Court File No. A-124-15

FEDERAL COURT OF APPEAL

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant
(Respondent)

- and -

ZUNERA ISHAQ

Respondent
(Applicant)

MOTION RECORD OF THE
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

MOTION OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.
FOR LEAVE TO INTERVENE

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Appellant
(Respondent)

- and –

ZUNERA ISHAQ

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(Applicant)

NOTICE OF MOTION of the WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. for leave to intervene

---

TAKE NOTICE THAT the Women's Legal Education and Action Fund Inc. ("LEAF") will make a motion to the Court in writing under Rule 369 of the *Federal Court Rules*.

THE MOTION IS FOR:

1. An Order:

   (a) granting LEAF status to intervene in this appeal on the following terms:

      (i) LEAF will not lead evidence, but will rely on the evidence adduced by the parties or the documents referred to in the reasons of the

Federal Court, as well as any other documents of which this Honourable Court may take judicial notice;

(ii) LEAF will be served with all materials of the parties;

(iii) LEAF will file its memorandum of fact and law not exceeding 25 pages in length in this appeal;

(iv) LEAF will have the right to make oral submissions before the Court;

(v) LEAF will not seek costs, nor shall costs be awarded against it; and

(b) allowing this motion to be decided on the basis of written representations.

THE GROUNDS FOR THE MOTION ARE:

1. The appeal raises justiciable issues of public interest;

2. The appeal raises important issues about the interpretation of s. 15 of the *Charter* and the unique, gendered and religious impact of the impugned policy of Citizenship and Immigration Canada (the "Policy") on women;

3. As a national non-profit organization that engages in equality and human rights litigation, law reform work and public education, LEAF has a genuine interest in the appeal and the necessary knowledge, skills and resources which it will dedicate to this appeal to assist the Court. LEAF will assist the Court in the resolution of those issues that are raised by the appeal but which will not be fully addressed by the parties or other proposed interveners, specifically the issue of the intersectional gendered and religious consequences of the Policy;

4. LEAF's distinct perspective and unique expertise lies in its long-standing work with women. As such, LEAF's participation will assist this court in its consideration of the issues on this appeal, by presenting an intersectional s. 15(1) analysis that recognizes how otherwise neutral laws and policies can have a distinctly adverse impact upon certain groups of women. In particular, LEAF will elucidate how the Policy problematically dictates women's dress, limits women's right to vote, and furthers women's marginalization in the citizenship and immigration system. LEAF can assist the Court in showing how the Policy creates a unique discriminatory effect for women who are niqab-wearing immigrant Muslims, whose religious beliefs conflict with the Policy, effectively denying them Canadian citizenship, and allowing them at best only the limited rights of permanent residency;

5. Granting LEAF leave to intervene is a reasonable and efficient means to ensure full argument on the issues raised in the appeal before the Court;

6. LEAF's intervention is in the interests of justice because it will expose the Court to a different and valuable perspective beyond those offered by the parties in this public, important and complex appeal.

7. LEAF's intervention in this appeal will not prejudice any party, or overly protract or complicate this appeal;

8. Rules 109 and 369 of the *Federal Court Rules*, SOR/98-106; and

9. Such further and other grounds as counsel may advise and this Honourable Court permits.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

10. The Affidavit of Diane O'Reggio, sworn June 1, 2015; and

11. Such further and other material as counsel may advise and this Honourable Court permit.

June 1, 2015

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THE MINISTER OF CITIZENSHIP AND IMMIGRATION
Appellant (Respondent)

and

ZUNERA ISHAQ
Respondent(Applicant)

Court File No.: A-124-15

FEDERAL COURT OF APPEAL

Proceeding commenced at TORONTO

NOTICE OF MOTION of the WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. FOR LEAVE TO INTERVENE

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TAB 2

File No. A-124-15

FEDERAL COURT OF APPEAL

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant
(Respondent)

- and -

ZUNERA ISHAQ

Respondent
(Applicant)

AFFIDAVIT OF DIANE O'REGGIO
(sworn June 1, 2015)

I, Diane O'Reggio, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Executive Director of the Women's Legal Education and Action Fund Inc. ("**LEAF**"), the national office of which is located at 260 Spadina Avenue, Suite 401, Toronto, Ontario, M5T 2E4. As such, I have personal knowledge of the matters set out herein except where stated to be based on information and belief, in which case I believe such information to be true.

2. LEAF seeks leave to intervene in the within appeal, with a focus on the issues that arise in the area of equality and discrimination, about which LEAF has intensive expertise and a genuine interest. LEAF would provide unique assistance to the Court in the resolution of these issues.

Nature and Expertise of LEAF

3. LEAF is a national, federally incorporated, non-profit organization founded in April 1985 to advance the equality rights of women and girls in Canada as guaranteed by the *Charter of Rights and Freedoms* (the "***Charter***"). To this end, LEAF engages in equality and human rights litigation, law reform work and public education.

4. With branches across the country, and an affiliated organization, West Coast LEAF, in British Columbia, LEAF's membership is broad and includes women of all ages and backgrounds located across Canada.

5. Through its litigation work, LEAF gives a voice to women who experience discrimination on the basis of sex or gender, and individuals who experience discrimination arising from the intersection of multiple personal characteristics, such as sex, gender, family status, race, ethnic origin, religion, disability, marital status, sexual orientation, and socio-economic status.

6. LEAF began its equality rights litigation in 1985, and quickly became a key participant in some of the most significant cases through which equality rights in Canada have been developed and defined.

7. LEAF has contributed to the evolution of the meaning of substantive equality and equality rights jurisprudence in Canada through interventions in dozens of cases throughout the last 30 years including: *Canadian Newspapers Co. v Canada (Attorney General)*, [1988] 2 S.C.R. 122; *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Borowski v The Attorney General of Canada*, [1989] 1 S.C.R. 342; *Brooks v Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Janzen and Govereau v Platy Enterprises*

Ltd., [1989] 1 S.C.R. 1252; *Tremblay v Daigle*, [1989] 2 S.C.R. 530; *R. v Keegstra*, [1990] 3 S.C.R. 697; *Canadian Human Rights Commission v Taylor*, [1990] 3 S.C.R. 892; *Schachter v Canada* [1992] 2 S.C.R 679; *R. v Sullivan*, [1991] 1 S.C.R. 489; *R. v Seaboyer; R. v Gayme*, [1991] 2 S.C.R. 577; *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *R. v Butler,* [1992] 1 S.C.R. 452; *M.(K) v M (H)*, [1992] 3 S.C.R. 6; *Moge v Moge,* [1992] 3 S.C.R. 813; *Weatherall v Canada (Attorney General)*, [1993] 2 S.C.R. 872; *R. v Whitley*, [1994] 3 S.C.R. 830; *R. v O'Connor*, [1995] 4 SCR 411; *Thibaudeau v Canada*, [1995] 2 S.C.R. 627; *A. (L.L.) v B. (A.),*, [1995] 4 S.C.R. 536; *Gordon v Goertz*, [1996] 2 S.C.R. 27; *Vriend v Alberta,* [1998] 1 S.C.R. 3; *R. v Ewanchuk*, [1999] 1 S.C.R. 330; *M. v H.*, [1999] 2 S.C.R. 3; *British Columbia (Public Service Employee Relations Commission) v BCGSEU ["Meiorin"]*, [1999] 3 S.C.R. 3; *R. v Mills*, [1999] 3 S.C.R. 668; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44; *R. v Darrach*, [2000] 2 S.C.R. 443; *R. v Shearing*, [2002] 3 S.C.R. 33; *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 S.C.R. 381; *Dickie v Dickie*, 2007 SCC 8; *Honda Canada Inc. v Keays,* 2008 SCC 39; *Withler v Canada (Attorney General)* 2011 SCC 12; *R. v J.A.*, 2011 SCC 28; *L.M.P. v L.S.*, 2011 SCC 64; *Québec (Attorney General) v A.*, 2013 SCC 5; and *Saskatchewan (Human Rights Commission) v Whatcott,* 2013 SCC 11.

8. LEAF has also previously intervened at the Federal Court of Appeal in *Schachter v Canada*, [1990] 2 F.C. 129; *Miller v Canada (Attorney General)*, 2002 FCA 370; *Canada (Attorney General) v Lesiuk*, 2003 FCA 3; *Jean v Canada*, 2009 FCA 377; and *Canada (Attorney General) v Johnstone*, 2014 FCA 110.

9. Through its interventions, LEAF has successfully argued for novel approaches to the judicial consideration of *Charter* rights, including, in particular, equality rights under s. 15(1). For example:

(a) LEAF was central in gaining recognition of new analogous grounds under s. 15(1) of the Charter in such cases as: *Andrews v Law Society of British Columbia, supra*; *Vriend v Alberta, supra*; and *Falkiner v Ontario (Minister of Community and Social Services*), 2002 CanLII 44902 (ON CA);

(b) LEAF played a key role in the Supreme Court of Canada's decision in *Withler v Canada (Attorney General), supra,* to eliminate the requirement of a mirror image comparator group in s. 15(1) analysis; and

(c) Of particular importance to this case, LEAF has developed and advanced approaches to s. 15(1) analysis that consider and account for the reality that discrimination based on sex or gender is experienced differently by individuals whose identities also encompass other prohibited grounds of discrimination such as race, class, Aboriginal status, sexual orientation, poverty, and/or disability. LEAF thus has expertise regarding women's experiences of inequality as shaped by the intersection of multiple prohibited grounds. Examples include: *Norberg v Wynrib*, [1992] 2 S.C.R. 226; *Winnipeg Child and Family Services v G.(D.F.)*, [1997] 3 S.C.R. 925; *Eldridge v British Columbia (Attorney General), supra*; *Falkiner v Ontario, supra*; *Jean v Canada, supra*; and *R. v N.S.*, 2012 SCC 72; and *R. v D.A.I.*, 2012 SCC 5.

10. Significantly, LEAF has also engaged in legal challenges on behalf of Muslim women who wear the niqab, including before both the Ontario Court of Appeal and the Supreme Court of Canada in *R. v N.S.* [2012] SCR 726.

11. In addition, LEAF made a submission to the Québec National Assembly in 2010, urging the withdrawal of Bill 94, "An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions", which would have excluded Muslim women who wear the niqab or burqa from public services and institutions.

12. LEAF issued a statement in 2013 urging the Québec government to withdraw its proposed Québec Charter of Values. LEAF stated that:

> To focus on what a woman wears in the name of equality is a perverse retrenchment of myths against which we have fought for a very long time. We need to engage with the issues that really matter in order to achieve equality, rather than seeking to divide us along lines that will only serve to intensify inequality. The proposal runs counter to a Canada and a Québec that cherish and celebrate a diverse society.

13. More recently, LEAF engaged in a research and community engagement project to consider the intersection of religion and equality rights. LEAF hosted a packed community event in Toronto entitled "What is Barbaric? Feminist Reflections on Religion and Equality" on January 29, 2015. The panel discussion referenced the Minister of Citizenship and Immigration sponsored Bill S-7, the "Zero Tolerance for Barbaric Cultural Practices Act". LEAF hosted a full-day symposium the next day, bringing together academics, activists and advocates with expertise regarding the intersection of

religion and equality rights to engage in a dialogue about the challenges facing women's equality in Canada, including a particular focus on the challenges facing Muslim women.

14. As a result of our advocacy in this area, LEAF has now been invited to contribute to a national civil society organizations' shadow report to the United Nations Human Rights Committee on Canada's compliance with the International Convention on Civil and Political Rights. LEAF is specifically asked to contribute sections of the report related to the rights of niqab-wearing women in Canada.

LEAF's Interest in this Appeal

15. This appeal raises important substantive equality questions under s. 15 of the *Charter*, including:

(a) the gendered impacts of section 13.2 of Citizenship and Immigration Canada's policy manual, "CP 15: Guide to Citizenship Ceremonies", which creates a unique discriminatory effect for Muslim women who wear the niqab;

(b) how s. 15(1) *Charter* analysis should consider complex forms of discrimination, including how laws and policies that create a distinction among groups may have a particularly adverse impact on women who experience discrimination on multiple grounds, and who thus experience greater and distinctive effects of inequality; and

(c) how s. 15(1) analysis should consider the intersecting religious and equality rights of women.

16. The way courts approach these issues affects how they evaluate *Charter* claims which in turn affects the protection of equality rights more broadly. As an organization that actively participates in litigation to expand the scope of equality rights, LEAF has an interest in this appeal and the *Charter* issues it raises.

17. I believe that LEAF's expertise and perspective as an experienced intervener in equality rights litigation will assist the Court in ensuring that its interpretation of s. 15 of the *Charter* is responsive to the social, economic and political realities facing women generally and immigrant women, in particular. Drawing on its experience, LEAF will bring different and valuable insights to assist the Court in its understanding and application of a purposive and inclusive approach to *Charter* law.

LEAF's Unique Perspective

18. LEAF will provide the Court with a unique perspective and particular expertise on the issues raised in this appeal because LEAF:

(a) represents a diversity of women across Canada;

(b) has particular expertise concerning equality law and theory;

(c) has particular expertise in the development of key equality jurisprudence recognizing and advancing substantive equality;

(d) has particular expertise on the adverse impact of differential treatment experienced by minority women;

(e) has particular expertise regarding how women's experiences of inequality are shaped by the intersection of multiple prohibited grounds, an issue

likely to arise in cases, like this one, involving immigrants and citizenship applicants; and

(f) knows that immigrant women, some of the most marginalized members of society, do not have the resources, economic or otherwise, to litigate their rights before the Federal Court of Appeal. The opportunity for LEAF to intervene before this Court to make submissions on the gendered dimensions of this appeal is an important way to provide access to justice for these women.

LEAF's Intended Arguments

19. I confirm that if granted leave to intervene, LEAF proposes to make the following arguments concerning the Citizenship and Immigration Canada Policy that prohibits Ms. Ishaq from wearing her niqab during her citizenship ceremony (the "Policy"):

(a) State control or regulation of women's clothing, including religious attire, disadvantages all women. Historically, a woman's clothing has been interpreted as an indicium of her trustworthiness and character. Sexual assault complainants were evaluated as victim-worthy and credible based on their dress or demeanour. Though McLachlin J. (as she then was) wrote 15 years ago that such assumptions about women are stereotypical and no longer "find a place in Canadian law",[1] these same misogynistic beliefs permeate the Policy. The Policy assumes that women who wear a niqab are not only more able (because of their veils), but also more likely

[1] *R. v Ewanchuk*, [1999] 1 SCR 330 at ¶ 103

(because of some unnamed inherent quality), than other citizenship candidates to defraud the oath. Based on stereotypical views of her clothing, the Policy forces a woman to choose, at an important moment in her life, between denying who she is and foregoing citizenship.

(b) The Policy disadvantages women by disenfranchising them. The struggle for suffrage has historically been both gendered and racialized, with women only attaining full suffrage in Canada in 1960 when Aboriginal women were finally afforded the right to vote. The disenfranchisement of women – who are otherwise qualified to be citizens – because of what they wear excludes women from our democratic institutions and diminishes the equality rights of all women. Women's voices are silenced when they are denied the right to vote and participate fully in Canadian public life by seeking public office. The appellant's prohibition of the niqab effectively shuts out niqab-wearing women from Canadian democratic processes contrary to ss. 2(a) and 15 of the *Charter* and the constitutional principles of democracy, constitutionalism and the rule of law, and respect for minorities.

(c) The Policy exacerbates barriers already faced by women in immigration and citizenship processes, and vulnerabilities as a result of their precarious immigration status. Immigrant women are more likely to face poverty,[2] are more vulnerable to intimate-partner violence (especially if

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[2] Tina Chui, "Immigrant Women", *Women in Canada: A Gender-based Statistical Report*. (Statistics Canada, July 2011), <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11528-eng.pdf> at pp 29,

sponsored by a spouse),[3] and may face language and cultural challenges in accessing services or employment.[4] A denial of citizenship to otherwise-qualified immigrant women only aggravates these conditions and enhances inequality.

(d) The Policy, and the government's public media comments as to its purposes, legitimizes the unique stigmatization that niqab-wearing Muslim women face. By refusing niqab-wearing Muslim women access to citizenship and the rights it confers, the Policy creates the isolation that the appellant claims is self-imposed. LEAF will advance an intersectional s. 15 analysis focusing on the gender and religious discrimination suffered by women who are Muslim and who wear the niqab. In doing so, it will argue that the Policy also perpetuates two dangerous and contradictory stereotypes of niqab-wearing Muslim women: as victim (of Muslim men and a misogynistic culture) and as threat (to fundamental "Canadian values").

31; Ontario Council of Agencies Serving Immigrants (OCASI), *Making Ontario Home 2012: A Study of Settlement and Integration Services for Immigrants and Refugees.* <http://www.ocasi.org/downloads/OCASI_MOH_ENGLISH.pdf> at p 12, citing Reitz and Banerjee, 2007; Shields et al., 2010; Block and Galabuzi, 2011; Galabuzi, 2005 (citations available in the document's bibliography).

[3] Ending Violence Association of BC, MOSAIC, Vancouver & Lower Mainland Multicultural Family Support Services Society. *Immigrant Women's Project: Safety of Immigrant, Refugee and Non-Status Women,* <http://endingviolence.org/files/uploads/IWP_Resource_Guide_FINAL.pdf> at p 8.

[4] Sheryl Burns, "Single Mothers Without Legal Status in Canada: Caught in the Intersection Between Immigration Law and Family Law" (YWCA Vancouver, 2010) <http://www.ywcavan.org/sites/default/files/resources/downloads/YWCA%20Mothers%20Without%20Legal%20Status%20Report_2010_web.pdf>, at p 27; Canadian Research Institute for the Advancement of Women, "Fact Sheet: Immigrant and Refugee Women" (CRIAW, No. 5, 2003), <http://www.criaw-icref.ca/sites/criaw/files/Immigrant%20%26%20Refugee%20Women%20Factsheet.pdf>, at pp 5,6,8.

20. In addition to the fact that LEAF's arguments will be substantively different from those of the other parties, the process LEAF will follow in developing its legal analysis is unique. LEAF develops its legal arguments in consultation and collaboration with leading academics, experts, and practitioners from across Canada who have considerable experience in studying and exposing social inequality and the impact that inequality has on vulnerable groups. Although this consultation process is time-consuming and can sometimes cause delay in our ability to seek leave to intervene, LEAF uses this extensive review process to ensure its submissions as an intervener are of use to the Court and do not duplicate the submissions of the other parties. LEAF will dedicate its knowledge, skills and resources to this matter. I believe that LEAF's expertise and attention to diverse perspectives would contribute to a fuller hearing of the issues by this Court.

Proposed Terms for Intervention

21. I do not believe that an intervention by LEAF will cause prejudice to other parties, especially in light of the terms upon which LEAF proposes to participate. If granted leave to intervene, LEAF will consult with the respondent and any other interveners to ensure that LEAF's submissions are not duplicative.

22. LEAF seeks leave to intervene on the following terms:

(a) LEAF will not lead evidence, but will rely on the evidence adduced by the parties and on the documents referred to in the lower court decision, as well as any other documents of which this Court may take judicial notice;

(b) LEAF will be served with all materials of the parties and other interveners;

(c) LEAF will file and serve its memorandum of fact and law of no more than 25 pages in length in this appeal;

(d) LEAF will have the right to make oral submissions before the Court of no more than 20 minutes in duration; and

(e) LEAF will not seek costs, nor shall costs be awarded against it.

23. I swear this affidavit in support of LEAF's motion for leave to intervene, to file written submissions, and to present oral argument in *The Minister of Citizenship and Immigration v Ishaq* and for no other purpose.

SWORN BEFORE me at the City of Toronto, this 1st day of June, 2015.

A Commissioner for taking affidavits
Kim Stanton (LSUC #61160H)

DIANE O'REGGIO

THE MINISTER OF CITIZENSHIP AND IMMIGRATION Appellant (Respondent)	and	ZUNERA ISHAQ Respondent(Applicant)	Court File No.: A-1247-15

FEDERAL COURT OF APPEAL

Proceeding commenced at TORONTO

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TAB 3

Court File No. A-124-15

FEDERAL COURT OF APPEAL

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

- and -

ZUNERA ISHAQ

Respondent

WRITTEN REPRESENTATIONS OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

MOTION OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. FOR LEAVE TO INTERVENE

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Lawyers for the Respondent, Zunera Ishaq

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PART I - OVERVIEW

1. The Women's Legal Education and Action Fund Inc. ("LEAF") seeks leave to intervene in this appeal pursuant to Rule 109 of the Federal Court Rules,[1] to assist the Court in its consideration of the substantive equality issues that arise in this case.

2. This appeal raises issues that go to the core of LEAF's experience, namely the specific gendered impacts of discriminatory laws and policies and, in particular, the effects on individuals like Muslim women, who experience discrimination on multiple grounds and are subject to greater effects of inequality.

3. If granted leave to appeal, LEAF will provide a voice to the gendered dimension of this appeal and a unique and informed perspective on the equality issues that are raised. LEAF will draw upon its expertise in equality rights including the development, interpretation and application of s. 15 of the *Charter of Rights and Freedoms* (the "*Charter*") to provide the Court with helpful assistance on the intersectional, gendered framework within which to approach s. 15 equality issues when resolving the important public issues raised in this appeal.

PART II – FACTS

LEAF's Background

4. LEAF is a national, non-profit organization founded in 1985 to advance the equality rights of women and girls in Canada as guaranteed by the *Charter*. To this end, LEAF engages in equality and human rights litigation, law reform work and public education.[2]

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[1] *Federal Court Rules*, SOR/98-106, r. 109

[2] Affidavit of Diane O'Reggio, sworn June 1, 2015, Motion Record of the Women's Legal Education and Action Fund Inc. for leave to intervene, Tab 2 ("O'Reggio Affidavit"), at ¶ 3

5. LEAF is an organization that is national in scope, with branches across Canada and an affiliated organization in British Columbia. Its membership is broad and includes women of all ages and backgrounds located across Canada.[3]

6. As an intervener, LEAF will be able to provide a unique perspective and particular expertise on the issues raised in this appeal. LEAF has a long history of representing the interests of a diversity of women across Canada in equality rights cases. Through its litigation work, LEAF gives a voice to women who experience discrimination on the basis of sex or gender, and from the intersection of multiple personal characteristics, including sex, gender, race, ethnic origin, and religion, among others. LEAF has expertise on such matters, including how laws and policies that create a distinction among groups may have a particularly adverse impact on individuals such as Muslim women, who experience discrimination on multiple grounds and who thus experience greater and distinctive effects of inequality.[4]

7. LEAF has previously contributed to the meaning of substantive equality and equality rights jurisprudence in Canada through interventions in dozens of cases throughout the last 30 years including: *Canadian Newspapers Co. v Canada (Attorney General)*, [1988] 2 S.C.R. 122; *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Borowski v The Attorney General of Canada*, [1989] 1 S.C.R. 342; *Brooks v Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Janzen and Govereau v Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Tremblay v Daigle*, [1989] 2 S.C.R. 530; *R. v Keegstra*, [1990] 3 S.C.R. 697; *Canadian Human Rights Commission v Taylor*, [1990] 3 S.C.R. 892; *Schachter v Canada* [1992] 2 S.C.R 679; *R. v Sullivan*, [1991] 1 S.C.R. 489; *R. v Seaboyer*; *R. v Gayme*, [1991] 2 S.C.R. 577; *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *R. v Butler*, [1992] 1 S.C.R. 452; *M.(K) v M (H)*, [1992] 3 S.C.R. 6; *Moge v Moge*, [1992] 3 S.C.R. 813; *Weatherall v Canada (Attorney General)*, [1993] 2 S.C.R. 872; *R. v Whitley*, [1994] 3 S.C.R. 830; *R. v O'Connor*, [1995] 4 SCR 411; *Thibaudeau v Canada*, [1995] 2 S.C.R.

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[3] O'Reggio Affidavit at ¶ 4

[4] O'Reggio Affidavit at ¶ 5-6

627; *A. (L.L.) v B. (A.)*, [1995] 4 S.C.R. 536; *Gordon v Goertz*, [1996] 2 S.C.R. 27; *Vriend v Alberta*, [1998] 1 S.C.R. 3; *R. v Ewanchuk*, [1999] 1 S.C.R. 330; *M. v H.*, [1999] 2 S.C.R. 3; *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 S.C.R. 3; *R. v Mills*, [1999] 3 S.C.R. 668; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44; *R. v Darrach*, [2000] 2 S.C.R. 443; *R. v Shearing*, [2002] 3 S.C.R. 33; *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 S.C.R. 381; *Dickie v Dickie*, 2007 SCC 8; *Honda Canada Inc. v Keays*, 2008 SCC 39; *Withler v Canada (Attorney General)* 2011 SCC 12; *R. v J.A.*, 2011 SCC 28; *L.M.P. v L.S.*, 2011 SCC 64; *Québec (Attorney General) v A.*, 2013 SCC 5; and *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.[5]

8. LEAF has also previously intervened at the Federal Court of Appeal in *Schachter v Canada*, [1990] 2 F.C. 129; *Miller v Canada (Attorney General)*, 2002 FCA 370; *Canada (Attorney General) v Lesiuk*, 2003 FCA 3; *Jean v Canada*, 2009 FCA 377; and *Canada (Attorney General) v Johnstone*, 2014 FCA 110.[6]

9. Through its interventions, LEAF has made important contributions to the development of the section 15(1) jurisprudence, including gaining recognition of new analogous grounds[7] and eliminating the requirement of a mirror image comparator group.[8] Significantly, LEAF has developed and advanced intersectional approaches to section 15(1) analysis, which will be critical to the thorough understanding of the issues on this appeal.[9]

10. Courts have drawn upon LEAF's experience, perspective and analysis in other cases that involve these intersectional issues. The Ontario Court of Appeal and the

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[5] O'Reggio Affidavit at ¶ 7
[6] O'Reggio Affidavit at ¶ 8
[7] O'Reggio Affidavit at ¶ 9(a)
[8] O'Reggio Affidavit at ¶ 9(b)
[9] O'Reggio Affidavit at ¶ 9(c)

Supreme Court of Canada welcomed LEAF's contribution as intervener in *R. v. N.S.*, another legal challenge on behalf of Muslim women who wear the niqab.[10]

11. In addition, LEAF has contributed to public discussion of issues around the equality rights of Muslim women who wear the niqab. It made a submission to the Québec National Assembly in 2010, urging the withdrawal of Bill 94, "An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions", which would have excluded Muslim women who wear the niqab or burqa from public services and institutions. It also issued a statement in 2013 urging the Québec government to withdraw its proposed Québec Charter of Values, noting that "focusing on what a woman wears in the name of equality is a perverse retrenchment of myths against which [women] have fought for a very long time".[11]

12. LEAF recently engaged in a research and community engagement project to consider the intersection of religion and equality rights, hosting an event entitled "What is Barbaric? Feminist Reflections on Religion and Equality" on January 29, 2015. The panel discussion referenced the Minister of Citizenship and Immigration sponsored Bill S-7, the "Zero Tolerance for Barbaric Cultural Practices Act". LEAF hosted a full-day symposium the next day, bringing together academics, activists and advocates with expertise regarding the intersection of religion and equality rights to engage in a dialogue about the challenges facing women's equality in Canada, including a particular focus on the challenges facing Muslim women.[12]

13. As a result of its advocacy in this area, LEAF has now been invited to contribute to a national civil society organizations' shadow report to the United Nations Human Rights Committee on Canada's compliance with the International Convention on Civil and Political Rights. LEAF has specifically been asked to contribute sections of the report related to the rights of niqab-wearing women in Canada.[13]

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[10] O'Reggio Affidavit at ¶ 10
[11] O'Reggio Affidavit at ¶ 11-12
[12] O'Reggio Affidavit at ¶ 13
[13] O'Reggio Affidavit at ¶ 14

LEAF's Interest in the Appeal

14. This case raises important substantive equality questions under s. 15 of the *Charter* including:

(a) the gendered impacts of s. 13.2 of Citizenship and Immigration Canada's policy manual, "CP 15: Guide to Citizenship Ceremonies" (the "Policy"), which creates a unique discriminatory effect for Muslim women who wear the niqab;

(b) how s. 15(1) *Charter* analysis should consider complex forms of discrimination, including how laws and policies that create a distinction among groups may have a particularly adverse impact on women who experience discrimination on multiple grounds, and who thus experience greater and distinctive effects of inequality; and

(c) how s. 15(1) analysis should consider the intersecting religious and equality rights of women.[14]

15. A court's approach to these issues affects how it evaluates *Charter* claims which in turn affects the protection of equality rights more broadly. As an organization that actively participates in litigation to expand the scope of equality rights, LEAF has an interest in this appeal and the *Charter* issues it raises.[15]

16. LEAF's expertise and perspective as an experienced intervener in equality rights litigation and as an advocate in public discussions around issues of discrimination including how they impact Muslim women who wear the niqab, will assist the Court in ensuring that its interpretation of s. 15 is responsive to the social, economic and political realities facing immigrant women and that it follows a purposive and inclusive approach to *Charter* law.[16]

17. Immigrant women are often some of the most marginalized members of society. Such women lack the resources, economic or otherwise, to litigate their rights before

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[14] O'Reggio Affidavit at ¶ 15
[15] O'Reggio Affidavit at ¶ 16
[16] O'Reggio Affidavit at ¶ 11-14, 17

this Court. LEAF's intervention, which will give voice to the gendered dimensions of this appeal, is an important way to provide access to justice for these women.[17]

LEAF's Intended Arguments

18. If granted leave to intervene, LEAF's arguments about the Policy that prohibits Ms. Ishaq from wearing her niqab during her citizenship ceremony will include:[18]

(a) State control or regulation of women's clothing, including religious attire, disadvantages all women. Historically, a woman's clothing has been interpreted as an indicium of her trustworthiness and character. Sexual assault complainants were evaluated as victim-worthy and credible based on their dress or demeanour. Though McLachlin J. (as she then was) wrote 15 years ago that such assumptions about women are stereotypical and no longer "find a place in Canadian law",[19] these same misogynistic beliefs permeate the Policy. The Policy assumes that women who wear a niqab are not only more able (because of their veils), but also more likely (because of some unnamed inherent quality), than other citizenship candidates to defraud the oath. Based on stereotypical views of her clothing, the Policy forces a woman to choose, at an important moment in her life, between denying who she is and foregoing citizenship.

(b) The Policy disadvantages women by disenfranchising them. The struggle for suffrage has historically been both gendered and racialized, with women only attaining full suffrage in Canada in 1960 when Aboriginal women were finally afforded the right to vote. The disenfranchisement of women – who are otherwise qualified to be citizens – because of what they wear excludes women from our democratic institutions and diminishes all women's equality rights. Women's voices are silenced when they are denied the right to vote and participate fully in Canadian

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[17] O'Reggio Affidavit at ¶ 18(d)(e) and (f)
[18] O'Reggio Affidavit at ¶ 19
[19] *R. v Ewanchuk*, [1999] 1 SCR 330 at ¶ 103

public life by seeking public office. The appellant's prohibition of the niqab effectively shuts out niqab-wearing women from Canadian democratic processes contrary to ss. 2(a) and 15 of the *Charter* and the constitutional principles of democracy, constitutionalism and the rule of law, and respect for minorities.

(c) The Policy exacerbates barriers already faced by women in immigration and citizenship processes, and vulnerabilities as a result of their precarious immigration status. Immigrant women are more likely to face poverty, are more vulnerable to intimate-partner violence (especially if sponsored by a spouse), and may face language and cultural challenges in accessing services or employment. A denial of citizenship to otherwise-qualified immigrant women only aggravates these conditions and enhances inequality.

(d) The Policy, and the government's public media comments as to its purposes, legitimizes the unique stigmatization that niqab-wearing Muslim women face. By refusing niqab-wearing Muslim women access to citizenship and the rights it confers, the Policy creates the isolation that the appellant claims is self-imposed. LEAF will advance an intersectional s. 15 analysis focusing on the gender and religious discrimination suffered by women who are Muslim and who wear the niqab. In doing so, it will argue that the Policy also perpetuates two dangerous and contradictory stereotypes of niqab-wearing Muslim women: as victim (of Muslim men and a misogynistic culture) and as threat (to fundamental "Canadian values").

PART III – POINTS IN ISSUE

19. At issue in this motion is whether LEAF should be granted leave to intervene in the appeal.

PART IV – SUBMISSIONS

The Test for Leave to Intervene

20. The test for leave to intervene was originally set down in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*:

(a) Is the proposed intervener directly affected by the outcome?

(b) Is there a justiciable issue and a veritable public interest?

(c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the court?

(d) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(e) Are the interests of justice better served by the intervention of the proposed third party?[20]

21. In light of the discretionary nature of the decision to grant intervener status, the courts have found that not all of the above-noted criteria need be satisfied. For example, a public interest organization such as LEAF need not be "directly affected by the outcome" in order to obtain leave to intervene in cases engaging issues of constitutional or other fundamental public interest.[21]

22. Recently, in *Attorney-General of Canada v. Pictou Landing Band Council*, Stratas J.A. reformulated the test for granting leave to intervene:

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

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[20] *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 FC 74 (TD) at ¶ 12; aff'd, [1990] 1 FC 90 (FCA) [*Rothmans*]

[21] *Rothmans, supra* note 20 at ¶¶ 10-11, 16-18, 22; *Canadian Pacific Railway Company v Boutique Jacob Inc.*, 2006 FCA 426 at ¶ 21 [*Boutique Jacob*]; *Canada (Attorney General) v United States Steel Corp.*, 2010 FC 1330 at ¶ 26 [*US Steel*]

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

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

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

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?[22]

23. The updated test thus focuses the inquiry on whether the intervener has a genuine interest in the issue and demonstrates an ability and willingness to assist the court.

24. This is consistent with recent Supreme Court of Canada jurisprudence on public interest standing. In *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, the Court held that the factors to be considered when considering whether to grant public interest standing should be interpreted in a liberal and generous manner. The "factors should not be viewed as items on a checklist", but as "interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes".[23]

25. Either test should be interpreted in this manner. Under either test, LEAF satisfies the criteria for leave to intervene.

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[22] *Attorney General of Canada v. Pictou Landing Band Council,* 2014 FCA 21 at ¶ 11 [*Pictou Landing*]

[23] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* [2012] 2 SCR 524 at ¶¶ 35-36 [*Downtown Eastside*]

The *Pictou Landing* Test

i) LEAF offers detailed and particularized evidence.

26. In accordance with Rule 109, LEAF has provided detailed and well-particularized evidence about itself, its proposed submissions and how those submissions will assist the Court. In particular, LEAF will assist by presenting a perspective that draws broadly on women's experience, by providing helpful assistance on the intersectional framework within which to approach the s. 15 equality issues, and by assisting the Court in ensuring that its interpretation of s. 15 of the *Charter* will be responsive to the social, economic and political realities facing immigrant women. These arguments are not otherwise advanced by the parties.

ii) LEAF has a genuine interest in this appeal.

27. Since 1985, LEAF has been active and instrumental in the development of equality rights jurisprudence. It has particular expertise in advancing equality law and theory, and substantive equality, and expertise on the adverse impact of differential treatment experienced by minority women. LEAF represents a diversity of women across Canada and has expertise about how women's experiences of inequality are shaped by the intersection of multiple prohibited grounds.

28. LEAF's expertise and leadership in advocating for substantive equality has been described by one academic as follows:

> As the lead feminist equality rights intervener, participating in more equality-related cases than any other social movement organization, LEAF has played a critical role in coaxing the Supreme Court away from its previously formalist understanding of equality to a more nuanced, contextualized, and substantive vision.[24]

29. LEAF's extensive history of interventions in equality rights cases, coupled with its unique consultive and collaborative process in the development of its legal arguments,[25] demonstrates that it has the necessary knowledge, skills and resources to assist the

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[24] Radha Jhappan, "Introduction: Feminist Adventures in Law" in Radha Jhappan, ed., *Women's Legal Strategies in Canada,* (Toronto: University of Toronto Press, 2002) p. 9

[25] O'Reggio Affidavit at ¶ 20

Court in this matter. As its history of useful interventions demonstrates, LEAF will dedicate these resources to the appeal before the Court.

iii) LEAF will advance different and valuable insights and perspectives.

30. If granted leave, LEAF will make the different and valuable submissions, described above at ¶ 18, on the intersectional approach to s. 15(1) analysis. Given LEAF's long history of advocacy and participation in litigation affecting women's rights, LEAF will also assist the Court through its ability to provide context on the issues raised in this appeal that has not otherwise been explored by the parties or the other proposed interveners. LEAF will do so without augmenting the record.

iv) It is in the interests of justice to permit LEAF's intervention.

31. This appeal has attracted a great deal of public attention. It has engaged Canadian society on matters such as what it means to be "Canadian", Islamophobia, the role and treatment of women, religious freedom and equality rights. The issues are "public, important and complex",[26] and as such, this is exactly the type of appeal in which the Court will benefit from exposure to perspectives beyond those offered by the parties.

32. LEAF's intervention will provide the Court with its wealth of experience and its unique perspective on the equality issues raised in this appeal. This will assist the Court and serve the interests of justice by ensuring full argument in this very important equality rights appeal.

v) LEAF's intervention will not prejudice the parties.

33. LEAF's intervention is not inconsistent with the imperatives of Rule 3 of the Federal Court Rules, namely to secure "the just, most expeditious and least expensive determination of every proceeding on its merits".[27] As noted above, the interests of justice are advanced when full argument on these complex issues is heard. LEAF's

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[26] *Pictou Landing*, *supra* note 22 at ¶ 11(IV)
[27] *Federal Court Rules*, SOR/98-106, r. 3

intervention will not cause any delay or otherwise prejudice the parties, as LEAF does not propose to augment the record nor will it seek costs.

The *Rothmans* Test

34. LEAF's intervention is also justified under the *Rothmans* test:

(a) **Directly Affected By the Outcome** - As noted above, this Court has held that it is not necessary for LEAF to be directly affected by the outcome of an appeal to be granted leave to intervene.[28] As a public interest organization and leading advocate in the advancement of women's equality and the development of equality jurisprudence in Canada, LEAF has a genuine interest in the outcome of this appeal sufficient to satisfy this criteria.

(b) **Justiciable Issue of Veritable Public Interest** – This appeal raises issues relating to the constitutionality of the Policy, including, among others, whether it is a violation of s. 15 of the *Charter*. This issue has significant implications for the development of equality jurisprudence in Canada and is of veritable public interest. A justiciable issue need not exist as between a party and an intervener. Leave to intervene can be granted when the court could hear and decide an application on the merits without interveners.[29]

(c) **Reasonable and Efficient Means to Submit the Question to the Court** – Granting LEAF leave to intervene in the appeal is a reasonable and efficient means to submit the question to the Court. The Supreme Court of Canada has held, in the context of public interest standing, that this criteria requires a flexible, discretionary approach.[30] LEAF's expertise in advocating for women will allow it to voice concerns relevant to immigrant

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[28] *Rothmans, supra* note 20 at ¶¶ 10-11, 16-18, 22; *Boutique Jacob, supra* note 21 at ¶ 21; *US Steel, supra* note 21 at ¶ 26

[29] *US Steel, supra* note 21 at ¶¶ 40, 42 and 64

[30] *Downtown Eastside, supra* note 23 at ¶ 50

women who do not have the means, economic or otherwise, to bring these issues to the Federal Court. Thus, LEAF's intervention will provide access to justice for those women. LEAF's intervention will not cause any delay or prejudice to the parties and will be an efficient way to have a full hearing on the issues raised in the appeal.

(d) **Adequate Defence of Proposed Intervener's Position by One of the Parties** - LEAF's position is not adequately represented by the parties. LEAF's perspective on, and expertise in, the advancement of equality rights is unique and grounded in its history of intervening in leading cases on Canadian equality law. LEAF represents a diversity of women across Canada and has expertise regarding women's experiences of inequality as shaped by the intersection of multiple prohibited grounds. Courts have granted leave to intervene even when there is some overlap between the positions of the proposed intervener and one of the parties.[31] Here, LEAF's proposed arguments do not overlap with the arguments made by the parties. If granted leave to intervene, LEAF will work to ensure that it does not duplicate the arguments of the parties or any other interveners.

(e) **Interests of Justice** – The interests of justice will be served by granting LEAF leave to intervene. LEAF's participation will ensure that the Court has the benefit of full argument on the issues before it.

35. Accordingly, LEAF has met both the traditional *Rothmans* test and the reformulated *Pictou Landing* test for intervention. LEAF's submission will assist the Court in its just resolution of the complex, public issues raised in this appeal.

PART V – ORDER SOUGHT

36. For the reasons set out above, LEAF requests an order:

(a) granting it leave to intervene in this appeal on the following terms:

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[31] *Rothmans, supra* note 20 at ¶ 15, *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd.* (1990), 74 OR (2d) 164 (CA) at 3.

(i) LEAF will not lead evidence but will rely on the evidence adduced by the parties or the documents referred to in the Reasons of the Federal Court, as well as any other documents of which this court may take judicial notice;

(ii) LEAF will be served with all materials of the parties;

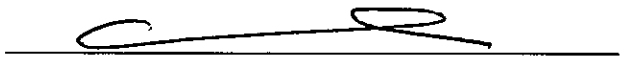
(iii) LEAF will file its memorandum of fact and law not exceeding 25 pages in length in this appeal;

(iv) LEAF will have the right to make oral submissions before the Court, of no more than 20 minutes duration; and

(v) LEAF will not seek costs, nor shall costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF JUNE, 2015.

Jasmine T. Akbarali



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PART VI – LIST OF AUTHORITIES

Para(s).

APPENDIX A

RELEVANT STATUTORY PROVISIONS

Federal Court Rules, SOR/98-106, Rule 3

General principle

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

Federal Court Rules, SOR/98-106, Rule 109

Leave to intervene

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

Marginal note: Contents of notice of motion

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

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

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

Marginal note: Directions

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

- (*a*) the service of documents; and

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

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
Appellant (Respondent)

and

ZUNERA ISHAQ
Respondent(Applicant)

Court File No.: A-124-15

FEDERAL COURT OF APPEAL

Proceeding commenced at TORONTO

WRITTEN REPRESENTATIONS OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

MOTION OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. FOR LEAVE TO INTERVENE

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Lawyers for the Women's Legal Education and Action Fund Inc.

TAB 4

PARA 11

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 29, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

[2] The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The respondents consent to the motions.

[3] Rule 109 provides as follows:

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109.** (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	*a*) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	*b*) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	(3) La Cour assortit l'autorisation d'intervenir de directives concernant :
(*a*) the service of documents; and	*a*) la signification de documents;
(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	*b*) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[4] Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

[5] The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.), an oft-applied authority: see, *e.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (F.C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

[6] In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

[7] In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to

others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

[8] In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

[9] The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

- *Is the proposed intervener directly affected by the outcome?* "Directly affected" is a requirement for full party status in an application for judicial review – *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.

- *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is

not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250.

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners – and others – are not allowed to raise new questions on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 22-29.

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court

assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing – and to do – justice in the case.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

[10] To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

- *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7.

- *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?* Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this, brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

[11] To summarize, in my view, the following considerations should guide whether intervener status should be granted:

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

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

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

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

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

[12] In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

[13] I shall now apply these considerations to the motions before me.

– I –

[14] The moving parties have complied with the specific procedural requirements in Rule 109(2). This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association, supra* at paragraphs 34-39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

– II –

[15] The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

– III –

[16] Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

[17] To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

[18] This appeal arises from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Band Council: *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle.

[19] Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010 she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

[20] Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon *Jordan's Principle*, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

[21] Aboriginal Affairs and Northern Development Canada considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The

respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

[22] The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

[23] The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it.

[24] This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

[25] The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

[26] If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of

acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 37-41 and see also *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at paragraph 22, *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50, and *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. In what precise circumstances the range broadens or narrows is unclear – at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

[27] In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the contextual matters they propose to raise – informed by their different and valuable insights and perspectives – will actually further the Court's determination of the appeal one way or the other.

– IV –

[28] Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal – the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle – have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the

circumstances of this case, it is in the interests of justice that the Court should expose itself to perspectives beyond those advanced by the existing parties before the Court.

[29] These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

– V –

[30] The proposed interventions are not inconsistent with the imperatives in Rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the "just...determination of [this] proceeding on its merits."

[31] The matters the moving parties intend to raise do not duplicate the matters already raised in the parties' memoranda of fact and law.

[32] Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of Rule 3, I shall impose strict terms on the moving parties' intervention.

[33] In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties' motions to intervene should be granted.

[34] Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners' memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with Rules 65-68 and 70, and shall be no more than ten pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than fifteen minutes at the hearing of the appeal. The interveners are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

"David Stratas"

J.A.

