)(a.1). These amendments comply with the authors' requests. While the date of entry into force is not stipulated, the Bill contains numerous safeguards holding the Government accountable to Parliament to implement the legislation.[16]

5.16 Finally, the State party admits that persons registered under the Indian Act have an important interest in transmitting their status to their children. It also recognizes the significant links, for some Indigenous Canadians, between Indian status and their personal identity as Indigenous persons. The State party does not agree that the differential treatment of the descendants of Indian women born prior to 1951 violates the Covenant, but it recognizes that there were significant historical inequities related to the Indian Act's treatment of Indigenous women prior to 1951. And eligibility for registration under section 6(1)(a) has special significance for certain individuals, such as the authors, who have experienced historical sex-based discrimination. It is in recognition of this fact that Parliament adopted in Bill S-3 amendments that will ensure that persons in the authors' situation become eligible under section 6(1)(a). Bill S-3 removes remaining sex-based inequities in the Indian Act by extending eligibility for persons previously affected by the "1951 cut-off." The State party regrets the historical discrimination and other inequities to which Indigenous women and their descendants have been subject. It views addressing these inequities as an important step towards reconciliation with Indigenous peoples.

Authors

5.17 The 1985 Act as amended in 2011 still excludes from eligibility for registration status Aboriginal women and their descendants who would be entitled to register if sex discrimination were completely eradicated from the scheme.

5.18 The 2011 amendments improved the registration entitlement of Jacob Grismer, making him eligible for section 6(1)(c.1) status, and thereby able to transmit status to his children. In contrast, Sharon McIvor's brother and all his children have full section 6(1)(a) status, and this difference is solely based on sex. The 2011 amendments also do not treat Jacob Grismer and his cousins equally: he is ineligible for section 6(1)(a) status, but the cousins are. Although the authors enjoy the tangible benefits of status for themselves, they

[15] The consultation plan includes an information-gathering phase lasting from September 2018 to March 2019, and an analysis and formulation of recommendations phase taking place from April 2019 to June 2019. As part of this latter phase, the Government, in cooperation with the Minister's Special Representative, will develop an implementation plan for the remaining aspects of Bill S-3 that are not yet in force, as well as for next steps for broader legislative reform including devolution of the responsibility for determining membership/citizenship to First Nations. The Government will also table a report to Parliament to summarize the process and to provide recommendations.

[16] Section 12(1) of Bill S-3 requires the Minister to review section 6 of the Indian Act to ensure that all sex-based inequities have been eliminated.

still do not enjoy all the intangible benefits on an equal basis with their peers, in particular the legitimacy and social standing.

5.19 The State party's assumption that there is only one Indian status is incorrect. Section 6(1)(a) status is superior and the intangible benefits (the ability to transmit status and the legitimacy and social standing conferred by status) associated with it are unquestionably superior to those associated with section 6(1)(c) and section 6(2) status, although the tangible benefits (access to social programs and tax exemptions) are the same. Furthermore, section 6(1)(c) status is stigmatized within Indigenous communities. There is a perception among First Nations communities that "real" Indians are those who have section 6(1)(a) status. Such differences are not simply a matter of individual perception.

5.20 The State party claims that section 6(1)(c) status is transitional. However, the authors continue to be directly affected by the discrimination that remains in the 1985 Act after the amendments of 2011 and 2017, and that will continue for generations to come. The 2017 amendments which have already come into force do not afford them a remedy. They extend a form of inferior section 6(1)(c) status to some additional subgroups, but leave the discriminatory sex-based hierarchy between section 6(1)(a) and section 6(1)(c) undisturbed.

5.21 On 12 May 2018, the authors reiterated that the State party's registration regime continues to privilege male Indian progenitors and patrilineal descendants. Even if the State party contends that the distinction between section 6(1)(a) status and section 6(1)(c) status is based on reasonable and objective criteria and that the sex-based differential treatment is justified because it preserves "acquired rights," this is not a legitimate goal for the differential treatment in the registration regime, since previously acquired rights were conferred under a sex-based status hierarchy created by the State party. This cannot be reconciled with the object and purpose of the Covenant and the fundamental character of the guarantees of equality and equal protection. Furthermore, as a matter of fact, previously acquired rights would not be diminished by extending full section 6(1)(a) status to Indigenous women, including women who married out and matrilineal descendants, including descendants of married and unmarried status women, who were previously excluded from status based on non-Indian paternity.