Federal Court of Appeal | Cour d'appel fédérale

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-158-13

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v. PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: JANUARY 29, 2014

WRITTEN REPRESENTATIONS BY:

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Justin Safayeni Kathrin Furniss	FOR THE PROPOSED INTERVENER, AMNESTY INTERNATIONAL
Katherine Hensel Sarah Clarke	FOR THE PROPOSED INTERVENER, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

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TAB 5

PARAS 35-36; 50

Attorney General of Canada *Appellant*

v.

Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach *Respondents*

and

Attorney General of Ontario, Community Legal Assistance Society, British Columbia Civil Liberties Association, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario and Positive Living Society of British Columbia *Interveners*

Procureur général du Canada *Appelant*

c.

Downtown Eastside Sex Workers United Against Violence Society et Sheryl Kiselbach *Intimées*

et

Procureur général de l'Ontario, Community Legal Assistance Society, Association des libertés civiles de la Colombie-Britannique, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Association canadienne des libertés civiles, Association canadienne des avocats et avocates en droit des réfugiés, Conseil canadien pour les réfugiés, Réseau juridique canadien VIH/sida, HIV & AIDS Legal Clinic Ontario et Positive Living Society of British Columbia *Intervenants*

INDEXED AS: CANADA (ATTORNEY GENERAL) *v.* DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY

2012 SCC 45

File No.: 33981.

2012: January 19; 2012: September 21.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Parties — Standing — Public interest standing — Public interest group and individual working on behalf of sex workers initiating constitutional

RÉPERTORIÉ : CANADA (PROCUREUR GÉNÉRAL) *c.* DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY

2012 CSC 45

N° du greffe : 33981.

2012 : 19 janvier; 2012 : 21 septembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

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

Procédure civile — Parties — Qualité pour agir — Qualité pour agir dans l'intérêt public — Groupe de défense de l'intérêt public et individu œuvrant pour

challenge to prostitution provisions of Criminal Code — Whether constitutional challenge constituting a reasonable and effective means to bring case to court — Whether public interest group and individual should be granted public interest standing.

A Society whose objects include improving conditions for female sex workers in the Downtown Eastside of Vancouver and K, who worked as such for 30 years, launched a *Charter* challenge to the prostitution provisions of the *Criminal Code*. The chambers judge found that they should not be granted either public or private interest standing to pursue their challenge; the British Columbia Court of Appeal, however, granted them both public interest standing.

Held: The appeal should be dismissed.

In determining whether to grant standing in a public law case, courts must consider three factors: whether the case raises a serious justiciable issue; whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favor granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred.

In this case, the issue that separates the parties relates to the formulation and application of the third factor. This factor has often been expressed as a strict requirement that a party seeking standing persuade the court that there is *no* other reasonable and effective manner in which the issue may be brought before the court. While this factor has often been expressed as a strict requirement, this Court has not done so consistently and in fact has rarely applied the factor restrictively. Thus, it would be better expressed as requiring that the proposed suit be, in all of the circumstances and in light of a number of considerations, *a* reasonable and effective means to bring the case to court.

les travailleuses du sexe à l'origine d'une contestation constitutionnelle des dispositions du Code criminel relatives à la prostitution — La contestation constitutionnelle constitue-t-elle une manière raisonnable et efficace de soumettre la cause à la cour? — Le groupe de défense de l'intérêt public et l'individu devraient-ils se voir reconnaître la qualité pour agir dans l'intérêt public?

Une Société dont l'objet consiste notamment à améliorer les conditions de travail des travailleuses du sexe dans le quartier Downtown Eastside de Vancouver et K, qui a exercé ce métier durant 30 ans, ont lancé une contestation fondée sur la *Charte* des dispositions du *Code criminel* relatives à la prostitution. Le juge en cabinet a conclu qu'elles ne devraient ni l'une ni l'autre se voir reconnaître la qualité pour agir que ce soit dans l'intérêt public ou privé afin de poursuivre leur action; la Cour d'appel de la Colombie-Britannique leur a toutefois reconnu à toutes les deux la qualité pour agir dans l'intérêt public.

Arrêt : Le pourvoi est rejeté.

Lorsqu'il s'agit de décider s'il est justifié de reconnaître la qualité pour agir dans une cause de droit public, les tribunaux doivent soupeser trois facteurs. Ils doivent se demander si l'affaire soulève une question justiciable sérieuse; si la partie qui a intenté la poursuite a un intérêt réel dans les procédures ou est engagée quant aux questions qu'elles soulèvent; et si la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations, constitue une manière raisonnable et efficace de soumettre la question à la cour. Le demandeur qui souhaite se voir reconnaître la qualité pour agir dans l'intérêt public doit convaincre la cour que ces facteurs, appliqués d'une manière souple et téléologique, militent en faveur de la reconnaissance de cette qualité. Toutes les autres considérations étant égales par ailleurs, un demandeur qui possède de plein droit la qualité pour agir sera généralement préféré.

La question qui oppose les parties en l'espèce a trait à la formulation et à l'application du troisième de ces facteurs. Ce facteur a longtemps été qualifié d'exigence stricte que la personne demandant la reconnaissance de sa qualité pour agir devait démontrer qu'il *n'*y a *pas* d'autre manière raisonnable et efficace de soumettre la question à la cour. Il n'empêche que la Cour ne l'a pas formulé systématiquement de cette façon et l'a même rarement appliqué restrictivement. Ainsi, il serait préférable de formuler ce facteur comme exigeant que la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations, constitue *une* manière raisonnable et efficace de soumettre la question à la cour.

By taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible. Whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

In this case, all three factors, applied purposively and flexibly, favour granting public interest standing to the respondents. In fact, there is no dispute that the first and second factors are met: the respondents' action raises serious justiciable issues and the respondents have an interest in the outcome of the action and are fully engaged with the issues that they seek to raise. Indeed, the constitutionality of the prostitution provisions of the *Criminal Code* constitutes a serious justiciable issue and the respondents, given their work, have a strong engagement with the issue.

In this case, the third factor is also met. The existence of a civil case in another province is certainly a highly relevant consideration that will often support denying standing. However, the existence of parallel litigation — even litigation that raises many of the same issues — is not necessarily a sufficient basis for denying standing. Given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. Further, the issues raised are not the same as those in the other case. The court must also examine not only the precise legal issue, but the perspective from which it is made. In the other case, the perspective is very different. The claimants in that case were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. A stay of proceedings pending resolution of other litigation is

En abordant la question sous l'angle téléologique, les tribunaux doivent se demander si l'action envisagée constitue une utilisation efficiente des ressources judiciaires, si les questions sont justiciables dans un contexte accusatoire, et si le fait d'autoriser la poursuite de l'action envisagée favorise le respect du principe de la légalité. Une approche souple et discrétionnaire est de mise pour juger de l'effet de ces considérations sur la décision ultime de reconnaître ou non la qualité pour agir. Une analyse dichotomique répondant par un oui ou par un non n'est pas envisageable. Les questions visant à déterminer si une manière de procéder est raisonnable, si elle est efficace et si elle favorise le renforcement du principe de la légalité sont des questions de degré et elles doivent être analysées en fonction de solutions de rechange pratiques, compte tenu de toutes les circonstances.

En l'espèce, appliqués selon une approche téléologique et souple, les trois facteurs militent pour la reconnaissance de la qualité pour agir dans l'intérêt public des intimées. En fait, il n'y a guère de désaccord quant au fait qu'il a été satisfait aux deux premiers facteurs : la poursuite des intimées soulève des questions justiciables sérieuses et les intimées ont un intérêt dans l'issue de l'action et sont totalement engagées au regard des questions qu'elles souhaitent soulever. En effet, la constitutionnalité des dispositions du *Code criminel* relatives à la prostitution constitue une question justiciable sérieuse et les intimées, compte tenu de leur travail, ont un solide engagement à l'égard de l'enjeu en cause.

En l'espèce, il est également satisfait au troisième facteur. L'existence d'une cause civile dans une autre province constitue certainement un facteur hautement pertinent qui milite souvent contre la reconnaissance de la qualité pour agir. Toutefois, l'existence d'une instance parallèle, même si elle soulève beaucoup de questions identiques, n'est pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir. Compte tenu de l'organisation provinciale de nos cours supérieures, les décisions rendues par celles d'une province ne lient pas les cours des autres provinces. Ainsi, une instance dans une province n'apporte pas nécessairement une réponse complète au demandeur qui désire intenter une poursuite sur des questions semblables dans une autre province. En outre, les questions soulevées dans l'autre cause ne sont pas identiques à celles soulevées en l'espèce. Le tribunal doit examiner non seulement la question juridique précise posée, mais aussi le contexte dans lequel elle l'est. Or, les contextes qui sont à l'origine des contestations dans l'autre cause et dans la présente affaire sont très différents. Les demanderesses dans l'autre cause n'étaient pas principalement

one possibility that should be taken into account in exercising the discretion as to standing.

Taking these points into account here, the existence of other litigation, in the circumstances of this case, does not seem to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward.

Moreover, the existence of other potential plaintiffs, while relevant, should be considered in light of practical realities, which are such that it is very unlikely that persons charged under the prostitution provisions would bring a claim similar to the respondents'. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance.

In this case, also, the record shows that there were no sex workers in the Downtown Eastside willing to bring a challenge forward. The willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge in their own names.

Other considerations should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim.

des travailleuses de l'industrie du sexe qui exercent leur métier dans la rue, tandis que, en l'espèce, ce sont elles qui sont au cœur du débat. Finalement, mise à part la mesure radicale qui consiste à ne pas reconnaître la qualité pour agir, il pourrait y avoir d'autres stratégies en matière de gestion des litiges visant à assurer l'utilisation efficiente et efficace des ressources judiciaires. La suspension des procédures jusqu'au règlement d'autres instances est, de fait, une possibilité qui devrait être prise en compte lors de l'exercice du pouvoir discrétionnaire de reconnaître ou non la qualité pour agir.

En tenant compte de ce qui précède, l'existence de l'autre instance, dans les circonstances de la présente affaire, ne semble pas peser très lourd contre les intimées lorsqu'il s'agit de déterminer si la poursuite qu'elles ont intentée constitue une manière raisonnable et efficace de soumettre les allégations formulées à l'intention de la cour.

De plus, l'existence de demandeurs potentiels, bien qu'il s'agisse d'un facteur pertinent, ne devrait être prise en compte qu'en fonction de considérations d'ordre pratique qui sont telles qu'il est très peu probable que des personnes accusées en application des dispositions relatives à la prostitution engageraient une action semblable à celle des intimées. De plus, le caractère imprévisible inhérent aux procès criminels rend les choses encore plus difficiles pour une partie soulevant une contestation de la nature de celle engagée en l'espèce.

En outre, en l'espèce, il appert du dossier qu'aucun travailleur de l'industrie du sexe du quartier Downtown Eastside de Vancouver n'était prêt à engager une contestation exhaustive. La volonté de bon nombre de ces personnes de souscrire des affidavits ou de comparaître pour témoigner n'affecte en rien la crédibilité de leur témoignage voulant qu'elles ne soient pas prêtes ou capables d'engager en leurs propres noms une contestation de cette nature.

D'autres considérations devraient être prises en compte lors de l'examen du facteur relatif aux manières plus raisonnables et efficaces. La présente affaire constitue un litige d'intérêt public : les intimées ont soulevé des questions d'importance pour le public, des questions qui transcendent leurs intérêts immédiats. Leur contestation est exhaustive en ce qu'elle vise la presque totalité du régime législatif. Elle fournit l'occasion d'évaluer, du point de vue du droit constitutionnel, l'effet global de ce régime sur les personnes les plus touchées par ses dispositions. Une contestation de cette nature est susceptible de prévenir une multiplicité de contestations individuelles engagées dans le cadre de poursuites criminelles. Il n'y a aucun risque de porter

It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of K, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

Having found that the respondents have public interest standing to pursue their action, it is not necessary to address the issue of whether K has private interest standing.

Cases Cited

Applied: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; **discussed:** *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; **referred to:** *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, rev'd in part 2012 ONCA 186, 109 O.R. (3d) 1; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331; *Baker v. Carr*, 369 U.S. 186 (1962); *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Skinner*, [1990] 1 S.C.R. 1235; *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *R. v. Smith* (1988), 44 C.C.C. (3d) 385; *R. v. Gagne*, [1988] O.J. No. 2518 (QL); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111; *R. v. Kazelman*, [1987] O.J. No. 1931 (QL); *R. v. Bavington*, [1987] O.J. No. 2728 (QL); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223; *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255; *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232; *R. v. Bailey*, [1986] O.J. No. 2795 (QL); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (QL); *R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424.

atteinte aux droits d'autres individus ayant un intérêt plus personnel ou plus direct dans la question du fait d'une action trop générale ou mal présentée. Il est évident que la demande est plaidée avec rigueur et habileté. Rien ne laisse croire que d'autres personnes touchées de façon plus directe ou personnelle aient choisi de plein gré de ne pas contester ces dispositions. La présence de K, de même que celle de la Société, garantira que le litige aura une dimension à la fois individuelle et collective.

Ayant conclu que les intimées ont la qualité pour agir dans l'intérêt public afin de poursuivre leur action, il n'est pas nécessaire d'aborder la question de savoir si K a la qualité pour agir dans l'intérêt privé.

Jurisprudence

Arrêt appliqué : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263; **arrêts analysés :** *Finlay c. Canada (Ministre des Finances)*, [1986] 2 R.C.S. 607; *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236; *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575; *Hy and Zel's Inc. c. Ontario (Procureur général)*, [1993] 3 R.C.S. 675; *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265; **arrêts mentionnés :** *Bedford c. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, inf. en partie par 2012 ONCA 186, 109 O.R. (3d) 1; *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791; *Smith c. Attorney General of Ontario*, [1924] R.C.S. 331; *Baker c. Carr*, 369 U.S. 186 (1962); *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49; *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *R. c. Skinner*, [1990] 1 R.C.S. 1235; *R. c. Stagnitta*, [1990] 1 R.C.S. 1226; *R. c. Smith* (1988), 44 C.C.C. (3d) 385; *R. c. Gagne*, [1988] O.J. No. 2518 (QL); *R. c. Jahelka* (1987), 43 D.L.R. (4th) 111; *R. c. Kazelman*, [1987] O.J. No. 1931 (QL); *R. c. Bavington*, [1987] O.J. No. 2728 (QL); *R. c. Cunningham* (1986), 31 C.C.C. (3d) 223; *R. c. Bear* (1986), 47 Alta. L.R. (2d) 255; *R. c. McLean* (1986), 2 B.C.L.R. (2d) 232; *R. c. Bailey*, [1986] O.J. No. 2795 (QL); *R. c. Cheeseman*, C. prov. Sask., 19 juin 1986; *R. c. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464; *R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Boston*, [1988] B.C.J. No. 1185 (QL); *R. c. DiGiuseppe* (2002), 161 C.C.C. (3d) 424.

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Cheryl J. Tobias, Q.C., and *Donnaree Nygard*, for the appellant.

Joseph J. Arvay, Q.C., Elin R. S. Sigurdson and *Katrina Pacey*, for the respondents.

Janet E. Minor and *Courtney J. Harris*, for the intervener the Attorney General of Ontario.

David W. Mossop, Q.C., and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

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Cheryl J. Tobias, c.r., et *Donnaree Nygard*, pour l'appelant.

Joseph J. Arvay, c.r., Elin R. S. Sigurdson et *Katrina Pacey*, pour les intimées.

Janet E. Minor et *Courtney J. Harris*, pour l'intervenant le procureur général de l'Ontario.

David W. Mossop, c.r., et *Diane Nielsen*, pour l'intervenante Community Legal Assistance Society.

Jason B. Gratl and *Megan Vis-Dunbar*, for the intervener the British Columbia Civil Liberties Association.

Justin Duncan and *Kaitlyn Mitchell*, for the intervener Ecojustice Canada.

C. Tess Sheldon, *Niamh Harraher* and *Kasari Govender*, for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and the ARCH Disability Law Centre.

Written submissions only by *Mark C. Power* and *Jean-Pierre Hachey*, for the intervener Conseil scolaire francophone de la Colombie-Britannique.

Kent Roach and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Written submissions only by *Cara Faith Zwibel*, for the intervener the Canadian Civil Liberties Association.

Lorne Waldman, *Clare Crummey* and *Tamara Morgenthau*, for the interveners the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees.

Written submissions only by *Michael A. Feder*, *Alexandra E. Cocks* and *Jordanna Cytrynbaum*, for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario and the Positive Living Society of British Columbia.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled

Jason B. Gratl et *Megan Vis-Dunbar*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Justin Duncan et *Kaitlyn Mitchell*, pour l'intervenant Ecojustice Canada.

C. Tess Sheldon, *Niamh Harraher* et *Kasari Govender*, pour les intervenants Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth et ARCH Disability Law Centre.

Argumentation écrite seulement par *Mark C. Power* et *Jean-Pierre Hachey*, pour l'intervenant le Conseil scolaire francophone de la Colombie-Britannique.

Kent Roach et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

Argumentation écrite seulement par *Cara Faith Zwibel*, pour l'intervenante l'Association canadienne des libertés civiles.

Lorne Waldman, *Clare Crummey* et *Tamara Morgenthau*, pour les intervenants l'Association canadienne des avocats et avocates en droit des réfugiés et le Conseil canadien pour les réfugiés.

Argumentation écrite seulement par *Michael A. Feder*, *Alexandra E. Cocks* et *Jordanna Cytrynbaum*, pour les intervenants le Réseau juridique canadien VIH/sida, HIV & AIDS Legal Clinic Ontario et Positive Living Society of British Columbia.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Le présent pourvoi porte sur les règles de droit relatives à la qualité pour agir dans l'intérêt public dans les causes en matière constitutionnelle. Ces

to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

règles déterminent qui peut soumettre une affaire aux tribunaux. Bien entendu, la situation serait insoutenable si tous avaient la qualité pour engager des poursuites à tout propos, aussi ténu leur intérêt personnel soit-il dans la cause. Des restrictions s'imposent donc en matière de qualité pour agir afin d'assurer que les tribunaux ne deviennent pas complètement submergés par des poursuites insignifiantes ou redondantes, d'écarter les trouble-fête et de s'assurer que les tribunaux entendent les principaux intéressés faire valoir contradictoirement leurs points de vue et jouent le rôle qui leur est propre dans le cadre de notre système démocratique de gouvernement : *Finlay c. Canada (Ministre des Finances)*, [1986] 2 R.C.S. 607, p. 631. Selon l'approche traditionnellement retenue, la qualité pour agir était limitée aux personnes dont les intérêts privés étaient en jeu ou pour qui l'issue des procédures avait des incidences particulières. Dans les causes de droit public, les tribunaux canadiens ont toutefois tempéré ces limites et adopté une approche souple et discrétionnaire quant à la question de la qualité pour agir dans l'intérêt public, guidés en cela par les objectifs qui étaient sous-jacents aux limites traditionnelles.

[2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[2] Lorsqu'ils exercent leur pouvoir discrétionnaire en matière de qualité pour agir, les tribunaux soupèsent trois facteurs à la lumière de ces objectifs sous-jacents et des circonstances particulières de chaque cas. Ils se demandent si l'affaire soulève une question justiciable sérieuse, si la partie qui a intenté la poursuite a un intérêt réel ou véritable dans son issue et, en tenant compte d'un grand nombre de facteurs, si la poursuite proposée constitue une manière raisonnable et efficace de soumettre la question à la cour : *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236, p. 253. Les tribunaux exercent ce pouvoir discrétionnaire de reconnaître ou non la qualité pour agir de façon « libérale et souple » (p. 253).

[3] In this case, the respondents the Downtown Eastside Sex Workers United Against Violence Society, whose objects include improving working conditions for female sex workers,

[3] En l'espèce, les intimées Downtown Eastside Sex Workers United Against Violence Society (« Société ») — dont l'objet consiste notamment à améliorer les conditions de travail

and Ms. Kiselbach, have launched a broad constitutional challenge to the prostitution provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. The British Columbia Court of Appeal found that they should be granted public interest standing to pursue this challenge; the Attorney General of Canada appeals. The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing. In my view, the latter approach is the right one. Applying it here, my view is that the Society and Ms. Kiselbach should be granted public interest standing. I would therefore dismiss the appeal.

II. Issues

[4] The issues as framed by the parties are whether the respondents should be granted public interest standing and whether Ms. Kiselbach should be granted private interest standing. In my view, this case is best resolved by considering the discretion to grant public interest standing and standing should be granted to the respondents on that basis.

III. Overview of Facts and Proceedings

A. *Facts*

[5] The respondent Society is a registered British Columbia society whose objects include improving working conditions for female sex workers. It is run "by and for" current and former sex workers living in the Vancouver Downtown Eastside. The Society's members are women, the majority of whom are Aboriginal, living with addiction issues, health challenges, disabilities, and poverty; almost

des travailleuses du sexe — et M^me^ Kiselbach ont lancé une vaste contestation constitutionnelle des dispositions du *Code criminel*, L.R.C. 1985, ch. C-46, relatives à la prostitution. La Cour d'appel de la Colombie-Britannique a jugé qu'il y avait lieu de leur reconnaître la qualité pour agir dans l'intérêt public pour qu'elles puissent faire valoir cette contestation. Le procureur général du Canada interjette appel de cette décision. Le pourvoi porte principalement sur la question de savoir si les trois facteurs que les tribunaux doivent prendre en compte afin de juger de la qualité pour agir doivent être considérés comme des éléments d'une liste de contrôle rigide ou s'ils doivent être pris en compte et soupesés dans l'exercice du pouvoir discrétionnaire judiciaire en vue de servir les principes sous-jacents des règles de droit applicables à ce sujet. À mon avis, la dernière approche est la bonne et, en l'appliquant en l'espèce, j'estime qu'il y a lieu de reconnaître à la Société et à M^me^ Kiselbach la qualité pour agir dans l'intérêt public. Je suis donc d'avis de rejeter le pourvoi.

II. Questions en litige

[4] Les questions en litige telles qu'elles sont exposées par les parties sont celles de savoir si la Cour devrait reconnaître aux intimées la qualité pour agir dans l'intérêt public et à M^me^ Kiselbach la qualité pour agir dans l'intérêt privé. À mon avis, la meilleure façon de régler la présente affaire consiste à procéder à l'examen du pouvoir discrétionnaire de reconnaître la qualité pour agir dans l'intérêt public et, sur cette base, de la reconnaître aux intimées.

III. Aperçu des faits et des procédures

A. *Les faits*

[5] La Société intimée est une entreprise enregistrée de la Colombie-Britannique qui a notamment pour objet d'améliorer les conditions de travail des travailleuses du sexe. Elle est administrée « par et pour » des travailleuses du sexe actives et retirées vivant dans le quartier Downtown Eastside de Vancouver. Les membres de la Société sont des femmes, la plupart autochtones, vivant avec des

all have been victims of physical and/or sexual violence.

[6] Sheryl Kiselbach is a former sex worker currently working as a violence prevention coordinator in the Downtown Eastside. For approximately 30 years, Ms. Kiselbach engaged in a number of forms of sex work, including exotic dancing, live sex shows, work in massage parlours and street-level free-lance prostitution. During the course of this time, she was convicted of several prostitution-related offences. Ms. Kiselbach left the sex industry in 2001. She claims to have been unable to participate in a court challenge to prostitution laws when working as a sex worker because of risk of public exposure, fear for her personal safety, and the potential loss of social services, income assistance, clientele and employment opportunities (chambers judge's reasons, 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, at paras. 29 and 44).

[7] The respondents commenced an action challenging the constitutional validity of sections of the *Criminal Code* that deal with different aspects of prostitution. They seek a declaration that these provisions violate the rights of free expression and association, to equality before the law and to life, liberty and security of the person guaranteed by ss. 2(*b*), 2(*d*), 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The challenged provisions are what I will refer to as the "prostitution provisions", the "bawdy house provisions", the "procurement provision" and the "communication provision". Prostitution provisions is the generic term to refer to the provisions in the *Criminal Code* relating to the criminalization of activities related to prostitution (ss. 210 to 213). Within these provisions can be found the bawdy house provisions, which include those relating to keeping and being within a common bawdy house (s. 210), and transporting a person to a common bawdy house (s. 211). The procurement provision refers to the act of procuring and living on the avails of prostitution (s. 212,

problèmes de toxicomanie, de santé, d'incapacités et de pauvreté; elles ont presque toutes été victimes de violence physique ou sexuelle, ou des deux.

[6] Sheryl Kiselbach est une ancienne travailleuse du sexe qui occupe actuellement un emploi de coordonnatrice en prévention de la violence dans le quartier Downtown Eastside. Pendant environ 30 ans, elle a exercé diverses activités dans l'industrie du sexe dont la danse exotique, les spectacles érotiques en direct, les séances en salons de massage et la prostitution de rue en tant que travailleuse autonome. Durant cette période, elle a été déclarée coupable de plusieurs infractions relatives à la prostitution. Elle a quitté cette industrie en 2001. Elle soutient avoir été incapable de participer à une contestation judiciaire des lois relatives à la prostitution pendant qu'elle était active comme travailleuse du sexe en raison des risques liés à une exposition publique, de la crainte pour sa sécurité personnelle et de la perte éventuelle de services sociaux, d'aide au revenu, de clientèle et de possibilités d'emploi (motifs du juge en cabinet, 2008 BCSC 1726, 90 B.C.L.R. (4th) 177, par. 29 et 44).

[7] Les intimées ont intenté une action contestant la validité constitutionnelle de certains articles du *Code criminel* qui traitent de différents aspects de la prostitution. Elles sollicitent un jugement déclaratoire portant que ces dispositions enfreignent les droits à la liberté d'expression et d'association, ainsi que les droits à l'égalité devant la loi, à la vie, à la liberté et à la sécurité de la personne garantis par les al. 2*b*) et 2*d*) ainsi que par les art. 7 et 15 de la *Charte canadienne des droits et libertés*. Les dispositions contestées sont ce que j'appellerai les « dispositions relatives à la prostitution », les « dispositions relatives aux maisons de débauche », la « disposition relative au proxénétisme » et la « disposition relative à la communication ». Le premier de ces termes, soit « dispositions relatives à la prostitution », constitue l'expression générique pour désigner l'ensemble des dispositions du *Code criminel* portant sur la criminalisation des activités relatives à la prostitution (art. 210 à 213). Parmi elles, on retrouve les dispositions relatives aux maisons de débauche qui créent notamment les

except for s. 212(1)(*g*) and (*i*)), while the communication provision refers to the act of soliciting in a public place (s. 213(1)(*c*)). Neither respondent is currently charged with any of the offences challenged.

[8] The respondents' position is that the prostitution provisions (ss. 210 to 213) infringe s. 2(*d*) freedom of association rights because these provisions prevent prostitutes from joining together to increase their personal safety; s. 7 security of the person rights due to the possibility of arrest and imprisonment and because the provisions prevent prostitutes from taking steps to improve the health and safety conditions of their work; s. 15 equality rights because the provisions discriminate against members of a disadvantaged group; and s. 2(*b*) freedom of expression rights by making illegal communication which could serve to increase safety and security.

B. *Proceedings*

(1) British Columbia Supreme Court (Ehrcke J.), 2008 BCSC 1726, 90 B.C.L.R. (4th) 177

[9] The Attorney General of Canada applied in British Columbia Supreme Court Chambers to dismiss the respondents' action on the ground that they lacked standing to bring it. In the alternative, he applied under Rule 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by *Supreme Court Civil Rules*, B.C. Reg. 168/2009, effective July 1, 2010), to have portions of the statement of claim struck out and part of the action stayed on the basis that the pleadings disclosed no reasonable

infractions que constitue le fait de tenir une maison de débauche, de se trouver dans une telle maison (art. 210), ainsi que d'y transporter une personne (art. 211); la disposition relative au proxénétisme qui vise l'acte d'induire à avoir des rapports sexuels et de vivre des produits de la prostitution (art. 212, sauf les al. 212(1)*g*) et *i*)), et la disposition relative à la communication qui vise l'acte de sollicitation dans un endroit public (al. 213(1)*c*)). Aucune des intimées n'est actuellement accusée de l'une ou l'autre des infractions décrites par les dispositions contestées.

[8] Selon les intimées, les dispositions relatives à la prostitution (art. 210 à 213) portent atteinte au droit à la liberté d'association garanti par l'al. 2*d*) parce qu'elles empêchent les prostituées de se regrouper afin d'accroître leur sécurité personnelle. Elles soutiennent que ces dispositions portent également atteinte au droit à la sécurité de la personne garanti par l'art. 7 parce que les prostituées courent le risque d'être arrêtées et détenues et parce que ces dispositions les empêchent de prendre des mesures pour améliorer leurs conditions de santé et de sécurité au travail; au droit à l'égalité garanti par l'art. 15 parce que ces dispositions sont discriminatoires à l'égard des membres d'un groupe défavorisé; et au droit à la liberté d'expression garanti par l'al. 2*b*) puisque des communications qui pourraient servir à accroître leur sécurité sont rendues illégales.

B. *Historique des procédures*

(1) Cour suprême de la Colombie-Britannique (le juge Ehrcke), 2008 BCSC 1726, 90 B.C.L.R. (4th) 177

[9] Le Procureur général du Canada a demandé à la Cour suprême de la Colombie-Britannique siégeant en cabinet de rejeter la poursuite des intimées au motif qu'elles n'avaient pas la qualité pour l'intenter. Subsidiairement, au titre de la règle 19(24) des *Supreme Court Rules*, B.C. Reg. 221/90 (remplacées par les *Supreme Court Civil Rules*, B.C. Reg. 168/2009, entrées en vigueur le 1er juillet 2010), il a demandé la radiation de certaines parties de la déclaration et la suspension d'une partie

claim. In the further alternative, he applied for particulars which he said were necessary in order to know the case to be met (chambers judge's reasons, at para. 2). The chambers judge dismissed the action, holding that neither respondent had private interest standing and that discretionary public interest standing should not be granted to them. In light of this conclusion, the chambers judge found it unnecessary to consider the Attorney General's applications under Rule 19(24) and for particulars (para. 88).

de la poursuite au motif que les actes de procédures ne révélaient aucune cause d'action raisonnable. Subsidiairement encore, il a demandé des précisions qui, selon lui, étaient nécessaires pour connaître les éléments invoqués dans la poursuite et les réfuter (motifs du juge en cabinet, par. 2). Le juge en cabinet a rejeté l'action statuant que ni l'une ni l'autre des intimées n'avaient la qualité pour agir dans l'intérêt privé et que la qualité pour agir dans l'intérêt public qui est tributaire de l'exercice d'un pouvoir discrétionnaire ne devait pas leur être reconnue. Compte tenu de cette décision, le juge en cabinet a conclu qu'il n'était pas nécessaire d'examiner la demande présentée par le procureur général au titre de la règle 19(24), ni celle sollicitant des précisions (par. 88).

[10] The chambers judge reasoned that neither the Society nor Ms. Kiselbach was charged with any of the impugned provisions or was a defendant in an action brought by a government agency relying upon the legislation. Further, the Society is a separate entity with rights distinct from those of its members. Ms. Kiselbach, he determined, was not entitled to private interest standing because she was not currently engaged in sex work and the continued stigma associated with her past convictions could not give rise to private interest standing because that would amount to a collateral attack on her previous convictions.

[10] Le juge en cabinet a noté que ni la Société ni M^me^ Kiselbach n'étaient accusées des infractions prévues aux dispositions contestées ou n'étaient défenderesses à une action engagée par un organisme gouvernemental, toujours en application des dispositions en question. En outre, il a précisé que la Société est une entité séparée dont les droits sont distincts de ceux de ses membres. Il a aussi jugé que M^me^ Kiselbach ne pouvait pas se voir reconnaître la qualité pour agir dans l'intérêt privé, d'une part parce qu'elle ne travaillait pas actuellement dans l'industrie du sexe et, d'autre part parce que le stigmate persistant associé à ses condamnations antérieures ne pouvait lui donner cette qualité, puisque cela équivaudrait à les contester de façon indirecte.

[11] The chambers judge turned to public interest standing and found that he should not exercise his discretion to grant standing to either respondent. He reviewed what he described as the three "requirements" for public interest standing as set out in *Canadian Council of Churches* and concluded that the respondents' action raised serious constitutional issues and they had a genuine interest in the validity of the provisions. Thus, the judge held that the first and second "requirements" for public interest standing were established. He then turned to the third part of the test, "whether, if standing is denied, there exists another reasonable and effective way to bring the issue before the court" (para.

[11] Le juge en cabinet s'est ensuite penché sur la question de la qualité pour agir dans l'intérêt public et il ne devrait pas exercer son pouvoir discrétionnaire pour reconnaître cette qualité ni à l'une ni à l'autre des intimées. Il a examiné ce qu'il a décrit comme étant les trois « exigences » pour se voir reconnaître la qualité pour agir dans l'intérêt public tel qu'elles sont énoncées dans l'arrêt *Conseil canadien des Églises*. Il a conclu que la poursuite des intimées soulevait des questions constitutionnelles sérieuses et que les intimées avaient un intérêt véritable quant à la validité des dispositions. Le juge a donc estimé qu'il avait été satisfait aux première et deuxième « exigences » relatives à la qualité pour

70). This, in the judge's view, was where the respondents' claim for standing faltered.

[12] He agreed with the Attorney General's argument that the provisions could be challenged by litigants charged under them. The fact that members of the Society were "particularly vulnerable" and allegedly unable to come forward could not give rise to public interest standing (para. 76). Members of the Society would likely have to come forward as witnesses should the matter proceed to trial and if they were willing to testify as witnesses, they were able to come forward as plaintiffs. The chambers judge noted that there was litigation underway in Ontario raising many of the same issues: *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, rev'd in part 2012 ONCA 186, 109 O.R. (3d) 1. He reasoned that, while the existence of this litigation was not necessarily a sufficient reason for denying standing, it tended to show that there "may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75). He also referred to the fact that there had been a number of cases in British Columbia and elsewhere where the impugned legislation had been challenged and that there are hundreds of criminal prosecutions every year in British Columbia in each of which the accused "would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77).

[13] The judge concluded that he was bound to apply the test of whether there is no other reasonable and effective way to bring the issue before the court and that the respondents did not meet that test (para. 85).

agir dans l'intérêt public. Il a ensuite examiné le troisième élément du test, soit [TRADUCTION] « la question de savoir si, dans la mesure où la qualité n'était pas reconnue, il existait une autre manière raisonnable et efficace de soumettre la question à la cour » (par. 70). Selon le juge, c'est à cet égard que la demande des intimées présentait des faiblesses.

[12] Il a souscrit à l'argument du procureur général selon lequel les dispositions pouvaient être contestées par les justiciables accusés en vertu d'elles. À son avis, le fait que des membres de la Société soient [TRADUCTION] « particulièrement vulnérables » et soi-disant incapables de se manifester ne pouvait justifier la reconnaissance de la qualité pour agir dans l'intérêt public (par. 76). Si l'affaire avait été instruite, des membres de la Société auraient probablement eu à témoigner, et si elles étaient prêtes à faire cela, elles étaient aussi en mesure de se présenter à titre de demanderesses. Le juge en cabinet a aussi souligné qu'il y avait une poursuite en cours en Ontario qui soulevait bon nombre des mêmes questions : *Bedford c. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, inf. en partie par 2012 ONCA 186, 109 O.R. (3d) 1. Il a expliqué que, même si l'existence de ce litige ne constituait pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir, elle tendait à démontrer qu'« il pourrait néanmoins y avoir des demandeurs éventuels ayant qualité pour agir dans l'intérêt privé qui pourraient, s'ils choisissaient de le faire, soumettre l'ensemble de ces questions à la cour » (par. 75). Il a également mentionné qu'il y avait eu un certain nombre de causes en Colombie-Britannique et ailleurs dans le cadre desquelles les dispositions législatives contestées en l'espèce avaient fait l'objet de contestations et qu'il y a chaque année en Colombie-Britannique des centaines de procès au criminel durant lesquels l'accusé « pourrait soulever, de plein droit, les questions constitutionnelles que les demanderesses tentent de soulever en l'espèce » (par. 77).

[13] Le juge a conclu qu'il était tenu d'appliquer le critère visant à déterminer s'il n'y a pas une autre manière raisonnable et efficace de soumettre la question à la cour et que les intimées n'avaient pas satisfait à ce critère (par. 85).

(2) British Columbia Court of Appeal, 2010 BCCA 439, 10 B.C.L.R. (5th) 33

[14] The respondents appealed, submitting that the chambers judge had erred by rejecting private interest standing for Ms. Kiselbach and public interest standing for both respondents. The chambers judge's finding that the Society did not have private interest standing was not appealed (para. 3). The majority of the Court of Appeal upheld the chambers judge's decision to deny Ms. Kiselbach's private interest standing, but concluded that both respondents ought to have been granted public interest standing. The only issue on which the Court of Appeal divided was with respect to the third factor, that is, whether standing should be denied because there were other ways the issues raised in the respondents' proceedings could be brought before the courts.

[15] Saunders J.A. (Neilson J.A. concurring), writing for the majority, found no reason for denying public interest standing. She held that this Court has made it clear that the discretion to grant standing must not be exercised mechanistically but rather in a broad and liberal manner to achieve the objective of ensuring that impugned laws are not immunized from review. The majority read the dissenting reasons for judgment of Binnie and LeBel JJ. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, as characterizing the *Charter* challenge in that case as a "systemic" challenge, which differs in scope from an individual's challenge addressing a discrete issue. To the majority, *Chaoulli* recognized that any problems arising from the difference in scope of the challenge may be resolved by taking "a more relaxed view of standing in the right case" (para. 59).

(2) Cour d'appel de la Colombie-Britannique, 2010 BCCA 439, 10 B.C.L.R. (5th) 33

[14] Les intimées ont interjeté appel, faisant valoir que le juge en cabinet avait commis une erreur en refusant de reconnaître à M^me^ Kiselbach la qualité pour agir dans l'intérêt privé et aux deux intimées la qualité pour agir dans l'intérêt public. La conclusion du juge en cabinet selon laquelle la Société n'avait pas qualité pour agir dans l'intérêt privé n'a pas été portée en appel (par. 3). La Cour d'appel, à la majorité, a maintenu la décision du juge en cabinet de refuser de reconnaître à M^me^ Kiselbach la qualité pour agir dans l'intérêt privé, mais elle a conclu que la qualité pour agir dans l'intérêt public des deux intimées aurait dû être reconnue. Une seule question a donné lieu à une dissidence en Cour d'appel, soit celle relative au troisième facteur de l'analyse qui vise à déterminer si la cour devait refuser de reconnaître la qualité pour agir parce qu'il y avait d'autres manières de saisir les tribunaux des questions soulevées par les intimées dans le cadre de leurs procédures.

[15] La juge Saunders de la Cour d'appel, avec l'accord de la juge Neilson et rédigeant au nom des juges majoritaires, n'a trouvé aucune raison de refuser de reconnaître la qualité pour agir dans l'intérêt public. Selon elle, la Cour avait énoncé clairement que le pouvoir discrétionnaire de reconnaître la qualité pour agir ne doit pas être exercé mécaniquement, mais plutôt de manière large et libérale afin d'assurer que les dispositions législatives contestées n'échappent pas à tout examen. Selon les juges majoritaires, les motifs dissidents exprimés par les juges Binnie et LeBel dans l'arrêt *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791, qualifiaient la contestation fondée sur des dispositions de la *Charte* dans cette instance de contestation « systémique » dont la portée différait de celle d'une contestation engagée par un individu et touchant une question particulière. Pour les juges majoritaires, l'arrêt *Chaoulli* a reconnu que les problèmes soulevés par des contestations dont la portée diffère peuvent être réglés en adoptant [TRADUCTION] « une conception plus large de la qualité pour agir lorsqu'il y a lieu de le faire » (par. 59).

[16] Applying this approach, the majority considered this case to fall closer on the spectrum to *Chaoulli* than to *Canadian Council of Churches*. Saunders J.A. took the view that the chambers judge had stripped the action of its central thesis by likening it to cases in which prostitution-related charges were laid. Saunders J.A. focused on the multi-faceted nature of the proposed challenge and felt that the respondents were seeking to challenge the *Criminal Code* provisions with reference to their cumulative effect on sex trade workers. In the majority judges' view, public interest standing ought to be granted in this case because the essence of the complaint was that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities and exacerbates their vulnerability.

[17] In dissent, Groberman J.A. agreed with the chambers judge's reasoning. In his view, this case did not raise any challenges that could not be advanced by persons with private interest standing. He accepted the respondents' position that it was unlikely that a case would arise in which a multi-pronged attack on all of the impugned provisions could take place. However, he did not consider that the lack of such an opportunity established a valid basis for public interest standing. He took the view that a very broad-ranging challenge such as the one in this case required extensive evidence on a multitude of issues and he did not find it clear that the litigation process would deal fairly and effectively with such a challenge in a reasonable amount of time. Interpreting the judgment in *Chaoulli*, Groberman J.A. held that the Court had not broadened the basis for public interest standing. In his view, *Chaoulli* did not establish that public interest standing should be granted preferentially for wide and sweeping attacks on legislation.

[16] Appliquant cette approche, les juges majoritaires ont estimé que la présente instance se rapprochait davantage de l'affaire *Chaoulli* que de celle du *Conseil canadien des Églises*. Selon la juge Saunders, le juge en cabinet a dépouillé la poursuite de la thèse sur laquelle elle reposait en l'assimilant aux poursuites où avaient été déposées des accusations relatives à la prostitution. La juge Saunders s'est concentrée sur la nature multidimensionnelle de la contestation envisagée et a conclu que les intimées cherchaient à contester les dispositions du *Code criminel* en fonction de leur effet cumulatif sur les travailleurs de l'industrie du sexe. Dans l'opinion des juges majoritaires, la qualité pour agir dans l'intérêt public devait être reconnue en l'espèce puisque l'essence de la plainte était que ces dispositions législatives rendent vulnérables de façon inacceptable des personnes s'adonnant à des activités par ailleurs licites et aggravent leur vulnérabilité.

[17] Le juge Groberman, dissident, a souscrit au raisonnement du juge en cabinet. À son avis, la présente affaire ne soulève aucune contestation qui n'aurait pas pu être engagée par quiconque ayant la qualité pour agir dans l'intérêt privé. Il a accepté la position des intimées selon laquelle il était peu probable qu'une affaire soit engagée dans laquelle il serait possible d'attaquer sous plusieurs aspects la validité de toutes les dispositions contestées. Il n'a cependant pas considéré que l'absence d'une telle possibilité justifie la reconnaissance de la qualité pour agir dans l'intérêt public. Il a estimé qu'une contestation dont la portée est très large, comme celle en l'espèce, exige une preuve considérable sur une multitude d'aspects et il ne lui a pas semblé manifeste que le processus judiciaire traiterait de façon équitable et efficace une telle contestation dans un délai raisonnable. Suivant son interprétation de l'arrêt *Chaoulli*, le juge Groberman a conclu que la Cour n'avait pas élargi le fondement de la qualité pour agir dans l'intérêt public. À son avis, cet arrêt n'a pas établi que la qualité pour agir dans l'intérêt public devait être reconnue de façon préférentielle dans le contexte de contestations de portée vaste et générale visant des dispositions législatives.

IV. Analysis

A. *Public Interest Standing*

(1) The Central Issue

[18] In *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, the majority of the Court summed up the law of standing to seek a declaration that legislation is invalid as follows: if there is a serious justiciable issue as to the law's invalidity, "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court" (p. 598). At the root of this appeal is how this approach to standing should be applied.

[19] The chambers judge, supported by quotations from the leading cases, was of the view that the law sets out three requirements — something in the nature of a checklist — which a person seeking discretionary public interest standing must establish in order to succeed. The respondents, on the other hand, contend for a more flexible approach, emphasizing the discretionary nature of the standing decision. The debate focuses on the third factor as it was expressed in *Borowski* — that there is no other reasonable and effective manner in which the issue may be brought to the court — and concerns how strictly this factor should be defined and how it should be applied.

[20] My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a

IV. Analyse

A. *La qualité pour agir dans l'intérêt public*

(1) La principale question en litige

[18] Dans l'arrêt *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575, les juges majoritaires ont résumé comme suit le droit applicable à la qualité pour agir dans une poursuite visant à faire invalider une loi : si une question justiciable sérieuse se pose quant à l'invalidité de la loi, « il suffit qu'une personne démontre qu'elle est directement touchée ou qu'elle a, à titre de citoyen, un intérêt véritable quant à la validité de la loi, et qu'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour » (p. 598). La manière dont cette conception de la qualité pour agir devrait s'appliquer est à l'origine du présent pourvoi.