5.22 The 2017 Bill S-3 did not remove the core of the discrimination that resides in the hierarchy between section 6(1)(a) and section 6(1)(c). Although it contains a provision (section 2.1) that has the potential to create entitlement to full section 6(1)(a) status for Indigenous women like Sharon McIvor and her descendants, this provision is not in force. Rather, it is subject to a delayed-coming-into-force clause which has no fixed date and has been deferred indefinitely.

5.23 The inclusion of section 2.1 in Bill S-3 represents a kind of moral vindication for the authors. This provision, known as the Government's version of "6(1)(a) all the way," is an acknowledgement by the State party that the only effective remedy for the ongoing sex discrimination in section 6 of the Indian Act is one which accords full section 6(1)(a) status to all Indian women and their descendants born before 1985, on the same basis as Indian men and their descendants born prior to that year. Through these additional provisions, the State party has demonstrated that it knows how to fix the problem. The State party declares that the Government's version of "6(1)(a) all the way" means that all persons will be entitled to the same status as persons on the paternal line, no matter how many generations removed from the women who lost status upon marriage, and that both will have the same ability to transmit status. It appears that the intention of that amendment is to eliminate the sex-based hierarchy. If the Government's "section 6(1)(a) all the way" amendment were brought into force, the authors would become entitled to section 6(1)(a) status at long last.

5.24 However, the lack of a fixed date for section 2.1 to come into force means that the amendment is entirely without legal force and makes the authors' remedy completely hypothetical. Furthermore, Bill S-3 is devoid of any mechanism to ensure that the amendment will ever come into force, which means that, as a legal legislative provision, it is meaningless.

5.25 In conclusion, the authors' situation of inequality is unchanged by Bill S-3 which is already in force. Sharon McIvor continues to be confined to inferior and stigmatized section 6(1)(c) status. She is neither able to hold section 6(1)(a) status, nor to transmit that status to her child.

5.26 The State party attempts to excuse its failure to bring the Government's "6(1)(a) all the way" clause into effect for an indefinite period of time on the grounds that it wishes to consult First Nations. It is not appropriate for the State party to consult about whether it will continue legislated discrimination. Nor is it necessary to consult about discrimination in the status registration scheme. The State party has been consulting about this discrimination for decades, and consultation has been a tactic for delaying the elimination of sex discrimination. More delay cannot be countenanced under the Covenant.

5.27 Therefore, the authors request the Committee to find that they are entitled to be registered under section 6(1)(a) of the Indian Act.

Article 27

State party

5.28 The authors have not adequately claimed or substantiated a violation of their right to enjoy their culture. Both are members of the Lower Nicola Indian Band (part of the Nlaka'pamux Nation), and at issue is their ability to enjoy the Nlaka'pamux culture as practiced by the Lower Nicola Indian Band. They have failed to substantiate any violation of their right to enjoy the particular culture of their indigenous group. Moreover, the Committee's view is that not every interference is a denial of rights within the meaning of article 27.[17]

5.29 The current Indian Act imposes no limit on the authors' ability to enjoy their own culture, to practice their religion or to speak their language. The question is whether the impact of a measure adopted by the State is "so substantial" that it effectively denies the authors the right to enjoy their culture. The Views of the Committee under article 27 all refer to tangible detrimental impacts established by solid proof.

5.30 The authors do not allege that they have no right to live on the reserve lands of their band. It is the Band, and not the Government, that decides who lives on the reserves of the Lower Nicola Indian Band on the basis of its membership list.

5.31 Indian status is only one facet of the identity of those who are eligible.[18] The legislated scheme for determining eligibility for status does not and cannot confer personal dignity. Furthermore, eligibility for status under any of the paragraphs of section 6 is not a marker for legitimacy, whether personal or cultural, except in the *perception* of the authors, perhaps bolstered by the actions of family and community. It cannot be attributed to the State party.

5.32 The authors conflate cultural identity and Indian status to too great a degree. Indian status is not a legislated approximation of any First Nation culture; it is a determinant of eligibility for a range of specific benefits provided by the State party to individuals. Since the 1985 amendments, status as an Indian and membership in an Indian band have been separated. Band membership and not Indian status is more closely aligned with cultural identity as bands are communities of persons sharing the same culture.

[17] *Poma Poma v.* Peru (CCPR/C/95/D/1457/2006); *Prince v. South Africa* (CCPR/C/91/D/1474/2006), para. 7.4; *Lansman (Ilmari)* et *al. v. Finland* (CCPR/C/52/D/511/1992); and *Lovelace v. Canada* (CCPR/C/13/D/24/1977), para. 15.

[18] The State party refers the Committee to the website of the Lower Nicola Indian Band to which the authors belong, as an illustration of the importance that membership in their particular community and culture gives to the sense of personal identity of First Nations individuals: www.lnib.net.

Authors

5.33 The authors have demonstrated significant interference with their right to the equal exercise and enjoyment of their culture, in particular their right to the full enjoyment of their Indigenous cultural identity. A foundational aspect of an individual's right to enjoy his or her culture is the formation of a sense of identity and belonging to a group, and recognition of that identity and belonging by others in the group. The capacity to transmit one's cultural identity is also a key component of cultural identity.

5.34 The State party attempts to avoid responsibility for the impact of its legislated sex discrimination within Indigenous communities. Given the role that Canada has played in superimposing a patriarchal definition of Indian on First Nations communities, and the fact that Canada's status registration scheme continues to prefer male Indians and their descendants, the alleged sex discrimination is ongoing.

5.35 The Covenant requires the State party to ensure and respect the rights of Indigenous women to the equal exercise and enjoyment of First Nations culture on and off reserve, in their local communities, and in the broader community of First Nations and individuals of First Nations descent across Canada. When the State party submits that status is not official recognition of an individual's cultural identity, it seeks to ignore the harmful effects of its discriminatory status regime. But under the Covenant, the guarantee of equality and non-discrimination extends to both direct and indirect effects of the State party's conduct in promulgating and maintaining the registration regime.

Article 2(3)

State party

5.36 Article 2(3) of the Covenant cannot alone give rise to a claim under the Optional Protocol.[19] Since the allegations of violations of articles 26 and 27 have not been substantiated, there is no foundation on which to find a breach of article 2(3). In addition, the authors not only have had access to effective remedies, but have also been successful in their cases.

Authors

5.37 The authors insist that they have not received an adequate remedy. The authors request that the Committee (a) direct Canada to take immediate measures to ensure that section 6(1)(a) of the status registration regime, introduced by the 1985 Indian Act, and re-enacted by Bill C-3 and Bill S-3, is interpreted or amended so as to entitle to registration under section 6(1)(a) those persons who were previously not entitled to be registered under section 6(1)(a) solely as a result of the preferential treatment accorded to Indian men over Indian women born prior to 17 April 1985 and to patrilineal descendants over matrilineal descendants, born prior to 17 April 1985; and (b) find that the authors are entitled to be registered under either section 6(1)(a) of the 1985 Indian Act or section 6(1)(a) of the 1985 Indian Act as amended.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

6.2 The Committee notes the State party's contention that the communication should be declared partly inadmissible for failure to exhaust domestic remedies, on the ground that the

[19] Rogerson *v. Australia* (CCPR/C/74/D/802/1998), para. 7.9, and Peirano *Basso v. Uruguay* (CCPR/C/100/D/1887/2009), para. 9.4.

authors' allegations were not argued before the Canadian jurisdictions, as the authors lacked standing to raise such allegations. The Committee notes, however, that the authors challenged the constitutionality of section 6 of the 1985 Indian Act under the Canadian Charter of Rights and Freedoms, also relying on articles 2 and 26 of the Covenant; that on 8 June 2007, the British Columbia Supreme Court ruled in their favour, and determined that section 6 of the 1985 Indian Act violated the Canadian Charter in that it discriminated on grounds of sex and marital status, and that the British Columbia Court of Appeal confirmed on 6 April 2009 that section 6 of the Indian Act was discriminatory, albeit on a narrower basis. Following that ruling, the authors sought leave to appeal before the Supreme Court of Canada, which was refused. The Committee considers that the authors have adequately pursued domestic remedies at their disposal, and that it is not precluded from considering the communication under article 5(2)(b) of the Optional Protocol.

6.3 The Committee notes the State party's objection to the admissibility of the communication on the grounds that the authors' allegations, to the extent that they relate to the 1951 amendments to the Indian Act, should be excluded *ratione temporis* from the competence of the Committee, as they pertain to Sharon McIvor's loss of status, which occurred before the entry into force of the Covenant and Optional Protocol for Canada. The Committee, however, notes the authors' claim that the essence of their complaint lies in the alleged discrimination inherent to the eligibility criteria in s. 6 of the Indian Act, as amended in 1985, and later in 2011 and 2017, which occurred after the entry into force of the relevant instruments for the State party. The Committee therefore considers that it is not precluded, *ratione temporis*, from examining the authors' allegations related to the 1985, 2011 and 2017 amendments.