[19] S'appuyant sur des citations tirées des arrêts de principe, le juge en cabinet a estimé que le droit établit trois conditions — une méthode rappelant l'utilisation d'une liste de contrôle — auxquelles une personne sollicitant l'exercice du pouvoir discrétionnaire judiciaire pour se voir accorder la qualité pour agir dans l'intérêt public doit satisfaire pour avoir gain de cause. Les intimées plaident cependant pour une approche plus souple, mettant l'accent sur le caractère discrétionnaire des décisions relatives à la qualité pour agir. Le débat porte sur le troisième facteur tel qu'il a été énoncé dans l'arrêt *Borowski* — soit celui qui consiste à se demander s'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour — et consiste à déterminer la rigueur avec laquelle ce facteur devrait être défini et la façon dont il devrait être appliqué.

[20] À mon avis, les trois éléments énoncés dans l'arrêt *Borowski* sont intimement liés et doivent être considérés dans l'exercice du pouvoir discrétionnaire de reconnaître ou non la qualité pour agir. Ces facteurs, et plus particulièrement le troisième, ne devraient pas être considérés comme des exigences inflexibles ou comme des critères autonomes sans aucun lien de dépendance les uns avec les autres. Ils devraient plutôt être appréciés et

flexible and generous manner that best serves those underlying purposes.

[21] I do not propose to lead a forced march through all of the Court's case law on public interest standing. However, I will highlight some key aspects of the Court's standing jurisprudence: its purposive approach, its underlying concern with the principle of legality and its emphasis on the wise application of judicial discretion. I will then explain that, in my view, the proper consideration of these factors supports the Court of Appeal's conclusion that the respondents ought to be granted public interest standing.

(2) The Purposes of Standing Law

[22] The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: *Canadian Council of Churches*, at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the *Charter* have led the courts to move away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: *Canadian Council of Churches*, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 *Law & Hum. Behav.* 121. The Court has recognized that, in a constitutional democracy like Canada with a *Charter of Rights and Freedoms*, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.

[23] This Court has taken a purposive approach to the development of the law of standing in public

soupesés de façon cumulative — à la lumière des objectifs qui sous-tendent les restrictions à la qualité pour agir — et appliqués d'une manière souple et libérale de façon à favoriser la mise en œuvre de ces objectifs sous-jacents.

[21] Je n'ai pas l'intention d'entreprendre l'examen exhaustif de la jurisprudence de la Cour en matière de qualité pour agir dans l'intérêt public. Je vais cependant en souligner certains aspects clés : l'approche téléologique, la préoccupation sous-jacente envers le principe de la légalité et l'importance de l'exercice judicieux du pouvoir judiciaire discrétionnaire. Ensuite, je vais expliquer que, à mon avis, l'examen qu'il convient d'appliquer à ces facteurs confirme la conclusion de la Cour d'appel selon laquelle il y a lieu de reconnaître aux intimées la qualité pour agir dans l'intérêt public.

(2) Les objectifs des règles de droit relatives à la qualité pour agir

[22] Les tribunaux ont reconnu depuis longtemps la nécessité de restreindre la qualité pour agir. En effet, ce ne sont pas toutes les personnes voulant débattre d'une question, sans tenir compte du fait qu'elles soient touchées par l'issue du débat ou pas, qui devraient être autorisées à le faire : *Conseil canadien des Églises*, p. 252. Cela étant dit, l'augmentation de la réglementation gouvernementale et l'entrée en vigueur de la *Charte* ont incité les tribunaux à s'éloigner d'une conception de leur rôle fondée strictement sur le droit privé, comme en témoigne l'observation d'un certain relâchement des règles traditionnelles de droit privé en ce qui concerne la qualité pour engager une poursuite : *Conseil canadien des Églises*, p. 249, et voir aussi généralement O. M. Fiss, « The Social and Political Foundations of Adjudication » (1982), 6 *Law & Hum. Behav.* 121. La Cour a reconnu que, dans le cadre d'une démocratie constitutionnelle comme celle du Canada qui est doté d'une *Charte des droits et libertés*, il existe des occasions où un litige d'intérêt public constitue la façon appropriée de procéder pour saisir les tribunaux de questions d'intérêt public d'importance.

[23] Dans les affaires de droit public, la Cour a adopté une approche téléologique pour l'élaboration

law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": *Canadian Council of Churches*, at p. 252.

[24] It will be helpful to trace, briefly, the underlying purposes of standing law which the Court has identified and how they are considered.

[25] The most comprehensive discussion of the reasons underlying limitations on standing may be found in *Finlay*, at pp. 631-34. The following traditional concerns, which are seen as justifying limitations on standing, were identified: properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of courts and their constitutional relationship to the other branches of government. A brief word about each of these traditional concerns is in order.

(a) *Scarce Judicial Resources and "Busybodies"*

[26] The concern about the need to carefully allocate scarce judicial resources is in part based on the well-known "floodgates" argument. Relaxing standing rules may result in many persons having the right to bring similar claims and "grave inconvenience" could be the result: see, e.g., *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331, at p. 337. Cory J. put the point cogently on behalf of the Court in *Canadian Council of Churches*, at

des règles de droit applicables à la question de la qualité pour agir. Lorsqu'il s'agit de décider s'il est justifié de reconnaître cette qualité, les tribunaux doivent exercer leur pouvoir discrétionnaire et mettre en balance, d'une part, le raisonnement qui sous-tend les restrictions à cette reconnaissance et, d'autre part, le rôle important qu'ils jouent lorsqu'ils se prononcent sur la validité des mesures prises par le gouvernement. En somme, les règles de droit relatives à la qualité pour agir tirent leur origine de la nécessité d'établir un équilibre « entre l'accès aux tribunaux et la nécessité d'économiser les ressources judiciaires » : *Conseil canadien des Églises*, p. 252.

[24] Il est utile de rappeler ici succinctement les objectifs sous-jacents que visent les règles de droit relatives à la qualité pour agir formulées par la Cour ainsi que la manière dont ils sont pris en compte.

[25] C'est dans l'arrêt *Finlay*, aux p. 631-634, qu'on trouve l'examen le plus exhaustif du raisonnement qui sous-tend les restrictions à la reconnaissance de la qualité pour agir. En effet, la Cour y a décrit les préoccupations qui, traditionnellement, ont servi à expliquer ces restrictions : l'affectation appropriée des ressources judiciaires limitées et la nécessité d'écarter les trouble-fête; l'assurance que les tribunaux entendront les principaux intéressés faire valoir contradictoirement leurs points de vue; et la sauvegarde du rôle propre aux tribunaux et de leur relation constitutionnelle avec les autres branches du gouvernement. Quelques mots sont de mise concernant chacune de ces préoccupations traditionnelles.

a) *Les ressources judiciaires limitées et les « trouble-fête »*

[26] La préoccupation au regard de l'affectation appropriée des ressources judiciaires limitées est en partie fondée sur l'argument bien connu du « raz de marée ». Le relâchement des règles concernant la qualité pour agir pourrait avoir comme résultat de conférer à plusieurs personnes le droit d'intenter des actions de nature semblable et il pourrait en résulter de [TRADUCTION] « graves inconvénients » : voir, p. ex., *Smith c. Attorney General of Ontario*,

p. 252: "It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important." This factor is not concerned with the convenience or workload of judges, but with the effective operation of the court system as a whole.

[27] The concern about screening out "mere busybodies" relates not only to the issue of a possible multiplicity of actions but, in addition, to the consideration that plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources. The court must also consider the possible effect of granting public interest standing on others. For example, granting standing may undermine the decision not to sue by those with a personal stake in the case. In addition, granting standing for a challenge that ultimately fails may prejudice other challenges by parties with "specific and factually established complaints": *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at p. 694.

[28] These concerns about a multiplicity of suits and litigation by "busybodies" have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court — A Functional Analysis" (1973), 86 *Harv. L. Rev.* 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the

[1924] R.C.S. 331, p. 337. Le juge Cory a présenté la chose de façon convaincante au nom de la Cour dans l'arrêt *Conseil canadien des Églises* : « Ce serait désastreux si les tribunaux devenaient complètement submergés en raison d'une prolifération inutile de poursuites insignifiantes ou redondantes intentées par des organismes bien intentionnés dans le cadre de la réalisation de leurs objectifs, convaincus que leur cause est fort importante » (p. 252). Ce facteur ne vise pas les questions de commodités ni celles relatives à la charge de travail des juges, mais bien celle du fonctionnement efficace du système judiciaire dans son ensemble.

[27] La préoccupation alimentée par la volonté d'écarter les trouble-fête découle, pour sa part, non seulement de la question de la multiplicité possible des actions, mais également de la thèse selon laquelle les demandeurs qui ont un intérêt personnel dans l'issue d'une affaire devraient bénéficier d'une affectation prioritaire des ressources judiciaires. Les tribunaux doivent aussi prendre en compte l'effet que peut avoir sur les autres la décision de reconnaître la qualité pour agir dans l'intérêt public. Par exemple, une telle décision pourrait ébranler celle de ne pas intenter de poursuite prise par les personnes ayant un intérêt personnel dans une affaire. En outre, le fait de reconnaître la qualité pour agir dans le cadre d'une contestation qui est ultimement rejetée pourrait faire obstacle à des contestations engagées par des parties qui auraient « des plaintes précises fondées sur des faits » : *Hy and Zel's Inc. c. Ontario (Procureur général)*, [1993] 3 R.C.S. 675, p. 694.

[28] Ces préoccupations concernant la multiplicité des poursuites et des demandes présentées par des « trouble-fête » sont reconnues depuis longtemps. Toutefois, il a également été reconnu qu'elles pourraient avoir été exagérées. Après tout, bien peu de gens saisiront les tribunaux d'une affaire dans laquelle ils n'ont aucun intérêt et qui, en soi, ne laisse entrevoir aucune fin légitime. Selon les mots du professeur K. E. Scott, [TRADUCTION] « [l]e demandeur passif et capricieux, le dilettante qui plaide pour le plaisir est un spectre qui hante la littérature juridique, non les salles d'audience » : « Standing in the Supreme Court — A Functional

most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see, e.g., *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 145.

(b) *Ensuring Contending Points of View*

[29] The second underlying purpose of limiting standing relates to the need for courts to have the benefit of contending points of view of the persons most directly affected by the issue. Courts function as impartial arbiters within an adversary system. They depend on the parties to present the evidence and relevant arguments fully and skillfully. "[C]oncrete adverseness" sharpens the debate of the issues and the parties' personal stake in the outcome helps ensure that the arguments are presented thoroughly and diligently: see, e.g., *Baker v. Carr*, 369 U.S. 186 (1962), at p. 204.

(c) *The Proper Judicial Role*

[30] The third concern relates to the proper role of the courts and their constitutional relationship to the other branches of government. The premise of our discretionary approach to public interest standing is that the proceedings raise a justiciable question, that is, a question that is appropriate for judicial determination: *Finlay*, at p. 632; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-91; see also L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in*

Analysis » (1973), 86 *Harv. L. Rev.* 645, p. 674. De plus, le déni catégorique de la reconnaissance de la qualité pour agir n'est pas la seule manière, ni nécessairement la plus appropriée, pour se prémunir contre ces périls. Les tribunaux peuvent vérifier le bien-fondé des demandes dès le stade préliminaire des procédures, ils peuvent intervenir afin de prévenir les abus et ils disposent du pouvoir d'adjuger des dépens. Ces avenues peuvent toutes constituer des manières plus appropriées pour remédier aux dangers de la multiplicité des poursuites ou des demandes présentées par de simples trouble-fête : voir, p. ex., *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, p. 145.

b) *L'assurance que les principaux intéressés feront valoir contradictoirement leurs points de vue*

[29] La deuxième raison sous-jacente à la restriction de la reconnaissance de la qualité pour agir a trait à la nécessité pour les tribunaux d'entendre les principaux intéressés faire valoir contradictoirement leurs points de vue. En effet, les tribunaux agissent comme des arbitres impartiaux dans le cadre d'un système accusatoire. Ils dépendent des parties quant à la présentation complète et adroite des éléments de preuve et des arguments. Or, [TRADUCTION] « une opposition réelle » stimule les débats sur les questions en litige et l'intérêt personnel des parties dans l'issue de l'affaire contribue à la formulation exhaustive et diligente des arguments : voir, p. ex., *Baker c. Carr*, 369 U.S. 186 (1962), p. 204.

c) *Le rôle propre aux tribunaux*

[30] La troisième préoccupation a trait au rôle propre aux tribunaux et à la relation constitutionnelle qu'ils doivent entretenir avec les autres branches du gouvernement. Notre approche discrétionnaire de la qualité pour agir dans l'intérêt public est fondée sur la prémisse selon laquelle l'instance soulève une question justiciable, c'est-à-dire une question dont les tribunaux peuvent être saisis : *Finlay*, p. 632; *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49, p. 90-91; voir aussi,

Canada (2nd ed. 2012), at pp. 6-10. This concern engages consideration of the nature of the issue and the institutional capacity of the courts to address it.

(3) The Principle of Legality

[31] The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should not be "immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication" (p. 145 (emphasis added)).

[32] The legality principle was further discussed in *Finlay*. The Court noted the "repeated insistence in *Thorson* on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). To Le Dain J., this was "the dominant consideration of policy in *Thorson*" (*Finlay*, at p. 627). After reviewing the case law on public interest standing, the Court in *Finlay* extended the scope of discretionary public interest standing to challenges to the statutory authority for administrative action. This was done, in part because these types of challenges were supported by the concern to maintain respect for the "limits of statutory authority" (p. 631).

L. M. Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada* (2e éd. 2012), p. 6-10. Cette préoccupation commande un examen de la nature de la question et de la capacité institutionnelle des tribunaux à considérer la question.

(3) Le principe de la légalité

[31] Le principe de la légalité renvoie à deux concepts : d'abord, le fait que les actes de l'État doivent être conformes à la Constitution et au pouvoir conféré par la loi, et qu'il doit exister des manières pratiques et efficaces de contester la légalité des actions de l'État. Ce principe a été au cœur de l'évolution de la notion de qualité pour agir dans l'intérêt public au Canada. Par exemple, dans l'arrêt de principe *Thorson*, le juge Laskin a écrit que « le droit des citoyens au respect de la Constitution par le Parlement » (p. 163) milite pour la reconnaissance de la qualité pour agir et qu'une question de constitutionnalité ne devrait pas être « mise à l'abri d'un examen judiciaire en niant qualité pour agir à quiconque tente d'attaquer la loi contestée » (p. 145). Il a conclu qu'« il serait étrange et même alarmant qu'il n'y ait aucun moyen par lequel une question d'abus de pouvoir législatif, matière traditionnellement de la compétence des cours de justice, puisse être soumise à une décision de justice » (p. 145 (je souligne)).

[32] Le principe de la légalité a été analysé plus en profondeur dans l'arrêt *Finlay*. La Cour y a souligné l'« insistance répétée dans l'arrêt *Thorson* sur l'importance dans un État fédéral de pouvoir s'adresser aux tribunaux pour contester la constitutionnalité d'une loi » (p. 627). Selon le juge Le Dain, cet énoncé constituait « la considération dominante du principe dans l'arrêt *Thorson* » (*Finlay*, p. 627). Au terme d'un examen de la jurisprudence relative à la qualité pour agir dans l'intérêt public, la Cour a étendu, dans l'arrêt *Finlay*, la portée du pouvoir discrétionnaire de reconnaître la qualité pour agir dans l'intérêt public aux contestations visant des pouvoirs administratifs conférés par une loi. Cette étape a été franchie en partie parce que les contestations de cette nature étaient motivées par le souci d'assurer le respect des « limites [du] pouvoir légal » (p. 631).

[33] The importance of the principle of legality was reinforced in *Canadian Council of Churches*. The Court acknowledged both aspects of this principle: that no law should be immune from challenge and that unconstitutional laws should be struck down. To Cory J., the *Constitution Act, 1982* "entrench[ed] the fundamental right of the public to government in accordance with the law" (p. 250). The use of "discretion" in granting standing was "necessary to ensure that legislation conforms to the Constitution and the *Charter*" (p. 251). Cory J. noted that the passage of the *Charter* and the courts' new concomitant constitutional role called for a "generous and liberal" approach to standing (p. 250). He stressed that there should be no "mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (p. 256).

[33] L'importance du principe de la légalité a été renforcée dans l'arrêt *Conseil canadien des Églises* où la Cour en a reconnu les deux volets : soit, qu'aucune loi ne doit être à l'abri d'une contestation, et que les dispositions législatives inconstitutionnelles doivent être invalidées. Selon le juge Cory, la *Loi constitutionnelle de 1982* « constitutionnalise le droit fondamental du public d'être gouverné conformément aux règles de droit » (p. 250). Ainsi, il est nécessaire que les tribunaux exercent leur pouvoir discrétionnaire de reconnaître la qualité pour agir « dans les cas où ils doivent [en décider ainsi] pour s'assurer que la loi en question est compatible avec la Constitution et la *Charte* » (p. 251). Le juge Cory a souligné que l'entrée en vigueur de la *Charte* et le nouveau rôle constitutionnel qui en a découlé pour les tribunaux commandaient l'adoption d'une interprétation « souple et libérale » de la question de la qualité pour agir (p. 250). Il a en outre souligné que la décision ne devrait pas découler d'une « application mécaniste d'une exigence technique. On doit plutôt se rappeler que l'objet fondamental de la reconnaissance de la qualité pour agir dans l'intérêt public est de garantir qu'une loi n'est pas à l'abri de la contestation » (p. 256).

[34] In *Hy and Zel's*, Major J. commented on the underlying rationale for restricting standing and the balance that needs to be struck between limiting standing and giving due effect to the principle of legality:

> If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations. [p. 692]

[34] Dans l'arrêt *Hy and Zel's*, le juge Major a expliqué plus en détail le raisonnement sous-jacent justifiant les restrictions à la qualité pour agir et l'équilibre qu'il faut établir entre l'application de ces restrictions et la nécessité de donner plein effet au principe de la légalité :

> S'il existe d'autres manières de soumettre la question aux tribunaux, les ressources judiciaires limitées peuvent être mieux utilisées. Ce même critère empêche toutefois les lois d'échapper au contrôle judiciaire, comme cela se serait produit dans les circonstances des affaires *Thorson* et *Borowski*. [p. 692]

(4) Discretion

[35] From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147

(4) Le pouvoir discrétionnaire

[35] Depuis les premières décisions modernes concernant la qualité pour agir dans l'intérêt public, la question de la qualité pour agir a été considérée comme une question dont la solution est tributaire de l'exercice avisé du pouvoir discrétionnaire judiciaire. Comme l'a affirmé le juge Laskin dans *Thorson*, la qualité pour agir dans l'intérêt public « est une matière qui relève particulièrement

and 163; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).

[36] It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

(5) A Purposive and Flexible Approach to Applying the Three Factors

[37] In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

de l'exercice du pouvoir discrétionnaire des cours de justice, puisqu'elle se rapporte à l'efficacité du recours » (p. 161); voir aussi p. 147 et 163; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265, p. 269 et 271; *Borowski*, p. 593; *Finlay*, p. 631-632 et 635. La décision de reconnaître ou non la qualité pour agir nécessite l'exercice minutieux du pouvoir discrétionnaire judiciaire par la mise en balance des trois facteurs (une question justiciable sérieuse, la nature de l'intérêt du demandeur et les autres manières raisonnables et efficaces). Le juge Cory a insisté sur ce point dans *Conseil canadien des Églises* où il a souligné que les facteurs à prendre en compte dans l'exercice de ce pouvoir discrétionnaire ne devaient pas être considérés comme des exigences techniques et que les principes qui s'y appliquent devraient être interprétés d'une façon libérale et souple (p. 256 et 253).

[36] En conséquence, les trois facteurs ne doivent pas être perçus comme des points figurant sur une liste de contrôle ou comme des exigences techniques. Ils doivent plutôt être vus comme des considérations connexes devant être appréciées ensemble, plutôt que séparément, et de manière téléologique.

(5) L'application des trois facteurs par une approche téléologique et souple

[37] Lorsqu'ils exercent le pouvoir discrétionnaire de reconnaître ou non la qualité pour agir dans l'intérêt public, les tribunaux doivent prendre en compte trois facteurs : (1) une question justiciable sérieuse est-elle soulevée? (2) le demandeur a-t-il un intérêt réel ou véritable dans l'issue de cette question? et (3) compte tenu de toutes les circonstances, la poursuite proposée constitue-t-elle une manière raisonnable et efficace de soumettre la question aux tribunaux? : *Borowski*, p. 598; *Finlay*, p. 626; *Conseil canadien des Églises*, p. 253; *Hy and Zel's*, p. 690; *Chaoulli*, par. 35 et 188. Le demandeur qui souhaite se voir reconnaître la qualité pour agir doit convaincre la cour que ces facteurs, appliqués d'une manière souple et téléologique, militent en faveur de la reconnaissance de cette qualité. Toutes les autres considérations étant égales par ailleurs, un demandeur qui possède de plein droit la qualité pour agir sera généralement préféré.

[38] The main issue that separates the parties relates to the formulation and application of the third of these factors. However, as the factors are interrelated and there is some disagreement between the parties with respect to at least one other factor, I will briefly review some of the considerations relevant to each and then turn to my analysis of how the factors play out here.

(a) *Serious Justiciable Issue*

[39] This factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.

[40] By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; see also L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 *U.B.C. L. Rev.* 727, at pp. 733-34; Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at p. 27.

[41] This factor also reflects the concern about overburdening the courts with the "unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody:

[38] La principale question qui oppose les parties en l'espèce a trait à la formulation et à l'application du troisième de ces facteurs. Cependant, comme ils sont tous les trois intimement liés et qu'il existe un différend entre les parties en ce qui concerne au moins un d'entre eux, je vais exposer brièvement certaines des considérations pertinentes quant à chacun de ces facteurs et j'analyserai, par la suite, le rôle qu'ils jouent en l'espèce.

a) *Question justiciable sérieuse*

[39] Ce facteur concerne deux des préoccupations qui sous-tendent les restrictions traditionnelles imposées à la qualité pour agir. Dans *Finlay*, le juge Le Dain a lié la justiciabilité d'une question à la « préoccupation relative au rôle propre des tribunaux et à leur relation constitutionnelle avec les autres branches du gouvernement » et son caractère sérieux à la préoccupation relative à l'utilisation des ressources judiciaires limitées (p. 631); voir aussi, la juge L'Heureux-Dubé, dissidente, dans *Hy and Zel's*, p. 702-703.

[40] En insistant sur l'existence d'une question justiciable, les tribunaux s'assurent d'exercer leur pouvoir discrétionnaire de reconnaître la qualité pour agir d'une façon qui est cohérente avec l'objectif de demeurer dans les limites du rôle constitutionnel qui leur est propre (*Finlay*, p. 632). Dans *Finlay*, le juge Le Dain a cité l'arrêt *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, et a écrit que « lorsqu'est en cause un litige que les tribunaux peuvent trancher, ceux-ci ne devraient pas refuser de statuer au motif qu'à cause de ses incidences ou de son contexte politiques, il vaudrait mieux en laisser l'examen et le règlement au législatif ou à l'exécutif » : p. 632-633; voir aussi L. Sossin, « The Justice of Access : Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid? » (2007), 40 *U.B.C. L. Rev.* 727, p. 733-734; Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada*, p. 27.

[41] Ce facteur traduit aussi la préoccupation quant au risque que les tribunaux soient submergés en raison d'une « prolifération inutile de poursuites insignifiantes ou redondantes » et la nécessité

Canadian Council of Churches, at p. 252; *Finlay*, at pp. 631-33. As discussed earlier, these concerns can be overplayed and must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.

[42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

(b) *The Nature of the Plaintiff's Interest*

[43] In *Finlay*, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor is concerned

d'écarter les simples trouble-fête : *Conseil canadien des Églises*, p. 252; *Finlay*, p. 631-633. Comme je l'ai exposé précédemment, ces préoccupations peuvent être exagérées et doivent être appréciées en pratique en fonction des circonstances de chaque affaire plutôt que dans l'abstrait ou de façon hypothétique. Il conviendrait aussi d'examiner d'autres façons possibles de se prémunir contre ces dangers.

[42] Pour être considérée comme une « question sérieuse », la question soulevée doit constituer un « point constitutionnel important » (*McNeil*, p. 268) ou constituer une « question [. . .] importante » (*Borowski*, p. 589). L'action doit être « loin d'être futil[e] » (*Finlay*, p. 633), bien que les tribunaux ne doivent pas examiner le bien-fondé d'une affaire autrement que de façon préliminaire. Par exemple, dans l'arrêt *Hy and Zel's*, le juge Major s'est appuyé sur la norme applicable aux cas où il est tellement peu probable que l'action soit accueillie qu'on pourrait considérer son issue comme une conclusion qui « soit [. . .] assurée » (p. 690). Il a adopté cette position en dépit du fait que la Cour avait déclaré sept ans auparavant que la même Loi était constitutionnelle : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713. Le juge Major a statué qu'il était « prêt à tenir pour acquis que les nombreuses modifications apportées au cours des sept années qui ont suivi l'arrêt *Edwards Books* ont suffisamment changé la Loi pour que sa validité ne soit plus assurée » (*Hy and Zel's*, p. 690). Dans *Conseil canadien des Églises*, la Cour avait de nombreuses réserves quant à la nature de l'action envisagée, mais elle a ultimement accepté que « certains aspects de la déclaration soulev[aient] une question sérieuse quant à la validité de la loi » (p. 254). En outre, dès qu'il devient évident qu'une déclaration fait état d'au moins une question sérieuse, il ne sera généralement pas nécessaire d'examiner minutieusement chacun des arguments plaidés pour trancher la question de la qualité pour agir.

b) *La nature de l'intérêt du demandeur*

[43] Dans l'arrêt *Finlay*, la Cour a écrit que ce facteur traduisait la préoccupation de conserver les ressources judiciaires limitées et la nécessité d'écarter les simples trouble-fête (p. 633). À mon

with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In *Finlay*, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants" (p. 254). In examining the plaintiff's reputation, continuing interest, and link with the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. Roach, *Constitutional Remedies in Canada* (looseleaf), at ¶5.120).

avis, ce facteur concerne la question de savoir si le demandeur a un intérêt réel dans les procédures ou est engagé quant aux questions qu'elles soulèvent. Ce point est illustré dans la jurisprudence de la Cour. Dans *Finlay*, par exemple, même si, selon la Cour, le demandeur n'avait pas la qualité pour agir de plein droit, il avait néanmoins un intérêt direct et personnel quant aux questions qu'il souhaitait soulever. Dans *Borowski*, la Cour a conclu que le demandeur avait un intérêt véritable dans la contestation des dispositions disculpatoires concernant l'avortement. Il était un citoyen inquiet et un contribuable, et il avait tenté sans succès d'obtenir une décision sur la question par d'autres moyens (p. 597). La Cour a donc évalué l'engagement de M. Borowski relativement à l'objet du litige en examinant s'il avait un intérêt véritable quant à la question qu'il désirait soulever. En outre, dans l'arrêt *Conseil canadien des Églises*, il était évident pour la Cour que le demandeur avait un « intérêt véritable », vu qu'il jouissait « de la meilleure réputation possible et [qu']il a[vait] démontré un intérêt réel et constant dans les problèmes des réfugiés et des immigrants » (p. 254). En examinant la réputation du demandeur, son intérêt continu et son lien avec l'action, la Cour a ainsi évalué son « engagement », de façon à assurer une utilisation efficiente des ressources judiciaires limitées (voir K. Roach, *Constitutional Remedies in Canada* (feuilles mobiles), ¶5.120).

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

[44] This factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show . . . that there is no other reasonable and effective manner in which the issue may be brought before the Court": p. 598 (emphasis added); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring

c) *Manières raisonnables et efficaces de soumettre la question à la Cour*

[44] Ce facteur a longtemps été qualifié d'exigence stricte. Par exemple, dans *Borowski*, les juges majoritaires de la Cour ont déclaré que la personne demandant l'exercice du pouvoir discrétionnaire pour se voir reconnaître la qualité pour agir doit « démontre[r] qu'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour » : p. 598 (je souligne); voir aussi *Finlay*, p. 626; *Hy and Zel's*, p. 690. Ce facteur n'a cependant pas toujours été exprimé de façon aussi restrictive et a rarement été appliqué de la sorte. J'estime que nous devrions maintenant indiquer clairement qu'il s'agit d'un des trois facteurs qui doivent être analysés et soupesés par les tribunaux lors de l'exercice

consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

(i) The Court Has Not Always Expressed and Rarely Applied This Factor Rigidly

[45] A fair reading of the authorities from this Court demonstrates, in my view, that while this factor has often been expressed as a strict requirement, the Court has not done so consistently and in fact has not approached its application in a rigid fashion.

[46] The strict formulation of the third factor as it appeared in *Borowski* was not used in the two major cases on public interest standing: see *Thorson*, at p. 161; *McNeil*, at p. 271. Moreover, in *Canadian Council of Churches*, the third factor was expressed as whether "there [was] another reasonable and effective way to bring the issue before the court" (p. 253 (emphasis added)).

[47] A number of decisions show that this third factor, however formulated, has not been applied rigidly. For example, in *McNeil*, at issue was the constitutionality of the legislative scheme empowering a provincial board to permit or prohibit the showing of films to the public. It was clear that there were persons who were more directly affected by this regulatory scheme than was the plaintiff, notably the theatre owners and others who were the subject of that scheme. Nonetheless, the Court upheld granting discretionary public interest standing on the basis that the plaintiff, as a member of

de leur pouvoir discrétionnaire. À mon humble avis, il serait préférable de formuler ce troisième facteur comme étant celui exigeant l'examen de la question de savoir si la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations dont je vais traiter sous peu, constitue une manière raisonnable et efficace de soumettre la question à la cour. Cette approche quant au troisième facteur correspond davantage à l'interprétation souple, discrétionnaire et téléologique de la qualité pour agir dans l'intérêt public qui sous-tend toutes les décisions prononcées par la Cour dans ce domaine.

(i) La Cour n'a pas toujours exprimé ce facteur de façon rigide et l'a rarement appliqué de la sorte

[45] À mon avis, une lecture attentive des décisions rendues par la Cour permet de déceler que même si ce facteur a souvent été qualifié d'exigence stricte, la Cour ne l'a pas appliqué avec rigidité de façon constante et, en fait, n'a pas non plus examiné son application de cette manière.

[46] La formulation rigide du troisième facteur telle qu'elle a été énoncée dans l'arrêt *Borowski* n'a pas été retenue dans les deux principales affaires concernant la qualité pour agir dans l'intérêt public : voir *Thorson*, p. 161, et *McNeil*, p. 271. En outre, dans l'arrêt *Conseil canadien des Églises*, le troisième facteur a été formulé comme étant la question de savoir s'« il [y avait] une autre manière raisonnable et efficace de soumettre la question à la cour » (p. 253 (je souligne)).

[47] En outre, un grand nombre de décisions illustre que ce troisième facteur n'a pas été appliqué de façon rigide, quelle qu'ait été sa formulation. Par exemple, dans l'arrêt *McNeil*, la question en litige concernait la constitutionnalité de dispositions législatives conférant à une commission provinciale le pouvoir d'autoriser ou d'interdire la projection de films pour le public. Il était évident qu'il y avait des personnes touchées plus directement par ce régime réglementaire que ne l'était le demandeur, notamment les propriétaires de cinémas et d'autres personnes visées par ces dispositions législatives. La

the public, had a different interest than the theatre owners and that there was no other way "practically speaking" to get a challenge of that nature before the court (pp. 270-71). Similarly in *Borowski*, although there were many people who were more directly affected by the legislation in question, they were unlikely in practical terms to bring the type of challenge brought by the plaintiff (pp. 597-98). In both cases, the consideration of whether there were no other reasonable and effective means to bring the matter before the court was addressed from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring.

[48] Even when standing was denied because of this factor, the Court emphasized the need to approach discretionary standing generously and not by applying the factors mechanically. The best example is *Canadian Council of Churches*. On one hand, the Court stated that granting discretionary public interest standing "is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (p. 252). However, on the other hand, the Court emphasized that public interest standing is discretionary, that the applicable principles should be interpreted "in a liberal and generous manner" and that the other reasonable and effective means aspect must not be interpreted mechanically as a "technical requirement" (pp. 253 and 256).

(ii) This Factor Must Be Applied Purposively

[49] This third factor should be applied in light of the need to ensure full and complete adversarial

Cour, au terme de l'exercice de son pouvoir discrétionnaire, a tout de même confirmé la reconnaissance de la qualité pour agir dans l'intérêt public aux motifs que le demandeur, en tant que membre du public, avait un intérêt différent de celui des propriétaires de cinémas et qu'il n'y avait « pratiquement » aucune autre manière de saisir la cour d'une contestation de cette nature (p. 270-271). De même, dans l'arrêt *Borowski*, bien que plusieurs personnes fussent davantage touchées par la loi en cause, il était peu probable en pratique que ces gens puissent soumettre au tribunal une contestation de la nature de celle engagée par le demandeur (p. 597-598). Dans les deux cas, la question de savoir s'il n'y avait pas d'autres manières raisonnables et efficaces de soumettre la question à la cour a été traitée d'un point de vue pratique et pragmatique, et en fonction de la nature précise de la contestation que le demandeur avait l'intention d'engager.

[48] Même dans les cas où la qualité pour agir n'a pas été reconnue par suite de l'application de ce facteur, la Cour a insisté sur la nécessité d'exercer le pouvoir discrétionnaire de reconnaître ou non la qualité pour agir plutôt qu'en appliquant les facteurs de façon mécanique. Le meilleur exemple de cette approche se trouve dans l'arrêt *Conseil canadien des Églises*. La Cour a déclaré d'une part que l'exercice par le tribunal de son pouvoir discrétionnaire pour reconnaître la qualité pour agir dans l'intérêt public « n'est pas nécessaire [. . .] lorsque, selon une prépondérance des probabilités, on peut établir qu'un particulier contestera la mesure » (p. 252). Toutefois, la Cour a souligné d'autre part que la décision de reconnaître ou non la qualité pour agir dans l'intérêt public relève d'un pouvoir discrétionnaire, que les principes applicables devraient être interprétés « d'une façon libérale et souple » et que le facteur relatif aux autres manières raisonnables et efficaces ne doit pas être interprété comme le résultat d'une application mécaniste d'une « exigence technique » (p. 253 et 256).

(ii) Ce facteur doit être appliqué de manière téléologique

[49] Ce troisième facteur doit être appliqué au regard de la nécessité d'assurer un exposé complet

presentation and to conserve judicial resources. In *Finlay*, the Court linked this factor to the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue" (p. 633); see also Roach, at ¶5.120. In *Hy and Zel's*, Major J. linked this factor to the concern about needlessly overburdening the courts, noting that "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (p. 692). The factor is also closely linked to the principle of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors. Applying this factor purposively thus requires the court to consider these underlying concerns.

(iii) A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor

[50] The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

des positions contradictoires des parties et de ménager les ressources judiciaires. Dans l'arrêt *Finlay*, la Cour a associé ce facteur à la préoccupation du « tribunal [. . .] d'entendre les principaux intéressés faire valoir contradictoirement leurs points de vue » (p. 633); voir aussi Roach, ¶5.120. Dans l'arrêt *Hy and Zel's*, le juge Major a lié ce facteur à la préoccupation de ne pas surcharger inutilement les tribunaux, soulignant que « [s]'il existe d'autres manières de soumettre la question aux tribunaux, les ressources judiciaires limitées peuvent être mieux utilisées » (p. 692). Ce facteur est aussi étroitement lié au principe de la légalité, puisque les tribunaux doivent déterminer s'il est souhaitable de reconnaître la qualité pour agir en fonction de la nécessité d'assurer la légalité des mesures prises par les acteurs gouvernementaux. Pour appliquer ce facteur de manière téléologique, il est donc nécessaire que le tribunal prenne en compte ces préoccupations sous-jacentes.

(iii) Il est nécessaire d'adopter une approche souple pour évaluer le facteur relatif aux manières « raisonnables et efficaces »

[50] La jurisprudence de la Cour n'est pas très riche en enseignement sur la façon de juger du caractère « raisonnable et efficace » ou non d'une manière donnée de soumettre une question à la cour. Toutefois, en abordant la question sous l'angle téléologique, les tribunaux doivent se demander si l'action envisagée constitue une utilisation efficiente des ressources judiciaires, si les questions sont justiciables dans un contexte accusatoire, et si le fait d'autoriser la poursuite de l'action envisagée favorise le respect du principe de la légalité. Une approche souple et discrétionnaire est de mise pour juger de l'effet de ces considérations sur la décision ultime de reconnaître ou non la qualité pour agir. Par ailleurs, une analyse dichotomique répondant par un oui ou par un non à la question à l'étude n'est pas envisageable : les questions visant à déterminer si une façon de procéder est raisonnable, si elle est efficace et si elle favorise le renforcement du principe de la légalité sont des questions de degré et elles doivent être analysées en fonction de solutions de rechange pratiques, compte tenu de toutes les circonstances.

[51] It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

- The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.

- The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

- The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained

[51] Il pourrait être utile de donner des exemples de certaines questions interdépendantes que les tribunaux pourraient trouver utile de prendre en compte au moment de se pencher sur le troisième facteur discrétionnaire. La liste qui suit n'est naturellement pas exhaustive et ne comprend que quelques exemples.

- Le tribunal devrait tenir compte de la capacité du demandeur d'engager une poursuite. Ce faisant, il devrait examiner notamment ses ressources et son expertise ainsi que la question de savoir si l'objet du litige sera présenté dans un contexte factuel suffisamment concret et élaboré.

- Le tribunal devrait déterminer si la cause est d'intérêt public en ce sens qu'elle transcende les intérêts des parties qui sont le plus directement touchées par les dispositions législatives ou par les mesures contestées. Les tribunaux devraient tenir compte du fait qu'une des idées associées aux poursuites d'intérêt public est que ces poursuites peuvent assurer un accès à la justice aux personnes défavorisées de la société dont les droits reconnus par la loi sont touchés. Ceci ne devrait naturellement pas être assimilé à une permission de reconnaître la qualité pour agir à quiconque décide de s'afficher comme le représentant des personnes pauvres et marginalisées.

- Le tribunal devrait se pencher sur la question de savoir s'il y a d'autres manières réalistes de trancher la question qui favoriseraient une utilisation plus efficace et efficiente des ressources judiciaires et qui offriraient un contexte plus favorable à ce qu'une décision soit rendue dans le cadre du système contradictoire. Les tribunaux devraient adopter une approche pratique et pragmatique. L'existence d'autres demandeurs potentiels, notamment ceux qui possèdent de plein droit la qualité pour agir, est pertinente, mais les chances en pratique qu'ils soumettent la question aux tribunaux ou que des manières aussi ou plus raisonnables et efficaces soient utilisées pour le faire devraient être prises en compte en fonction des réalités pratiques et non des possibilités théoriques. Lorsqu'il y a

by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

- The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

(iv) Conclusion

[52] I conclude that the third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of

d'autres demandeurs, en ce sens que d'autres actions ont été engagées relativement à la question, le tribunal devrait évaluer d'un point de vue pratique les avantages, le cas échéant, d'avoir des recours parallèles et se demander si ces autres actions vont résoudre les questions de manière aussi ou plus raisonnable et efficace. En procédant ainsi, le tribunal ne devrait pas uniquement prendre en compte les questions juridiques précises ou les points soulevés, mais plutôt chercher à savoir si le demandeur apporte une perspective particulièrement utile ou distincte en vue de régler ces points. À la lecture de l'arrêt *McNeil* par exemple, on voit que même lorsque des personnes peuvent avoir un intérêt plus direct dans la question, le demandeur peut avoir un intérêt distinct et important qui diffère de celui des autres, ce qui peut justifier que le tribunal exerce son pouvoir discrétionnaire pour lui reconnaître la qualité pour agir.

- L'incidence éventuelle des procédures sur les droits d'autres personnes dont les intérêts sont aussi, sinon plus touchés devrait être prise en compte. En effet, les tribunaux devraient porter une attention particulière aux situations où les intérêts privés et publics seraient susceptibles d'entrer en conflit. Comme il est indiqué dans l'arrêt *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, p. 1093, le tribunal devrait se demander, par exemple, si « l'échec d'une contestation trop diffuse pourrait faire obstacle à des contestations ultérieures des règles en question, par certaines parties qui auraient des plaintes précises fondées sur des faits ». L'inverse est également vrai. Ainsi, que les personnes ayant des intérêts plus directs et personnels dans la cause se soient abstenues volontairement d'engager une poursuite pourrait militer pour le refus par la cour d'exercer son pouvoir discrétionnaire de reconnaître la qualité pour agir.

(iv) Conclusion

[52] Je conclus que le troisième facteur de l'analyse de la qualité pour agir dans l'intérêt public devrait être formulé comme ceci : la poursuite proposée constitue-t-elle, compte tenu de toutes les

bringing the matter before the court. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.

(6) Weighing the Three Factors

[53] I return to the circumstances of this case in light of the three factors which must be considered: whether the case raises a serious justiciable issue, whether the respondents have a real stake or a genuine interest in the issue(s) and the suit is a reasonable and effective means of bringing the issues before the courts in all of the circumstances. Although there is little dispute that the first two factors favour granting standing, I will review all three as in my view they must be weighed cumulatively rather than individually. I conclude that when all three factors are considered in a purposive, flexible and generous manner, the Court of Appeal was right to grant public interest standing to the Society and Ms. Kiselbach.

(a) *Serious Justiciable Issue*

[54] As noted, with one exception, there is no dispute that the respondents' action raises serious and justiciable issues. The constitutionality of the prostitution laws certainly constitutes a "substantial constitutional issue" and an "important one" that is "far from frivolous": see *McNeil*, at p. 268; *Borowski*, at p. 589; *Finlay*, at p. 633. Indeed, the respondents argue that the impugned *Criminal Code* provisions, by criminalizing many of the activities surrounding prostitution, adversely affect a great number of women. These issues are also clearly justiciable ones, as they concern the constitutionality of the challenged provisions. Consideration of this factor unequivocally supports exercising discretion in favour of standing.

[55] The appellant submits, however, that the respondents' action does not disclose a serious

circonstances, une manière raisonnable et efficace de soumettre la question à la cour. Ce facteur, comme les deux autres, doit être apprécié d'une manière souple et téléologique en plus d'être soupesé à la lumière des autres facteurs.

(6) Appréciation des trois facteurs

[53] Je reviens aux circonstances de l'espèce pour y appliquer les trois facteurs qui doivent être pris en compte : l'affaire soulève-t-elle une question justiciable sérieuse? Les intimées ont-elles un intérêt réel ou véritable dans la question ou les questions? La poursuite constitue-t-elle, compte tenu de toutes les circonstances, une manière raisonnable et efficace de soumettre les questions à la cour? Bien qu'il n'y ait guère de désaccord quant au fait que les deux premiers facteurs favorisent la reconnaissance de la qualité pour agir, je vais les examiner tous les trois, car, à mon avis, ils doivent être appréciés cumulativement plutôt qu'individuellement. Après avoir examiné les trois facteurs suivant une approche téléologique, souple et libérale, je conclus que la Cour d'appel était justifiée de reconnaître la qualité pour agir dans l'intérêt public à la Société et à M^me^ Kiselbach.

a) *Une question justiciable sérieuse*

[54] Comme je l'ai déjà indiqué, à une exception près, nul ne conteste que l'action des intimées soulève des questions sérieuses et justiciables. La constitutionnalité des lois relatives à la prostitution constitue certainement un « point constitutionnel important » (*McNeil*, p. 268) et une « question [. . .] importante » (*Borowski*, p. 589) qui est « loin d'être futil[e] » (*Finlay*, p. 633). De fait, les intimées soutiennent que les dispositions contestées du *Code criminel* en criminalisant plusieurs des activités entourant la prostitution, nuisent à un grand nombre de femmes. Ces questions sont aussi clairement justiciables, en ce qu'elles concernent la constitutionnalité des dispositions contestées. L'examen de ce facteur appuie sans équivoque l'exercice du pouvoir discrétionnaire dont jouissent les tribunaux afin de reconnaître la qualité pour agir.

[55] L'appelant fait cependant valoir que l'action des intimées ne soulève pas de question

issue with respect to the constitutionality of s. 213(1)(*c*) (formerly s. 195.1(1)(*c*)) because this Court has upheld that provision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, and *R. v. Skinner*, [1990] 1 S.C.R. 1235.

[56] On this point, I completely agree with the learned chambers judge. He held that, in the circumstances of this broad and multi-faceted challenge, it is not necessary for the purposes of deciding the standing issue to resolve whether the principles of *stare decisis* permit the respondents to raise this particular aspect of their much broader claim. A more pragmatic approach is to say, as did Cory J. in *Canadian Council of Churches* and the chambers judge in this case, that some aspects of the statement of claim raise serious issues as to the invalidity of the legislation. Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles.

(b) *The Proposed Plaintiff's Interest*

[57] Applying the purposive approach outlined earlier, there is no doubt, as the appellant accepts that this factor favours granting public interest standing. The Society has a genuine interest in the current claim. It is fully engaged with the issues it seeks to raise.

[58] As the respondents point out, the Society is no busybody and has proven to have a strong engagement with the issue. It has considerable experience with the sex workers in the Downtown Eastside of Vancouver and it is familiar with their interests. It is a registered non-profit organization that is run "by and for" current and former sex

sérieuse au regard de la constitutionnalité de l'al. 213(1)*c*) (anciennement l'al. 195.1(1)*c*)) parce que la Cour a confirmé la validité de cette disposition dans le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, et dans *R. c. Skinner*, [1990] 1 R.C.S. 1235.

[56] Sur ce point, je suis tout à fait d'accord avec le juge en cabinet. Il a conclu que, dans les circonstances de la présente contestation vaste et à multiples facettes, il n'était pas nécessaire, aux fins de disposer de la question de la qualité pour agir, de déterminer si le principe du *stare decisis* permet aux intimées de soulever cet aspect particulier de leur action qui est par ailleurs beaucoup plus vaste. On peut dire de façon plus pragmatique, comme l'ont fait le juge Cory dans l'arrêt *Conseil canadien des Églises* et le juge siégeant en cabinet en l'espèce, que certains éléments de la déclaration soulèvent des questions sérieuses au regard de l'invalidité des dispositions législatives. Lorsqu'il est évident que certains aspects de l'action soulèvent des questions justiciables sérieuses, il est préférable dans le cadre de l'analyse de la question de la qualité pour agir de ne pas se livrer à un examen en profondeur du bien-fondé des aspects distincts et particuliers de l'action. Ces derniers peuvent être examinés au moyen d'autres véhicules procéduraux appropriés.

b) *L'intérêt que devrait avoir le demandeur*

[57] En appliquant l'approche téléologique déjà exposée, il ne subsiste aucun doute, d'ailleurs l'appelant en convient lui-même, que ce facteur joue en faveur de la reconnaissance de la qualité pour agir dans l'intérêt public. La Société a un intérêt véritable dans la présente demande. Elle est totalement engagée au regard des questions qu'elle souhaite soulever.

[58] Comme le soulignent les intimées, la Société n'agit pas en trouble-fête et a démontré un solide engagement à l'égard de l'enjeu en cause. Elle a une expérience considérable relativement aux travailleurs de l'industrie du sexe du quartier Downtown Eastside de Vancouver et elle connaît bien leurs intérêts. Il s'agit d'un organisme sans but

workers who live and/or work in this neighbourhood of Vancouver. Its mandate is based upon the vision and the needs of street-based sex workers and its objects include working toward better health and safety for sex workers, working against all forms of violence against sex workers and lobbying for policy and legal changes that will improve the lives and working conditions of the sex workers (R.F., at para. 8).

[59] From Sheryl Kiselbach's affidavit, it is clear that she is deeply engaged with the issues raised. Not only does she claim that the prostitution laws have directly and significantly affected her for 30 years (A.R., vol. IV, at pp. 15-17), but also she notes that she is now employed as a violence prevention coordinator.

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

[60] Understandably, the chambers judge treated the traditional formulation of this factor as a requirement of a strict test. He rejected the respondents' submission that they ought to have standing because their action was "[t]he most reasonable and effective way" to bring this challenge to court. The judge noted that this submission misstated the test set down by this Court and that he was "bound to apply" the test requiring the respondents to show that "there is no other reasonable and effective way to bring the issue before the court" (paras. 84-85). However, for the reasons I set out earlier, approaching the third factor in this way should be considered an error in principle. We must therefore reassess the weight to be given to this consideration when it is applied in a purposive and flexible manner.

[61] The learned chambers judge had three related concerns which he thought militated strongly

lucratif enregistré qui est administré « par et pour » des travailleurs qui exercent un métier dans l'industrie du sexe, ou qui en ont déjà exercé un, et qui habitent ou travaillent dans ce quartier de Vancouver. L'objet de cet organisme est fondé sur la vision et les besoins des travailleurs de la rue de l'industrie du sexe et ses objets visent notamment à améliorer leur santé et leur sécurité, à s'opposer à toutes les formes de violence à leur égard et à exercer des pressions pour obtenir des modifications aux politiques et aux lois afin d'améliorer les conditions de vie et de travail des travailleurs du sexe (m.i., par. 8).

[59] D'après l'affidavit de Sheryl Kiselbach, il est évident qu'elle est fortement engagée dans les questions soulevées. Non seulement soutient-elle que les lois relatives à la prostitution l'ont directement et considérablement affectée durant 30 ans (d.a., vol. IV, p. 15-17), mais elle souligne également qu'elle est maintenant employée comme coordonnatrice de la prévention de la violence.

c) *Les manières raisonnables et efficaces de soumettre la question à la cour*

[60] Pour des raisons faciles à comprendre, le juge en cabinet a considéré la formulation traditionnelle de ce facteur comme une exigence d'un test d'application stricte. Il a rejeté l'argument des intimées selon lequel la qualité pour agir aurait dû leur être reconnue parce que leur action était [TRADUCTION] « [l]a manière la plus raisonnable et efficace » de soumettre la présente contestation à la cour. Le juge a souligné que cet argument dénaturait le critère formulé par la Cour et qu'il était « tenu d'appliquer » le critère exigeant que les intimées démontrent qu'« il n'y a pas d'autres manières raisonnables et efficaces de soumettre la question à la cour » (par. 84-85). Toutefois, pour les motifs que j'ai déjà formulés, un tel examen du troisième facteur devrait être considéré comme une erreur de principe. Nous devons donc réévaluer le poids qu'il convient de donner à ce facteur lorsqu'il est pris en compte de manière téléologique et souple.

[61] Le juge en cabinet était préoccupé par trois questions connexes qui, selon lui, militaient

against granting public interest standing. First, he thought that the existence of the *Bedford* litigation in Ontario showed that there could be other potential plaintiffs to raise many of the same issues. Second, he noted that there were many criminal prosecutions under the challenged provisions and that the accused in each one of them could raise constitutional issues as of right. Finally, he was not persuaded that individual sex workers could not bring the challenge forward as private litigants. I will discuss each of these concerns in turn.

fortement contre la reconnaissance de la qualité pour agir dans l'intérêt public. Premièrement, il croyait que l'existence de l'affaire *Bedford* en Ontario démontrait qu'il pourrait y avoir de nombreux autres demandeurs susceptibles de soulever en grand nombre les mêmes points. Deuxièmement, il a remarqué que de nombreuses poursuites criminelles avaient été engagées en application des dispositions contestées et que l'accusé dans chacune de ces poursuites pouvait de plein droit soulever des questions constitutionnelles. Enfin, il n'était pas convaincu que des travailleurs du sexe ne pouvaient pas, de leur propre chef, faire valoir la contestation en tant que parties privées. Je vais examiner chacune de ces préoccupations successivement.

[62] The judge was first concerned by the related *Bedford* litigation underway in Ontario. The judge noted that the fact that there is another civil case in another province which raises many of the same issues "would not necessarily be sufficient reason for concluding that the present case . . . should not proceed", it nonetheless "illustrates that if public interest standing is not granted . . . there may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75).

[62] Le juge était d'abord préoccupé par le litige connexe en cours en Ontario, soit l'affaire *Bedford*. Il a souligné que le fait qu'il y ait une autre affaire en matière civile dans une autre province et dans laquelle plusieurs des mêmes questions sont soulevées [TRADUCTION] « ne constituerait pas nécessairement un motif suffisant pour conclure que la présente instance [. . .] ne devrait pas procéder », mais cela « illustre que si la qualité pour agir n'est pas accordée [. . .], il pourrait tout de même y avoir des demandeurs ayant la qualité pour agir qui pourraient, s'ils décidaient de le faire, soumettre à la cour l'ensemble de ces questions » (par. 75).

[63] The existence of parallel litigation is certainly a highly relevant consideration that will often support denying standing. However, I agree with the chambers judge that the existence of a civil case in another province — even one that raises many of the same issues — is not necessarily a sufficient basis for denying standing. There are several reasons for this.

[63] L'existence d'une instance parallèle constitue certainement un facteur hautement pertinent qui milite souvent contre la reconnaissance de la qualité pour agir. Je conviens cependant avec le juge en cabinet que l'existence d'une affaire civile dans une autre province — même si elle soulève beaucoup de questions identiques — n'est pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir. Cela s'explique de plusieurs façons.

[64] One is that, given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. What is needed is a

[64] Premièrement, compte tenu de l'organisation provinciale de nos cours supérieures, les décisions rendues par celles d'une province ne lient pas les cours des autres provinces. Ainsi, une instance dans une province n'apporte pas nécessairement une réponse complète au demandeur qui désire

practical and pragmatic assessment of whether having parallel proceedings in different provinces is a reasonable and effective approach in the particular circumstances of the case. Another point is that the issues raised in the *Bedford* case are not identical to those raised in this one. Unlike in the present case, the *Bedford* litigation does not challenge ss. 211, 212(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*h*) or (3) of the *Code* and does not challenge any provisions on the basis of ss. 2(*d*) or 15 of the *Charter*. A further point is that, as discussed earlier, the court must examine not only the precise legal issue, but the perspective from which it is raised. The perspectives from which the challenges in *Bedford* and in this case come are very different. The claimants in *Bedford* were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. As the claim of unconstitutionality of the prostitution laws revolves mainly around the effects it has on street-level sex workers, the respondents in this action ground their challenges in a distinctive context. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. We were told, for example, that the respondents proposed that their appeal to this Court should be stayed awaiting the results of the *Bedford* litigation. A stay of proceedings pending resolution of other litigation is one possibility that should be taken into account in exercising the discretion as to standing.

[65] Taking these points into account, the existence of the *Bedford* litigation in Ontario, in the circumstances of this case, does not seem to me to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward. The *Bedford* litigation, in my view, has not

intenter une poursuite sur des questions semblables dans une autre province. Il faut donc évaluer de façon pratique et pragmatique si le fait d'avoir des instances parallèles dans des provinces différentes constitue une approche raisonnable et efficace dans les circonstances particulières de l'espèce. Deuxièmement, les questions soulevées dans l'affaire *Bedford* ne sont pas identiques à celles soulevées en l'espèce. En effet, contrairement à la présente affaire, l'affaire *Bedford* ne vise pas la contestation de l'art. 211, des al. 212(1)*a*), *b*), *c*), *d*), *e*), *f*) et *h*) et du par. 212(3) du *Code criminel* et ne conteste aucune disposition sur le fondement de l'al. 2*d*) ou sur l'art. 15 de la *Charte*. En outre, comme nous l'avons vu, le tribunal doit examiner non seulement la question juridique précise posée, mais aussi le contexte dans lequel elle l'est. Or, les contextes qui sont à l'origine des contestations dans l'affaire *Bedford* et dans la présente affaire sont très différents. Les demanderesses dans l'affaire *Bedford* n'étaient pas principalement des travailleuses de l'industrie du sexe qui exerçait leur métier dans la rue, tandis que, en l'espèce, ce sont elles qui sont au cœur du débat. Comme l'argument d'inconstitutionnalité des lois relatives à la prostitution porte principalement sur les effets qu'elles ont sur ces travailleurs, les intimées en l'espèce fondent leurs contestations dans un contexte distinctif. Troisièmement, mise à part la mesure radicale qui consiste à ne pas reconnaître la qualité pour agir, il pourrait y avoir d'autres stratégies en matière de gestion des litiges visant à assurer l'utilisation efficiente et efficace des ressources judiciaires. Par exemple, les intimées auraient suggéré que leur pourvoi devant la Cour soit suspendu dans l'attente de l'issue de l'affaire *Bedford*. La suspension des procédures jusqu'au règlement d'autres instances est, de fait, une possibilité qui devrait être prise en compte lors de l'exercice du pouvoir discrétionnaire de reconnaître ou non la qualité pour agir.

[65] En tenant compte de ce qui précède, l'existence de l'affaire *Bedford* en Ontario, dans les circonstances de la présente affaire, ne me semble pas peser très lourd contre les intimées lorsqu'il s'agit de déterminer si la poursuite qu'elles ont intentée constitue une manière raisonnable et efficace de soumettre à la cour les allégations formulées. À

been shown to be a more reasonable and effective means of doing so.

[66] The second concern identified by the chambers judge was that there are hundreds of prosecutions under the impugned provisions every year in British Columbia. In light of this, he reasoned that "the accused in each one of those cases would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77). He noted, in addition, that such challenges have been mounted by accused persons in numerous prostitution-related criminal trials (paras. 78-79). In my view, however, there are a number of points in the circumstances of this case that considerably reduce the weight that should properly be given this concern here.

[67] To begin, the importance of a purposive approach to standing makes clear that the existence of a parallel claim, either potential or actual, is not conclusive. Moreover, the existence of potential plaintiffs, while of course relevant, should be considered in light of practical realities. As I will explain, the practical realities of this case are such that it is very unlikely that persons charged under these provisions would bring a claim similar to the respondents'. Finally, the fact that some challenges have been advanced by accused persons in numerous prostitution-related criminal trials is not very telling either.

[68] The cases to which we have been referred did not challenge nearly the entire legislative scheme as the respondents do. As the respondents point out, almost all the cases referred to were challenges to the communication law alone: *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *Skinner*; *R. v. Smith* (1988), 44 C.C.C. (3d) 385 (Ont. H.C.J.); *R. v. Gagne*, [1988] O.J. No. 2518 (QL) (Prov. Ct.); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111 (Alta. C.A.); *R.*

mon avis, il n'a pas été démontré que cette autre affaire constituait une manière plus raisonnable et efficace d'y arriver.

[66] Le deuxième point dont le juge en cabinet était préoccupé concernait les centaines de poursuites engagées chaque année en Colombie-Britannique en application des dispositions contestées. Il en a conclu que [TRADUCTION] « l'accusé dans chacune de ces causes pourrait de plein droit soulever les questions constitutionnelles que les demanderesses tentent de soulever en l'espèce » (par. 77). En outre, il a souligné que de telles contestations avaient été formulées par des accusés dans de nombreux procès criminels en matière de prostitution (par. 78-79). À mon avis, il y a cependant un certain nombre de facteurs qui, dans les circonstances de la présente instance, réduisent considérablement l'importance qu'il convient d'accorder à cette préoccupation.

[67] Tout d'abord, compte tenu de l'importance d'adopter une approche téléologique au regard de la qualité pour agir, il est évident que l'existence d'une action parallèle, qu'elle soit éventuelle ou réelle, n'est pas déterminante. De plus, l'existence de demandeurs potentiels, bien qu'évidemment un facteur pertinent, ne devrait être prise en compte qu'en fonction de considérations d'ordre pratique. Comme je l'expliquerai plus loin, les considérations d'ordre pratique, en l'espèce, sont telles qu'il est très peu probable que des personnes accusées en application de ces dispositions engageraient une action semblable à celle des demanderesses. Enfin, le fait que certaines contestations aient été formulées par des accusés dans le cadre de nombreux procès criminels en matière de prostitution n'est pas non plus très révélateur.

[68] Les causes qui ont été portées à notre attention étaient loin de contester la validité de l'ensemble du régime législatif comme les intimées le font en l'espèce. Comme celles-ci l'ont d'ailleurs souligné, la presque totalité de la jurisprudence citée renvoie à des contestations qui visaient uniquement les infractions relatives à la communication : *R. c. Stagnitta*, [1990] 1 R.C.S. 1226; *Skinner*; *R. c. Smith* (1988), 44 C.C.C. (3d) 385 (H.C.J. Ont.); *R.*

v. Kazelman, [1987] O.J. No. 1931 (QL) (Prov. Ct.); *R. v. Bavington*, 1987 [1987] O.J. No. 2728 (QL) (Prov. Ct.); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.); *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255 (Prov. Ct.); *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232 (S.C.); *R. v. Bailey*, [1986] O.J. No. 2795 (QL) (Prov. Ct.); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464. Most of the other cases challenged one provision only, either the procurement provision (*R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (QL) (C.A.)), or the bawdy house provision (*R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424 (Ont. C.A.)). From the record, the only criminal cases that challenge more than one section of the prostitution provisions were commenced *after* this case (Affidavit of Karen Howden, June 24, 2011, at para. 10 (*R. v. Mangat*) (A.R., vol. V, at p. 102; vol. IX, at pp. 31-36); paras. 4-5 (*R. v. Cho*) (A.R., vol. V, at p. 102; vol. VIII, at p. 163); paras. 2 and 11 (*R. v. To*) (A.R., vol. V, at pp. 101-3 and 104-12)). At the time of writing these reasons, one case had been dismissed, the other held in abeyance pending the outcome of this case and the last one was set for a preliminary inquiry.

[69] Of course, an accused in a criminal case will always be able to raise a constitutional challenge to the provisions under which he or she is charged. But that does not mean that this will necessarily constitute a more reasonable and effective alternative way to bring the issue to court. The case of *Blais* illustrates this point. In that case, the accused, a client, raised a constitutional challenge to the communication provision without any evidentiary support. The result was that the Provincial Court of British Columbia dismissed the constitutional claim, without examining it in detail. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance. For instance, in *R. v. Hamilton* (Affidavit of Elizabeth Campbell, September 17, 2008, at para. 6 (A.R., vol. II, at pp. 34-35)), the Crown, for

c. Gagne, [1988] O.J. No. 2518 (QL) (C. prov.); *R. c. Jahelka* (1987), 43 D.L.R. (4th) 111 (C.A. Alb.); *R. c. Kazelman*, [1987] O.J. No. 1931 (QL) (C. prov.); *R. c. Bavington*, [1987] O.J. No. 2728 (QL) (C. prov.); *R. c. Cunningham* (1986), 31 C.C.C. (3d) 223 (C. prov. Man.); *R. c. Bear* (1986), 47 Alta. L.R. (2d) 255 (C. prov.); *R. c. McLean* (1986), 2 B.C.L.R. (2d) 232 (C.S.); *R. c. Bailey*, [1986] O.J. No. 2795 (QL) (C. prov.); *R. c. Cheeseman*, C. prov. Sask., 19 juin 1986; *R. c. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464. La majorité des autres causes ne contestaient qu'une disposition, soit celle relative au proxénétisme (*R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Boston*, [1988] B.C.J. No. 1185 (QL) (C.A.)), ou celle relative aux maisons de débauche (*R. c. DiGiuseppe* (2002), 161 C.C.C. (3d) 424 (C.A. Ont.)). Il appert du dossier que les seules causes criminelles dont la contestation porte sur plus d'une disposition relative à la prostitution ont été intentées *après* la présente affaire (affidavit de Karen Howden, 24 juin 2011, par. 10 (*R. c. Mangat*) (d.a., vol. V, p. 102; d.a., vol. IX, p. 31-36); par. 4-5 (*R. c. Cho*) (d.a., vol. V, p. 102; d.a., vol. VIII, p. 163); par. 2 et 11 (*R. c. To*) (d.a., vol. V, p. 101-103 et 104-112). Au moment de rédiger les présents motifs, une affaire avait été rejetée, une autre avait été suspendue en attendant l'issue de la présente affaire et, dans la dernière, une date avait été fixée pour la tenue de l'enquête préliminaire.

[69] Il va de soi qu'une personne accusée dans une instance en matière criminelle peut toujours soulever une contestation constitutionnelle des dispositions en application desquelles elle est accusée. Mais, cela ne signifie pas que cette éventualité constituera nécessairement une manière plus raisonnable et efficace de soumettre la question à la cour. L'affaire *Blais* illustre ce point. Dans cette affaire, l'accusé, un client, a soulevé une contestation constitutionnelle à l'encontre de la disposition relative à la communication, et ce, sans aucune preuve à l'appui. La Cour provinciale de la Colombie-Britannique a donc rejeté la revendication constitutionnelle sans l'examiner en détail. De plus, le caractère imprévisible inhérent aux procès criminels rend les choses encore plus difficiles pour une partie soulevant une contestation de la nature de celle engagée en l'espèce. Par exemple,

unrelated reasons, entered a stay of proceedings after the accused filed a constitutional challenge to a bawdy house provision. Thus, the challenge could not proceed.

[70] Moreover, the fact that many challenges could be or have been brought in the context of criminal prosecutions may in fact support the view that a comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised. There could be a multitude of similar challenges in the context of a host of criminal prosecutions. Encouraging that approach does not serve the goal of preserving scarce judicial resources. Moreover, a summary conviction proceeding may not necessarily be a more appropriate setting for a complex constitutional challenge.

[71] The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)).

dans l'affaire *R. c. Hamilton* (affidavit d'Elizabeth Campbell, 17 septembre 2008, par. 6 (d.a., vol. II, p. 34-35)), le ministère public a demandé, pour des raisons distinctes, la suspension des procédures à la suite du dépôt par l'accusé d'une contestation constitutionnelle de la disposition concernant les maisons de débauche. La contestation n'a donc pas pu suivre son cours.

[70] En outre, le fait que de nombreuses contestations pourraient être ou aient été engagées, ou l'ont été, dans le cadre de poursuites en matière criminelle pourrait en fait corroborer la thèse selon laquelle une demande exhaustive de jugement déclaratoire est en fait une manière plus raisonnable et efficace d'en arriver à un règlement définitif des questions soulevées. Il pourrait y avoir une multitude de contestations semblables engagées dans le cadre d'une myriade de poursuites criminelles. En favorisant cette approche, on ne satisferait pas à l'objectif visant à préserver les ressources judiciaires limitées. En outre, une procédure par voie de déclaration sommaire de culpabilité ne constitue pas nécessairement un cadre plus approprié pour le traitement d'une contestation constitutionnelle complexe.

[71] La troisième préoccupation exposée par le juge en cabinet portait sur le fait qu'il ne pouvait pas s'expliquer comment la vulnérabilité des membres de la Société les empêchait de comparaître en qualité de demanderesses, étant donné qu'elles étaient prêtes à témoigner au procès (par. 76). Or, être témoin et être partie à une action sont deux choses bien différentes. Il appert du dossier en l'espèce qu'aucun travailleur de l'industrie du sexe du quartier Downtown Eastside de Vancouver n'était prêt à intenter une contestation exhaustive. Ils craignent une atteinte à leur vie privée et à leur sécurité ainsi qu'un accroissement des actes de violence de la part des clients. De plus, leurs conjoints, leurs amis, les membres de leur famille ou de leur collectivité pourraient ne pas savoir qu'ils travaillent ou ont travaillé dans l'industrie du sexe et qu'ils consomment ou ont consommé des drogues. Ils craignent que leurs enfants leur soient retirés par les autorités responsables de la protection des enfants. Enfin, en engageant une contestation de cette

As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

nature, ils craignent de nuire à leurs perspectives, actuelles ou futures, d'études et d'emploi (affidavit de Jill Chettiar, 26 septembre 2008, par. 16-18 (d.a., vol. IV, p. 184-185)). Selon moi, la volonté de bon nombre de ces personnes de souscrire des affidavits ou de comparaître pour témoigner n'affecte en rien la crédibilité de leur témoignage voulant qu'elles ne soient pas prêtes ou capables d'engager en leurs propres noms une contestation de cette nature. La conduite d'une importante poursuite judiciaire en matière constitutionnelle comporte également des aspects pratiques. Les avocats doivent être en mesure de communiquer avec leurs clients, et ces derniers doivent être en mesure de fournir en temps opportun des instructions ponctuelles et appropriées. En outre, dans le cadre de contestations individuelles, de nombreuses difficultés pourraient surgir compte tenu des éléments de preuve relatifs à la situation de plusieurs des personnes les plus directement touchées par les dispositions contestées.

[72] I conclude, therefore, that these three concerns identified by the chambers judge were not entitled to the decisive weight which he gave them.

[72] Par conséquent, je conclus que ces trois préoccupations décrites par le juge en cabinet ne justifiaient pas qu'il leur accorde le poids déterminant qu'il leur a accordé.

[73] I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will

[73] Je vais maintenant aborder d'autres considérations qui devraient être prises en compte lors de l'examen du facteur relatif aux manières plus raisonnables et efficaces. La présente affaire constitue un litige d'intérêt public : les intimées ont soulevé des questions d'importance pour le public, des questions qui transcendent leurs intérêts immédiats. Leur contestation est exhaustive en ce qu'elle vise la presque totalité du régime législatif. Elle fournit l'occasion d'évaluer, du point de vue du droit constitutionnel, l'effet global de ce régime sur les personnes les plus touchées par ses dispositions. Une contestation de cette nature est susceptible de prévenir une multiplicité de contestations individuelles engagées dans le cadre de poursuites criminelles. Il n'y a aucun risque de porter atteinte aux droits d'autres individus ayant un intérêt plus personnel ou plus direct dans la question du fait d'une action trop générale ou mal présentée. Il est évident que la demande est plaidée avec rigueur et habileté. Rien ne laisse croire que d'autres personnes

ensure that there is both an individual and collective dimension to the litigation.

[74] The record supports the respondents' position that they have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside, and Ms. Kiselbach, a former sex worker in this neighbourhood, is supported by the resources of the Society. They provide a concrete factual background and represent those most directly affected by the legislation. For instance, the respondents' evidence includes affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver (R.F., at para. 20). Further, the Society is represented by experienced human rights lawyers, as well as by the Pivot Legal Society, a non-profit legal advocacy group working in Vancouver's Downtown Eastside and focusing predominantly on the legal issues that affect this community (Affidavit of Peter Wrinch, January 30, 2011, at para. 3 (A.R., vol. V, at p. 137)). It has conducted research on the subject, generated various reports and presented the evidence it has gathered before government officials and committees (see Wrinch Affidavit, at paras. 6-21 (A.R., vol. V, at pp. 137-44)). This in turn, suggests that the present litigation constitutes an effective means of bringing the issue to court in that it will be presented in a context suitable for adversarial determination.

[75] Finally, other litigation management tools and strategies may be alternatives to a complete denial of standing, and may be used to ensure that the proposed litigation is a reasonable and effective way of getting the issues before the court.

touchées de façon plus directe ou personnelle aient choisi de plein gré de ne pas contester ces dispositions. La présence de l'intimée qui agit à titre individuel de même que de la Société garantira que le litige aura une dimension à la fois individuelle et collective.

[74] Le dossier appuie la position des intimées selon laquelle elles ont la capacité d'engager la présente action. La Société est bien organisée et dotée d'une expertise considérable en ce qui concerne les travailleurs de l'industrie du sexe qui exercent leur métier dans le quartier Downtown Eastside, et M^me^ Kiselbach, une ancienne travailleuse du sexe dans ce quartier, est soutenue par les ressources de la Société. Elles apportent un contexte factuel concret et représentent les personnes qui sont le plus directement touchées par les dispositions législatives contestées. À titre d'exemple, la preuve des intimées comprend des affidavits de plus de 90 travailleurs du sexe, actifs ou retirés, du quartier Downtown Eastside de Vancouver (m.i., par. 20). De plus, la Société est représentée par des avocats expérimentés en droit de la personne, ainsi que par la Pivot Legal Society, un organisme sans but lucratif d'intervention juridique qui travaille dans le quartier en cause et dont les activités sont principalement centrées sur les questions juridiques touchant cette collectivité (affidavit de Peter Wrinch, 30 janvier 2011, par. 3 (d.a., vol. V, p. 137)). Cet organisme a effectué des recherches sur le sujet, a produit divers rapports et a présenté les éléments de preuve qu'elle a recueillis à des représentants et à des comités gouvernementaux (voir l'affidavit de Peter Wrinch, par. 6-21 (d.a., vol. V, p. 137-144)). Cela laisse entendre que la présente instance constitue une manière efficace de soumettre la question à la cour en ce sens qu'elle sera présentée dans un contexte qui permettra sa détermination dans un système contradictoire.

[75] Enfin, d'autres outils de gestion des litiges et d'autres solutions moins catégoriques qu'un déni total de la qualité pour agir peuvent être utilisés pour faire en sorte que le litige projeté constitue une manière raisonnable et efficace de soumettre les questions à la cour.

(7) Conclusion With Respect to Public Interest Standing

[76] All three factors, applied purposively, favour exercising discretion to grant public interest standing to the respondents to bring their claim. Granting standing will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of society, but it will also promote the economical use of scarce judicial resources: *Canadian Council of Churches*, at p. 252.

B. *Private Interest Standing*

[77] Having found that the respondents have public interest standing to pursue their claims, it is not necessary to address the issue of whether Ms. Kiselbach has private interest standing.

V. Disposition

[78] I would dismiss the appeal with costs. However, I would not grant special costs to the respondents. The Court of Appeal declined to do so (2011 BCCA 515, 314 B.C.A.C. 137) and we ought not to interfere with that exercise of discretion unless there are clear and compelling reasons to do so which in my view do not exist here: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 77.

Appeal dismissed with costs.

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors for the respondents: Arvay Finlay, Vancouver; Pivot Legal, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Community Legal Assistance Society: Community Legal Assistance Society, Vancouver.

(7) Conclusion en ce qui concerne la qualité pour agir dans l'intérêt public

[76] Appliqués selon une approche téléologique, les trois facteurs militent en faveur de l'exercice du pouvoir discrétionnaire pour reconnaître aux intimées la qualité pour agir dans l'intérêt public afin qu'elles présentent leur demande. La reconnaissance de cette qualité servira non seulement à renforcer le principe de la légalité en ce qui concerne des questions sérieuses touchant directement certains des membres les plus marginalisés de la société, mais aussi à faire la promotion d'une utilisation efficiente des ressources judiciaires limitées : *Conseil canadien des Églises*, p. 252.

B. *Qualité pour agir dans l'intérêt privé*

[77] Ayant conclu que les intimées ont la qualité pour agir dans l'intérêt public afin de poursuivre leur action, il n'est pas nécessaire d'aborder la question de savoir si M^me^ Kiselbach a la qualité pour agir dans l'intérêt privé.

V. Dispositif

[78] Je suis d'avis de rejeter le pourvoi avec dépens. Toutefois, je n'accorderai pas de dépens spéciaux aux intimées. La Cour d'appel a refusé de le faire (2011 BCCA 515, 314 B.C.A.C. 137) et nous ne devrions pas nous immiscer dans l'exercice de ce pouvoir discrétionnaire à moins d'avoir des motifs clairs et impérieux de le faire, ce qui, à mon avis, n'est pas le cas en l'espèce : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263, par. 77.

Pourvoi rejeté avec dépens.

Procureur de l'appelant : Procureur général du Canada, Vancouver.

Procureurs des intimées : Arvay Finlay, Vancouver; Pivot Legal, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenante Community Legal Assistance Society : Community Legal Assistance Society, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Gratl & Company, Vancouver; Megan Vis-Dunbar, Vancouver.

Solicitor for the intervener Ecojustice Canada: Ecojustice Canada, Toronto.

Solicitors for the interveners the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and the ARCH Disability Law Centre: West Coast Women's Legal Education and Action Fund (West Coast LEAF), Vancouver; Justice for Children and Youth, Toronto; ARCH Disability Law Centre, Toronto.

Solicitors for the intervener Conseil scolaire francophone de la Colombie-Britannique: Heenan Blaikie, Ottawa.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitor for the intervener the Canadian Civil Liberties Association: Canadian Civil Liberties Association, Toronto.

Solicitors for the interveners the Canadian Association of Refugee Lawyers and the Canadian Council for Refugees: Waldman & Associates, Toronto.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network, the HIV & AIDS Legal Clinic Ontario and the Positive Living Society of British Columbia: McCarthy Tétrault, Vancouver.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Gratl & Company, Vancouver; Megan Vis-Dunbar, Vancouver.

Procureur de l'intervenant Ecojustice Canada : Ecojustice Canada, Toronto.

Procureurs des intervenants Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth et ARCH Disability Law Centre : West Coast Women's Legal Education and Action Fund (West Coast LEAF), Vancouver; Justice for Children and Youth, Toronto; ARCH Disability Law Centre, Toronto.

Procureurs de l'intervenant le Conseil scolaire francophone de la Colombie-Britannique : Heenan Blaikie, Ottawa.

Procureur de l'intervenant David Asper Centre for Constitutional Rights : Université de Toronto, Toronto.

Procureur de l'intervenante l'Association canadienne des libertés civiles : Association canadienne des libertés civiles, Toronto.

Procureurs des intervenants l'Association canadienne des avocats et avocates en droit des réfugiés et le Conseil canadien pour les réfugiés : Waldman & Associates, Toronto.

Procureurs des intervenants le Réseau juridique canadien VIH/sida, HIV & AIDS Legal Clinic Ontario et Positive Living Society of British Columbia : McCarthy Tétrault, Vancouver.

TAB 6

PARAS 26, 40, 42, 64

Federal Court | Cour fédérale

Date: 20101223

Docket: T-1162-09

Citation: 2010 FC 1330

Ottawa, Ontario, December 23, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

UNITED STATES STEEL CORPORATION AND U.S. STEEL CANADA INC.

Respondents

and

LAKESIDE STEEL INC. AND LAKESIDE STEEL CORP.

Interveners

and

THE UNITED STEEL WORKERS AND LOCAL 1005 AND LOCAL 8782 AND JOHN PITTMAN AND GORD ROLLO

Interveners

REASONS FOR ORDER AND ORDER

[1] This is a motion brought by the Respondents, United States Steel Corporation and U.S. Steel Canada Inc. (US Steel) appealing the Order of Prothonotary Martha Milczynski, issued September 23, 2009, (the Order) which granted intervener status to Lakeside Steel Inc. and Lakeside Steel Corp. (Lakeside) and to the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), Local 1005 of the USW, Local 8782 of the USW, John Pittman on behalf of himself and all affected members, and Gord Rollo on behalf of himself and all affected members (collectively the Union Interveners and, together with Lakeside, Interveners).

I. Background

A. *Factual Background*

[2] On July 17, 2009 the Attorney General of Canada (AGC) commenced an application on behalf of the Minister of Industry (the Minister) pursuant to section 40 of the *Investment Canada Act*, R.S.C. 1985 c.28 (the Act). The AGC alleges that US Steel has failed to comply with two written undertakings (the Undertakings) made to the Minister in connection with US Steel's acquisition of certain assets of Stelco Inc. (the Canadian Business). The undertakings relate to the annual level of steel production in US Steel's Canadian Business (the output undertaking) and aggregate employment levels at the Canadian Business (the employment undertaking).

[3] The Application was commenced following the issuance of a Ministerial demand under section 39 of the Act. The AGC is now seeking a monetary penalty as well as an Order requiring the Respondents to comply with the undertakings. Consequently, at issue in the Application is:

1) whether the Minister was justified in sending a demand to US Steel under section 39 of the Act;

2) whether US Steel failed to comply with the demand; and

3) what remedial order, in the Court's opinion, is appropriate in the circumstances.

[4] In accordance with Rule 109 of the *Federal Courts Rules* (the Rules), SOR/98-106, the Interveners sought and were granted, following the Order, leave to intervene in the proceedings.

B. *The Order*

[5] Prothonotary Milczynski was satisfied that Lakeside and the Union Interveners met the test for intervener status under the Rules, and determined that their submissions on remedies not sought by the Applicant would be of assistance to the Court hearing the merits of the Application.

[6] Prothonotary Milczynski considered the relevant principles governing the exercise of the Court's discretion pursuant to Rule 109 as outlined in *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd.*(2000), [2010] 1 FCR 226, 95 ACWS (3d) 249 (*CUPE*), and further noted that she had to also consider whether the intervention would cause prejudice to the parties.

[7] She concluded that it would be appropriate to allow the Interveners to present arguments relating to the merit of remedies available under the Act other than those sought by the Applicant, especially considering that this is the first application being made under section 40 of the Act. Lakeside seeks to advance an argument relating to the appropriateness of divesture of the Canadian Business as a viable remedy. The Union Interveners submit that the Court, empowered by subsection 40(2) of the Act to "make any order or orders as, in its opinion the circumstances require," ought to make an order seeking compensation for each bargaining unit and the individuals affected by the failure of US Steel to meet the production and employment level undertakings. Neither of these remedies are being sought by the Applicant, and therefore, but for the intervention of Lakeside and the Union Interveners, these remedies would not be meaningfully before the Court.

[8] Accordingly, Prothonotary Milczynski limited the role of the Interveners to filing affidavit evidence, to cross-examine, to participate in pre-hearing motions and to make oral and written submissions in respect of their proposed remedies.

C. *Legislative Scheme*

[9] Rule 109 of the Rules gives the Court discretion to grant to non-parties leave to intervene in a proceeding upon such terms as the Court finds appropriate if it is satisfied that "participation will assist the determination of a factual or legal issue related to the proceedings" (109(2)(b)).

[10] The purpose of the *Investment Canada Act* is set out in section 2:

Purpose of Act	Objet de la loi
2. Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.	2. Étant donné les avantages que retire le Canada d'une augmentation du capital et de l'essor de la technologie et compte tenu de l'importance de préserver la sécurité nationale, la présente loi vise à instituer un mécanisme d'examen des investissements importants effectués au Canada par des non-Canadiens de manière à encourager les investissements au Canada et à contribuer à la croissance de l'économie et à la création d'emplois, de même qu'un mécanisme d'examen des investissements effectués au Canada par des non-Canadiens et susceptibles de porter atteinte à la sécurité nationale.

[11] The remedies available should a party fail to comply with a ministerial demand under section 39, are described in section 40:

Application for court order	Demande d'ordonnance judiciaire
40. (1) If a non-Canadian or any other person or entity fails to comply with a demand under section 39, an application on behalf of the Minister may be made to a superior court for an order under subsection (2) or (2.1).	40. (1) Une demande d'ordonnance judiciaire peut être présentée au nom du ministre à une cour supérieure si le non-Canadien, la personne ou l'unité ne se conforme pas à la mise en demeure reçue en application de l'article 39.

Court orders	Ordonnance judiciaire
(2) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to the non-Canadian or other person or entity under section 39 and that the non-Canadian or other person or entity has failed to comply with the demand, the court may make any order or orders as, in its opinion, the circumstances require, including, without limiting the generality of the foregoing, an order	(2) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut du non-Canadien, de la personne ou de l'unité peut rendre l'ordonnance que justifient les circonstances; elle peut notamment rendre une ou plusieurs des ordonnances suivantes :
(a) directing the non-Canadian to divest themselves of control of the Canadian business, or to divest themselves of their investment in the entity, on any terms and conditions that the court considers just and reasonable;	a) ordonnance enjoignant au non-Canadien de se départir soit du contrôle de l'entreprise canadienne, soit de son investissement dans l'unité, selon les modalités que la cour estime justes et raisonnables;
(b) enjoining the non-Canadian from taking any action specified in the order in relation to the investment that might prejudice the ability of a superior court, on a subsequent application for an order under paragraph (a), to effectively accomplish the end of such an order;	b) ordonnance enjoignant au non-Canadien de ne pas prendre les mesures mentionnées dans l'ordonnance à l'égard de l'investissement qui pourraient empêcher une cour supérieure, dans le cadre d'une autre demande pour une ordonnance visée à l'alinéa a), de rendre une ordonnance efficace;
(c) directing the non-Canadian to comply with a written undertaking given to	c) ordonnance enjoignant au non-Canadien de se conformer à l'engagement

Her Majesty in right of Canada in relation to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada;

écrit envers Sa Majesté du chef du Canada pris à l'égard d'un investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;

(c.1) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in accordance with an order made under section 25.4;

c.1) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;

(d) against the non-Canadian imposing a penalty not exceeding ten thousand dollars for each day the non-Canadian is in contravention of this Act or any provision thereof;

d) ordonnance infligeant au non-Canadien une pénalité maximale de dix mille dollars pour chacun des jours au cours desquels se commet ou se continue la contravention;

(e) directing the revocation, or suspension for any period specified in the order, of any rights attached to any voting interests acquired by the non-Canadian or of any right to control any such rights;

e) ordonnance de révocation ou de suspension, pour une période qu'elle précise, des droits afférents aux intérêts avec droit de vote qu'a acquis le non-Canadien ou du droit de contrôle de ces droits;

(f) directing the disposition by any non-Canadian of any voting interests acquired by the non-Canadian or of any assets acquired by the non-Canadian that are or were used in carrying on a Canadian business; or

f) ordonnance enjoignant au non-Canadien de se départir des intérêts avec droit de vote qu'il a acquis ou des actifs qu'il a acquis et qui sont ou ont été utilisés dans l'exploitation de l'entreprise canadienne;

(g) directing the non-Canadian or other person or entity to provide

g) ordonnance enjoignant au non-Canadien, à la personne ou à l'unité de fournir les

information requested by the Minister or Director.	renseignements exigés par le ministre ou le directeur.
Court orders — person or entity	Ordonnance judiciaire — personne ou unité
(2.1) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to a person or an entity under section 39 and that the person or entity has failed to comply with it, the court may make any order or orders that, in its opinion, the circumstances require, including, without limiting the generality of the foregoing, an order against the person or entity imposing a penalty not exceeding $10,000 for each day on which the person or entity is in contravention of this Act or any of its provisions.	(2.1) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut de conformité peut rendre l'ordonnance que justifient, à son avis, les circonstances, et notamment infliger à la personne ou à l'unité en défaut une pénalité maximale de 10 000 $ pour chacun des jours au cours desquels se commet ou se continue la contravention.

II. Issues

[12] The issues raised in this appeal are:

(a) What is the applicable standard of review of the Prothonotary's decision?

(b) Is there any basis upon which this Court can set aside the Prothonotary's decision?

III. Argument and Analysis

A. *Standard of Review*

[13] As set out in *Canada v Aqua-Gem Investments Ltd.*, [1993] 2 FC 425 (CA), [1993] FCJ No 103 and restated in *Merck & Co. v Apotex Inc.*, 2003 FCA 488, [2004] 2 FCR 459, at para 19, discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[14] If the question is determined to be vital to the final issue, under the first branch of the test, a *de novo* review is conducted and no deference is shown to the prothonotary's decision. However, if the matter is reviewed on the second branch, the Court must determine that the Order was clearly wrong. This is a deferential standard.

[15] The first question then, is whether, as the Respondents submit, the Order is vital to the final issue of the case.

[16] The test to determine if a question is "vital" is stringent. As Justice Robert Décary explained in *Merck & Co.*, above, at para 22:

> The use of the word "vital" is significant. It gives effect to the intention of Parliament, [...]
>
> [...] that the office of prothonotary is intended to promote "the efficient performance of the work of the Court".

[17] In *Aqua-Gem Investments Ltd*, above, at para 97, Justice Mark R. MacGuigan described questions that are vital as "questions vital to the final issue of the case, i.e. to its final resolution".

[18] The Respondents argue that by permitting the Interveners to present evidence to the Court regarding remedies not sought by the AGC, the nature of the section 40 proceeding risks being fundamentally altered from a bilateral legal proceeding into an open-ended public policy debate. They further submit that allowing affected stakeholders to seek personalized remedies upsets the legislative scheme which permits only the Minister to choose the remedy for any alleged non-compliance. In their view, the Interveners acting to enable the Court to consider other remedies are vital to the outcome of the Application as a whole.

[19] The Interveners however, submit that the discretionary decision to grant intervener status is not vital to the result of the case. The Interveners have been given a circumscribed role, designed to assist the Court in evaluating factual and legal issues relevant to determining the appropriate remedy.

[20] Although it is true that the presence of the Interveners might have an effect on the ultimate outcome of the application, I cannot agree with the Respondents that the decision to allow them to

participate in a limited capacity in assisting the Court think through the available remedial options is vital to the outcome of the case as required by the test in *Merck & Co.*, above.

[21] As the Union Interveners point out, whether the Order is vital to the final issue of the case refers to the subject matter of the order issued by the Prothonotary, not the effect of the Order (*Society of Composers, Authors and Music Publishers of Canada v Landmark Cinemas of Canada Ltd.*, 2004 FCA 57, 316 NR 387 at para 12).

[22] Justice Barbara Reed cited examples of vital issues in *James River Corp. of Virginia v Hallmark Cards, Inc.*(1997), 72 CPR (3d) 157 (FCTD) stating at para 4:

> Questions that are vital to the final issues of a case are, for example, the entering of default judgment, a decision not to allow an amendment to pleadings, a decision to add additional defendants and thereby potentially reduce the liability of the existing defendant, or a decision on a motion for dismissal for want of prosecution. [...]

[23] In my view, the decision to grant the Interveners intervener status in the application is not vital to the final issue, or the resolution of the case. The Interveners are barred from making submissions on the merits of the case. The Court still has to determine whether the Minister was justified in sending the demand under section 39 and if so, whether the Respondents failed to comply. If those questions are answered in the affirmative, as per subsection 40(2) of the Act, the Court may make any order as the circumstances require. The Interveners were granted status because the Prothonotary determined that their intervention would assist the Court to fulfill its role in determining the appropriate remedy. That the Court might now be able to form a more complete opinion on what the circumstances require does not change the substantive rights of the parties.

B. *The Order is Not Clearly Wrong: it is Not Based on a Wrong Principle of Law, or Upon a Misapprehension of the Facts*

[24] The Respondents submit that the Order was clearly wrong and based on wrong principles of law and a misapprehension of the facts. The Respondents allege that although Prothonotary Milczynski used the proper test, she nonetheless committed several errors when considering the motion to intervene against the factors outlined in *CUPE*, above.