6.4 The Committee also notes that State party's objection to admissibility based on the fact that the alleged harm and the impact on the authors' social and cultural relationships are not attributable to the State. However, the Committee notes the authors' contention that their claim is based on the discriminatory effects of the State's regulation of Indian registration, including the effects the State's actions had on non-state actors. The Committee therefore considers that it is not precluded, *ratione personae*, from examining the authors' claims.

6.5 The Committee notes the State party's allegation that certain aspects of the communication are inadmissible because the authors point to a series of perceived problems with the eligibility criteria in the 1985 amendments to the Indian Act which have no application to them and thus cannot demonstrate that they are the victims of the harm alleged. In this regard, the Committee recalls its jurisprudence according to which "a person may claim to be a victim under article 1 of the Optional Protocol only if his or her rights are effectively violated. The concrete application of this condition is a question of degree. However, no person can in the abstract, by way of *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant".[20] The Committee, however, notes the authors' submission that their communication refers to the application to their specific situation of the legal framework created under section 6(1) of the Indian Act. The Committee therefore considers that the authors may claim to be victims of the alleged violation of their rights under the Covenant in the meaning of article 1 of the Optional Protocol.

6.6 The Committee notes the State party's allegation that article 2(3) of the Covenant cannot alone give rise to a claim under the Optional Protocol, but observes that the authors invoked that provision with reference to an alleged violation of their rights under articles 26 and 27 in conjunction with articles 2(1) and 3 of the Covenant. Accordingly, the Committee declares this claim admissible.

6.7 The Committee further considers that the authors' claims under articles 2(1), 2(3), 3, 26 and 27 of the Covenant have been sufficiently substantiated for purposes of admissibility and proceeds to their examination on the merits.

[20] Aumeeruddy-Cziffra *et al. v.* Mauritius (CCPR/C/12/D/35/1978), para. 9.2.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5(1) of the Optional Protocol.

7.2 The Committee notes the authors' argument that until 1985, the Indian Act favoured Indian men and their male descendants, and took away status from Indian women who married non-Indian men, while also denying status to children whose First Nations descent was derived through Indian women. In spite of legislative amendments in 2011 and 2017, the authors contend that they continue to be directly affected by the alleged discrimination that remains in the 1985 Indian Act. Although the authors admit enjoying the tangible benefits of status for themselves, they contend that they do not enjoy all the intangible benefits of status on a basis of equality with their peers, especially the ability to transmit full section 6(1)(a) status and the social legitimacy conferred by that status, in violation of articles 2(1), 3 and 26 of the Covenant. The authors further contend that the continuing discrimination in section 6 of the amended Indian Act has denied them and other female progenitors and their descendants the equal right to full enjoyment of their cultural identity as members of First Nations, in violation of article 27 of the Covenant.

7.3 The Committee notes the authors' claim that the 1985 Act, as amended in 2011, did not recognize their eligibility for full section 6(1)(a) registration status, while Sharon McIvor's brother and all his children have full section 6(1)(a) status. This difference is based solely on sex, as Sharon McIvor's brother has the same lineage as herself and the same pattern of marriage and parenting. While Sharon McIvor's brother can hold and transmit section 6(1)(a) status to his children born prior to 17 April 1985, following the passage of the 2011 amendments, Sharon McIvor continued to be confined to the allegedly inferior and stigmatized section 6(1)(c) status, neither able to hold nor transmit section 6(1)(a) status to her child. Moreover, the authors claim that this discriminatory state of affairs is fundamentally unchanged following the 2017 amendments to the Indian Act, since the enacted provisions to date have extended a form of inferior section 6(1)(c) status to some additional subgroups, but have not altered the discriminatory sex-based hierarchy between section 6(1)(a) and section 6(1)(c).

7.4 The Committee notes the significant efforts by the State party in recent years to address continuing distinctions on the basis of sex in the Indian Act, including the recent 2017 amendments to the Indian Act and the fact that most of them have come into force. However, section 2.1, that the authors consider crucial for their situation by bestowing 6(1)(a) status based on maternal as well as paternal lineage, has not entered into force. The authors state that if those provisions were brought into force, the discrimination based on sex would be eliminated and they would become entitled to section 6(1)(a) status, but that this remains hypothetical.