[25] The *CUPE* test consists of six criteria that help the Court determine if, pursuant to Rule 109, granting a motion to intervene will "assist the determination of a factual or legal issue related to the proceeding". The Prothonotary listed these criteria on page 3 of the Order:

> (i) Is the proposed intervener directly affected by the outcome?
> (ii) Does there exist a justiciable issue and a veritable public interest?
> (iii) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
> (iv) Is the position of the proposed intervener adequately defended by one of the parties to the case?
> (v) Are the interests of justice better served by the intervention of the proposed third party?
> (vi) Can the Court hear and decide the cause on its merits without the proposed intervener?

[26] As the Prothonotary noted, the *CUPE* test is not conjunctive, all factors need not be present in order for leave to be granted. Rather, the Court must weigh the various interests involved. Additionally the Court has the inherent authority to impose terms and conditions appropriate in the circumstances (*Boutique Jacob Inc. v Paintainer Ltd.*, 2006 FCA 426, 357 NR 384 at para 21).

[27] The Respondents submit that there are five reviewable errors:

(1) Prothonotary Milczynski considered whether the Interveners were directly affected by the outcome of the Application, but erred in law in confounding the legal and factual tests;

(2) Prothonotary Milczynski failed to adequately consider the public interest in the proposed intervention;

(3) Prothonotary Milczynski failed to consider any of the other factors mandated by *CUPE*;

(4) Prothonotary Milczynski failed to adequately consider prejudice to the Moving Parties in her analysis of the "interests of justice" factor;

(5) Prothonotary Milczynski erred in considering whether alleged failure to perform the Undertakings would result in the absence of "net benefit" to Canada – an issue not before her on the intervention motion, and one on which no evidence was adduced.

[28] Additionally, the Respondents submit that the Prothonotary failed to consider all of the *CUPE* factors, and if she had, she should have concluded that the Interveners satisfy none of them.

[29] I will deal with each allegation in turn.

(1) The Prothonotary Did Not Err in Law in Determining that the Interveners Have a Sufficient Interest in the Outcome of the Application

[30] The Respondents submit that Prothonotary Milczynski, in finding that the Interveners would be affected by the outcome of the Application, has confounded the concept of being economically

affected with that of being legally affected. The Respondents argue that the only interest the Interveners have in the outcome of the Application is economic or pecuniary in nature. The Interveners have no contract or tort rights to exercise against the Respondents and as a result the Respondents allege that in intervening they seek only to secure for themselves benefits that are not the fruit of negotiation with the Respondents. No existing legal rights of the Interveners will be affected by the outcome of the Application.

[31] While it is true that the case law relied on by the Respondents requires would-be interveners to show that they have a direct legal interest distinct from an economic interest (*Apotex Inc. v Canada (Attorney General)*, [1986] 2 FC 233, [1986] FCJ No 159 (QL) at para 12 and *Genencor International, Inc. v Canada (Commissioner of Patents)*, 2007 FC 376, 55 CPR (4th) 395 at para 13), these cases relate specifically to "meddling competitors" in the context of patent litigation. In the present matter, given the uncontested impact that the Respondents' alleged failure to comply with the undertakings has on the Interveners and the purpose with which they were granted intervener status, I am persuaded by the Interveners' arguments that they have a sufficient interest in the proceedings to meet the test to intervene.

[32] For their part, the Union Interveners argue that interest in employment rights are distinct from purely commercial or economic interests. Lakeside meanwhile claims that the Respondents distort the *CUPE* test, and that the concept of being "directly affected" as required should be interpreted broadly, keeping in mind the objective of Rule 109.

[33] The Prothonotary found that the alleged failure of the Respondents to meet the employment undertakings directly impacted the employees and retirees of the Canadian business. Loss of union dues has also affected the bargaining agent's ability to represent their membership. Although, these interests are obviously in a way economic, in the same case relied upon by the Respondents, *Apotex [1986]*, above, the Court conceded that cited caselaw involving would-be intervener doctors who risked losing their employment had interests distinct from a pharmaceutical company experiencing a reduction in profits. The latter is solely an economic interest, while in the former situation, "from a practical point of view, they have an intense and somewhat special interest in the outcome of these proceedings" (see *Apotex [1986]*, above at paras 10 and 12).

[34] In the case of Lakeside, the Prothonotary found that as a customer of the Canadian Business Lakeside had been adversely affected by the Respondents' failure to meet the production levels undertaking. More importantly, the Prothonotary found that Lakeside filed evidence on the motion that established that divesture would be a viable option.

[35] Again, considering the matter contextually, and keeping in mind the central purpose of Rule 109, I am persuaded by Lakeside's position that they ought not to be denied intervener status simply because they are not pursuing a contract or tort remedy against the Respondents.

[36] Contrasting Rule 109 with Rule 303(1) which requires that applicants name as respondents every person who is "directly affected" by an application, Lakeside argues that interveners cannot be held to as stringent a test as actual parties to an application. I agree that one of the *CUPE*

considerations, interpreted narrowly, cannot and should not be used to undermine the intent of Rule 109.

(2) There is a Justiciable Issue and Public Interest in Granting Intervener Status to Lakeside and the Union Interveners

[37] Prothonotary Milczynski found that the remedies under the Act are a justiciable issue and that public interest would be served in ensuring that the Act is interpreted and applied in a manner consistent with its stated purpose, which is to encourage investment, economic growth and employment opportunities in Canada.

[38] The Respondents submit that the Prothonotary erred in failing to consider the absence of a justiciable issue between the parties, in stating that the subject matter of the Application is a matter of public interest even though public interest is not a dispositive factor under the *CUPE* test, in failing to recognize that the public interest aspect has been designated as the responsibility of the Minister alone and in incorrectly using the term public interest to refer to general public interest in the Application as opposed to public interest in a particular intervener's participation.

[39] Again, I find the arguments of the Interveners more persuasive on these points.

[40] The Respondents point to no case law to support their position. As Lakeside submits, nothing in *CUPE* suggests that a justiciable issue has to exist between the appellant and the interveners, nor is this reasoning supported by the purpose Rule 109. Rather the Court's ultimate obligation to fashion the appropriate remedy is a justiciable issue.

[41] The Prothonotary never suggested that the public interest in ensuring that the Act is applied consistently with its purpose was dispositive, rather it was one consideration among many as required by *CUPE*.

[42] The argument that public interest is solely to be defended by the Minister is absurd and countered by the wording of the statute. Subsection 40(2) of the Act specifically requires the Court to make such "order or orders as, in its opinion, the circumstances require". I take Lakeside's point that public interest in the interpretation and application of the Act is analogous with public interest in injunctions and stay proceedings, where the Court has established that "the government does not have a monopoly on the public interest" (*RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 at para 65). Similarly, in the present matter the Minister cannot be said to be solely responsible for representing the entire landscape of Canadian commerce.

[43] As found by the Prothonotary, both Interveners are particularly well-positioned to advance specific arguments regarding appropriate remedial measures that would be of interest to Canadian workers and Canadians involved in the Steel industry.

[44] In *Benoit v. Canada*, 2001 FCA 71, 201 FTR 137 at para 18, the Federal Court of Appeal stated:

> [...] if in a case where important public interest issues are raised, an intervener wishes to raise a related public interest question which naturally arises out of the existing lis between the parties, and which none of the other parties has raised, it is appropriate to permit the intervention.

[45] As such, the Prothonotary was not clearly wrong in deciding that the remedy ordered by the Court under the Act is a justiciable issue of public interest, helpfully illuminated by the intervention of Lakeside and the Union Interveners.

(3) The Prothonotary Did Not Fail to Consider Any of the CUPE Factors

[46] The Respondents submit that the Prothonotary failed to consider the remaining factors under *CUPE*.

[47] In fact, Prothonotary Milczynski listed the *CUPE* factors and then either expressly or implicitly addressed them, as submitted by the Interveners. However, as already discussed above, not all of the *CUPE* criteria need to be met in order to grant intervener status (*International Assn. of Immigration Practitioners v Canada*, 2004 FC 630, 130 ACWS (3d) 1100 at para 20).

[48] Failing to expressly consider each factor is not an error of law. I am of the view that considering the circumstances, the nature of the order made and the evidence before the Prothonotary, the Order reasonably demonstrates the manner in which the Prothonotary exercised her discretion (*Anchor Brewing Co. v Sleeman Brewing & Malting Co.*, 2001 FCT 1066, 15 CPR (4th) 63 at paras 31-34).

[49] Considering each *CUPE* factor individually (except the first two, which were discussed above), I cannot say that the Prothonotary was clearly wrong in her analysis, or based any of her findings on a misapprehension of the facts or a wrong principle of law:

(iii) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?

[50] Prothonotary Milczynski was quite obviously referring to the point the Respondents allege she ignored, considering whether there are other means to submit the issues to the Court, when she stated:

> I am satisfied that on this first application under section 40 of the *Investment Canada Act*, it would be of assistance to the hearing judge to consider the evidence and argument relating to these possible remedies and that without the interveners, would not otherwise be before the Court in an effective or meaningful way.
>
> [Emphasis added]

[51] This is not a baseless assumption. As the Union Interveners submit, they have no standing in any other forum to raise the interests and concerns of the Canadian Business' employees regarding the effects of the Respondents' alleged failure to comply with the undertakings, and consequently, what the remedy should be.

[52] The Prothonotary clearly did not overlook this consideration, nor can I say that she based her conclusion on any kind of misapprehension.

(iv) Is the position of the proposed intervener adequately defended by one of the parties to the case?

[53] As the Respondents submit, the positions of the AGC and Interveners diverge on the question of remedy. The Respondents argue that by granting the Interveners leave to present evidence on the remedy, they are usurping the authority of the Minister and using the proceedings to obtain *in personam* remedies to which they are not legally entitled.

[54] The Interveners, for their part, argue that they advance a unique perspective on the interpretation and application of the Act, insofar as the remedies available but not sought by the Minister.

[55] As Lakeside submits, the thrust of the Respondents' argument rests on a misunderstanding of the legislative scheme – it is not the AGC's election that determines the scope of remedies to be ordered by the Court should the merits of the Application be proven. As subsection 40(2) makes clear, it is for the Court to make any Order that it considers the circumstances to require.

[56] The Interveners were granted leave to intervene in a limited capacity in order to help the Court determine the viability and appropriateness of various remedial options. Although the Union Interveners may support the AGC's position on the merits of the test under section 40, this is irrelevant as they have been limited to making submissions only on the remedy aspect of the Application. It is in this aspect that Lakeside's position on the divesture remedy and the Union

Intervener's position on compensation to be awarded to affected bargaining units are not being advanced by the AGC.

[57] As such, I cannot say that Prothonotary Milczynski ignored or was clearly wrong in her consideration of this component of the *CUPE* test.

(v) Are the interests of justice better served by the intervention of the proposed third party?

[58] The Respondents submit that the Prothonotary failed to consider this component, and if she had she would have determined that it is not in the interests of justice to grant intervener status and as a result undermine: the Minister's ability to choose the remedy; the Respondents' ability to defend themselves against potentially heavy monetary fines; and the Court's interest in efficient adjudication.

[59] With respect, these submissions only amount to a disagreement with the Prothonotary's conclusion that allowing the Interveners to provide input would ultimately be helpful to the Court. To my mind it is clear that the Prothonotary implicitly considered this factor in holding that it would be of assistance to the hearing judge on this first application under section 40 of the Act to hear evidence relating to the possible remedies (that would not be before the Court were it not for the presence of the Interveners).

[60] Although the Respondents wish to paint an application under the Act as a bilateral process, the purpose of the Act suggests that its enforcement requires engaging a broader public perspective. As Lakeside submits, if the Interveners were truly usurping the role of the Minister, surely he would have objected on the motion to intervene. The Interveners have an interest in the outcome of the proceedings and they have been granted status to intervene in the most efficient and helpful way by the Prothonotary.

(vi) Can the Court hear and decide the cause on its merits without the proposed intervener?

[61] The Respondents submit that the statutory scheme envisions that the Court would be in a position to decide the merits of the application without the assistance of the Interveners, and therefore should seek to avoid the delay and expense inherent in permitting the intervention.

[62] The Union Interveners submit that the Court should not attempt to fashion a remedy without hearing their submissions, as they are in a position to offer unique and particularly helpful evidence regarding the employment undertakings and what remedy might adequately address this issue.

[63] Likewise, Lakeside argues that its presence will be helpful in adducing evidence and argument in support of the divestiture remedy. For this proposition Lakeside relies on *United Grain Growers Limited v Commissioner of Competition*, 2005 Comp Trib 36, a decision of Justice Sandra J. Simpson, sitting as the judicial member of the Competition Tribunal. Justice Simpson granted

intervener status to Mission, a prospective buyer, reasoning that they had "a unique perspective on the alleged change of circumstances which lie at the heart of the Application".

[64] Realistically, the Court could hear and decide the Application on the merits without the interveners. However, the Court would have much less information and would have a more difficult time fashioning the appropriate remedy. Prothonotary Milczynski considered the purpose of Rule 109, and governed the use of her discretion under that Rule with a consideration of the *CUPE* factors. I cannot agree with the Respondents that she either ignored or wrongly applied any of the six factors. Rather it appears obvious to me, that she engaged in a balancing exercise and the conclusion that the Interveners would be of assistance to the Court weighed more heavily in the end.

(4) Prothonotary Milczynski Did Properly Consider Prejudice to the Respondents

[65] I find no merit in the Respondents' submission that the Prothonotary neglected to properly consider the issue of prejudice to the Respondents. At the outset of the Order, the Prothonotary listed it as a necessary consideration and then, on page 9 of the Order went on to find that the Respondents' concern about "multiple prosecutors" was unfounded. The Prothonotary found that the Respondents would not experience undue prejudice as a result of the Interveners' participation as potential delays and complexities could be managed through the case management process.

[66] The Union Interveners take the position, and I accept it as correct, that although the Respondents may now face a more challenging legal argument, this does not by itself constitute prejudice. As held in *Abbott v Canada*, [2000] 3 FC 482, 186 FTR 269 at para 21, having to deal

with more complex issues and different viewpoints may represent an additional challenge for the Respondents and a little more expense, but it is not in itself prejudice.

(5) Prothonotary Milczynski Stated a Conclusion That Does Not Undermine the Rest of Her Reasons

[67] The Respondents take issue with the Prothonotary's comment on page 9 that, without the undertakings, there would have been no net benefit to Canada resulting from the sale of the Canadian Business. The Respondents submit that this issue was not before the Court, and there was no evidence upon which to base this statement and that it was therefore an error to make this comment.

[68] I read the comment of the Prothonotary, in the context of the entire paragraph in which it is found, as an effort to rebuff the Respondents' position that the application is a bilateral dispute between the Respondents and the Minister. The Prothonotary is not making a conclusion regarding the matter that will be before the hearing judge, but is explaining why the application is of interest to the public.

[69] The Respondents make one last argument that the Act does not contemplate granting a remedy to a third party. Prothonotary Milczynski acknowledged that this jurisdictional issue could not be determined on the motion and would need to be addressed at a later date.

[70] Accordingly, the Respondents are still not able to show that the Prothonotary's decision was clearly wrong in any respect.

V. Conclusion

[71] In consideration of the above conclusions, I dismiss this appeal.

ORDER

THIS COURT ORDERS that US Steel's motion appealing the decision of the Prothonotary's Order dated September 23, 2009 is dismissed with costs to the Interveners.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1162-09**
STYLE OF CAUSE:	**THE ATTORNEY GENERAL OF CANADA v. UNITED STATES STEEL CORPORATION ET AL.**
PLACE OF HEARING:	**OTTAWA**
DATE OF HEARING:	**NOVEMBER 15, 2010**
REASONS FOR ORDER AND ORDER BY:	**NEAR J.**
DATED:	**DECEMBER 23, 2010**

APPEARANCES:

Michael E. Barrack and Ronald Podolny	FOR THE RESPONDENTS
Marie Henein	FOR THE RESPONDENTS
Paula Turtle	FOR THE INTERVENERS (UNION)
David Wilson	FOR THE INTERVENERS (LAKESIDE)

SOLICITORS OF RECORD:

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Jeffery Kaufman Fasken Martineau DuMoulin LLP Toronto, Ontario	

TAB 7

PARA 21

Date: 20061222

Docket: A-116-06

Citation: 2006 FCA 426

Present: **NADON J.A.**

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

BOUTIQUE JACOB INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 22, 2006.

REASONS FOR ORDER BY: NADON J.A.

Date: 20061222

Docket: A-116-06

Citation: 2006 FCA 426

Present: **NADON J.A.**

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

BOUTIQUE JACOB INC.

Respondent

REASONS FOR ORDER

NADON J.A.

[1] Before me are four motions to intervene in the present appeal of a decision of de Montigny J. of the Federal Court, 2006 FC 217, February 20, 2006.

[2] By his decision, the learned Judge maintained, in part, an action for damages commenced by Boutique Jacob Inc. (the "respondent") against a number of defendants, namely, Pantainer Ltd., Panalpina Inc., Orient Overseas Container Line Ltd. ("OOCL") and Canadian Pacific Railway ("CPR"). Specifically, the Judge granted judgment in favour of the respondent against the defendant

CPR and awarded it the sum of $35,116.56 with interest, and he dismissed the action insofar as it was directed against the other defendants.

[3] A brief examination of the facts and issues leading to the judgement of de Montigny J. will be helpful in understanding the basis upon which the motions to intervene are being made.

[4] At issue before the Judge was the carriage by various modes of transport from Hong Kong to Montreal of a container of goods, namely, pieces of textile in cartons, destined for the respondent. As is usual in the transport of containerized cargo, a number of entities were involved in the carriage of the container, namely, an ocean carrier, OOCL, which carried it from Hong Kong to Vancouver, and a railway carrier, CPR, which carried it from Vancouver to Montreal.

[5] On April 27, 2003, as a result of a train derailment which occurred near Sudbury, Ontario, part of the respondent's cargo was damaged and part of it was lost.

[6] It should be pointed out that at no time whatsoever did the respondent contract with either OOCL or CPR. Rather, the respondent retained the services of Panalpina Inc. which, in turn, retained the services of Pantainer Ltd. to carry the respondent's cargo from Hong Kong to Montreal. Pantainer then proceeded to engage OOCL to carry the container from Hong Kong to Montreal. In turn, OOCL entered into a contract of carriage with CPR with respect to the carriage of the container from Vancouver to Montreal.

[7] The issues before the Judge were, *inter alia*, whether the defendants, individually or collectively, were liable for the damages suffered by the respondent and, in the event of liability, whether the defendants could limit their liability either by law or by contract.

[8] As I have already indicated, the Judge dismissed the respondent's action against all of the defendants, except CPR. In so concluding, the Judge held that CPR was not entitled to limit its liability because it had not complied with the terms of section 137 of the *Canada Transportation Act*, S.C. 1996, c. C-10 (the "Act"), which provides as follows:

137. (1) **A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.** (2) If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may *(a)* on the application of the company, specify for the traffic; or *(b)* prescribe by regulation, if none are specified for the traffic. [Emphasis added]	137. (1) **La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs.** (2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office. [Le souligné est le mien]

[9] More particularly, the Judge held that CPR could not limit its liability because it had not entered into a "... written agreement signed by the shipper or by an association or other body representing shippers" to that effect.

[10] It will be recalled that the services of CPR were retained by the ocean carrier, OOCL, and not by the owner of the goods, the respondent Boutique Jacob. In the Judge's view, the written agreement between CPR and OOCL did not meet the requirements of sub-section 137(1), as "the shipper" was not OOCL, but the respondent.

[11] CPR also argued that it was entitled to benefit from the limitations and exemptions of liability found in the bills of lading issued both by OOCL and by Pantainer, and more particularly, that it could benefit from the so-called Himalaya clause found in these bills of lading. De Montigny J. concluded that by reason of section 137 of the Act, neither the Himalaya clause nor the principles of sub-bailment could be successfully invoked by CPR. At paragraph 50 of his Reasons, he explained his conclusion in the following terms:

> 50. Alternatively, counsel for CPR has argued that her client could take advantage of the limitations and exemptions found in OOCL and Paintainer terms and conditions. It is true that clause 1 of the OOCL waybill and clause 3 of the Pantainer bill of lading explicitly provide that participating carriers shall be entitled to the same rights, exemptions from liability, defences and immunities to which each of these two carriers are entitled. But the application of these clauses to a railway carrier would defeat the purpose of s. 137 of the *Canada Transportation Act*. It would make no sense to protect the shipper by prescribing that a railway company cannot limit its liability except by written agreement signed by that shipper, if the railway company could nevertheless achieve the same result through the means of a Himalaya clause found upstream in the contract of another carrier. I recognize that such reasoning results in a less advantageous position for railway companies as opposed to other carriers. But this is true not only for the purpose of liability but also in many other respects, since other modes of transportation are not as heavily regulated as are railway companies.

[12] On March 20, 2006, CPR filed a Notice of Appeal in this Court and on March 30, 2006, the respondent filed a cross-appeal. On June 15, 2006, Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S and Hapag-Lloyd Container Line GmbH filed a motion for leave to intervene in the appeal. On July 13, 2006, August 23, 2006 and September 11, 2006, similar motions were filed

respectively by 13 protection and indemnity clubs ("P&I Clubs"), by Canadian National Railway Company ("CN") and by Safmarine Container Line Ltd.

[13] The proposed interveners seek to intervene in this appeal on the following questions:

1. The interpretation of section 137 of the Act, including, *inter alia*, the definition of "shipper", "association of" or "body representing shippers".
2. The right of a railway to invoke the Himalaya clause found in the ocean carrier's bill of lading.
3. The right of a railway to enforce the terms of confidential contracts that it has with an ocean carrier when sued by the owner of the damaged or lost cargo.

[14] The motions to intervene are all made pursuant to Rule 109 of the *Federal Courts Rules*, which reads as follows:

109. (1) **the Court may, on motion, grant leave to any person to intervene in a proceeding.**	**109.** (1) **La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.**
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	*a)* précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) **describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.**	*b)* **explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.**
(3) In granting a motion under subsection (1), the Court shall give directions regarding	(3) La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	*a)* la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other	*b)* le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

matters relating to the procedure to be followed by the intervener.

[Le souligné est le mien]

[Emphasis added]

[15] Three of the motions are brought by a number of companies, all represented by the same attorneys, which I will hereinafter refer to as the ocean carriers. These proposed interveners, with the exception of the P&I Clubs, are, like the defendant OOCL in the proceedings below, engaged in the transportation of containerized cargo to Canada from various points around the world and from Canada to various points around the world. The other proposed interveners in this group, the P&I Clubs, are insurance mutuals which protect their member shipowners and operators against, *inter alia*, third-party liability for cargo damage. For the present purposes, it is sufficient to note that they insure about 90% of the world's oceangoing tonnage and represent most, if not all, of the international ocean carriers of containerized cargo operating in Canada.

[16] The other motion is brought by CN, a federally-regulated railway which operates a continuous railway system in Canada and in the United States.

[17] The ocean carriers say that they meet the requirements for intervention and further say that their participation in the appeal will assist this Court in determining the factual and legal issues of the appeal for the following reasons:

- The ocean carrier involved in the trial of this action, OOCL, is not a party to the appeal and hence the Court of Appeal will not have the benefit of the point of view of one of the vital links to multimodal transportation, i.e., the ocean carrier which issued a multimodal bill of lading;

- An ocean carrier, such as OOCL, can be a shipper in the context of the rail movement of cargo as that term is understood in Section 137 of the Act, a point that CPR may not need to make or cannot make in its arguments on appeal;
- An ocean carrier could, alternatively, be a "body representing shippers" as that term is understood in Section 137 of the Act, an argument that CPR may not need to make or cannot make in its arguments on appeal;
- Himalaya clauses similar to the one contained in the OOCL bill of lading at issue are provisions which were developed by ocean carriers and are regularly found in all bills of lading of ocean carriers of containerized cargo. They have been developed to allow the ocean carrier's sub-contractors such as railways to benefit from, *inter alia*, the same liability regime and limits of liability to which the ocean carriers benefit under the terms of their contracts of carriage with cargo owners. Ocean carriers are therefore in the best position to speak to the intent and application of such clauses.
- Ocean carriers are in the best position to make the argument regarding the application of the rules on sub-bailment because CPR, in the present case, does not have to reply on this argument as it is arguably protected by the indemnity provisions found in its tariff. In any event, it is likely that the limits of liability incorporated in the rail contract between OOCL and CPR may have exceeded the value of the Plaintiff's claim, hence CPR's lack of interest to press the issue of the application of the principles of sub-bailment.

[18] With respect to its proposed intervention, CN says that its presence in the appeal will be of assistance to this Court in that:

- CN proposes to argue that the definition of shipper involves the control and not necessarily the ownership of goods;
- CN is the only Canadian railway with a full North American network and proposes to demonstrate the legal impact of the Trial decision on goods moving through Canada en route from and to international points;
- CN proposes to argue that Himalaya clauses should receive an interpretation harmonized with the interpretation given by the United States Supreme Court considering that a significant portion of containerized traffic destined to the United States enters that country through CN's network;
- CN is in the best position to assist the Federal Court of Appeal with respect to the issues raised in this appeal and in the appeal before the Quebec Court of Appeal of the Quebec Superior Court's decision in *Sumitomo Marine and Fire Insurance Co. Ltd. v. CN*, [2004] J.Q. 11243 in connection with the interpretation of section 137.

[19] In *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, 2000 F.C.J. No. 220, this Court, at paragraph 8 of the Reasons of Noël J.A., enumerated the following factors as those which ought to be considered in deciding whether a motion to intervene should be allowed:

> 8 It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:
> 1) Is the proposed intervener directly affected by the outcome?
> 2) Does there exist a justiciable issue and a veritable public interest?
> 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
> 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
> 5) Are the interests of justice better served by the intervention of the proposed third party?

6) Can the Court hear and decide the cause on its merits without the proposed intervener?

[20] In addition, Noël J.A. indicated that the Court had to have regard to Rule 109(2), which required a proposed intervener to indicate how its participation would assist the Court in determining the factual or legal issues raised by the proceedings.

[21] It must also be said that for leave to intervene to be granted, it is not necessary that all of the factors be met by a proposed intervener (see: *Rothmans Benson and Hedges Inc. v. Canada*, [1990] 1 F.C. 84 (TD); affirmed [1990] 1 F.C. 90 (CA)) and that, in the end, the Court has the inherent authority to allow intervention on terms and conditions which are appropriate in the circumstances (see: *Canada (Director of Investigations and Research) v. Air Canada*, [1989] 2 F.C. 88 (CA); affirmed [1989] 1 S.C.R. 236; also *Fishing Vessel Owners Association of B.C. v. Canada*, [1985] 57 N.R. 376 (CA) at 381).

[22] I now turn to the ocean carriers' motions to intervene.

[23] The ocean carriers say that the decision to be rendered by this Court in the appeal will have a significant impact on the multi-modal transportation industry, as the factual matrix represents a typical multi-modal transportation case and that the contractual documents in evidence are common across the industry. They say that de Montigny J.'s decision and that of the Quebec Superior Court in *Sumitomo Marine and Fire Insurance Co. Ltd. v. Canadian National Railway Co.*, [2004] J.Q. 11243, are the only two interpretations of section 137 of the Act. They further say that most ocean carriers of containerized cargo offer to their clients multi-modal transportation services in Canada,

that they have contracts with either CN or CPR with respect to the inland portion of the transportation services which they provide, and that such contracts consistently incorporate tariffs which provide for, *inter alia*, limitations of liability in favour of the railway for damage to cargo as well as an obligation of the part of the ocean carrier to indemnify the railway in the event that the latter is held liable to third parties in excess of such limits of liability.

[24] Hence, the ocean carriers point out that the direct consequence of de Montigny J.'s interpretation of section 137 of the Act is that failing written agreements between railways and cargo owners, the railways will be facing unlimited liability and, consequently, will seek to pursue indemnity rights against the ocean carriers in order to recover any amount paid in excess of the limits stipulated in the contracts between them and the ocean carriers.

[25] The ocean carriers therefore submit that they will ultimately be paying the amount of damages to which the railways have been condemned, to the extent that these amounts exceed the railways' limits of liability.

[26] In my view, leave ought to be granted to the ocean carriers. I am satisfied that the position which the ocean carriers seek to assert will not be adequately defended by CPR and that their participation will undoubtedly assist this Court in determining the legal issues raised by the appeal. An important, if not crucial, consideration in my decision to grant leave to the ocean carriers is that OOCL, the ocean carrier which carried the respondents' container from Hong Kong to Vancouver and which sub-contracted the Vancouver to Montreal portion of the carriage to CPR, is not a party in the appeal.

[27] As a result, it is my view that the interests of justice will be better served by allowing the ocean carriers to intervene.

[28] For these reasons, I will grant leave to the ocean carriers to intervene in the appeal and costs shall be spoken to. In so concluding, I am obviously not casting any aspersions on CPR and its attorneys. My point is simply that the ocean carriers will be bringing a different perspective to the issues which are before the Court.

[29] I now turn to CN's motion.

[30] I have not been convinced that leave to intervene ought to be granted to CN. In my view, CN's position and the arguments which it seeks to make in the appeal are identical to the position and the arguments that will be put forward by CPR. I have no reason to believe, and CN has offered none, that CPR will not adequately defend the position which it seeks to advance. As a result, this Court can hear and decide the appeal on its merits without the participation of CN. In the end, I do not believe that the interests of justice will be better served by allowing CN to intervene in this appeal.

[31] As a result, CN's motion will be dismissed. Costs shall be spoken to.

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-116-06
STYLE OF CAUSE:	CPR v. BOUTIQUE JACOB INC.
MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES	
REASONS FOR ORDER BY:	NADON J.A.
DATED:	December 22, 2006

WRITTEN REPRESENTATIONS BY:

Sandra Sahyouni	For the Respondent
Jean-Marie Fontaine	For the Proposed Interveners Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S, Hapag-Lloyd Container Line GmbH, Safmarine Container Lines N.V., American Steamship Owners Mutual Protection and Indemnity Association Inc. et al.
L. Michel Huart	For the Proposed Intervener Canadian National Railway Company.

SOLICITORS OF RECORD:

The Law Offices of J. Kendrick Sproule	For the Respondent
Borden Ladner Gervais LLP Montreal, QC	For the Proposed Interveners Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S, Hapag-Lloyd Container Line GmbH, Safmarine Container Lines N.V., American Steamship Owners Mutual Protection and Indemnity Association Inc. et al.
Langlois Gaudreau O'Connor LLP Montreal, QC	For the Proposed Intervener Canadian National Railway Company.

TAB 8

Regional Municipality of Peel and Attorney General of Ontario v. Great Atlantic & Pacific Co. of Canada Ltd., Loblaws Supermarkets Ltd., Steinberg Inc. (c.o.b. Miracle Food Mart) and Oshawa Group Ltd. Indexed as: Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (C.A.)

74 O.R. (2d) 164

[1990] O.J. No. 1378

Action No. 455/90

ONTARIO
Court of Appeal

Dubin C.J.O., in Chambers

August 3, 1990.

Civil procedure -- Parties -- Intervention -- Applicant seeking to be added as party or as friend of court in appeal of judgment that held statute unconstitutional and contrary to Canadian Charter of Rights and Freedoms -- Considerations -- Rules of Civil Procedure, O. Reg. 560/84, rules 13.01, 13.02.

The applicant was a non-profit corporation whose objects included preserving Sunday as a day of rest, monitoring all legislation bearing on Sunday labour or business and pressing for new legislation or amendment of existing law to minimize activity on Sunday. While, historically, members of the applicant were drawn from religious groups, the majority of its members now were representatives of trade unions, small retail businesses and trade associations. The applicant applied for leave to intervene as an added party or as a friend of the court in pending appeals of a judgment that held the Retail Business Holidays Act, as amended in February 1989, unconstitutional and in contravention of the Canadian Charter of Rights and Freedoms.

Held, subject to certain conditions, leave should be granted to the applicant to intervene as a friend of the court.

In determining whether an application for intervention should be granted the matters to be considered were the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties. In constitutional cases, including cases under the Charter, there has been a relaxation of the rules governing applications for leave to intervene and an increase in the desirability of permitting intervention because the judgments in these cases have a great impact on others who are not immediate parties. In this case, although the applicant's argument may overlap with the argument of the Attorney General in support of the legislation the applicant represented a very large number of individuals who had a direct interest in

the outcome, had special knowledge and expertise of the subject-matter and was in a position to place the issues in a slightly different perspective from that of the Attorney General. Since the Retail Business Holidays Act does not affect the applicant corporation as such or its employees, it was not appropriate to grant leave as an added party under rule 13.01 of the Rules of Civil Procedure. Subject to certain conditions, it was appropriate to grant leave to intervene under rule 13.02 as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44 Canadian Charter of Rights and Freedoms Retail Business Holidays Act, R.S.O. 1980, c. 453

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]

APPLICATION for leave to intervene as added party or friend of the court.

David A. McKee, for People for Sunday Association of Canada, applicant for leave to intervene.

Elizabeth C. Goldberg and Hart Schwartz, for Attorney General of Ontario.

Robert S. Russell and Freya J. Kristjanson, for Loblaws Supermarkets Ltd.

Julian N. Falconer, for Great Atlantic & Pacific Co. of Canada Ltd.

John B. Laskin and Kent E. Thomson, for Oshawa Group Ltd.

Robert J. Arcand and Sharon M. Addison, for Steinberg Inc. (c.o.b. Miracle Food Mart).

Angus T. McKinnon, for Hudson's Bay Co.

DUBIN C.J.O.:-- This is an application by the People for Sunday Association of Canada for leave to intervene as an added party or as a friend of the court in the appeals now pending from the judgment [in the High Court of Justice on June 22, 1990] of Mr. Justice Southey [reported 73 O.R. (2d) 289, 90 C.L.L.C. Paragraph14,023], who held that the Retail Business Holidays Act, R.S.O. 1980, c. 453 (the Act), as amended in February 1989, is in contravention of the Canadian Charter of Rights and Freedoms and is thereby unconstitutional.

This is the first time that the constitutionality of the Retail Business Holidays Act, as amended, has come before this court, although it has twice before considered the constitutionality of its predecessor.

The applicant is a non-profit organization incorporated under the Canada Business Corporations Act, R.S.C. 1985, c. C-44. The current objects of the corporation include:

(a) To affirm Sunday as a unique weekly opportunity, for as many people as possible, to enjoy spiritual, physical, moral and cultural renewal;
(b) To cultivate the conviction of Canadian people that the preservation of Sunday as the national, weekly day of rest is necessary for the well-being of the individual, the family and

the community;

(c) To monitor carefully the drafting and enactment of all legislation bearing on Sunday labour or business and to press for new legislation or amendment of existing law where deemed necessary to minimize activity on Sunday;

(d) To encourage active enforcement of laws protecting the special status of Sunday.

Historically, the membership of the Association was drawn from religious groups. While certain of such groups are still members of the Association, the majority of its members are representatives of trade unions, small retail businesses and trade associations. Included in its membership is a trade union, the majority of whose members work in the retail food sector. The membership also includes retail associations which represent small retail businesses, often owned and operated by single families.

Over the years the Association has taken an active role on issues arising under the present statute, as well as its predecessor, and, in particular, has addressed the role that municipalities play in the present Act, a core factor in the reasons for judgment of Mr. Justice Southey.

In constitutional cases, including cases under the Canadian Charter of Rights and Freedoms, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.

The Attorney General for Ontario supports this application for intervention, but it is opposed by all the other respondents. The principal submission made by those who submit that leave to intervene should not be granted is that the interests of those whom the applicant represents are now fully protected by the position being taken on the appeals by the Attorney General for Ontario and, indeed, much of the evidence relied upon by the Attorney General in the proceedings before Mr. Justice Southey was drawn from sources that the applicant represents.

However, in my opinion, that is not a sufficient reason in this case to deny leave to intervene. The role of counsel for the Attorney General for Ontario is to support the constitutionality of the province's legislation. Although the argument may overlap, the applicant represents a very large number of individuals who have a direct interest in the outcome, has a special knowledge and expertise of the subject-matter and is in a position to place the issues in a slightly different perspective than that of the Attorney General.

It was also submitted that the applicant had considered seeking the right to intervene in the proceedings before Mr. Justice Southey and declined to do so and, therefore, should not be permitted to intervene now. However, I do not think that the failure to apply for intervention before Mr. Justice Southey should foreclose the applicant's opportunity for seeking intervention at this stage.

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

The relevant provisions of our rules of practice relating to intervention [Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]] are as follows:

13.01(1) Where a person who is not a party to a proceeding claims,

(a) an interest in the subject matter of the proceeding;

(b) that he or she may be adversely affected by a judgment in the proceeding; or

(c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,

the person may move for leave to intervene as an added party.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

. . . . .

13.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

It is apparent that the Retail Business Holidays Act does not affect the applicant corporation as such or its employees, and I do not think that leave to intervene as an added party pursuant to rule 13.01 would be appropriate.

However, in my opinion, it is appropriate to grant leave to intervene under rule 13.02, as a friend of the court, for the purpose of rendering assistance to the court by way of argument.

In the result, I would grant leave to the applicant to intervene on such a basis subject to the following conditions:

(1) that the applicant takes the record as it is and will not be permitted to adduce further evidence;
(2) that it will not seek costs on the appeals, but that costs may be awarded against it;
(3) that it file its factums within seven days of having been served with the factums of the Attorney General for Ontario;
(4) that the costs of this application will be costs in the appeal.

Order accordingly.

TAB 9

PARA 103

Her Majesty The Queen *Appellant*

v.

Steve Brian Ewanchuk *Respondent*

and

The Attorney General of Canada, Women's Legal Education and Action Fund ("LEAF"), Disabled Women's Network Canada ("DAWN Canada") and Sexual Assault Centre of Edmonton *Interveners*

INDEXED AS: R. *v.* EWANCHUK

File No.: 26493.

1998: October 14; 1999: February 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Criminal law — Sexual assault — Consent — Nature of consent — Accused persistently engaging complainant in a series of progressively more intimate sexual advances — Complainant clearly saying no to each advance — Complainant fearful and accused aware of her fear — Whether a sexual assault occurred — Whether defence of "implied consent" exists in Canadian law — Whether trial judge erred in applying that defence — Criminal Code, R.S.C., 1985, c. C-46, ss. 265(1), (2), (3), 273.1, 273.2, 686(4).

The complainant, a 17-year-old woman, was interviewed by the accused for a job in his van. She left the van door open as she was hesitant about discussing the job offer in his vehicle. The interview was conducted in a polite, business-like fashion. After the interview, the accused invited the complainant to see some of his work which was in the trailer behind the van. The complainant purposely left the trailer door open but the accused closed it in a way which made the complainant think that he had locked it. There was no evidence whether the door was actually locked. The complainant stated that she became frightened at this point. The accused

Sa Majesté la Reine *Appelante*

c.

Steve Brian Ewanchuk *Intimé*

et

Le procureur général du Canada, le Fonds d'action et d'éducation juridiques pour les femmes («FAEJ»), le Réseau d'action des femmes handicapées du Canada («DAWN Canada») et le Sexual Assault Centre of Edmonton *Intervenants*

RÉPERTORIÉ: R. *c.* EWANCHUK

N° du greffe: 26493.

1998: 14 octobre; 1999: 25 février.

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 DE L'ALBERTA

Droit criminel — Agression sexuelle — Consentement — Nature du consentement — Persistance de l'accusé à faire des avances sexuelles progressivement plus intimes — Refus clairement exprimé par la plaignante à chacune des avances — Crainte éprouvée par la plaignante et connaissance de cette crainte par l'accusé — Y a-t-il eu agression sexuelle? — La défense de «consentement tacite» existe-t-elle en droit canadien? — Le juge du procès a-t-il commis une erreur en appliquant cette défense? — Code criminel, L.R.C. (1985), ch. C-46, art. 265(1), (2), (3), 273.1, 273.2, 686(4).

La plaignante, une jeune femme de 17 ans, a eu une entrevue d'emploi avec l'accusé dans la camionnette de ce dernier. Elle a laissé la porte de la camionnette ouverte car elle hésitait à discuter de l'offre d'emploi à l'intérieur du véhicule de l'accusé. L'entrevue s'est déroulée de façon professionnelle et polie. Après l'entrevue, l'accusé a demandé à la plaignante si elle voulait voir des exemples de son travail qui se trouvaient dans la remorque attachée à sa camionnette. La plaignante a intentionnellement laissé la porte de la remorque ouverte derrière elle, mais l'accusé l'a fermée d'une manière qui a fait croire à la plaignante qu'il l'avait fer-

initiated a number of incidents involving touching, each progressively more intimate than the previous, notwithstanding the fact that the complainant plainly said "no" on each occasion. He stopped his advances on each occasion when she said "no" but persisted shortly after with an even more serious advance. Any compliance by the complainant was done out of fear and the conversation that occurred between them clearly indicated that the accused knew that the complainant was afraid and certainly not a willing participant. The trial judge acquitted the accused of sexual assault relying on the defence of implied consent and the Court of Appeal upheld that acquittal. At issue here are whether the trial judge erred in his understanding of consent in sexual assault and whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

mée à clé. Il n'y a aucune preuve que la porte était réellement fermée à clé. La plaignante a déclaré qu'elle a commencé à avoir peur à ce moment-là. L'accusé a été à l'origine d'un certain nombre d'incidents ayant donné lieu à des attouchements, chacun plus intime que le précédent, malgré le fait que la plaignante ait clairement dit «non» à chaque occasion. Il cessait ses avances chaque fois que la plaignante disait «non», mais recommençait peu de temps après en faisant une avance encore plus grave. Tout acquiescement de la plaignante n'a été que le fruit de la peur, et il ressort clairement de la conversation qu'ils ont eue que l'accusé savait que la plaignante avait peur et qu'elle n'était pas une participante de plein gré. Le juge du procès a acquitté l'accusé d'agression sexuelle en se fondant sur la défense de consentement tacite, et la Cour d'appel a confirmé l'acquittement. Les questions litigieuses dans le présent pourvoi sont de savoir si le juge du procès a mal compris la notion de consentement en matière d'agression sexuelle et si sa conclusion qu'il existe une défense de «consentement tacite» en droit canadien était juste.

Held: The appeal should be allowed.

Per Lamer C.J. and Cory, Iacobucci, Major, Bastarache and Binnie JJ.: If the trial judge misdirected himself as to the legal meaning or definition of consent, then his conclusion is one of law, and is reviewable. It properly falls to this Court to determine whether the trial judge erred in his understanding of consent in sexual assault, and to determine whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

Arrêt: Le pourvoi est accueilli.

Le juge en chef Lamer et les juges Cory, Iacobucci, Major, Bastarache et Binnie: Si le juge du procès s'est donné de mauvaises directives en ce qui concerne le sens ou la définition de consentement en droit, il a alors tiré une conclusion de droit susceptible de révision. Il revient à juste titre à notre Cour de décider si le juge du procès a mal compris la notion de consentement en matière d'agression sexuelle et si sa conclusion qu'il existe une défense de «consentement tacite» en droit canadien était juste.

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

Pour qu'un accusé soit déclaré coupable d'agression sexuelle, deux éléments fondamentaux doivent être prouvés hors de tout doute raisonnable: qu'il a commis l'*actus reus* et qu'il avait la *mens rea* requise. L'*actus reus* de l'agression consiste en des attouchements sexuels non souhaités. La *mens rea* est l'intention de se livrer à des attouchements sur une personne, tout en sachant que celle-ci n'y consent pas, en raison de ses paroles ou de ses actes, ou encore en faisant montre d'insouciance ou d'aveuglement volontaire à l'égard de cette absence de consentement.

The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The Crown need not prove that the accused had any *mens rea* with respect to the sexual

L'*actus reus* de l'agression sexuelle est établi par la preuve de trois éléments: (i) les attouchements, (ii) la nature sexuelle des contacts, (iii) l'absence de consentement. Les deux premiers éléments sont objectifs. Il suffit que le ministère public prouve que les actes de l'accusé étaient volontaires. Le ministère public n'a pas besoin de prouver que l'accusé avait quelque *mens rea*

nature of his behaviour. The absence of consent, however, is purely subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred. While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trier of fact in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, the trial judge believes the complainant that she did not consent, the Crown has discharged its obligation to prove the absence of consent. The accused's perception of the complainant's state of mind is not relevant and only becomes so when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

The trier of fact may only come to one of two conclusions: the complainant either consented or did not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. No defence of implied consent to sexual assault exists in Canadian law. Here, the trial judge accepted the complainant's testimony that she did not want the accused to touch her, but then treated her conduct as raising a reasonable doubt about consent, described by him as "implied consent". This conclusion was an error.

To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. Section 265(3) of the *Criminal Code* enumerates a series of conditions — including submission by reason of force, fear, threats, fraud or the exercise of authority — under which the law will deem an absence of consent in assault cases, notwithstanding the complainant's ostensible consent or participation. In a situation where the trier of fact finds that the complainant did not want to be touched sexually and made her decision to permit or participate in the sexual assault activity as a result of an

pour ce qui est de la nature sexuelle de son comportement. Toutefois, l'absence de consentement est purement subjective et déterminée par rapport à l'état d'esprit subjectif dans lequel se trouvait en son for intérieur la plaignante à l'égard des attouchements, lorsqu'ils ont eu lieu. Bien que le témoignage de la plaignante soit la seule preuve directe de son état d'esprit, le juge du procès ou le jury doit néanmoins apprécier sa crédibilité à la lumière de l'ensemble de la preuve. Il est loisible à l'accusé de prétendre que les paroles et les actes de la plaignante, avant et pendant l'incident, soulèvent un doute raisonnable quant à l'affirmation de cette dernière selon laquelle, dans son esprit, elle ne voulait pas que les attouchements sexuels aient lieu. Si, toutefois, le juge du procès croit la plaignante lorsqu'elle dit qu'elle n'a pas consenti, le ministère public s'est acquitté de l'obligation qu'il avait de prouver l'absence de consentement. La perception qu'avait l'accusé de l'état d'esprit de la plaignante n'est pas pertinente. Cette perception n'entre en jeu que dans le cas où la défense de croyance sincère mais erronée au consentement est invoquée à l'étape de la *mens rea* de l'enquête.

Le juge des faits ne peut tirer que l'une ou l'autre des deux conclusions suivantes: la plaignante a consenti ou elle n'a pas consenti. Il n'y a pas de troisième possibilité. Si le juge des faits accepte le témoignage de la plaignante qu'elle n'a pas consenti, même si son comportement contredit fortement cette prétention, l'absence de consentement est établie et le troisième élément de l'*actus reus* de l'agression sexuelle est prouvé. Il n'existe pas de défense de consentement tacite en matière d'agression sexuelle en droit canadien. En l'espèce, le juge des faits a accepté le témoignage de la plaignante qu'elle ne voulait pas que l'accusé la touche, mais il a par la suite considéré que le comportement de cette dernière soulevait un doute raisonnable quant au consentement, constituant ce qu'il a décrit comme un «consentement tacite». Cette conclusion était une erreur.

Pour être valide en droit, le consentement doit être donné librement. Par conséquent, même si la plaignante a consenti, ou si son comportement soulève un doute raisonnable quant à l'absence de consentement, il peut exister des circonstances amenant à s'interroger sur les facteurs qui ont pu motiver le consentement apparent de la plaignante. Le paragraphe 265(3) du *Code criminel* énumère une série de situations — notamment la soumission en raison de la force, de la crainte, de menaces, de la fraude ou de l'exercice de l'autorité — dans lesquelles le droit considère qu'il y a eu absence de consentement dans des affaires de voies de fait, et ce malgré la participation ou le consentement apparent de la plaignante. Dans le cas où le juge des faits conclut que la

honestly held fear, the law deems an absence of consent and the third component of the *actus reus* of sexual assault is established. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, the approach is subjective. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea.*

plaignante ne voulait pas subir d'attouchements sexuels et qu'elle a décidé de permettre l'activité sexuelle ou d'y participer en raison d'une crainte sincère, le droit considère qu'il y a absence de consentement, et le troisième élément de l'*actus reus* de l'infraction d'agression sexuelle est établi. Il n'est pas nécessaire que la crainte de la plaignante soit raisonnable, ni qu'elle ait été communiquée à l'accusé pour que le consentement soit vicié. Bien que la plausibilité de la crainte alléguée et toutes expressions évidentes de cette crainte soient manifestement pertinentes pour apprécier la crédibilité de la prétention de la plaignante qu'elle a consenti sous l'effet de la crainte, la démarche est subjective. Si, comme en l'espèce, le témoignage de la plaignante établit l'absence de consentement hors de tout doute raisonnable, l'analyse de *l'actus reus* est terminée, et le juge du procès aurait dû porter son attention sur la perception de la rencontre par l'accusé et sur la question de savoir si ce dernier avait eu la *mens rea* requise.

The *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched.

La *mens rea* de l'agression sexuelle comporte deux éléments: l'intention de se livrer à des attouchements sur une personne et la connaissance de son absence de consentement ou l'insouciance ou l'aveuglement volontaire à cet égard.

The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The defence of mistake is simply a denial of *mens rea.* It does not impose any burden of proof upon the accused. The accused need not testify in order to raise the issue. Support for the defence may stem from any of the evidence before the Court, including the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

L'accusé peut contester la preuve de *mens rea* du ministère public en plaidant la croyance sincère mais erronée au consentement. La défense d'erreur est simplement une dénégation de la *mens rea.* Elle n'impose aucune charge de la preuve à l'accusé, et il n'est pas nécessaire que l'accusé témoigne pour que ce point se soulève. Cette défense peut découler de tout élément de preuve présenté au tribunal, y compris la preuve principale du ministère public et le témoignage de la plaignante. Cependant, en pratique, cette défense découle habituellement de la preuve présentée par l'accusé.

Consent is an integral component of the *mens rea,* but considered from the perspective of the accused. In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

Le consentement fait partie intégrante de la *mens rea,* mais il est considéré du point de vue de l'accusé. Pour que les actes de l'accusé soient empreints d'innocence morale, la preuve doit démontrer que ce dernier croyait que la plaignante avait communiqué son consentement à l'activité sexuelle en question. Le fait que l'accusé ait cru dans son esprit que la plaignante souhaitait qu'il la touche, sans toutefois avoir manifesté ce désir, ne constitue pas une défense. Les suppositions de l'accusé relativement à ce qui se passait dans l'esprit de la plaignante ne constituent pas un moyen de défense.

There is a difference in the concept of "consent" as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea.* For the purposes of

La notion de «consentement» diffère selon qu'elle se rapporte à l'état d'esprit de la plaignante vis-à-vis de l'*actus reus* de l'infraction et à l'état d'esprit de l'accusé vis-à-vis de la *mens rea.* Pour les fins de l'*actus reus,* la

the *actus reus* "consent" means that the complainant in her mind wanted the sexual touching to take place. In the context of *mens rea* — specifically for the purposes of the honest but mistaken belief in consent — "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. The two parts of the analysis must be kept separate.

Not all beliefs upon which an accused might rely will exculpate him. Consent in relation to the *mens rea* of the accused is limited by both the common law and the provisions of ss. 273.1(2) and 273.2 of the *Criminal Code*.

The accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence. Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

Here, the accused knew that the complainant was not consenting before each encounter. The trial judge ought to have considered whether anything occurred between the communication of non-consent and the subsequent sexual touching which the accused could honestly have believed constituted consent. The trial record conclusively establishes that the accused's persistent and increasingly serious advances constituted a sexual assault for which he had no defence. But for his errors of law, the trial judge would necessarily have found the accused guilty. Since a new trial would not be in the interests of justice, this Court can properly exercise its

notion de «consentement» signifie que, dans son esprit, la plaignante voulait que les attouchements sexuels aient lieu. Dans le contexte de la *mens rea* — particulièrement pour l'application de la croyance sincère mais erronée au consentement — la notion de «consentement» signifie que la plaignante avait, par ses paroles ou son comportement, manifesté son accord à l'activité sexuelle avec l'accusé. Les deux volets de l'analyse doivent demeurer distincts.

Ce ne sont pas toutes les croyances invoquées par un accusé qui le disculpent. Eu égard à la *mens rea* de l'accusé, la notion de consentement est limitée tant par la common law que par les dispositions du par. 273.1(2) et de l'art. 273.2 du *Code criminel*.

Le fait que l'accusé soulève la question du consentement équivaut à une prétention de croyance sincère au consentement. Si cette croyance est jugée erronée, il faut alors en apprécier la sincérité. Le juge du procès doit d'abord décider s'il existe des éléments de preuve conférant vraisemblance à la défense. Dans l'affirmative, le juge des faits doit alors trancher la question de savoir si l'accusé croyait sincèrement que la plaignante avait communiqué son consentement. Toute autre croyance, aussi sincère soit-elle, n'est pas un moyen de défense. En outre, pour être sincère, la croyance de l'accusé ne doit pas être le fruit de son insouciance ou de son aveuglement volontaire, ni être viciée par la connaissance de l'un des autres facteurs énumérés au par. 273.1(2) et à l'art. 273.2. Si la plaignante a, à un moment quelconque, manifesté son absence d'accord à l'activité sexuelle, il appartient alors à l'accusé de faire état des éléments de preuve qui lui permettaient de croire sincèrement qu'il avait à nouveau obtenu le consentement de la plaignante avant de reprendre ses avances. Si cette analyse soulève un doute raisonnable quant à la *mens rea* de l'accusé, l'accusation n'est pas prouvée.

En l'espèce, l'accusé a été à même de constater avant chaque attouchement que la plaignante n'était pas consentante. Le juge du procès aurait dû se demander si, entre le moment où le non-consentement a été exprimé et les attouchements sexuels ultérieurs, il s'était passé quelque chose que l'accusé aurait pu sincèrement considérer comme un consentement. Le dossier du procès établit de façon concluante que les avances persistantes et de plus en plus graves de l'accusé ont constitué une agression sexuelle à laquelle il ne pouvait opposer aucun moyen de défense. N'eût été des erreurs de droit qu'il a commises, le juge du procès aurait nécessairement conclu à la culpabilité de l'accusé. Comme l'intérêt de la justice ne commande pas la tenue d'un nouveau procès, notre Cour se doit d'exercer le pouvoir discrétionnaire

discretion under s. 686(4) of the *Code* and enter a conviction.

Whether the accused took reasonable steps to ascertain that the complainant was consenting is a question of fact to be determined by the trier of fact only after the air of reality test has been met. Given the way the trial and appeal were argued, s. 273.2(*b*) did not have to be considered.

Per L'Heureux-Dubé and Gonthier JJ.: Agreement was expressed generally with the reasons of Major J. on most issues.

Canada is a party to the *Convention on the Elimination of All Forms of Discrimination against Women*, which requires respect for and observance of the human rights of women. Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. These human rights are protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and their violation constitutes an offence under the assault provisions of s. 265 and under the more specific sexual assault provisions of ss. 271, 272 and 273 of the *Criminal Code*.

This case is not about consent, since none was given. It is about myths and stereotypes. The trial judge believed the complainant and accepted her testimony that she was afraid and he acknowledged her unwillingness to engage in any sexual activity. However, he gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her. The application of s. 265(3) requires an entirely subjective test. As irrational as a complainant's motive might be, if she subjectively felt fear, it must lead to a legal finding of absence of consent.

The question of implied consent should not have arisen. The trial judge's conclusion that the complainant implicitly consented and that the Crown failed to prove lack of consent was a fundamental error given that he found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid. This error does not derive from the findings of fact but from mythical assumptions. It denies women's

que lui confère le par. 686(4) du *Code* et d'inscrire une déclaration de culpabilité.

La question de savoir si l'accusé a pris des mesures raisonnables pour s'assurer du consentement de la plaignante est une question de fait qui doit être tranchée par le juge des faits, seulement après que le critère de la vraisemblance a été satisfait. Vu la façon dont le procès et l'appel ont été plaidés, l'al. 273.2*b*) n'avait pas à être pris en considération.

Les juges L'Heureux-Dubé et Gonthier: Les motifs du juge Major sont acceptés de façon générale sur la plupart des questions en litige.

Le Canada est signataire de la *Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes*, qui exige le respect et l'observation des droits de la personne à l'égard des femmes. La violence à l'égard des femmes est autant une question d'égalité qu'une violation de la dignité humaine et des droits de la personne. Ces droits de la personne sont protégés par les art. 7 et 15 de la *Charte canadienne des droits et libertés* et leur violation constitue une infraction aux dispositions en matière de voies de fait prévues à l'art. 265 et aux dispositions touchant particulièrement les agressions sexuelles prévues aux art. 271, 272 et 273 du *Code criminel*.

Cette affaire ne met pas en cause une question de consentement, puisqu'aucun consentement n'a été donné. Elle met en cause des mythes et des stéréotypes. Le juge du procès a cru la plaignante et accepté son témoignage qu'elle avait eu peur, et il a admis le fait qu'elle n'avait pas voulu se livrer à quelque activité sexuelle que ce soit. Toutefois, il n'a donné aucun effet juridique à sa conclusion que la plaignante s'était soumise à des activités sexuelles par crainte que l'accusé emploie la force contre elle. L'application du par. 265(3) commande un test entièrement subjectif. Aussi irrationnel que puisse avoir été le motif d'une plaignante, si elle a subjectivement éprouvé de la crainte, il faut conclure en droit à l'absence de consentement.

La question du consentement tacite n'aurait pas dû être soulevée. La conclusion du juge du procès que la plaignante avait consenti tacitement et que le ministère public n'avait pas prouvé l'absence de consentement était une erreur fondamentale, étant donné qu'il a jugé la plaignante crédible et qu'il a accepté son témoignage selon lequel elle a dit «non» à trois reprises et elle était effrayée. Cette erreur ne résulte pas des conclusions de fait mais relève plutôt de mythes et stéréotypes. Cette attitude nie aux femmes leur autonomie sur le plan sexuel et laisse entendre que les femmes sont dans un

sexual autonomy and implies that women are in a state of constant consent to sexual activity.

The majority of the Court of Appeal also relied on inappropriate myths and stereotypes. Complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions.

The findings necessary to support a verdict of guilty on the charge of sexual assault were made. In particular, there was no evidence that would give an air of reality to a defence of honest but mistaken belief in consent for any of the sexual activity which took place in this case. Section 273.2(*b*) precludes an accused from raising that defence if he did not take reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting. The position that the nature of the defence of honest but mistaken belief does not need to be based on reasonable grounds as long as it is honestly held has been modified by the enactment of s. 273.2(*b*), which introduced the "reasonable steps" requirement.

Finally, on the facts as found at trial, s. 273.1(2)(*d*) also applies to this case and could not be ignored by the trial judge.

Per McLachlin J.: The reasons of Major J. and the finding of L'Heureux-Dubé J. that stereotypical assumptions lay at the heart of this case were agreed with. These stereotypical assumptions no longer find a place in Canadian law.

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By Major J.

Referred to: *Belyea v. The King*, [1932] S.C.R. 279; *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Jensen* (1996), 106 C.C.C. (3d) 430, aff'd [1997] 1 S.C.R. 304; *R. v. Park*, [1995] 2 S.C.R. 836; *Saint-Laurent v. Hétu*, [1994] R.J.Q. 69; *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. Creighton*, [1993] 3 S.C.R. 3; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Bulmer*, [1987] 1 S.C.R. 782; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Cassidy*, [1989] 2 S.C.R. 345.

état permanent de consentement à des activités sexuelles.

Les juges majoritaires de la Cour d'appel se sont fondés sur des mythes et des stéréotypes inappropriés. Les plaignants devraient être en mesure de compter sur un système libre de mythes et de stéréotypes et sur des juges dont l'impartialité n'est pas compromise par ces suppositions tendancieuses.

Les conclusions nécessaires pour étayer un verdict de culpabilité relativement à l'accusation d'agression sexuelle ont été tirées. En particulier, il n'y avait au dossier aucun élément de preuve ayant pour effet de conférer vraisemblance à une croyance sincère au consentement à l'une ou l'autre des activités sexuelles en cause dans le présent cas. L'alinéa 273.2*b*) empêche l'accusé de soulever la défense de croyance au consentement s'il n'a pas pris de mesures raisonnables, dans les circonstances qu'il connaissait alors, pour s'assurer du consentement de la plaignante. L'approche selon laquelle il n'est pas nécessaire que la défense de croyance sincère mais erronée soit fondée sur des motifs raisonnables, pourvu que la croyance soit sincère, a été modifiée par la promulgation de l'al. 273.2*b*), qui a introduit la condition relative aux «mesures raisonnables».

Enfin, compte tenu des faits tels que prouvés au procès, l'al. 273.1(2)*d*) s'applique également au présent cas et le juge du procès ne pouvait l'ignorer.

Le juge McLachlin: Les motifs du juge Major et la conclusion du juge L'Heureux-Dubé que l'existence de stéréotypes est au cœur même de la présente affaire sont acceptés. Ces stéréotypes n'ont plus leur place en droit canadien.

Jurisprudence

Citée par le juge Major

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By L'Heureux-Dubé J.

Distinguished: *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; **referred to:** *R. v. Osolin*, [1993] 4 S.C.R. 595; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Daigle*, [1998] 1 S.C.R. 1220.

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APPEAL from a judgment of the Alberta Court of Appeal (1998), 57 Alta. L.R. (3d) 235, 13 C.R. (5th) 324, [1998] A.J. No. 150 (QL), dismissing an appeal from acquittal by Moore J. Appeal allowed.

Bart Rosborough, for the appellant.

Peter J. Royal, Q.C., for the respondent.

Beverly Wilton and *Lisa Futerman*, for the intervener the Attorney General of Canada.

Diane Oleskiw and *Ritu Khullar*, for the interveners the Women's Legal Education and Action Fund and the Disabled Women's Network Canada.

Paul L. Moreau, for the intervener the Sexual Assault Centre of Edmonton.

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POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1998), 57 Alta. L.R. (3d) 235, 13 C.R. (5th) 324, [1998] A.J. No. 150 (QL), qui a rejeté l'appel formé contre l'acquittement prononcé par le juge Moore. Pourvoi accueilli.

Bart Rosborough, pour l'appelante.

Peter J. Royal, c.r., pour l'intimé.

Beverly Wilton et *Lisa Futerman*, pour l'intervenant le procureur général du Canada.

Diane Oleskiw et *Ritu Khullar*, pour les intervenants le Fonds d'action et d'éducation juridiques pour les femmes et le Réseau d'action des femmes handicapées du Canada.

Paul L. Moreau, pour l'intervenant le Sexual Assault Centre of Edmonton.

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

MAJOR J. — In the present appeal the accused was acquitted of sexual assault. The trial judge relied on the defence of implied consent. This was a mistake of law as no such defence is available in assault cases in Canada. This mistake of law is reviewable by appellate courts, and for the reasons that follow the appeal is allowed.

I. Facts

The complainant was a 17-year-old woman living in the city of Edmonton. She met the accused respondent Ewanchuk on the afternoon of June 2, 1994, while walking through the parking lot of the Heritage Shopping Mall with her roommate. The accused, driving a red van towing a trailer, approached the two young women. He struck up a conversation with them. He related that he was in the custom wood-working business and explained that he displayed his work at retail booths in several shopping malls. He said that he was looking for staff to attend his displays, and asked whether the young women were looking for work. The complainant's friend answered that they were, at which point the accused asked to interview her friend privately. She declined, but spoke with the accused beside his van for some period of time about the sort of work he required, and eventually exchanged telephone numbers with the accused.

The following morning the accused telephoned the apartment where the complainant and her friend resided with their boyfriends. The complainant answered the phone. She told the accused that her friend was still asleep. When he learned this, the accused asked the complainant if she was interested in a job. She indicated that she was, and they met a short time later, again in the Heritage Mall parking lot. At the accused's suggestion, the interview took place in his van. In the words of the complainant, a "very business-like, polite" conver-

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

LE JUGE MAJOR — L'accusé en cause dans le présent pourvoi a été acquitté d'agression sexuelle. Le juge du procès s'est fondé sur la défense de consentement tacite. Il s'agit d'une erreur de droit car aucune défense de cette nature ne peut être invoquée au Canada dans les affaires d'agression sexuelle. Cette erreur de droit est susceptible de révision par les tribunaux d'appel, et, pour les motifs qui suivent, le pourvoi est accueilli. 1

I. Les faits

La plaignante, une jeune femme de 17 ans, résidait dans la ville d'Edmonton. Elle a rencontré l'accusé intimé Ewanchuk dans l'après-midi du 2 juin 1994, pendant qu'elle traversait, avec sa colocataire, le stationnement du centre commercial Heritage. L'accusé, qui conduisait une camionnette rouge tirant une remorque, s'est approché des deux jeunes femmes. Il a engagé la conversation avec elles. Il leur a dit qu'il était dans le commerce d'ébénisterie sur commande et leur a expliqué qu'il exposait son travail dans des stands de vente au détail dans plusieurs centres commerciaux. Il leur a mentionné qu'il cherchait du personnel pour ses expositions et leur a demandé si elles cherchaient du travail. L'amie de la plaignante ayant répondu par l'affirmative, l'accusé lui a alors demandé de passer une entrevue en privé. Elle a refusé, mais a discuté pendant un certain temps avec l'accusé, à côté de sa camionnette, du genre de travail qu'il demandait, après quoi ils ont échangé leurs numéros de téléphone. 2

Le lendemain matin, l'accusé a téléphoné à l'appartement où la plaignante et son amie habitaient avec leurs petits amis. La plaignante a répondu et a dit à l'accusé que son amie dormait encore. L'accusé a alors demandé à la plaignante si elle était intéressée par un travail. Elle a dit oui et ils se sont rencontrés peu de temps après, à nouveau dans le stationnement du centre commercial Heritage. À la suggestion de l'accusé, l'entrevue s'est déroulée dans sa camionnette. Au dire de la plaignante, une conversation [TRADUCTION] «très professionnelle et 3

sation took place. Some time later, the complainant asked if she could smoke a cigarette, and the accused suggested that they move outside since he was allergic to cigarette smoke. Once outside the van, he asked the complainant if she would like to see some of his work, which was kept inside the trailer attached to his van, and she indicated that she would.

4 The complainant entered the trailer, purposely leaving the door open behind her. The accused followed her in, and closed the door in a way which made the complainant think that he had locked it. There is no evidence whether the door was actually locked, but the complainant stated that she became frightened at this point. Once inside the trailer, the complainant and the accused sat down side-by-side on the floor of the trailer. They spoke and looked through a portfolio of his work. This lasted 10 to 15 minutes, after which the conversation turned to more personal matters.

5 During the time in the trailer the accused was quite tactile with the complainant, touching her hand, arms and shoulder as he spoke. At some point the accused said that he was feeling tense and asked the complainant to give him a massage. The complainant complied, massaging the accused's shoulders for a few minutes. After she stopped, he asked her to move in front of him so that he could massage her, which she did. The accused then massaged the complainant's shoulders and arms while they continued talking. During this mutual massaging the accused repeatedly told the complainant to relax, and that she should not be afraid. As the massage progressed, the accused attempted to initiate more intimate contact. The complainant stated that, "he started to try to massage around my stomach, and he brought his hands up around — or underneath my breasts, and he started to get quite close up there, so I used my elbows to push in between, and I said, No".

6 The accused stopped immediately, but shortly thereafter resumed non-sexual massaging, to which the complainant also said, "No". The accused

polie» a eu lieu. Après quelque temps, la plaignante a demandé si elle pouvait fumer une cigarette et l'accusé lui a proposé de sortir parce qu'il était allergique à la fumée. Une fois à l'extérieur de la camionnette, l'accusé a demandé à la plaignante si elle voulait voir des exemples de son travail qui se trouvaient dans la remorque attachée à sa camionnette, et elle a répondu oui.

La plaignante est entrée dans la remorque, laissant intentionnellement la porte ouverte derrière elle. L'accusé l'a suivie à l'intérieur et a fermé la porte d'une manière qui a fait croire à la plaignante qu'il l'avait fermée à clé. Il n'y a aucune preuve que la porte était réellement fermée à clé, mais la plaignante a déclaré qu'elle a commencé à avoir peur à ce moment-là. Une fois à l'intérieur de la remorque, la plaignante et l'accusé se sont assis par terre, l'un à côté de l'autre. Ils ont parlé et feuilleté un portfolio du travail de l'accusé pendant 10 à 15 minutes et, par la suite, la conversation a glissé sur des sujets plus personnels.

Dans la remorque, l'accusé avait un comportement très tactile à l'endroit de la plaignante, lui touchant la main, les bras et l'épaule en parlant. À un moment donné, il lui a dit qu'il se sentait tendu et lui a demandé de lui faire un massage. La plaignante a accepté et lui a massé les épaules pendant quelques minutes. Après qu'elle se soit arrêtée, l'accusé lui a demandé de se placer devant lui afin qu'il puisse la masser à son tour, ce qu'elle a fait. Il lui a alors massé les épaules et les bras pendant qu'ils continuaient à parler. Pendant ces massages réciproques, l'accusé n'a pas cessé de répéter à la plaignante de se relaxer et de ne pas avoir peur. Tout en continuant à la masser, l'accusé a tenté d'amorcer un contact plus intime. La plaignante déclare: [TRADUCTION] «il a commencé à essayer de me masser la région du ventre et il a monté ses mains autour de mes seins — ou sous ceux-ci, et il a commencé à toucher très haut dans cette région, alors j'ai glissé mes coudes entre ses mains, et j'ai dit Non».

L'accusé a immédiatement arrêté, mais peu de temps après il a recommencé les massages non sexuels, auxquels la plaignante a également dit:

again stopped, and said, "See, I'm a nice guy. It's okay".

The accused then asked the complainant to turn and face him. She did so, and he began massaging her feet. His touching progressed from her feet up to her inner thigh and pelvic area. The complainant did not want the accused to touch her in this way, but said nothing as she said she was afraid that any resistance would prompt the accused to become violent. Although the accused never used or threatened any force, the complainant testified that she did not want to "egg [him] on". As the contact progressed, the accused laid himself heavily on top of the complainant and began grinding his pelvic area against hers. The complainant testified that the accused asserted, "that he could get me so horny so that I would want it so bad, and he wouldn't give it to me because he had self-control".

The complainant did not move or reciprocate the contact. The accused asked her to put her hands across his back, but she did not; instead she lay "bone straight". After less than a minute of this the complainant asked the accused to stop. "I said, Just please stop. And so he stopped". The accused again told the complainant not to be afraid, and asked her if she trusted that he wouldn't hurt her. In her words, the complainant said, "Yes, I trust that you won't hurt me". On the stand she stated that she was afraid throughout, and only responded to the accused in this way because she was fearful that a negative answer would provoke him to use force.

After this brief exchange, the accused went to hug the complainant and, as he did so, he laid on top of her again, continuing the pelvic grinding. He also began moving his hands on the complainant's inner thigh, inside her shorts, for a short time. While still on top of her the accused began to

[TRADUCTION] «Non». L'accusé s'est à nouveau arrêté et a dit: [TRADUCTION] «Tu vois, j'suis un bon gars. Ça va».

7 L'accusé a alors demandé à la plaignante de se retourner et de lui faire face. Ce qu'elle a fait et il a commencé à lui masser les pieds. Les attouchements de l'accusé sont passés des pieds de la plaignante jusqu'à l'intérieur des cuisses et de la région pelvienne de cette dernière. La plaignante ne voulait pas que l'accusé la touche de cette façon, mais elle n'a rien dit parce que, a-t-elle affirmé, elle avait peur que toute résistance de sa part pousse l'accusé à devenir violent. Bien que l'accusé n'ait jamais eu recours à la force ni menacé d'y recourir, la plaignante a témoigné qu'elle ne voulait pas [TRADUCTION] «[l']encourager». À mesure que le contact progressait, l'accusé s'est étendu lourdement sur la plaignante et a commencé à frotter sa région pelvienne contre celle de la plaignante. L'accusé, de témoigner la plaignante, a dit: [TRADUCTION] «qu'il pouvait me rendre si excitée que je mourrais d'envie de le faire, mais qu'il ne me le ferait pas parce qu'il savait se maîtriser».

8 La plaignante n'a ni bougé, ni répondu au contact. L'accusé lui a demandé de poser ses mains sur son dos, mais elle ne l'a pas fait; elle est plutôt restée étendue [TRADUCTION] «parfaitement immobile». Moins d'une minute après, la plaignante a demandé à l'accusé d'arrêter. [TRADUCTION] «J'ai dit je vous en prie, arrêtez. Et il s'est arrêté». L'accusé a de nouveau dit à la plaignante de ne pas avoir peur et lui a demandé si elle avait confiance qu'il ne lui ferait pas de mal. En ses mots, la plaignante a dit: [TRADUCTION] «Oui, j'ai confiance que vous ne me ferez pas de mal». À la barre des témoins, elle déclare qu'elle a eu peur pendant tout l'épisode et qu'elle n'a répondu de cette façon à l'accusé que parce qu'elle craignait qu'une réponse négative le pousse à recourir à la force.

9 Après ce bref échange, l'accusé s'est approché pour étreindre la plaignante et, ce faisant, il s'est étendu de nouveau sur elle, continuant de frotter son pelvis contre celui de la plaignante. Il a également commencé à bouger ses mains à l'intérieur des cuisses de la plaignante, puis dans son short,

fumble with his shorts and took out his penis. At this point the complainant again asked the accused to desist, saying, "No, stop".

pendant un court moment. Toujours étendu sur la plaignante, l'accusé a commencé à fouiller dans son propre short et a sorti son pénis. À ce moment, la plaignante a une fois de plus demandé à l'accusé de cesser, en disant: [TRADUCTION] «Non, arrêtez».

10 Again, the accused stopped immediately, got off the complainant, smiled at her and said something to the effect of, "It's okay. See, I'm a nice guy, I stopped". At this point the accused again hugged the complainant lightly before opening up his wallet and removing a $100 bill, which he gave to the complainant. She testified that the accused said that the $100 was for the massage and that he told her not to tell anyone about it. He made some reference to another female employee with whom he also had a very close and friendly relationship, and said that he hoped to get together with the complainant again.

À nouveau, l'accusé s'est immédiatement arrêté, il s'est relevé de sur la plaignante, lui a souri et lui a dit quelque chose comme: [TRADUCTION] «C'est correct. Tu vois, j'suis un bon gars, j'ai arrêté». À ce moment, l'accusé a de nouveau étreint légèrement la plaignante avant d'ouvrir son portefeuille et d'y prendre un billet de 100 $, qu'il a donné à la plaignante. Cette dernière déclare que l'accusé a dit que les 100 $ étaient pour le massage, et qu'il lui a dit de ne pas en parler à personne. Il a parlé d'une autre employée avec laquelle il avait une relation très intime et chaleureuse, et il a dit à la plaignante qu'il espérait la revoir.

11 Shortly after the exchange of the money the complainant said that she had to go. The accused opened the door and the complainant stepped out. Some further conversation ensued outside the trailer before the complainant finally left and walked home. On her return home the complainant was emotionally distraught and contacted the police.

Peu après avoir reçu l'argent, la plaignante a dit qu'elle devait partir. L'accusé a ouvert la porte et elle est sortie. La conversation s'est poursuivie à l'extérieur de la remorque avant que la plaignante ne parte enfin chez elle à pied. Une fois arrivée, affolée, elle a appelé la police.

12 At some point during the encounter the accused provided the complainant with a brochure describing his woodwork and gave her his name and address, which she wrote on the brochure. The investigating officer used this information to locate the accused at his home, where he was arrested. He was subsequently charged with sexual assault and tried before a judge sitting alone.

Pendant la rencontre, l'accusé avait remis à la plaignante une brochure décrivant son travail d'ébéniste et lui avait donné ses nom et adresse, qu'elle avait notés sur la brochure. L'enquêteur s'est servi de ces renseignements pour retracer l'accusé à son domicile, où il a été arrêté. L'accusé a par la suite été inculpé d'agression sexuelle et jugé par un juge seul.

13 The accused did not testify, leaving only the complainant's evidence as to what took place between them. The trial judge found her to be a credible witness and her version of events was not contradicted or disputed. In cross-examination the complainant testified that, although she was extremely afraid throughout the encounter, she had done everything possible to project a confident demeanour, in the belief that this would improve

L'accusé n'a pas témoigné, de sorte que la déposition de la plaignante est le seul récit de ce qui s'est passé entre eux. Le juge du procès a conclu que la plaignante était un témoin crédible, et la version des faits donnée par cette dernière n'a pas été contredite ni contestée. En contre-interrogatoire, la plaignante a déclaré que, bien qu'elle ait eu extrêmement peur pendant toute la rencontre, elle s'était efforcée de projeter un air d'assurance,

her chances of avoiding a violent assault. The following passage is illustrative of her evidence:

Q You didn't want to show any discomfort, right?

A No.

Q Okay. In fact, you wanted to project the picture that you were quite happy to be with him and everything was fine, right?

A Not that I was happy, but that I was comfortable.

Q Comfortable, all right. And relaxed?

A Yes.

Q And you did your best to do that, right?

A Yes.

Later in cross-examination, counsel for the accused again asked the complainant about the image she sought to convey to the complainant by her behaviour:

Q And you wanted to make sure that he didn't sense any fear on your part, right?

A Yes.

II. Judicial History

A. *Court of Queen's Bench*

The trial judge made a number of findings of fact in his oral judgment. He found that the complainant was a credible witness. He found as facts: that in her mind she had not consented to any of the sexual touching which took place; that she had been fearful throughout the encounter; that she didn't want the accused to know she was afraid; and that she had actively projected a relaxed and unafraid visage. He concluded that the failure of the complainant to communicate her fear, including her active efforts to the contrary, rendered her subjective feelings irrelevant.

croyant que cela augmenterait ses chances d'éviter une agression violente. Le passage suivant est représentatif de son témoignage:

[TRADUCTION]

Q Vous ne vouliez pas montrer que vous étiez mal à l'aise, exact?

R Non.

Q D'accord. En fait, vous vouliez avoir l'air d'être très heureuse d'être avec lui et que tout était parfait, c'est bien cela?

R Pas que j'étais heureuse, mais que j'étais à l'aise.

Q À l'aise, d'accord. Et détendue?

R Oui.

Q Et vous avez fait de votre mieux pour y arriver, exact?

R Oui.

Plus tard au cours du contre-interrogatoire, l'avocat de l'accusé a de nouveau demandé à la plaignante quelle image elle souhaitait donner à l'accusé par son comportement: 14

[TRADUCTION]

Q Et vous vouliez faire en sorte qu'il ne sente pas que vous aviez peur, c'est bien cela?

R Oui.

II. L'historique des procédures

A. *La Cour du Banc de la Reine*

Le juge du procès a formulé un certain nombre de conclusions de fait dans son jugement oral. Il a conclu que la plaignante était un témoin crédible. Il a tiré les conclusions de fait suivantes: dans son esprit, la plaignante n'avait consenti à aucun des attouchements sexuels qui avaient eu lieu; elle avait eu peur pendant toute la rencontre; elle ne voulait pas que l'accusé se rende compte qu'elle avait peur; et elle s'était appliquée à présenter un visage détendu et dénué de peur. Il a conclu que le défaut de la plaignante de communiquer sa peur, de même que ses efforts constants pour démontrer le contraire, rendaient ses sentiments subjectifs non pertinents. 15

16 The trial judge then considered the question of whether the accused had raised the defence of honest but mistaken belief in consent, and concluded that he had not. The trial judge characterized the defence position as being a failure by the Crown to discharge its onus of proving "beyond a reasonable doubt that there was an absence of consent". That is, he took the defence to be asserting that the Crown had failed to prove one of the components of the *actus reus* of the offence. This led the trial judge to characterize the defence as one of "implied consent". In so doing he concluded that the complainant's conduct was such that it could be objectively construed as constituting consent to sexual touching of the type performed by the accused.

Le juge du procès a alors examiné la question de savoir si l'accusé avait invoqué la défense de croyance sincère mais erronée au consentement, et il a conclu que non. Le juge du procès a dit que la position de la défense était que le ministère public ne s'était pas acquitté du fardeau qui lui incombait de prouver [TRADUCTION] «hors de tout doute raisonnable qu'il y avait eu absence de consentement». Autrement dit, il a estimé que la défense avait fait valoir que le ministère public n'avait pas réussi à prouver l'un des éléments de l'*actus reus* de l'infraction. Cette constatation a amené le juge du procès à qualifier le moyen de défense de [TRADUCTION] «consentement tacite». Ce faisant, il a conclu que le comportement de la plaignante avait été tel qu'il était objectivement possible de considérer qu'il avait constitué un consentement aux attouchements sexuels du genre de ceux auxquels l'accusé s'était livré.

17 The trial judge treated consent as a question of the complainant's behaviour in the encounter. As a result of that conclusion he found that the defence of honest but mistaken belief in consent had no application since the accused made no claims as to his mental state. On the totality of the evidence, provided solely by the Crown's witnesses, the trial judge concluded that the Crown had not proven the absence of consent beyond a reasonable doubt and acquitted the accused.

Le juge du procès a traité le consentement comme une question se rapportant au comportement de la plaignante pendant la rencontre. Par suite de cette conclusion, il a statué que la défense de croyance sincère mais erronée au consentement ne s'appliquait pas parce que l'accusé n'avait fait aucune allusion à son propre état d'esprit. Se fondant sur l'ensemble de la preuve, émanant uniquement des témoins à charge, le juge du procès a conclu que le ministère public n'avait pas prouvé hors de tout doute raisonnable qu'il y avait eu absence de consentement, et il a acquitté l'accusé.

B. *Alberta Court of Appeal* (1998), 57 Alta. L.R. (3d) 235

B. *La Cour d'appel d'Alberta* (1998), 57 Alta. L.R. (3d) 235

18 Each of the three justices of the Court of Appeal issued separate reasons. McClung and Foisy JJ.A. both dismissed the appeal on the basis that it was a fact-driven acquittal from which the Crown could not properly appeal. In addition, McClung J.A. concluded that the Crown had failed to prove that the accused possessed the requisite criminal intent. He found that the Crown had failed to prove beyond a reasonable doubt that the accused had intended to commit an assault upon the complainant.

Les trois juges de la Cour d'appel ont rédigé des motifs distincts. Les juges Foisy et McClung ont tous deux rejeté l'appel parce qu'il s'agissait d'un acquittement fondé sur les faits, dont le ministère public ne pouvait interjeter appel. En outre, le juge McClung a conclu que le ministère public n'avait pas établi que l'accusé avait eu l'intention criminelle requise. Il a statué que le ministère public n'avait pas réussi à prouver hors de tout doute raisonnable que l'accusé avait eu l'intention d'agresser la plaignante.

Fraser C.J. dissented. She found that the trial judge erred in a number of ways. Specifically, she found that:

— The trial judge erred in his interpretation of the term "consent" as that term is applied to the offence of sexual assault.

— There is no defence of "implied consent", independent of the provisions of ss. 273.1 and 273.2 of the *Criminal Code*.

— It was an error to employ an objective test to determine whether a complainant's "consent" was induced by fear.

— The trial judge erred in the legal effect he ascribed:

to the complainant's silence when subjected to sexual contact by the respondent;

to the complainant's non-disclosure of her fear when subjected to sexual contact by the respondent;

to the complainant's expressed lack of agreement to sexual contact;

to the fact that there was no basis for a defence of "implied consent" or "consent by conduct";

to the fact that there was no consent to sexual activity.

— The defence of mistake of fact had no application to the issue of 'consent' in this case.

— The trial judge erred when he failed to consider whether the respondent had been wilfully blind or reckless as to whether the complainant consented.

Fraser C.J. held that the only defence available to the accused was that of honest but mistaken belief in consent, and concluded that this defence could not be sustained on the facts as found. Accordingly, she would have allowed the appeal and substituted a verdict of guilty.

Le juge en chef Fraser était dissidente. Elle a conclu que le juge du procès avait commis plusieurs erreurs. Elle a tiré les conclusions suivantes: 19

— Le juge du procès a mal interprété le mot «consentement» dans son application à l'infraction d'agression sexuelle.

— Il n'existe pas de défense de «consentement tacite», indépendante des dispositions des art. 273.1 et 273.2 du *Code criminel*.

— Le recours à un critère objectif pour décider si le «consentement» de la plaignante avait été incité par la peur était une erreur.

— Le juge du procès a commis des erreurs dans l'effet juridique qu'il a attribué:

au silence de la plaignante quand l'intimé l'a soumise à des contacts sexuels;

à la non-communication par la plaignante de sa crainte quand l'intimé l'a soumise à des contacts sexuels;

à l'absence d'accord aux contacts sexuels manifestée par la plaignante;

au fait qu'il n'existait aucun fondement à la défense de «consentement tacite» ou de «consentement déduit du comportement»;

au fait qu'il n'y avait pas eu consentement à l'activité sexuelle.

— La défense d'erreur de fait ne s'appliquait pas à la question du «consentement» dans la présente affaire.

— Le juge du procès a commis une erreur en ne se demandant pas si l'intimé avait fait montre d'aveuglement volontaire ou d'insouciance quant au consentement de la plaignante.

Le juge en chef Fraser a statué que le seul moyen de défense que l'accusé pouvait invoquer était celui de la croyance sincère mais erronée au consentement, et elle a conclu qu'on ne pouvait faire droit à cette défense compte tenu des faits avérés. Par conséquent, elle aurait accueilli l'appel et substitué un verdict de culpabilité. 20

III. Analysis

A. *Appealable Questions of Law*

21 The majority of the Court of Appeal dismissed the appeal on the ground that the Crown raised no question of law but sought to overturn the trial judge's finding of fact that reasonable doubt existed as to the presence or absence of consent. If the trial judge misdirected himself as to the legal meaning or definition of consent, then his conclusion is one of law, and is reviewable. See *Belyea v. The King*, [1932] S.C.R. 279, *per* Anglin C.J., at p. 296:

> The right of appeal by the Attorney-General, conferred by [the *Criminal Code*] is, no doubt, confined to "questions of law". . . . But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury . . . to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law, — especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge. [Emphasis added.]

22 It properly falls to this Court to determine whether the trial judge erred in his understanding of consent in sexual assault, and to determine whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

B. *The Components of Sexual Assault*

23 A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent,

III. L'analyse

A. *Les questions de droit susceptibles d'appel*

La majorité de la Cour d'appel a rejeté l'appel pour le motif que le ministère public n'avait pas soulevé de question de droit, mais avait plutôt cherché à écarter la conclusion de fait du juge du procès qu'il y avait un doute raisonnable quant à l'existence ou à l'absence de consentement. Si le juge du procès s'est donné de mauvaises directives en ce qui concerne le sens ou la définition de consentement en droit, il a alors tiré une conclusion de droit susceptible de révision. Voir *Belyea c. The King*, [1932] R.C.S. 279, le juge en chef Anglin, à la p. 296:

> [TRADUCTION] Le droit d'appel donné au procureur général par [. . .] [le *Code criminel*] se limite sans doute aux «questions de droit». [. . .] Nous ne pouvons cependant considérer que cette disposition prive la Chambre d'appel du droit de vérifier le bien-fondé d'une décision sur une question mixte de droit et de fait, comme la culpabilité ou la non-culpabilité de l'accusé, si cette décision dépend, comme c'est le cas ici, de la portée, en droit, de certaines conclusions de fait du juge ou du jury, [. . .] puisque nous ne pouvons pas considérer cette décision autrement que comme une question de droit, — spécialement si, comme dans le cas présent, elle résulte clairement d'une erreur de droit de la part du savant juge de première instance. [Je souligne.]

Il revient à juste titre à notre Cour de décider si le juge du procès a mal compris la notion de consentement en matière d'agressions sexuelles, et de décider si sa conclusion qu'il existe une défense de «consentement tacite» en droit canadien était juste.

B. *Les éléments de l'infraction d'agression sexuelle*

Pour qu'un accusé soit déclaré coupable d'agression sexuelle, deux éléments fondamentaux doivent être prouvés hors de tout doute raisonnable: qu'il a commis l'*actus reus* et qu'il avait la *mens rea* requise. L'*actus reus* de l'agression consiste en des attouchements sexuels non souhaités. La *mens rea* est l'intention de se livrer à des attouchements sur une personne, tout en sachant que celle-ci n'y consent pas, en raison de ses paroles

either by words or actions, from the person being touched.

(1) *Actus Reus*

The crime of sexual assault is only indirectly defined in the *Criminal Code*, R.S.C., 1985, c. C-46. The offence is comprised of an assault within any one of the definitions in s. 265(1) of the *Code*, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated: see *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909. Section 265 provides that:

265. (1) A person commits an assault when

(*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, and *R. v. Chase*, [1987] 2 S.C.R. 293.

ou de ses actes, ou encore en faisant montre d'insouciance ou d'aveuglement volontaire à l'égard de cette absence de consentement.

(1) L'*actus reus*

Le *Code criminel*, L.R.C. (1985), ch. C-46, ne définit qu'indirectement le crime d'agression sexuelle. L'infraction consiste en des voies de fait visées par l'une ou l'autre des définitions du par. 265(1) du *Code*, et qui sont commises dans des circonstances de nature sexuelle telles qu'il y a atteinte à l'intégrité sexuelle de la victime: voir *R. c. S. (P.L.)*, [1991] 1 R.C.S. 909. L'article 265 est ainsi rédigé: 24

265. (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas:

a) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement;

b) tente ou menace, par un acte ou un geste, d'employer la force contre une autre personne, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est alors en mesure actuelle d'accomplir son dessein;

c) en portant ostensiblement une arme ou une imitation, aborde ou importune une autre personne ou mendie.