7.5 The Committee also notes the State party's argument that there is only one Indian status associated with corollary tangible benefits, such as health benefits, financial assistance, tax exemptions, and that the provision of these tangible benefits is equal for all persons with status under section 6. It further notes the State party's argument that section 6(1)(a) includes everyone who had status prior to 1985, whereas section 6(1)(c) applies to those who were previously deprived of Indian status for a variety of reasons, including women who lost status through marriage to a non-Indian. The State party therefore contends that there is no discrimination in fact or law between section 6(1)(a) and section 6(1)(c); that the preservation of acquired rights is a legitimate legislative objective that justifies the distinction, and that any differences under the subsections of section 6 of the Indian Act are ones of legislative drafting, which describe different background eligibility criteria leading to status entitlement, and that the paragraphs of section 6(1), in particular (a), (c), (d) and (e) are transitional provisions for persons born before 1985. Accordingly, there is no "sub-class" of persons with some lesser form of Indian status. Any differential treatment in access to intangible benefits to persons with status under section 6(1)(c) is not attributable to the State party.

7.6 The Committee recalls that the principle of equal treatment of the sexes applies by virtue of articles 2(1), 3 and 26.[21] It further recalls its General comment No. 18 on non-discrimination, according to which the Covenant prohibits any distinction, exclusion, restriction or preference which is based on any ground including sex, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[22] In the present case, the Committee notes that the Indian Act as amended in 1985, 2011 and 2017 still incorporates a distinction based on sex.[23] It further notes that according to the State party, this distinction will be eliminated, and all persons in the maternal line will be entitled to the same status as persons in the paternal line, when the additional provision in Bill S-3 comes into force (para. 5.14). The Committee considers, however, that at the present time, those amendments are not yet in force, and the distinction based on sex still persists in the Indian Act. The Committee further notes that the domestic courts also found that section 6 of the 1985 Indian Act was discriminatory after the 2011 amendments.[24]

7.7 The Committee recalls its General comment No. 18 and its jurisprudence that not every differentiation amounts to discrimination, as long as it is based on reasonable and objective criteria, in pursuit of an aim that is legitimate under the Covenant. The test for the Committee therefore is whether, in the circumstances of the present communication, the distinction based on sex in the Indian Act, as amended, meets the criteria of reasonableness, objectivity and legitimacy of aim.

7.8 In this connection, the Committee notes that Sharon McIvor is treated differently from her own brother under the Indian Act and, as the State party admits, does not have the same section 6(1)(a) status as persons in the paternal line and also cannot transmit the same status in the same conditions as her brother. The Committee also notes the authors' argument that, as a consequence of the discrimination based on sex in the Indian Act, they have been stigmatized within their community and denied full opportunity to enjoy their culture in community with the other members of their Indigenous group. The authors submit that they are perceived as not being "real" Indians; Sharon McIvor is treated as a "Bill C-31 woman"; and following adoption of the 1985 Act, Jacob Grismer was denied full participation in traditional hunting and fishing activities.[25] The authors contend that the State party's century-old practice of defining who is an Indian has led Indigenous people to view legal entitlement to registration status as confirmation or validation of their "Indianness". The authors contend that the longstanding distinction in the Indian Act between recognizing status for descendants of the paternal line, but not the maternal line, has contributed to the stigmatization of descendants of the maternal line, and that this stigmatization is perpetuated in the different legal status for descendants of the maternal line in the amended Indian Act.

7.9 The State party argues that any impact of the status bestowed by the Indian Act, as amended, on the authors' social and cultural relationships that they perceive or in fact suffer because of the provisions under which they are eligible for status should be attributed to the

[21] Ibid., para. 9.2 (b) 2 (i) 5.

[22] General comment No. 18, para. 7.

[23] The Committee notes that in 2016, the Committee on the Elimination of Discrimination against Women recommended that the State party "remove all remaining discriminatory provisions of the Indian Act that affect indigenous women and their descendants". CEDAW, Concluding observations on the combined eighth and ninth periodic reports of Canada (CEDAW/C/CAN/CO/8-9) (2016), paras. 12-13.

[24] Descheneaux v. Canada, note 7 above.