(2) Le présent article s'applique à toutes les espèces de voies de fait, y compris les agressions sexuelles, les agressions sexuelles armées, menaces à une tierce personne ou infliction de lésions corporelles et les agressions sexuelles graves.

L'*actus reus* de l'agression sexuelle est établi par la preuve de trois éléments: (i) les attouchements, (ii) la nature sexuelle des contacts, (iii) l'absence de consentement. Les deux premiers éléments sont objectifs. Il suffit que le ministère public prouve que les actes de l'accusé étaient volontaires. La nature sexuelle de l'agression est déterminée objectivement; le ministère public n'a pas besoin de prouver que l'accusé avait quelque *mens rea* pour ce qui est de la nature sexuelle de son comportement: voir *R. c. Litchfield*, [1993] 4 R.C.S. 333, et *R. c. Chase*, [1987] 2 R.C.S. 293. 25

26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, *per* L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

27 Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. Some of this confusion has been caused by the word "consent" itself. A number of commentators have observed that the notion of consent connotes active behaviour: see, for example, N. Brett, "Sexual Offenses and Consent" (1998), 11 *Can. J. Law & Jur.* 69, at p. 73. While this may be true in the general use of the word, for the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective.

28 The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": see Blackstone's *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.

Toutefois, l'absence de consentement est subjective et déterminée par rapport à l'état d'esprit subjectif dans lequel se trouvait en son for intérieur la plaignante à l'égard des attouchements, lorsqu'ils ont eu lieu: voir *R. c. Jensen* (1996), 106 C.C.C. (3d) 430 (C.A. Ont.), aux pp. 437 et 438, conf. par [1997] 1 R.C.S. 304, *R. c. Park*, [1995] 2 R.C.S. 836, à la p. 850, le juge L'Heureux-Dubé, et D. Stuart, *Canadian Criminal Law* (3e éd. 1995), à la p. 513.

Il arrive à l'occasion qu'il y ait confusion quant à la signification du consentement comme élément de l'*actus reus* de l'infraction d'agression sexuelle. Cette confusion est causée en partie par le mot «consentement» lui-même. Selon plusieurs commentateurs, la notion de consentement suggère un comportement actif: voir N. Brett, «Sexual Offenses and Consent» (1998), 11 *Can. J. Law & Jur.* 69, à la p. 73. Bien que cela puisse être exact dans l'usage général du mot, pour décider si l'absence de consentement est un élément de l'*actus reus*, c'est l'état d'esprit réel de la plaignante qui est déterminant. À cette étape, le juge des faits ne s'intéresse qu'au point de vue de la plaignante. La démarche est purement subjective.

Le raisonnement qui sous-tend la criminalisation des voies de fait explique cet état de choses. La société est déterminée à protéger l'intégrité personnelle, tant physique que psychologique, de tout individu. Le pouvoir de l'individu de décider qui peut toucher son corps et de quelle façon est un aspect fondamental de la dignité et de l'autonomie de l'être humain. L'inclusion des infractions de voies de fait et d'agression sexuelle dans le *Code* témoigne de la détermination de la société à assurer la sécurité des personnes, en les protégeant des contacts non souhaités ou des menaces de recours à la force. La common law reconnaît depuis des siècles que le droit d'un individu à son intégrité physique est un principe fondamental: [TRADUCTION] «la personne de tout homme étant sacrée, et nul n'ayant le droit de lui porter atteinte, quelque légère qu'elle soit»: voir Blackstone, *Commentaires sur les lois anglaises*, 1823, t. 4, aux pp. 195 et 196. Par conséquent, tout attouchement intentionnel mais non souhaité est criminel.

While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

29 Bien que le témoignage de la plaignante soit la seule preuve directe de son état d'esprit, le juge du procès ou le jury doit néanmoins apprécier sa crédibilité à la lumière de l'ensemble de la preuve. Il est loisible à l'accusé de prétendre que les paroles et les actes de la plaignante, avant et pendant l'incident, soulèvent un doute raisonnable quant à l'affirmation de cette dernière selon laquelle, dans son esprit, elle ne voulait pas que les attouchements sexuels aient lieu. Si, toutefois, comme c'est le cas en l'espèce, le juge du procès croit la plaignante lorsqu'elle dit qu'elle n'a pas subjectivement consenti, le ministère public s'est acquitté de l'obligation qu'il avait de prouver l'absence de consentement.

The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

30 La déclaration de la plaignante selon laquelle elle n'a pas consenti est une question de crédibilité, qui doit être appréciée à la lumière de l'ensemble de la preuve, y compris de tout comportement ambigu. À cette étape, il s'agit purement d'une question de crédibilité, qui consiste à se demander si, dans son ensemble, le comportement de la plaignante est compatible avec sa prétention selon laquelle elle n'a pas consenti. La perception qu'avait l'accusé de l'état d'esprit de la plaignante n'est pas pertinente. Cette perception n'entre en jeu que dans le cas où la défense de croyance sincère mais erronée au consentement est invoquée à l'étape de la *mens rea* de l'enquête.

(a) *"Implied Consent"*

a) *Le «consentement tacite»*

Counsel for the respondent submitted that the trier of fact may believe the complainant when she says she did not consent, but still acquit the accused on the basis that her conduct raised a reasonable doubt. Both he and the trial judge refer to this as "implied consent". It follows from the foregoing, however, that the trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a

31 L'avocat de l'intimé a soutenu que le juge des faits peut croire la plaignante quand elle affirme ne pas avoir consenti, mais néanmoins acquitter l'accusé pour le motif que le comportement de la plaignante a soulevé un doute raisonnable. Tant l'avocat de l'appelant que le juge du procès ont appelé cette situation le «consentement tacite». Cependant, il découle de l'exposé fait précédemment que le juge des faits ne peut tirer que l'une ou l'autre des deux conclusions suivantes: la plaignante a consenti ou elle n'a pas consenti. Il n'y a pas de troisième possibilité. Si le juge des faits accepte le témoignage de la plaignante qu'elle n'a pas consenti, même si son comportement contredit fortement cette prétention, l'absence de consentement est établie et le troisième élément de l'*actus reus*

variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.

de l'agression sexuelle est prouvé. Dans notre jurisprudence de common law, la doctrine du consentement tacite a été reconnue dans divers contextes, mais pas dans celui de l'agression sexuelle. Il n'existe pas de défense de consentement tacite en matière d'agression sexuelle en droit canadien.

(b) *Application to the Present Case*

b) *L'application à la présente affaire*

32 In this case, the trial judge accepted the evidence of the complainant that she did not consent. That being so, he then misdirected himself when he considered the actions of the complainant, and not her subjective mental state, in determining the question of consent. As a result, he disregarded his previous finding that all the accused's sexual touching was unwanted. Instead he treated what he perceived as her ambiguous conduct as a failure by the Crown to prove the absence of consent.

En l'espèce, le juge du procès a accepté le témoignage de la plaignante qu'elle n'avait pas consenti. Cela étant, il s'est ensuite donné de mauvaises directives lorsqu'il a pris en compte les actes de la plaignante, mais non son état d'esprit subjectif, pour décider de la question du consentement. Par conséquent, il n'a pas tenu compte de sa conclusion précédente selon laquelle tous les attouchements sexuels de l'accusé étaient non souhaités. Il a plutôt considéré ce qu'il percevait comme un comportement ambigu de la part de la plaignante comme étant l'incapacité du ministère public de prouver l'absence de consentement.

33 As previously mentioned, the trial judge accepted the complainant's testimony that she did not want the accused to touch her, but then treated her conduct as raising a reasonable doubt about consent, described by him as "implied consent". This conclusion was an error. See D. Stuart, Annotation on *R. v. Ewanchuk* (1998), 13 C.R. (5th) 330, where the author points out that consent is a matter of the state of mind of the complainant while belief in consent is, subject to s. 273.2 of the *Code*, a matter of the state of mind of the accused and may raise the defence of honest but mistaken belief in consent.

Comme je l'ai mentionné plus tôt, le juge des faits a accepté le témoignage de la plaignante qu'elle ne voulait pas que l'accusé la touche, mais il a par la suite considéré que le comportement de cette dernière soulevait un doute raisonnable quant au consentement, constituant ce qu'il a décrit comme un «consentement tacite». Cette conclusion était une erreur. Voir D. Stuart, Annotation on *R. v. Ewanchuk* (1998), 13 C.R. (5th) 330, où l'auteur souligne que le consentement est une question qui touche à l'état d'esprit de la plaignante alors que la croyance au consentement est, sous réserve de l'art. 273.2 du *Code*, une question qui touche à l'état d'esprit de l'accusé et peut donner lieu à la défense de croyance sincère mais erronée au consentement.

34 The finding that the complainant did not want or consent to the sexual touching cannot co-exist with a finding that reasonable doubt exists on the question of consent. The trial judge's acceptance of the complainant's testimony regarding her own state of mind was the end of the matter on this point.

La conclusion que la plaignante ne désirait pas les attouchements sexuels ou n'y a pas consenti ne peut coexister avec la conclusion qu'il existe un doute raisonnable sur la question du consentement. L'acceptation par le juge du procès du témoignage de la plaignante relativement à son état d'esprit avait tranché cette question.

This error was compounded somewhat by the trial judge's holding that the complainant's subjective and self-contained fear would not have changed his mind as to whether she consented. Although he needn't have considered this question, having already found that she did not in fact consent, any residual doubt raised by her ambiguous conduct was accounted for by what he accepted as an honest and pervasive fear held by the complainant.

Cette erreur a dans une certaine mesure été exacerbée par la conclusion du juge du procès que la peur subjective et contenue de la plaignante ne l'aurait pas amené à changer d'avis sur la question du consentement. Même si le juge du procès n'avait pas à se poser cette question, puisqu'il avait déjà conclu que la plaignante n'avait pas consenti dans les faits, tout doute qu'il pouvait encore avoir en raison du comportement ambigu de cette dernière avait été dissipé lorsqu'il avait accepté la crainte sincère et omniprésente ressentie par la plaignante. 35

(c) *Effect of the Complainant's Fear*

c) *L'effet de la crainte de la plaignante*

To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. The *Code* defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant's ostensible consent or participation. As enumerated in s. 265(3), these include submission by reason of force, fear, threats, fraud or the exercise of authority, and codify the longstanding common law rule that consent given under fear or duress is ineffective: see G. Williams, *Textbook of Criminal Law* (2nd ed. 1983), at pp. 551-61. This section reads as follows:

Pour être valide en droit, le consentement doit être donné librement. Par conséquent, même si la plaignante a consenti, ou si son comportement soulève un doute raisonnable quant à l'absence de consentement, il peut exister des circonstances amenant à s'interroger sur les facteurs qui ont pu motiver le consentement apparent de la plaignante. Le *Code* définit une série de situations dans lesquelles le droit considère qu'il y a eu absence de consentement dans des affaires de voies de fait, et ce malgré la participation ou le consentement apparent de la plaignante. Le paragraphe 265(3) en énumère plusieurs, dont la soumission en raison de la force, de la crainte, de menaces, de la fraude ou de l'exercice de l'autorité, et il codifie la règle bien établie de common law selon laquelle le consentement donné sous l'empire de la crainte ou de la contrainte n'est pas valable: voir G. Williams, *Textbook of Criminal Law* (2e éd. 1983), aux pp. 551 à 561. Cette disposition est ainsi rédigée: 36

265. . . .

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(*a*) the application of force to the complainant or to a person other than the complainant;

(*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;

(*c*) fraud; or

(*d*) the exercise of authority.

265. . . .

(3) Pour l'application du présent article, ne constitue pas un consentement le fait pour le plaignant de se soumettre ou de ne pas résister en raison:

a) soit de l'emploi de la force envers le plaignant ou une autre personne;

b) soit des menaces d'emploi de la force ou de la crainte de cet emploi envers le plaignant ou une autre personne;

c) soit de la fraude;

d) soit de l'exercice de l'autorité.

37 The words of Fish J.A. in *Saint-Laurent v. Hétu*, [1994] R.J.Q. 69 (C.A.), at p. 82, aptly describe the concern which the trier of fact must bear in mind when evaluating the actions of a complainant who claims to have been under fear, fraud or duress:

> "Consent" is . . . stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.

38 In these instances the law is interested in a complainant's reasons for choosing to participate in, or ostensibly consent to, the touching in question. In practice, this translates into an examination of the choice the complainant believed she faced. The courts' concern is whether she freely made up her mind about the conduct in question. The relevant section of the *Code* is s. 265(3)(*b*), which states that there is no consent as a matter of law where the complainant believed that she was choosing between permitting herself to be touched sexually or risking being subject to the application of force.

39 The question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed. If a complainant agrees to sexual activity solely because she honestly believes that she will otherwise suffer physical violence, the law deems an absence of consent, and the third component of the *actus reus* of sexual assault is established. The trier of fact has to find that the complainant did not want to be touched sexually and made her decision to permit or participate in sexual activity as a result of an honestly held fear. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complain-

Dans *Saint-Laurent c. Hétu*, [1994] R.J.Q. 69 (C.A.), à la p. 82, le juge Fish a décrit avec justesse la préoccupation que doit sans cesse avoir à l'esprit le juge des faits lorsqu'il évalue les actes d'une plaignante qui prétend avoir été sous l'empire de la crainte, de la fraude ou de la contrainte:

> [TRADUCTION] Le «consentement» est [. . .] dépouillé des caractéristiques qui le définissent lorsqu'il est appliqué à la soumission, à l'absence de résistance, à l'absence d'opposition ou même à l'accord apparent d'une volonté trompée, inconsciente ou imposée.

Dans ces circonstances, le droit s'attache aux raisons qu'a la plaignante de décider de participer aux attouchements en question ou d'y consentir apparemment. En pratique, cela se traduit par l'examen du choix auquel la plaignante croyait être confrontée. Le souci des tribunaux est alors de déterminer si la plaignante a librement choisi le comportement en cause. La disposition pertinente du *Code* est l'al. 265(3)*b*), suivant lequel il n'y a pas de consentement en droit lorsque la plaignante croyait qu'elle choisissait entre soit permettre qu'on la touche sexuellement soit risquer d'être victime de l'emploi de la force.

La question n'est pas de savoir si la plaignante aurait préféré ne pas se livrer à l'activité sexuelle, mais plutôt si elle croyait n'avoir le choix qu'entre deux partis: acquiescer ou être violentée. Si la plaignante donne son accord à l'activité sexuelle uniquement parce qu'elle croit sincèrement qu'elle subira de la violence physique si elle ne le fait pas, le droit considère qu'il y a absence de consentement, et le troisième élément de l'*actus reus* de l'infraction d'agression sexuelle est établi. Le juge des faits doit conclure que la plaignante ne voulait pas subir d'attouchements sexuels et qu'elle a décidé de permettre l'activité sexuelle ou d'y participer en raison d'une crainte sincère. Il n'est pas nécessaire que la crainte de la plaignante soit raisonnable, ni qu'elle ait été communiquée à l'accusé pour que le consentement soit vicié. Bien que la plausibilité de la crainte alléguée et toutes expressions évidentes de cette crainte soient manifestement pertinentes pour apprécier la crédibilité de la prétention de la plaignante qu'elle a consenti

ant's claim that she consented out of fear, the approach is subjective.

Section 265(3) identifies an additional set of circumstances in which the accused's conduct will be culpable. The trial judge only has to consult s. 265(3) in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea.*

(2) *Mens Rea*

Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement. See *R. v. Daviault*, [1994] 3 S.C.R. 63.

However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, [1993] 3 S.C.R. 3. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. See *Park, supra*, at para. 39.

The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The nature of this defence was described in *Pappajohn v. The Queen*, [1980]

sous l'effet de la crainte, la démarche est subjective.

40 Le paragraphe 265(3) précise une série de situations additionnelles où le comportement de l'accusé sera jugé coupable. Le juge du procès n'est tenu de consulter le par. 265(3) que dans les cas où la plaignante a réellement choisi de participer à l'activité sexuelle ou dans ceux où son comportement ambigu fait naître un doute relativement à l'absence de consentement. Si, comme en l'espèce, le témoignage de la plaignante établit l'absence de consentement hors de tout doute raisonnable, l'analyse de l'*actus reus* est terminée, et le juge du procès aurait dû porter son attention sur la perception de la rencontre par l'accusé et sur la question de savoir si ce dernier avait eu la *mens rea* requise.

(2) La *mens rea*

41 L'agression sexuelle est un acte criminel d'intention générale. Par conséquent, le ministère public n'a qu'à prouver que l'accusé avait l'intention de se livrer à des attouchements sur la plaignante pour satisfaire à l'exigence fondamentale relative à la *mens rea.* Voir *R. c. Daviault*, [1994] 3 R.C.S. 63.

42 Toutefois, étant donné que l'agression sexuelle ne devient un crime qu'en l'absence de consentement de la plaignante, la common law admet une défense d'erreur de fait qui décharge de toute culpabilité l'individu qui croyait sincèrement mais erronément que la plaignante avait consenti aux attouchements. Agir autrement donnerait lieu à l'injustice que constituerait le fait de déclarer coupable des personnes moralement innocentes: voir *R. c. Creighton*, [1993] 3 R.C.S. 3. Par conséquent, la *mens rea* de l'agression sexuelle comporte deux éléments: l'intention de se livrer à des attouchements sur une personne et la connaissance de son absence de consentement ou l'insouciance ou l'aveuglement volontaire à cet égard. Voir *Park*, précité, au par. 39.

43 L'accusé peut contester la preuve de *mens rea* du ministère public en plaidant la croyance sincère mais erronée au consentement. La nature de cette défense a été décrite dans *Pappajohn c. La Reine*,

2 S.C.R. 120, at p. 148, by Dickson J. (as he then was) (dissenting in the result):

> Mistake is a defence . . . where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.

44 The defence of mistake is simply a denial of *mens rea*. It does not impose any burden of proof upon the accused (see *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 936) and it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the court, including, the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

(a) *Meaning of "Consent" in the Context of an Honest but Mistaken Belief in Consent*

45 As with the *actus reus* of the offence, consent is an integral component of the *mens rea*, only this time it is considered from the perspective of the accused. Speaking of the *mens rea* of sexual assault in *Park*, *supra*, at para. 39, L'Heureux-Dubé J. (in her concurring reasons) stated that:

> . . . the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes".

46 In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A

[1980] 2 R.C.S. 120, à la p. 148, par le juge Dickson (plus tard Juge en chef) (dissident quant au résultat):

> L'erreur constitue [. . .] un moyen de défense lorsqu'elle empêche un accusé de former la *mens rea* exigée en droit pour l'infraction même dont on l'accuse. L'erreur de fait est plus justement décrite comme une négation d'intention coupable que comme un moyen de défense positif. Un accusé peut l'invoquer lorsqu'il agit innocemment, par suite d'une perception viciée des faits, et qu'il commet néanmoins l'*actus reus* d'une infraction. L'erreur constitue cependant un moyen de défense, en ce sens que c'est l'accusé qui le soulève. Le ministère public connaît rarement les facteurs subjectifs qui ont pu amener un accusé à croire à l'existence de faits erronés.

La défense d'erreur est simplement une dénégation de la *mens rea*. Elle n'impose aucune charge de la preuve à l'accusé (voir *R. c. Robertson*, [1987] 1 R.C.S. 918, à la p. 936) et il n'est pas nécessaire que l'accusé témoigne pour que se soulève ce point. Cette défense peut découler de tout élément de preuve présenté au tribunal, y compris la preuve principale du ministère public et le témoignage de la plaignante. Cependant, en pratique, cette défense découle habituellement de la preuve présentée par l'accusé.

a) *Le sens de la notion de «consentement» dans le contexte de la croyance sincère mais erronée au consentement*

Tout comme pour l'*actus reus* de l'infraction, le consentement fait partie intégrante de la *mens rea*, mais, cette fois-ci, il est considéré du point de vue de l'accusé. Parlant de la *mens rea* de l'agression sexuelle dans *Park*, précité, au par. 39 (dans ses motifs concordants), le juge L'Heureux-Dubé affirme ceci:

> . . . la *mens rea* de l'agression sexuelle est établie non seulement lorsqu'il est démontré que l'accusé savait que la plaignante disait essentiellement «non», mais encore lorsqu'il est démontré qu'il savait que la plaignante, essentiellement, ne disait pas «oui».

Pour que les actes de l'accusé soient empreints d'innocence morale, la preuve doit démontrer que ce dernier croyait que la plaignante avait communiqué son consentement à l'activité sexuelle en

belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

question. Le fait que l'accusé ait cru dans son esprit que le plaignant souhaitait qu'il la touche, sans toutefois avoir manifesté ce désir, ne constitue pas une défense. Les suppositions de l'accusé relativement à ce qui se passait dans l'esprit de la plaignante ne constituent pas un moyen de défense.

For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the *Code* by Parliament in 1992 is consistent with the common law:

47 Dans le cadre de l'analyse de la *mens rea*, la question est de savoir si l'accusé croyait avoir obtenu le consentement de la plaignante. Ce qui importe, c'est de savoir si l'accusé croyait que le plaignant avait vraiment dit «oui» par ses paroles, par ses actes, ou les deux. La définition légale qui a été ajoutée au *Code* par le Parlement en 1992 est conforme à la common law:

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

273.1 (1) Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l'application des articles 271, 272 et 273, en l'accord volontaire du plaignant à l'activité sexuelle.

There is a difference in the concept of "consent" as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea.* For the purposes of the *actus reus*, "consent" means that the complainant in her mind wanted the sexual touching to take place.

48 La notion de «consentement» diffère selon qu'elle se rapporte à l'état d'esprit de la plaignante vis-à-vis de l'*actus reus* de l'infraction et à l'état d'esprit de l'accusé vis-à-vis de la *mens rea.* Pour les fins de l'*actus reus*, la notion de «consentement» signifie que, dans son esprit, la plaignante souhaitait que les attouchements sexuels aient lieu.

In the context of *mens rea* – specifically for the purposes of the honest but mistaken belief in consent – "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.

49 Dans le contexte de la *mens rea* — particulièrement pour l'application de la croyance sincère mais erronée au consentement — la notion de «consentement» signifie que la plaignante avait, par ses paroles ou son comportement, manifesté son accord à l'activité sexuelle avec l'accusé. Il ne faut jamais oublier cette distinction, et les deux volets de l'analyse doivent demeurer distincts.

(b) *Limits on Honest but Mistaken Belief in Consent*

b) *Les limites de la croyance sincère mais erronée au consentement*

Not all beliefs upon which an accused might rely will exculpate him. Consent in relation to the *mens rea* of the accused is limited by both the common law and the provisions of ss. 273.1(2) and 273.2 of the *Code*, which provide that:

50 Ce ne sont pas toutes les croyances invoquées par un accusé qui le disculpent. Eu égard à la *mens rea* de l'accusé, la notion de consentement est limitée tant par la common law que par les dispositions du par. 273.1(2) et de l'art. 273.2 du *Code*, qui se lisent:

273.1 . . .

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(*a*) the agreement is expressed by the words or conduct of a person other than the complainant;

(*b*) the complainant is incapable of consenting to the activity;

(*c*) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(*d*) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(*e*) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(*a*) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(*b*) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

51 For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3. Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. An accused cannot say that he thought "no meant yes". As Fraser C.J. stated at p. 272 of her dissenting reasons below:

One "No" will do to put the other person on notice that there is then a problem with "consent". *Once a woman says "No" during the course of sexual activity, the person intent on continued sexual activity with her must then obtain a clear and unequivocal "Yes" before he*

273.1 . . .

(2) Le consentement du plaignant ne se déduit pas, pour l'application des articles 271, 272 et 273, des cas où:

a) l'accord est manifesté par des paroles ou par le comportement d'un tiers;

b) il est incapable de le former;

c) l'accusé l'incite à l'activité par abus de confiance ou de pouvoir;

d) il manifeste, par ses paroles ou son comportement, l'absence d'accord à l'activité;

e) après avoir consenti à l'activité, il manifeste, par ses paroles ou son comportement, l'absence d'accord à la poursuite de celle-ci.

273.2 Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation lorsque, selon le cas:

a) cette croyance provient:

(i) soit de l'affaiblissement volontaire de ses facultés,

(ii) soit de son insouciance ou d'un aveuglement volontaire;

b) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement.

Par exemple, le fait de croire que le silence, la passivité ou le comportement ambigu de la plaignante valent consentement de sa part est une erreur de droit et ne constitue pas un moyen de défense: voir *R. c. M. (M.L.)*, [1994] 2 R.C.S. 3. De même, un accusé ne peut invoquer sa croyance que l'absence d'accord exprimée par la plaignante aux attouchements sexuels constituait dans les faits une invitation à des contacts plus insistants ou plus énergiques. L'accusé ne peut pas dire qu'il croyait que «non voulait dire oui». Comme a dit le juge en chef Fraser, à la p. 272 de ses motifs de dissidence:

[TRADUCTION] Un seul «Non» suffit pour informer l'autre partie qu'il y a un problème en ce qui a trait au «consentement». *Dès qu'une femme a dit «non» pendant l'activité sexuelle, la personne qui entend poursuivre l'activité sexuelle avec elle doit alors obtenir un «Oui»*

again touches her in a sexual manner. [Emphasis in original.]

I take the reasons of Fraser C.J. to mean that an unequivocal "yes" may be given by either the spoken word or by conduct.

Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 79, the Court stated:

An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(*a*)(ii).

(c) *Application to the Facts*

In this appeal the accused does not submit that the complainant's clearly articulated "No's" were ambiguous or carried some other meaning. In fact, the accused places great reliance on his having stopped immediately each time the complainant said "no" in order to show that he had no intention to force himself upon her. He therefore knew that the complainant was not consenting on four separate occasions during their encounter.

The question which the trial judge ought to have considered was whether anything occurred between the communication of non-consent and the subsequent sexual touching which the accused could honestly have believed constituted consent.

clair et non équivoque avant de la toucher à nouveau de manière sexuelle. [En italique dans l'original.]

J'estime que les motifs du juge en chef Fraser signifient qu'un «oui» non équivoque peut soit être donné de vive voix, soit être exprimé par le comportement.

52 Le sens commun devrait dicter que, dès que la plaignante a indiqué qu'elle n'est pas disposée à participer à des contacts sexuels, l'accusé doit s'assurer qu'elle a réellement changé d'avis avant d'engager d'autres gestes intimes. L'accusé ne peut se fier au simple écoulement du temps ou encore au silence ou au comportement équivoque de la plaignante pour déduire que cette dernière a changé d'avis et qu'elle consent, et il ne peut pas non plus se livrer à d'autres attouchements sexuels afin de «voir ce qui va se passer». La poursuite de contacts sexuels après qu'une personne a dit «non» est, à tout le moins, une conduite insouciante qui n'est pas excusable. Dans *R. c. Esau*, [1997] 2 R.C.S. 777, au par. 79, la Cour a déclaré ceci:

L'accusé qui, en raison d'ignorance volontaire ou d'insouciance, croit que le plaignant [. . .] a réellement consenti à l'activité sexuelle en question est dans l'impossibilité d'invoquer la défense de croyance sincère mais erronée au consentement. C'est un fait que le législateur a codifié au sous-al. 273.2*a*)(ii) du *Code criminel*.

c) *L'application aux faits*

53 Dans le présent pourvoi, l'accusé ne prétend pas que les «non» clairement exprimés par la plaignante étaient ambigus ou avaient un autre sens. En fait, l'accusé insiste beaucoup sur le fait que, chaque fois que la plaignante a dit «non», il a immédiatement cessé ce qu'il faisait afin de montrer qu'il n'avait pas l'intention de la prendre de force. À quatre occasions distinctes pendant leur rencontre, il a donc été à même de constater que la plaignante n'était pas consentante.

54 Le juge du procès aurait dû se demander si, entre le moment où le non-consentement a été exprimé et les attouchements sexuels ultérieurs, il s'était passé quelque chose que l'accusé aurait pu sincèrement considérer comme un consentement.

55 The trial judge explicitly chose not to consider whether the accused had the defence of honest but mistaken belief in consent, and concluded that the defence was probably not available unless the accused testified. This conclusion ignores the right of the accused to have this defence considered solely on the Crown's case. The trial judge paid only passing interest to this defence undoubtedly because he had concluded that the defence of implied consent exonerated the accused. The accused is entitled to have all available defences founded on a proper basis considered by the court, whether he raises them or not: see *R. v. Bulmer*, [1987] 1 S.C.R. 782, at p. 789.

Le juge du procès a explicitement choisi de ne pas se demander si l'accusé était fondé à invoquer la défense de croyance sincère mais erronée au consentement, et il a conclu que ce moyen ne pouvait probablement pas être plaidé à moins que l'accusé ne témoigne pour sa défense. Cette conclusion ne tient pas compte du droit de l'accusé à ce que cette défense soit analysée à la seule lumière de la preuve du ministère public. Le juge du procès ne s'est arrêté que brièvement à ce moyen de défense, sans doute parce qu'il avait conclu que la défense de consentement tacite disculpait l'accusé. L'accusé a droit à ce que le tribunal prenne en considération tous les moyens de défense suffisamment étayés par la preuve, qu'il les ait invoqués ou non: voir *R. c. Bulmer*, [1987] 1 R.C.S. 782, à la p. 789.

56 In *Esau*, *supra*, at para. 15, the Court stated that, "before a court should consider honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence". See also *R. v. Osolin*, [1993] 4 S.C.R. 595. All that is required is for the accused to adduce some evidence, or refer to evidence already adduced, upon which a properly instructed trier of fact could form a reasonable doubt as to his *mens rea*: see *Osolin*, *supra*, at pp. 653-54, and p. 687.

Dans *Esau*, précité, au par. 15, la Cour affirme que, «pour qu'une cour soit tenue d'examiner la croyance sincère mais erronée ou de donner au jury des directives à cet égard, cette croyance doit d'abord être appuyée par une preuve plausible de façon que la défense acquière une vraisemblance». Voir également *R. c. Osolin*, [1993] 4 R.C.S. 595. Il suffit que l'accusé présente des éléments de preuve, ou renvoie à des éléments déjà présentés, à partir desquels un juge des faits ayant reçu des directives appropriées pourrait former un doute raisonnable quant à l'existence de la *mens rea* de l'accusé: voir *Osolin*, précité, aux pp. 653 et 654 et à la p. 687.

57 The analysis in this appeal makes no attempt to weigh the evidence. At this point we are concerned only with the facial plausibility of the defence of honest but mistaken belief and should avoid the risk of turning the air of reality test into a substantive evaluation of the merits of the defence.

L'analyse faite dans le présent pourvoi ne vise pas à soupeser les éléments de preuve. À ce stade-ci, nous ne nous attachons qu'à la plausibilité apparente de la défense de croyance sincère mais erronée, et il faut éviter le risque de transformer le critère de la vraisemblance en une évaluation substantielle du bien-fondé de la défense.

58 As the accused did not testify, the only evidence before the Court was that of the complainant. She stated that she immediately said "NO" every time the accused touched her sexually, and that she did nothing to encourage him. Her evidence was accepted by the trial judge as credible and sincere. Indeed, the accused relies on the fact that he momentarily stopped his advances each time the

Compte tenu du fait que l'accusé n'a pas témoigné, le seul élément de preuve dont dispose notre Cour est le témoignage de la plaignante. Elle a déclaré avoir dit immédiatement «NON» chaque fois que l'accusé l'a touchée sexuellement, et n'avoir rien fait pour l'encourager. Le juge du procès a trouvé le témoignage de la plaignante crédible et sincère. De fait, l'accusé invoque comme

complainant said "NO" as evidence of his good intentions. This demonstrates that he understood the complainant's "NO's" to mean precisely that. Therefore, there is nothing on the record to support the accused's claim that he continued to believe her to be consenting, or that he re-established consent before resuming physical contact. The accused did not raise nor does the evidence disclose an air of reality to the defence of honest but mistaken belief in consent to this sexual touching.

preuve de ses bonnes intentions le fait qu'il a momentanément cessé ses avances chaque fois que la plaignante a dit «NON». Ce fait démontre qu'il considérait que les «NON» de la plaignante signifiaient précisément cela. Par conséquent, il n'y a rien au dossier qui étaye la prétention de l'accusé qu'il continuait à croire qu'elle consentait, ou qu'il avait obtenu à nouveau son consentement avant de recommencer les contacts physiques. Ni l'accusé ni la preuve ne confèrent quelque vraisemblance à la défense de croyance sincère mais erronée au consentement aux attouchements sexuels.

The trial record conclusively establishes that the accused's persistent and increasingly serious advances constituted a sexual assault for which he had no defence. But for his errors of law, the trial judge would necessarily have found the accused guilty. In this case, a new trial would not be in the interests of justice. Therefore, it is proper for this Court to exercise its discretion under s. 686(4) of the *Code* and enter a conviction: see *R. v. Cassidy*, [1989] 2 S.C.R. 345, at pp. 354-55.

59 Le dossier du procès établit de façon concluante que les avances persistantes et de plus en plus graves de l'accusé ont constitué une agression sexuelle à laquelle il ne pouvait opposer aucun moyen de défense. N'eût été des erreurs de droit qu'il a commises, le juge du procès aurait nécessairement conclu à la culpabilité de l'accusé. En l'espèce, l'intérêt de la justice ne commande pas la tenue d'un nouveau procès. Par conséquent, notre Cour se doit d'exercer le pouvoir discrétionnaire que lui confère le par. 686(4) du *Code* et d'inscrire une déclaration de culpabilité: voir *R. c. Cassidy*, [1989] 2 R.C.S. 345, aux pp. 354 et 355.

In her reasons, Justice L'Heureux-Dubé makes reference to s. 273.2(*b*) of the *Code*. Whether the accused took reasonable steps is a question of fact to be determined by the trier of fact only after the air of reality test has been met. In view of the way the trial and appeal were argued, s. 273.2(*b*) did not have to be considered.

60 Dans ses motifs, le juge L'Heureux-Dubé fait mention de l'al. 273.2*b*) du *Code*. La question de savoir si l'accusé a pris des mesures raisonnables est une question de fait qui doit être tranchée par le juge des faits, seulement après que le critère de la vraisemblance a été satisfait. Vu la façon dont le procès et l'appel ont été plaidés, l'al. 273.2*b*) n'avait pas à être pris en considération.

IV. Summary

In sexual assault cases which centre on differing interpretations of essentially similar events, trial judges should first consider whether the complainant, in her mind, wanted the sexual touching in question to occur. Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant. If the trier of fact is satisfied beyond a reasonable doubt that

IV. Le résumé

61 Dans les affaires d'agression sexuelle mettant en jeu des interprétations différentes données essentiellement aux mêmes événements, le juge du procès doit d'abord se demander si la plaignante voulait, dans son esprit, que les attouchements sexuels en question aient lieu. Dès que la plaignante affirme ne pas avoir consenti, il s'agit d'une question de crédibilité. Dans cette appréciation, le juge des faits doit prendre en considération l'ensemble de la preuve, y compris le comportement ambigu ou contradictoire de la plaignante. Si le juge des

the complainant did not in fact consent, the *actus reus* of sexual assault is established and the inquiry must shift to the accused's state of mind.

62 If there is reasonable doubt as to consent, or if it is established that the complainant actively participated in the sexual activity, the trier of fact must still consider whether the complainant consented because of fear, fraud or the exercise of authority as enumerated in s. 265(3). The complainant's state of mind in respect of these factors need not be reasonable. If her decision to consent was motivated by any of these factors so as to vitiate her freedom of choice the law deems an absence of consent and the *actus reus* of sexual assault is again established.

63 Turning to the question of *mens rea*, it is artificial to require as a further step that the accused separately assert an honest but mistaken belief in consent once he acknowledges that the encounter between him and the complainant unfolded more or less as she describes it, but disputes that any crime took place: see *Park*, *supra*, at p. 851, *per* L'Heureux-Dubé J. In those cases, the accused can only make one claim: that on the basis of the complainant's words and conduct he believed her to be consenting. This claim both contests the complainant's assertions that in her mind she did not consent, and posits that, even if he were mistaken in his assessment of her wishes, he was nonetheless operating under a morally innocent state of mind. It is for the trier of fact to determine whether the evidence raises a reasonable doubt over either her state of mind or his.

64 In cases such as this, the accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question

faits est convaincu hors de tout doute raisonnable que, dans les faits, la plaignante n'a pas consenti, l'*actus reus* de l'agression sexuelle est établi et l'examen doit passer à l'état d'esprit de l'accusé.

S'il y a un doute raisonnable sur la question du consentement, ou s'il est établi que la plaignante a participé activement à l'activité sexuelle, le juge des faits doit néanmoins se demander si celle-ci a consenti pour une des raisons énumérées au par. 265(3), notamment la crainte, la fraude ou l'exercice de l'autorité. Il n'est pas nécessaire que l'état d'esprit de la plaignante à l'égard de ces facteurs soit raisonnable. Si sa décision de consentir a été motivée par l'un de ces facteurs, de telle sorte que sa liberté de choisir a été viciée, le droit considère qu'il y a eu absence de consentement et l'*actus reus* de l'agression sexuelle est encore une fois établi.

Pour ce qui est de la question de la *mens rea*, il est arbitraire d'exiger, en tant qu'étape supplémentaire, que l'accusé fasse valoir séparément une croyance sincère mais erronée au consentement après avoir reconnu que la rencontre entre lui et la plaignante s'est déroulée plus ou moins comme cette dernière l'a décrite, mais qu'il conteste qu'un acte criminel a eu lieu: voir *Park*, précité, à la p. 851, le juge L'Heureux-Dubé. Dans un tel cas, l'accusé ne peut soutenir qu'une seule chose: il a cru, sur la foi des paroles et du comportement de la plaignante, que celle-ci a consenti. Cette prétention a pour effet à la fois de contester les affirmations de la plaignante selon lesquelles, dans son esprit, elle n'a pas consenti, et d'avancer que, même si l'accusé a fait erreur dans son appréciation des désirs de la plaignante, il a néanmoins agi dans un état d'esprit moralement innocent. Il appartient au juge des faits de décider si les éléments de preuve font naître un doute raisonnable quant à l'état d'esprit de la plaignante ou de l'accusé.

Dans des affaires comme la présente, le fait que l'accusé soulève la question du consentement équivaut à une prétention de croyance sincère au consentement. Si cette croyance est jugée erronée, il faut alors en apprécier la sincérité. Le juge du procès doit d'abord décider s'il existe des éléments de preuve conférant vraisemblance à la défense. Dans

which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence.

Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

Cases involving a true misunderstanding between parties to a sexual encounter infrequently arise but are of profound importance to the community's sense of safety and justice. The law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.

V. Disposition

The appeal is allowed, a conviction is entered and the matter is remanded to the trial judge for sentencing.

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

L'HEUREUX-DUBÉ J. — Violence against women takes many forms: sexual assault is one of them. In Canada, one-half of all women are said to have experienced at least one incident of physical or sexual violence since the age of 16 (Statistics Canada, "The Violence Against Women Survey",

l'affirmative, le juge des faits doit alors trancher la question de savoir si l'accusé croyait sincèrement que la plaignante avait communiqué son consentement. Toute autre croyance, aussi sincère soit-elle, n'est pas un moyen de défense.

65 En outre, pour être sincère, la croyance de l'accusé ne doit pas être le fruit de son insouciance ou de son aveuglement volontaire, ni être viciée par la connaissance de l'un des autres facteurs énumérés au par. 273.1(2) et à l'art. 273.2. Si la plaignante a, à un moment quelconque, manifesté son absence d'accord à l'activité sexuelle, il appartient alors à l'accusé de faire état des éléments de preuve qui lui permettaient de croire sincèrement qu'il avait à nouveau obtenu le consentement de la plaignante avant de reprendre ses avances. Si cette analyse soulève un doute raisonnable quant à la *mens rea* de l'accusé, l'accusation n'est pas prouvée.

66 Les affaires qui soulèvent un véritable malentendu entre les parties à une rencontre sexuelle ne sont pas fréquentes, mais elles ont néanmoins une grande importance pour ce qui est du sentiment de sécurité et de justice de la communauté. Le droit doit permettre aux femmes comme aux hommes d'avoir l'esprit tranquille et de savoir que leur intégrité physique et leur autonomie seront respectées lorsqu'ils décident de participer ou non à une activité sexuelle et du moment où ils entendent le faire. En même temps, il doit protéger ceux dont la culpabilité n'a pas été établie des stigmates sociaux rattachés à la délinquance sexuelle.

V. Le dispositif

67 Le pourvoi est accueilli, une déclaration de culpabilité est inscrite et l'affaire est renvoyée au juge du procès pour détermination de la peine.

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

68 LE JUGE L'HEUREUX-DUBÉ — La violence à l'égard des femmes se manifeste de plusieurs façons: l'agression sexuelle en est une. Au Canada, on dit que la moitié des femmes âgées de 16 ans et plus ont subi au moins un incident de violence physique ou sexuelle (Statistique Canada,

The Daily, November 18, 1993). The statistics demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women (*Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* (April 1992), at p. 13, also cited in *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 669).

69 Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. As Cory J. wrote in *Osolin*, *supra*, at p. 669, sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women". These human rights are protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and their violation constitutes an offence under the assault provisions of s. 265 and under the more specific sexual assault provisions of ss. 271, 272 and 273 of the *Criminal Code*, R.S.C., 1985, c. C-46.

70 So pervasive is violence against women throughout the world that the international community adopted in December 18, 1979 (Res. 34/180), in addition to all other human rights instruments, the *Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, entered into force on September 3, 1981, to which Canada is a party, which has been described as "the definitive international legal instrument requiring respect for and observance of the human rights of women". (R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" (1990), 30 *Va. J. Int'l L.* 643, at p. 643). Articles 1 and 2 of the Convention read:

ARTICLE I

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullify-

«L'enquête sur la violence envers les femmes», *Le Quotidien*, 18 novembre 1993). Les statistiques démontrent que 99 pour 100 des auteurs d'agressions sexuelles sont des hommes et que 90 pour 100 des victimes sont des femmes (*L'égalité des sexes dans le système de justice au Canada: Document récapitulatif et propositions de mesures à prendre* (avril 1992), à la p. 23, également cité dans l'arrêt *R. c. Osolin*, [1993] 4 R.C.S. 595, à la p. 669).

La violence à l'égard des femmes est autant une question d'égalité qu'une violation de la dignité humaine et des droits de la personne. Comme l'écrit le juge Cory dans l'arrêt *Osolin*, précité, à la p. 669, l'agression sexuelle «est un affront à la dignité humaine et un déni de toute notion de l'égalité des femmes». Ces droits de la personne sont protégés par les art. 7 et 15 de la *Charte canadienne des droits et libertés* et leur violation constitue une infraction aux dispositions en matière de voies de fait prévues à l'art. 265 et aux dispositions touchant particulièrement les agressions sexuelles prévues aux art. 271, 272 et 273 du *Code criminel*, L.R.C. (1985), ch. C-46.

La violence à l'égard des femmes est si répandue dans le monde que la communauté internationale a adopté, le 18 décembre 1979 (Rés. 34/180), en plus de tous les autres instruments touchant les droits de la personne, la *Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes*, R.T. Can. 1982 No. 31, entrée en vigueur le 3 septembre 1981, convention dont le Canada est signataire et qui a été décrite comme étant [TRADUCTION] «l'instrument juridique international définitif exigeant le respect et l'observation des droits de la personne à l'égard des femmes». (R. Cook, «Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women» (1990), 30 *Va. J. Int'l L.* 643, à la p. 643). Les articles I et II de la Convention se lisent ainsi:

ARTICLE I

Aux fins de la présente Convention, l'expression «discrimination à l'égard des femmes» vise toute distinction, exclusion ou restriction fondée sur le sexe qui a pour effet ou pour but de compromettre ou de détruire la

ing the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

ARTICLE II

States Parties condemn discrimination against women in all its forms, agree to pursue hy all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women. [Emphasis added.]

The Committee on the Elimination of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/47/48 (1979), established under Article 17

reconnaissance, la jouissance ou l'exercice par les femmes, quel que soit leur état matrimonial, sur la base de l'égalité de l'homme et de la femme, des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social, culturel et civil ou dans tout autre domaine.