[25] Cf. IACHR, *Missing* and *murdered indigenous women in British Columbia, Canada* (OEA/Ser.L/V/II. Doc.30/14) (2014), paras. 68-69 ("[T]he Indian Act as amended fails to fully address remaining concerns about gender equality….[I]n some cases the presence of a second, intermediate status classification can rise to the level of cultural and spiritual violence against indigenous women, since it creates a perception that certain subsets of indigenous women are less purely indigenous than those with 'full' status. This can have severe negative social and psychological effects on the women in question.").

authors' family and larger social and cultural communities, and not to the State (para. 4.3). However, the State party acknowledges that the amended Indian Act still maintains a distinction in status based on sex – a distinction that would be eliminated in the pending revision to the Indian Act (para. 5.15). The State party recognizes the significant links, for some Indigenous Canadians, between Indian status and their personal identity as Indigenous persons. The State party also acknowledges the historical discrimination and other inequities to which Indigenous women and their descendants have been subject, and that eligibility for registration under section 6(1)(a) has special significance for certain individuals, such as the authors, who have experienced historical sex-based discrimination. The pending revision establishing such eligibility was adopted in recognition of this fact (para. 5.16). The Committee considers that such a discriminatory distinction between members of the same community can affect and compromise their way of life.

7.10 The Committee recalls its General comment No. 23 (1994) that article 27 establishes and recognizes a right which is conferred on individuals belonging to indigenous groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant.[26] Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples, which may include such traditional activities as fishing and hunting. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.[27]

7.11 The Committee further recalls that the prohibition on discrimination in the Covenant applies not only to discrimination in law, but also to discrimination in fact, whether practised by public authorities, by the community, or by private persons or bodies.[28] It further recalls that the principle of equality sometimes requires States parties to adopt temporary special measures in order to diminish or eliminate conditions that cause or help to perpetuate discrimination prohibited by the Covenant.[29] In the present case, the State party acknowledges both that differential treatment based on status exists, and that the additional provisions of Bill S-3 that are not yet in force will entitle persons in the maternal line to the same status as those in the paternal line. The Committee also notes the State party's argument that the distinction based on sex existing in the different sub-paragraphs of section 6(1) of the 1985 Indian Act, as amended, is justified by the legitimate aim of preservation of acquired rights. However, the State party has not demonstrated how recognizing equal status for the authors under section 6(1)(a) would adversely affect the acquired rights of others. The State party therefore has failed to demonstrate that the stated aim is based on objective and reasonable grounds. The Committee accordingly concludes that the continuing distinction based on sex in section 6(1) of the Indian Act constitutes discrimination, which has impacted the right of the authors to enjoy their own culture together with the other members of their group. The Committee therefore concludes that the authors have demonstrated a violation of articles 3 and 26, read in conjunction with article 27 of the Covenant.

7.12 In the light of the previous findings, the Committee considers that it is not necessary to examine the authors' remaining claims under the Covenant.

8. The Committee, acting under article 5(4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the authors' rights under articles 3 and 26, read in conjunction with article 27 of the Covenant.

9. In accordance with article 2(3)(a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State

[26] General comment No. 23, para. 1.
[27] Ibid., para. 6.1.
[28] General comment No. 18, para. 9.
[29] Ibid., para. 10.

party is obligated, inter alia, (a) to ensure that section 6(1)(a) of the 1985 Indian Act, or of that Act as amended, is interpreted to allow registration by all persons including the authors who previously were not entitled to be registered under section 6(1)(a) solely as a result of preferential treatment accorded to Indian men over Indian women born prior to 17 April 1985 and to patrilineal descendants over matrilineal descendants, born prior to 17 April 1985; and (b) to take steps to address residual discrimination within First Nations communities arising from the legal discrimination based on sex in the Indian Act. Additionally, the State party is under the obligation to take steps to avoid similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

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OFFICIAL REPORT
(HANSARD)

Tuesday, June 13, 2017
(Part B)

Speaker: The Honourable Geoff Regan

What is troubling in that presentation is that the minister claims that the government cannot go forward with some of the amendments being proposed by the Senate, in particular the amendments that were suggested by Senator McPhedran, on the basis that we do not know the consequences. The minister seems to suggest that those human rights violations can continue to wait because it is a question of human rights and dollars. I am a bit troubled by that position.

I want to reiterate this for the record. In my view, she made reference to the concerns that were expressed by Senator Sinclair. However, I want to remind the House and the minister that Senator Sinclair voted in favour of the amendments that are before us today.

Mrs. McIvor wrote to the senators with respect to the amendments. She states:

> ...I take fundamental exception to this argument. Indian bands and communities have no legitimate say in whether the Government of Canada continues to discriminate against me and other Indian women because of our sex. The Government of Canada has an obligation under constitutional and international law and a fiduciary duty not to discriminate on the basis of sex, whether Indigenous bands and communities agree or not. By now most Indigenous bands and communities do not wish to see discrimination on the basis of sex continue.

I think that is a strong statement from one of the people who has been fighting these issues over the years. I would like the minister's comment on that.

Hon. Carolyn Bennett: Mr. Speaker, I thank the member for his ongoing advocacy. There is no place for a consultation on what is a charter right. A charter right is a charter right. I would correct the member that Senator Sinclair voted against, in clause by clause, the amendment by Senator McPhedran on 6(1)(a) all the way. He voted for the bill, to bring it to the House, but he did vote against that clause.

Obviously, Madam McIvor's advocacy is very important, but it is so important that we get it right. Because the B.C. Court of Appeal voted that extending 6(1)(a) all the way was not a charter right, it is, therefore, a policy issue. We need to make sure we get this right and that we are able to deal with this in a comprehensive way so that we finally stop making mistakes and ending up back in court, back in the House. We want to get all the discrimination, disenfranchisement, adoption, all of these issues where the Indian Act is not dealing with people fairly, and correct them.

● (1955)

Mr. Dan Albas (Central Okanagan—Similkameen—Nicola, CPC): Mr. Speaker, I certainly appreciate the minister's presentation here tonight and making herself accountable to this chamber. I think that is important.

I am simply going to ask her about the consultation process. Obviously, they are moving forward with phase two. She has said that they are looking to course correct. However, I would ask the minister if she has gotten to the root of the issue. There seems to be a problem with consultations within her own department. At some point one either says, "We're going to consult on consultations," or one says, "We know what the problem is and I, as the minister, am going to fix it."

I have been to Prince George. I have met with the chiefs. They have said that they were not consulted on the moratorium on tanker traffic off the B.C. coast and they were upset with that.

The minister continues to come to this place, and as the responsible minister, at some point, she is going to have to present a credible road map on how consultations need to be. What actions is she taking with her department? Who is she holding accountable, and if not, is there going to be a broader effort to reach out and to find out what is wrong in this area of consultation?

Hon. Carolyn Bennett: Mr. Speaker, I think acknowledging our mistakes in the past is the reason we put these additional amendments in the bill, where we will be reporting back to Parliament on the design of the consultation to show who we have talked with and the advice we have received in a completely transparent way. Then we will launch the consultation and report back to Parliament again, 12 months later, to show Parliament the progress we have made on the consultation before we table another bill.

Mr. Dan Vandal (Saint Boniface—Saint Vital, Lib.): Mr. Speaker, first, I congratulate the minister for her leadership on many files in indigenous affairs, but specifically, for withdrawing the appeal by the previous federal government against the Quebec Court of Appeal so that we can find solutions to this.

There are impassioned arguments for a much broader reform for registration and membership under the Indian Act. Many argue that Bill S-3 would not go far enough. I know this is only the first stage of our response, the government's response, to the Descheneaux decision. Would the minister explain what is anticipated in stage II of the plan?

Hon. Carolyn Bennett: Mr. Speaker, I think the main thing about stage II is that the process will be co-designed with first nations, including communities, impacted individuals, organizations, and experts, to be able to design a process that will lead to the substantial reforms, including advice on potential legislative changes. It means that we will come back with what we have heard and what we are planning, in terms of co-designing that process. Then we will launch it within six months and report back here 12 months after that. We believe we can get this done in 18 months.

Again, it is about our making sure that the future reforms are able to maintain an integrity to the registration system. However, I must tell the member that, eventually, we do not think it should be my department registering or determining who is a member or who has status. Eventually, first nations, Inuit, and Métis will determine that for themselves.

Mrs. Cathy McLeod (Kamloops—Thompson—Cariboo, CPC): Mr. Speaker, I rise today to speak to Bill S-3, an act to amend the Indian Act, elimination of sex-based inequities in registration. Right off, I should acknowledge that perhaps the title is in error. I am not totally convinced that everything in the bill performs that function.

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