ARTICLE II

Les États parties condamnent la discrimination à l'égard des femmes sous toutes ses formes, conviennent de poursuivre par tous les moyens appropriés et sans retard une politique tendant à éliminer la discrimination à l'égard des femmes et, à cette fin, s'engagent à:

a) Inscrire dans leur constitution nationale ou toute autre disposition législative appropriée le principe de l'égalité des hommes et des femmes, si ce n'est déjà fait, et assurer par voie de législation ou par d'autres moyens appropriés l'application effective dudit principe;

b) Adopter des mesures législatives et d'autres mesures appropriées assorties, y compris des sanctions en cas de besoin, interdisant toute discrimination à l'égard des femmes;

c) Instaurer une protection juridictionnelle des droits des femmes sur un pied d'égalité avec les hommes et garantir, par le truchement des tribunaux nationaux compétents et d'autres institutions publiques, la protection effective des femmes contre tout acte discriminatoire;

d) S'abstenir de tout acte ou pratique discriminatoire à l'égard des femmes et faire en sorte que les autorités publiques et les institutions publiques se conforment à cette obligation;

e) Prendre toutes mesures appropriées pour éliminer la discrimination pratiquée à l'égard des femmes par une personne, une organisation ou une entreprise quelconque;

f) Prendre toutes les mesures appropriées, y compris des dispositions législatives, pour modifier ou abroger toute loi, disposition réglementaire, coutume ou pratique qui constitue une discrimination à l'égard des femmes;

g) Abroger toutes les dispositions pénales qui constituent une discrimination à l'égard des femmes. [Je souligne.]

Le Comité pour l'élimination de la discrimination à l'égard des femmes, Rés. A.G. 34/180, Doc. N.U. A/47/48 (1979), établi en vertu de l'article 17

71

of the Convention, adopted General Recommendation No. 19 (Eleventh session, 1992) on the interpretation of discrimination as it relates to violence against women:

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends:

. . .

(b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention. . . . [Emphasis added.]

de la Convention, a adopté la Recommandation générale nº 19 (onzième session, 1992) sur l'interprétation du terme «discrimination» en ce qui concerne la violence à l'égard des femmes:

6. L'article premier de la Convention définit la discrimination à l'égard des femmes. Cette définition inclut la violence fondée sur le sexe, c'est-à-dire la violence exercée contre une femme parce qu'elle est une femme ou qui touche spécialement la femme. Elle englobe les actes qui infligent des tourments ou des souffrances d'ordre physique, mental ou sexuel, la menace de tels actes, la contrainte ou autres privations de liberté. La violence fondée sur le sexe peut violer des dispositions particulières de la Convention, même si ces dispositions ne mentionnent pas expressément la violence.

24. Tenant compte de ces observations, le Comité pour l'élimination de la discrimination à l'égard des femmes recommande:

. . .

b) Que les États parties veillent à ce que les lois contre la violence et les mauvais traitements dans la famille, le viol, les sévices sexuels et autres formes de violence fondée sur le sexe assurent à toutes les femmes une protection suffisante, respectent leur intégrité et leur dignité. Des services appropriés de protection et d'appui devraient être procurés aux victimes. Il est indispensable pour la bonne application de la Convention de fournir au corps judiciaire, aux agents de la force publique et aux autres fonctionnaires une formation qui les sensibilise aux problèmes des femmes . . . [Je souligne.]

72 On February 23, 1994, the U.N. General Assembly adopted the *Declaration on the Elimination of Violence against Women*, G.A. Res. 48/104, U.N. Doc. A/48/49 (1993). Although not a treaty binding states, it sets out a common international standard that U.N. members states are invited to follow. Article 4 of the Declaration provides:

Article 4

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate

Le 23 février 1994, l'Assemblée générale des Nations Unies a adopté la *Déclaration sur l'élimination de la violence à l'égard des femmes*, Rés. A.G. 48/104, Doc. N.U. A/48/49 (1993). Bien qu'il ne s'agisse pas d'un traité liant les États signataires, la déclaration établit une norme internationale commune que les États membres de l'ONU sont invités à respecter. Voici, en partie, le texte de l'article 4 de la Déclaration:

Article 4

Les États devraient condamner la violence à l'égard des femmes et ne pas invoquer de considérations de coutume, de tradition ou de religion pour se soustraire à l'obligation de l'éliminer. Les États devraient mettre en

means and without delay a policy of eliminating violence against women and, to this end, should:

. . .

(*i*) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;

(*j*) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women. . . . [Emphasis added.]

Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect (see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Keegstra*, [1990] 3 S.C.R. 697). In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity.

It is within that larger framework that, in 1983, Canada revamped the sexual assault provisions of the *Code* (S.C. 1980-81-82-83, c. 125), formerly ss. 143, 149 and 244 (R.S.C. 1970, c. C-34) which are now contained in the general assault provisions of s. 265. Together with the 1992 amendments of the *Code* (*An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38), mainly ss. 273.1 and 273.2, they govern the issue of consent in the context of sexual assault. In the preamble to the 1992 Act, Parliament expressed its concern about the "prevalence of sexual assault against women and children" and stated its intention to "promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*".

œuvre sans retard, par tous les moyens appropriés, une politique visant à éliminer la violence à l'égard des femmes et, à cet effet:

. . .

i) Veiller à ce que les agents des services de répression ainsi que les fonctionnaires chargés d'appliquer des politiques visant à prévenir la violence à l'égard des femmes, à assurer les enquêtes nécessaires et à punir les coupables reçoivent une formation propre à les sensibiliser aux besoins des femmes;

j) Adopter toutes les mesures voulues, notamment dans le domaine de l'éducation, pour modifier les comportements sociaux et culturels des hommes et des femmes et éliminer les préjugés, coutumes et pratiques tenant à l'idée que l'un des deux sexes est supérieur ou inférieur à l'autre ou à des stéréotypes concernant les rôles masculins et féminins . . . [Je souligne.]

73 Notre *Charte* est le principal véhicule donnant effet au Canada aux droits de la personne qui sont reconnus à l'échelle internationale (voir *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *R. c. Keegstra*, [1990] 3 R.C.S. 697). En particulier, l'art. 15 (la disposition en matière d'égalité) et l'art. 7 (qui garantit le droit à la vie, à la liberté et à la sécurité de la personne) expriment la notion de respect de la dignité et de l'intégrité de la personne.

74 C'est dans ce cadre général que, en 1983, le Canada a remanié les dispositions du *Code* relatives aux agressions sexuelles, (L.C. 1980-81-82-83, ch. 125) soit les anciens art. 143, 149 et 244 (S.R.C. 1970, ch. C-34), dont le contenu se retrouve maintenant dans les dispositions générales relatives aux voies de fait de l'art. 265. Ces dispositions, de concert avec les modifications apportées au *Code* en 1992 (*Loi modifiant le Code criminel (agression sexuelle)*, L.C. 1992, ch. 38), principalement les art. 273.1 et 273.2, régissent la question du consentement en matière d'agression sexuelle. Dans le préambule de la loi de 1992, le Parlement se disait préoccupé par «la fréquence des agressions sexuelles contre les femmes et les enfants» et déclarait son intention de «promouvoir et contribuer à assurer la pleine protection des droits garantis par les articles 7 et 15 de la *Charte canadienne des droits et libertés*».

75 Fraser C.J., in her dissenting reasons in this case, has set out the legislative history of those provisions. In *R. v. Cuerrier*, [1998] 2 S.C.R. 371, Cory J. and I both noted the significant reform of sexual assault provisions undertaken by Parliament. (See C. Boyle, *Sexual Assault* (1984), at pp. 27-29.) I observed in *R. v. Park*, [1995] 2 S.C.R. 836, at para. 42, that:

> . . . the primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in. If this is the case, then our approach to consent must evolve accordingly, for it may be out of phase with that conceptualization of the law.

See also *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

76 In the present case, the respondent was charged with sexual assault under s. 271 of the *Code*. The applicable notions of "assault" and "consent" are defined in ss. 265, 273.1 and 273.2 of the *Code*. The relevant provisions read:

> **265.** (1) A person commits an assault when
>
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
>
> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

Dans ses motifs dissidents dans la présente affaire, le juge en chef Fraser a fait l'historique de ces dispositions. Dans l'arrêt *R. c. Cuerrier*, [1998] 2 R.C.S. 371, le juge Cory et moi-même avons souligné la vaste réforme des dispositions applicables en matière d'agression sexuelle entreprise par le législateur. (Voir C. Boyle, *Sexual Assault* (1984), aux pp. 27 à 29.) J'ai fait l'observation suivante, dans l'arrêt *R. c. Park*, [1995] 2 R.C.S. 836, au par. 42:

> [À] l'heure actuelle, l'infraction d'agression sexuelle procède surtout de la croyance que les femmes ont le droit inhérent d'exercer un contrôle complet sur leur corps, et de ne prendre part à des actes sexuels que si elles le désirent. S'il en est ainsi, notre façon d'aborder le consentement doit évoluer en conséquence, car elle est peut-être déphasée par rapport à cette conception du droit.

Voir également *R. c. Seaboyer*, [1991] 2 R.C.S. 577.

En l'espèce, l'intimé a été accusé d'agression sexuelle en vertu de l'art. 271 du *Code*. Les notions applicables d'«agression» et de «consentement» sont définies aux art. 265, 273.1 et 273.2 du *Code*, dont les dispositions pertinentes prévoient:

> **265.** (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas:
>
> *a*) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement;
>
> *b*) tente ou menace, par un acte ou un geste, d'employer la force contre une autre personne, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est alors en mesure actuelle d'accomplir son dessein;
>
> *c*) en portant ostensiblement une arme ou une imitation, aborde ou importune une autre personne ou mendie.
>
> (2) Le présent article s'applique à toutes les espèces de voies de fait, y compris les agressions sexuelles, les agressions sexuelles armées, menaces à une tierce personne ou infliction de lésions corporelles et les agressions sexuelles graves.
>
> (3) Pour l'application du présent article, ne constitue pas un consentement le fait pour le plaignant de se soumettre ou de ne pas résister en raison:

(*a*) the application of force to the complainant or to a person other than the complainant;

(*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;

(*c*) fraud; or

(*d*) the exercise of authority.

. . .

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(*a*) the agreement is expressed by the words or conduct of a person other than the complainant;

(*b*) the complainant is incapable of consenting to the activity;

(*c*) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(*d*) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(*e*) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(*a*) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(*b*) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

a) soit de l'emploi de la force envers le plaignant ou une autre personne;

b) soit des menaces d'emploi de la force ou de la crainte de cet emploi envers le plaignant ou une autre personne;

c) soit de la fraude;

d) soit de l'exercice de l'autorité.

. . .

273.1 (1) Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l'application des articles 271, 272 et 273, en l'accord volontaire du plaignant à l'activité sexuelle.

(2) Le consentement du plaignant ne se déduit pas, pour l'application des articles 271, 272 et 273, des cas où:

a) l'accord est manifesté par des paroles ou par le comportement d'un tiers;

b) il est incapable de le former;

c) l'accusé l'incite à l'activité par abus de confiance ou de pouvoir;

d) il manifeste, par ses paroles ou son comportement, l'absence d'accord à l'activité;

e) après avoir consenti à l'activité, il manifeste, par ses paroles ou son comportement, l'absence d'accord à la poursuite de celle-ci.

(3) Le paragraphe (2) n'a pas pour effet de limiter les circonstances dans lesquelles le consentement ne peut se déduire.

273.2 Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation lorsque, selon le cas:

a) cette croyance provient:

(i) soit de l'affaiblissement volontaire de ses facultés,

(ii) soit de son insouciance ou d'un aveuglement volontaire;

b) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement.

77 Briefly stated, the accused is charged with sexually assaulting a 17-year-old girl. The accused was acquitted at trial and the acquittal was upheld on appeal, by a majority of the Alberta Court of Appeal, Fraser C.J. dissenting ((1998), 57 Alta. L.R. (3d) 235). The appellant alleges that the acquittal and the subsequent decision of the Court of Appeal are based on an error of law in the interpretation of the notion of consent contained in ss. 265(3), 273.1 and 273.2 of the *Code* and invites this Court to enter a conviction.

Brièvement, l'intimé est accusé d'avoir agressé sexuellement une jeune fille de 17 ans. Au procès, l'accusé a été acquitté, et ce verdict a été confirmé par une décision majoritaire de la Cour d'appel de l'Alberta, le juge en chef Fraser étant dissidente ((1998), 57 Alta. L.R. (3d) 235). L'appelante soutient que l'acquittement et l'arrêt ultérieur de la Cour d'appel sont fondés sur une erreur de droit dans l'interprétation de la notion de consentement visée aux art. 265(3), 273.1 et 273.2 du *Code*, et elle invite notre Cour à inscrire une déclaration de culpabilité.

78 I have had the benefit of the reasons of Justice Major in this appeal and I agree generally with his reasons on most issues and with the result that he reaches. However, I wish to add some comments and discuss some of the reasoning of the trial judge and of the majority of the Court of Appeal.

J'ai eu l'avantage de lire les motifs du juge Major dans le présent pourvoi et je souscris de façon générale à ses motifs sur la plupart des questions en litige ainsi qu'au résultat auquel il arrive. Je tiens cependant à ajouter quelques commentaires et à discuter de certains aspects du raisonnement du juge du procès et des juges majoritaires de la Cour d'appel.

79 Although my colleague has recounted the facts, there are some significant nuances that need to be stated. When the complainant and the accused met in the parking lot of a shopping mall to discuss the job offer, the complainant suggested that the interview be held in the mall. The accused expressed his preference for more privacy and proposed instead that the interview take place in his van to which a trailer was attached. The complainant agreed to sit in the van, but she left the door of the van open since she was still hesitant about discussing the job offer in his vehicle.

Bien que mon collègue ait déjà rappelé les faits, certaines précisions importantes doivent être apportées. Lorsque la plaignante et l'accusé se sont rencontrés dans le parc de stationnement d'un centre commercial pour discuter de l'offre d'emploi, la plaignante a suggéré que l'entrevue ait lieu dans le centre commercial. L'accusé a dit préférer un lieu plus intime, et a proposé à la plaignante que l'entrevue se déroule plutôt dans sa camionnette, à laquelle était attachée une remorque. La plaignante a accepté de s'asseoir dans la camionnette, mais elle a laissé la porte ouverte car elle hésitait toujours à discuter de l'offre d'emploi à l'intérieur du véhicule de l'accusé.

80 The accused then proposed that they proceed to his trailer. Shortly after entering the trailer, the complainant agreed to massage lightly the accused. However, she testified that she did not want to give him a massage but was afraid at this point, considering that she saw and heard the accused lock the door of the trailer and that the accused was almost twice her size. The accused then asked the complainant to come in front of him so that he could return the favour. He started massaging the complainant and brought his hands close to her breasts. The complainant pushed him away with her

L'accusé a ensuite proposé à la plaignante qu'ils aillent dans sa remorque. Peu après qu'ils y soient entrés, la plaignante a accepté de donner un léger massage à l'accusé. Elle a cependant témoigné qu'elle ne voulait pas lui donner de massage, mais qu'elle avait peur à ce moment-là, étant donné qu'elle avait vu et entendu l'accusé fermer à clé la porte de la remorque et que celui-ci avait presque deux fois sa taille. L'accusé a ensuite demandé à la plaignante de se placer devant lui afin qu'il puisse à son tour lui donner un massage. Il a commencé le massage puis il a placé ses mains près des seins de

elbows and said "no". He then told the complainant to turn around in order to massage her feet. Again out of fear, she complied. When he began massaging her feet, the touching progressed to her inner thigh and pelvic area up to a point where he laid heavily on top of the complainant and started grinding his pelvic area against hers while telling her, as she testified, that: "he could get me so horny so that I would want it so bad, and he wouldn't give it to me because he had self-control and because he wouldn't want to give it to me". The accused stopped after the complainant asked him to "Just please stop" and at one point he said: "I had you worried, didn't I? You were scared, weren't you?". She answered: "Yes, I was very scared". This is particularly revealing of the accused's knowledge that she was afraid and certainly not a willing participant. The accused resumed his pelvic grinding, only this time he tried to touch her vaginal area, exposed his penis and placed it on the complainant's clothed pelvic area under her shorts. He stopped after the complainant said "No, stop".

la plaignante, qui l'a repoussé avec ses coudes et a dit «non». L'accusé lui a alors demandé de se retourner afin qu'il puisse lui masser les pieds. À nouveau, animée par la peur, elle a accepté. Les attouchements de l'accusé sont passés des pieds de la plaignante jusqu'à l'intérieur de ses cuisses et de sa région pelvienne. À un certain moment, l'accusé s'est étendu lourdement sur la plaignante et a commencé à frotter son pelvis contre celui de la plaignante en affirmant, de dire cette dernière: [TRADUCTION] «qu'il pouvait me rendre si excitée que je mourrais d'envie de le faire, mais qu'il ne me le ferait pas parce qu'il savait se maîtriser et parce qu'il ne voulait pas me le faire». L'accusé s'est arrêté après que la plaignante lui ait dit [TRADUCTION] «je vous en prie, arrêtez», et, à un certain moment, il a dit: «Je t'ai inquiété, n'est-ce pas? Tu avais peur, n'est-ce pas?». Ce à quoi elle a répondu: [TRADUCTION] «Oui, j'avais très peur». Ces déclarations sont particulièrement révélatrices du fait que l'accusé savait que la plaignante avait peur et qu'elle n'était pas une participante de plein gré. L'accusé a recommencé à frotter son pelvis contre celui de la plaignante, mais cette fois-là il a tenté de toucher sa région vaginale, il a sorti son pénis de son pantalon et l'a placé sous le short de la plaignante, sur sa région pelvienne toujours couverte. Il s'est arrêté après que la plaignante a dit: [TRADUCTION] «Non, arrêtez».

After this ordeal, the accused opened the door at her request and the complainant finally exited the trailer. When the complainant arrived home, she was crying and told her roommate, Ms. Tait, what had occurred. Shortly after, the accused called the complainant's apartment to ask her if she was fine. She answered that she was and called the police. This evidence is uncontradicted and the trial judge found the complainant to be an articulate and intelligent young woman and a credible witness.

81 Après cette épreuve, l'accusé a ouvert la porte de la remorque à la demande de la plaignante, qui en est finalement sortie. En arrivant à la maison, la plaignante pleurait et a tout raconté à sa colocataire, M^lle^ Tait. Peu après, l'accusé a téléphoné à la plaignante pour lui demander si elle allait bien. Elle a répondu que oui et a ensuite appelé la police. Cette preuve n'a pas été contredite, et le juge du procès a trouvé que la plaignante était une jeune femme intelligente, qu'elle s'exprimait clairement et qu'elle était un témoin crédible.

This case is not about consent, since none was given. It is about myths and stereotypes, which have been identified by many authors and succinctly described by D. Archard, *Sexual Consent* (1998), at p. 131:

82 Cette affaire ne met pas en cause une question de consentement, puisqu'aucun consentement n'a été donné. Elle met en cause les mythes et stéréotypes relevés par bon nombre d'auteurs et décrits succinctement par D. Archard dans *Sexual Consent* (1998), à la p. 131:

Myths of rape include the view that women fantasise about being rape victims; that women mean 'yes' even when they say 'no'; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually 'innocent'); that women often deserve to be raped on account of their conduct, dress, and demeanour; that rape by a stranger is worse than one by an acquaintance. Stereotypes of sexuality include the view of women as passive, disposed submissively to surrender to the sexual advances of active men, the view that sexual love consists in the 'possession' by a man of a woman, and that heterosexual sexual activity is paradigmatically penetrative coitus.

[TRADUCTION] Un des mythes concernant le viol est l'idée que les femmes rêvent d'être victimes de viol; que même lorsqu'elles disent «non» elles veulent dire «oui»; que toute femme pourrait résister à un violeur si elle le voulait vraiment; que les femmes expérimentées sur le plan sexuel ne subissent pas de préjudice lorsqu'elles sont violées (ou du moins un préjudice moins grand que celles qui sont «innocentes» à cet égard); que, souvent, des femmes méritent d'être violées en raison de leur comportement, de la façon dont elles s'habillent et de leur attitude; et qu'il est pire d'être violée par un étranger que par une connaissance. Parmi les stéréotypes sur la sexualité mentionnons l'idée que les femmes sont passives, qu'elles sont disposées à succomber docilement aux avances des hommes entreprenants, que l'amour sexuel est la «possession» d'une femme par un homme, et que l'activité sexuelle type des hétérosexuels est le coït avec pénétration.

(For example see *Seaboyer*, *supra*, at p. 651, *per* L'Heureux-Dubé J.; M. Burt, "Rape Myths and Acquaintance Rape", in A. Parrot and L. Bechhofer, eds., *Acquaintance Rape: The Hidden Crime* (1991); N. Naffine, "Possession: Erotic Love in the Law of Rape" (1994), 57 *Mod. L. Rev.* 10; R. T. Andrias, "Rape Myths: A persistent problem in defining and prosecuting rape" (1992), 7 *Criminal Justice* 2; *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action*, *supra*; C. A. MacKinnon, *Toward a Feminist Theory of the State* (1989); E. A. Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989), 21 *Ottawa L. Rev.* 741.)

(Par exemple, voir *Seaboyer*, précité, à la p. 651, le juge L'Heureux-Dubé; M. Burt, «Rape Myths and Acquaintance Rape», dans A. Parrot et L. Bechhofer, dir., *Acquaintance Rape: The Hidden Crime* (1991); N. Naffine, «Possession: Erotic Love in the Law of Rape» (1994), 57 *Mod. L. Rev.* 10; R. T. Andrias, «Rape Myths: A persistent problem in defining and prosecuting rape» (1992), 7 *Criminal Justice* 2; *L'égalité des sexes dans le système de justice au Canada: Document récapitulatif et propositions de mesures à prendre*, *op. cit.*; C. A. MacKinnon, *Toward a Feminist Theory of the State* (1989); E. A. Sheehy, «Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?» (1989), 21 *R.D. Ottawa* 741.)

83 The trial judge believed the complainant and accepted her testimony that she was afraid and he acknowledged her unwillingness to engage in any sexual activity. In addition, there is no doubt that the respondent was aware that the complainant was afraid since he told her repeatedly not to be afraid. The complainant clearly articulated her absence of consent: she said no. Not only did the accused not stop, but after a brief pause, as Fraser C.J. puts it, he went on to an "increased level of sexual activity" to which twice the complainant said no. What could be clearer?

Le juge du procès a cru la plaignante et accepté son témoignage qu'elle avait eu peur, et il a admis le fait qu'elle n'avait pas voulu se livrer à quelque activité sexuelle que ce soit. En outre, il ne fait aucun doute que l'intimé savait que la plaignante avait peur, puisqu'il lui a dit à plusieurs reprises de ne pas avoir peur. La plaignante a clairement manifesté son absence de consentement: elle a dit non. Non seulement l'accusé ne s'est-il pas arrêté, mais après avoir fait une courte pause, il a, pour reprendre l'expression du juge en chef Fraser de la Cour d'appel, [TRADUCTION] «intensifié l'activité sexuelle», activité à laquelle la plaignante a dit non à deux reprises. Comment la situation aurait-elle pu être plus claire?

The trial judge gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her. Section 265(3)(*b*) states that no consent is obtained where the complainant submits by reason of threats or fear of the application of force. Therefore, s. 265(3)(*b*) applies and operates to further establish the lack of consent: see *Cuerrier*, *supra*.

Le juge du procès n'a donné aucun effet juridique à sa conclusion que la plaignante s'était soumise à des activités sexuelles par crainte que l'accusé emploie la force contre elle. L'alinéa 265(3)*b*) précise que ne constitue pas un consentement le fait pour la plaignante de se soumettre en raison de menaces ou de crainte d'emploi de la force. En conséquence, l'al. 265(3)*b*) s'applique et il a pour effet de permettre d'établir davantage l'absence de consentement: voir *Cuerrier*, précité. 84

I agree with Major J. that the application of s. 265(3) requires an entirely subjective test. In my opinion, as irrational as a complainant's motive might be, if she subjectively felt fear, it must lead to a legal finding of absence of consent. Accordingly, I agree with Fraser C.J. that any objective factor should be considered under the defence of honest but mistaken belief.

Je suis d'accord avec le juge Major que l'application du par. 265(3) commande un test entièrement subjectif. À mon avis, aussi irrationnel que puisse avoir été le motif d'une plaignante, si elle a subjectivement éprouvé de la crainte, il faut conclure en droit à l'absence de consentement. En conséquence, je suis d'accord avec le juge en chef Fraser de la Cour d'appel que tout facteur objectif devrait être pris en considération dans le cadre d'une défense de croyance sincère mais erronée. 85

However, in my view, Major J. unduly restricts the application of s. 265(3) to instances where the complainant chooses "to participate in, or ostensibly consent to, the touching in question" (at para. 38; see also para. 36). Section 265(3) applies to cases where the "complainant submits or does not resist" (emphasis added) by reason of the application of force, threats or fear of the application of force, fraud or the exercise of authority. Therefore, that section should also apply to cases where the complainant is silent or passive in response to such situations.

En outre, je suis d'avis que le juge Major restreint à tort l'application du par. 265(3) aux cas où la plaignante décide «de participer aux attouchements en question ou d'y consentir apparemment» (au par. 38, voir aussi le par. 36). Le paragraphe 265(3) s'applique dans les cas où la décision de la plaignante «de se soumettre ou de ne pas résister» (je souligne) résulte soit de l'emploi de la force, soit de menaces d'emploi de la force ou de la crainte de cet emploi, soit de la fraude, soit de l'exercice de l'autorité. Par conséquent, il doit s'appliquer aussi aux cas où la plaignante demeure silencieuse ou passive face à de telles situations. 86

In the circumstances of this case, it is difficult to understand how the question of implied consent even arose. Although he found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid, the trial judge nonetheless did not take "no" to mean that the complainant did not consent. Rather, he concluded that she implicitly consented and that the Crown had failed to prove lack of consent. This was a fundamental error. As noted by Professor

Dans les circonstances de la présente affaire, il est difficile de voir comment la question du consentement tacite a même pu être soulevée. Bien qu'il ait jugé la plaignante crédible et qu'il ait accepté son témoignage selon lequel elle a dit «non» à trois reprises et elle était effrayée, le juge du procès n'a pas pour autant considéré que ces «non» signifiaient que la plaignante n'avait pas consenti. Il a plutôt conclu qu'elle avait consenti tacitement et que le ministère public n'avait pas prouvé l'absence de consentement. Il s'agit là d'une erreur fondamentale. Comme l'a souligné le 87

Stuart in Annotation on *R. v. Ewanchuk* (1998), 13 C.R. (5th) 330, at p. 330:

> Both the trial judgment and that of Justice McClung do not make the basic distinction that consent is a matter of the state of mind of the complainant and belief in consent is, subject to s. 273.2 of the *Criminal Code*, a matter of the state of mind of the accused.

This error does not derive from the findings of fact but from mythical assumptions that when a woman says "no" she is really saying "yes", "try again", or "persuade me". To paraphrase Fraser C.J. at p. 263, it denies women's sexual autonomy and implies that women are "walking around this country in a state of constant consent to sexual activity".

88 In the Court of Appeal, McClung J.A. compounded the error made by the trial judge. At the outset of his opinion, he stated at p. 245 that "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines". He noted, at pp. 245-46, that "she was the mother of a six-month-old baby and that, along with her boyfriend, she shared an apartment with another couple".

89 Even though McClung J.A. asserted that he had no intention of denigrating the complainant, one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying "no", she really does not mean it and even if

professeur Stuart dans Annotation on *R. v. Ewanchuk* (1998), 13 C.R. (5th) 330, à la p. 330:

> [TRADUCTION] Ni le jugement de première instance, ni la décision du juge McClung ne font la distinction fondamentale que le consentement est une question qui touche à l'état d'esprit du plaignant alors que la croyance au consentement est, sous réserve de l'art. 273.2 du *Code criminel*, une question qui touche à l'état d'esprit de l'accusé.

Cette erreur ne résulte pas des conclusions de fait mais relève plutôt de mythes et stéréotypes voulant que, lorsqu'une femme dit «non», elle veut plutôt dire «oui», «essaie encore» ou «persuade-moi». Pour paraphraser le juge en chef Fraser, à la p. 263, cette attitude nie aux femmes leur autonomie sur le plan sexuel et laisse entendre que les femmes [TRADUCTION] «se promènent dans ce pays dans un état permanent de consentement à des activités sexuelles».

En Cour d'appel, le juge McClung a exacerbé l'erreur du juge du procès. En effet, au début de ses motifs, il dit, à la p. 245, qu'[TRADUCTION] «il convient de signaler que la plaignante n'était pas vêtue d'un bonnet et d'une crinoline lorsqu'elle s'est présentée devant Ewanchuk et qu'elle est entrée dans sa remorque». Il a souligné, aux pp. 245 et 246, qu'[TRADUCTION] «elle était la mère d'un bébé de six mois et que, avec son petit ami, elle partageait un appartement avec un autre couple».

Même si le juge McClung a affirmé qu'il n'avait nullement l'intention de dénigrer la plaignante, on peut se demander pourquoi il a jugé nécessaire de souligner ces aspects du dossier du procès. Était-ce pour signaler que la plaignante n'était pas vierge? Ou encore qu'elle est une personne de moralité douteuse puisqu'elle n'est pas mariée et qu'elle vit avec son petit ami et un autre couple? De telles remarques, formulées par un juge d'appel, contribuent à renforcer le mythe voulant que, dans de telles circonstances, la plaignante mérite moins d'être crue, qu'elle a invité l'agression sexuelle ou encore que son expérience sur le plan sexuel indique qu'elle a probablement consenti à se livrer à d'autres activités sexuelles. De telles suppositions impliquent que si la plaignante manifeste son

she does, her refusal cannot be taken as seriously as if she were a girl of "good" moral character. "Inviting" sexual assault, according to those myths, lessens the guilt of the accused as Archard, *supra*, notes at p. 139:

> . . . the more that a person contributes by her behaviour or negligence to bringing about the circumstances in which she is a victim of a crime, the less responsible is the criminal for the crime he commits. A crime is no less unwelcome or serious in its effects, or need it be any the less deliberate or malicious in its commission, for occurring in circumstances which the victim helped to realise. Yet judges who spoke of women 'inviting' or 'provoking' a rape would go on to cite such contributory behaviour as a reason for regarding the rape as less grave or the rapist as less culpable. It adds judicial insult to criminal injury to be told that one is the part author of a crime one did not seek and which in consequence is supposed to be a lesser one.

McClung J.A. writes, at p. 247:

> There is no room to suggest that Ewanchuk knew, yet disregarded, her underlying state of mind as he furthered his romantic intentions. He was not aware of her true state of mind. Indeed, his ignorance about that was what she wanted. The facts, set forth by the trial judge, provide support for the overriding trial finding, couched in terms of consent by implication, that the accused had no proven preparedness to assault the complainant to get what he wanted. [Emphasis added.]

On the contrary, both the fact that Ewanchuk was aware of the complainant's state of mind, as he did indeed stop each time she expressly stated "no", and the trial judge's findings reinforce the obvious conclusion that the accused knew there was no consent. These were two strangers, a young 17-year-old woman attracted by a job offer who found herself trapped in a trailer and a man approximately twice her age and size. This is hardly a scenario one would characterize as reflective of "romantic intentions". It was nothing more than an

absence de consentement en disant «non» ce n'est pas réellement ce qu'elle veut dire, et que même dans le cas contraire, son refus ne peut être pris au sérieux au même titre que s'il émanait d'une fille de «bonne» moralité. Selon ces mythes, l'«incitation» à l'agression sexuelle diminue la culpabilité de l'accusé, comme le souligne Archard, *op. cit.*, à la p. 139:

> [TRADUCTION] . . . plus la personne contribue par son comportement ou sa négligence à créer les circonstances dans lesquelles elle est victime d'un crime, moins l'auteur du crime est responsable de celui-ci. Un crime n'est pas moins indésiré ou grave du point de vue de ses effets ni moins délibéré ou malicieux parce qu'il a été commis dans des circonstances que la victime a contribué à créer. Pourtant, il y a des juges qui, après avoir affirmé que la femme a «incité» au viol ou l'a «provoqué», poursuivent en disant que le comportement contributif de celle-ci diminue la gravité du viol ou la culpabilité du violeur. C'est ajouter l'insulte judiciaire à l'injure criminelle que de dire à la victime qu'elle est en partie l'auteur d'un crime qu'elle n'a pas voulu et qui, de ce fait, est considéré moins grave.

Le juge McClung écrit, à la p. 247: 90

> [TRADUCTION] Rien ne permet de prétendre que Ewanchuk connaissait l'état d'esprit profond de la plaignante et qu'il ait décidé de ne pas en tenir compte en poursuivant ses intentions romantiques. Il ne connaissait pas son véritable état d'esprit. De fait, cette ignorance est ce que recherchait la victime. Les faits décrits par le juge du procès étayent sa conclusion capitale — formulée en invoquant le consentement par implication — selon laquelle il n'a pas été établi que l'accusé s'était préparé à agresser la plaignante afin d'obtenir ce qu'il voulait. [Je souligne.]

Bien au contraire, le fait que Ewanchuk connaissait l'état d'esprit de la plaignante, puisqu'il s'est effectivement arrêté chaque fois que la plaignante a expressément dit «non», ainsi que les constatations de fait du juge du procès renforcent la conclusion évidente que l'accusé savait que la plaignante ne consentait pas. Les deux parties étaient des étrangers l'une pour l'autre, d'un côté une jeune femme de 17 ans intéressée par une offre d'emploi qui s'est trouvée prise au piège dans une remorque, de l'autre un homme qui avait presque le double de son âge et de sa taille. Il est difficile d'imaginer comment quelqu'un peut considérer

effort by Ewanchuk to engage the complainant sexually, not romantically.

91 The expressions used by McClung J.A. to describe the accused's sexual assault, such as "clumsy passes" (p. 246) or "would hardly raise Ewanchuk's stature in the pantheon of chivalric behaviour" (p. 248), are plainly inappropriate in that context as they minimize the importance of the accused's conduct and the reality of sexual aggression against women.

92 McClung J.A. also concluded that "the sum of the evidence indicates that Ewanchuk's advances to the complainant were far less criminal than hormonal" (p. 250) having found earlier that "every advance he made to her stopped when she spoke against it" and that "[t]here was no evidence of an assault or even its threat" (p. 249). According to this analysis, a man would be free from criminal responsibility for having non-consensual sexual activity whenever he cannot control his hormonal urges. Furthermore, the fact that the accused ignored the complainant's verbal objections to any sexual activity and persisted in escalated sexual contact, grinding his pelvis against hers repeatedly, is more evidence than needed to determine that there was an assault.

93 Finally, McClung J.A. made this point: "In a less litigious age going too far in the boyfriend's car was better dealt with on site — a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee" (p. 250). According to this stereotype, women should use physical force, not resort to courts to "deal with" sexual assaults and it is not the perpetrator's responsibility to ascertain consent, as required by s. 273.2(*b*), but the women's not only to express an unequivocal "no", but also to fight her way out of such a situation. In that

que ce scénario reflète des «intentions romantiques». Ce n'était rien de plus qu'une tentative de la part de Ewanchuk d'avoir une relation sexuelle avec la plaignante et non une liaison amoureuse.

Les expressions qu'a utilisées le juge McClung pour décrire l'agression sexuelle commise par l'accusé, par exemple lorsqu'il a parlé [TRADUCTION] «d'avances maladroites» (p. 246) ou d'une situation qui [TRADUCTION] «ne contribuerait guère à élever Ewanchuk au panthéon de la conduite chevaleresque» (p. 248), sont carrément inappropriées dans ce contexte, car elles minimisent l'importance de la conduite de l'accusé et la réalité des agressions sexuelles dont les femmes sont victimes.

Le juge McClung a également conclu que [TRADUCTION] «l'ensemble de la preuve indique que les avances faites par Ewanchuk à la plaignante étaient beaucoup moins de nature criminelle qu'hormonale» (p. 250), après avoir constaté auparavant que ce dernier [TRADUCTION] «avait chaque fois mis fin à ses avances dès qu'elle s'y était opposée» et qu'«[i]l n'y avait aucune preuve d'agression ni même d'une menace d'agression» (p. 249). Suivant cette analyse, un homme n'engagerait pas sa responsabilité criminelle chaque fois qu'il se livre à une activité sexuelle non consensuelle parce qu'il est incapable de maîtriser ses pulsions hormonales. En outre, le fait que l'accusé n'ait pas tenu compte des objections verbales de la plaignante à toute activité sexuelle et qu'il ait persisté à poursuivre l'escalade des contacts sexuels, frottant à maintes reprises sa région pelvienne contre celle de la plaignante, apporte une preuve plus que suffisante qu'il y a eu agression.

Enfin, le juge McClung a fait la remarque suivante: [TRADUCTION] «À une autre époque, où on recourait moins aux tribunaux, lorsque les choses allaient trop loin dans la voiture du petit ami, on réglait la question sur-le-champ — par une interjection bien choisie, une gifle ou, au besoin, un coup de genou bien placé» (p. 250). Suivant ce stéréotype, les femmes devraient utiliser la force physique et non s'adresser aux tribunaux pour «régler» la question en cas d'agression sexuelle, et, contrairement à ce qu'exige l'al. 273.2*b*), il n'incombe

sense, Susan Estrich has noted that "rape is most assuredly not the only crime in which consent is a defense; but it is the only crime that has required the victim to resist physically in order to establish nonconsent" ("Rape" (1986), 95 *Yale L.J.* 1087, at p. 1090).

Cory J. referred to the inappropriate use of rape myths by courts in *Osolin*, *supra*, at p. 670:

A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented.

In *Seaboyer*, *supra*, I alluded to this issue as follows, at pp. 707-9:

Parliament exhibited a marked, and justifiedly so, distrust of the ability of the courts to promote and achieve a non-discriminatory application of the law in this area. In view of the history of government attempts, the harm done when discretion is posited in trial judges and the demonstrated inability of the judiciary to change its discriminatory ways, Parliament was justified in so choosing. My attempt to illustrate the tenacity of these discriminatory beliefs and their acceptance at all levels of society clearly demonstrates that discretion in judges is antithetical to the goals of Parliament.

. . .

History demonstrates that it was discretion in trial judges that saturated the law in this area with stereotype. My earlier discussion shows that we are not, all of a sudden, a society rid of such beliefs, and hence, discretionary decision making in this realm is absolutely antithetical to the achievement of government's pressing and substantial objective.

pas à l'auteur des actes de s'assurer du consentement de la femme, qui devrait non seulement opposer un «non» catégorique mais également se tirer par la force d'une telle situation. À cet égard, Susan Estrich a souligné que [TRADUCTION] «le viol n'est certes pas le seul crime pour lequel le consentement constitue un moyen de défense, mais il est le seul crime qui exige que la victime ait résisté physiquement comme preuve de l'absence de consentement» («Rape» (1986), 95 *Yale L.J.* 1087, à la p. 1090).

Le juge Cory a parlé de l'utilisation inappropriée des mythes sur le viol par les tribunaux dans l'arrêt *Osolin*, précité, à la p. 670:

Nombre de mythes sur le viol ont dans le passé indûment servi de cadre à l'examen des questions de preuve dans des affaires d'agression sexuelle. Faisaient partie de ce nombre les fausses notions suivantes: on ne peut violer une femme contre son gré; seules les «femmes de mauvaise réputation» sont violées; la personne qui n'a pas clairement une «bonne moralité» est plus susceptible d'avoir donné son consentement.

Dans l'arrêt *Seaboyer*, précité, j'ai fait allusion à cette question de la façon suivante, aux pp. 707 à 709:

Le législateur a fait montre d'une méfiance marquée, et justifiée, à l'égard de l'aptitude des tribunaux à promouvoir et à atteindre une application non discriminatoire des règles de droit dans ce domaine. Vu l'historique des tentatives du gouvernement, le préjudice entraîné par le fait de confier aux juges du procès un pouvoir discrétionnaire et l'inaptitude démontrée des tribunaux à changer leurs pratiques discriminatoires, le choix du législateur était justifié. Les efforts que j'ai faits pour illustrer le caractère tenace des croyances discriminatoires et leur acceptation à tous les échelons de la société font clairement ressortir que l'exercice du pouvoir discrétionnaire par les juges est à l'opposé des objectifs du Parlement.

. . .

L'histoire démontre que c'est l'exercice du pouvoir discrétionnaire par les juges du procès qui a saturé de stéréotypes les règles de droit dans ce domaine. Mon analyse antérieure illustre que nous ne sommes pas tout à coup une société débarrassée de ces croyances et, par conséquent, l'exercice d'un pouvoir discrétionnaire dans ce contexte est tout à fait à l'opposé de la réalisation de l'objectif urgent et réel du gouvernement.

94

95 This case has not dispelled any of the fears I expressed in *Seaboyer*, *supra*, about the use of myths and stereotypes in dealing with sexual assault complaints (see also Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990), 28 *Osgoode Hall L.J.* 507). Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The *Code* was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.

La présente affaire n'a dissipé aucune des craintes que j'ai exprimées dans l'arrêt *Seaboyer*, précité, sur l'utilisation de mythes et de stéréotypes dans le traitement des plaintes d'agression sexuelle (voir également Bertha Wilson, «Will Women Judges Really Make a Difference?» (1990), 28 *Osgoode Hall L.J.* 507). Les plaignants devraient être en mesure de compter sur un système libre de mythes et de stéréotypes et sur des juges dont l'impartialité n'est pas compromise par ces suppositions tendancieuses. Le *Code* a été modifié en 1983 et en 1992 pour empêcher qu'on se fonde sur de telles suppositions, qu'il ne faut pas laisser ressurgir par l'effet des stéréotypes que reflètent les motifs des juges majoritaires de la Cour d'appel. Notre Cour a notamment pour rôle de dénoncer ce genre de langage, qui est malheureusement encore utilisé de nos jours et qui non seulement perpétue des mythes et stéréotypes archaïques sur la nature des agressions sexuelles, mais également ne tient pas compte du droit applicable.

96 In "The Standard of Social Justice as a Research Process" (1997), 38 *Can. Psychology* 91, K. E. Renner, C. Alksnis and L. Park make a strong indictment of the current criminal justice process, at p. 100:

> The more general indictment of the current criminal justice process is that the law and legal doctrines concerning sexual assault have acted as the principle [*sic*] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs, the traditional view of the legal system as neutral, objective and gender-blind is not defensible. Since the system is ineffective in protecting the rights of women and children, it is necessary to re-examine the existing doctrines which reflect the cultural and social limitations that have preserved dominant male interests at the expense of women and children. [Emphasis added.]

Dans «The Standard of Social Justice as a Research Process» (1997), 38 *Can. Psychology* 91, les auteurs K. E. Renner, C. Alksnis et L. Park, critiquent sévèrement le processus de justice criminelle actuel à la p. 100:

> [TRADUCTION] La critique plus générale adressée au processus de justice criminelle actuel est que les règles de droit et les doctrines juridiques concernant l'agression sexuelle ont constitué les principaux mécanismes systémiques de négation des expériences vécues par les femmes et les enfants. Vu cet état de choses, le point de vue traditionnel, qui considère que le système juridique est neutre, objectif et désexualisé, est indéfendable. Comme le système ne parvient pas à protéger efficacement les droits des femmes et des enfants, il est nécessaire de réexaminer les doctrines existantes reflétant les limites culturelles et sociales qui ont préservé les intérêts dominants des hommes au détriment des femmes et des enfants. [Je souligne.]

97 This being said, turning to the facts of the present case, I agree with Major J. that the findings necessary to support a verdict of guilty on the charge of sexual assault have been made. In particular, there is, on the record, no evidence that would give an air of reality to an honest belief in consent for any of the sexual activity which took place in

Ceci dit, en ce qui conceme les faits de la présente affaire je suis d'accord avec le juge Major que les conclusions nécessaires pour étayer un verdict de culpabilité relativement à l'accusation d'agression sexuelle ont été tirées. En particulier, il n'y a au dossier aucun élément de preuve ayant pour effet de conférer vraisemblance à une

this case. One cannot imply that once the complainant does not object to the massage in the context of a job interview, there is "sufficient evidence" to support that the accused could honestly believe he had permission to initiate sexual contact. This would mean that complying to receive a massage is consent to sexual touching. It would reflect the myth that women are presumptively sexually accessible until they resist. McLachlin J. has recognized in *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 82, that reliance on rape myths cannot ground a defence of mistaken belief in consent:

> Care must be taken to avoid the false assumptions or "myths" that may mislead us in determining whether the conduct of the complainant affords a sufficient basis for putting the defence of honest mistake on consent to the jury. One of these is the stereotypical notion that women who resist or say no may in fact be consenting.

Furthermore, I agree with Fraser C.J. at p. 278 that there is no air of reality to a defence of mistaken belief in consent "in the face of the complainant's clearly stated verbal objections".

Moreover, s. 273.2(*b*) precludes the accused from raising the defence of belief in consent if he did not take "reasonable steps" in the circumstances known to him at the time to ascertain that the complainant was consenting. This provision and the defence of honest but mistaken belief were before the trial judge and it should have been given full effect. The trial judge erred in law by not applying s. 273.2(*b*) which was the law of the land at the time of the trial, irrespective of whether the case proceeded on that basis. As stated by McLachlin J. in *Esau*, *supra*, at para. 50, with whom I concurred:

croyance sincère au consentement à l'une ou l'autre des activités sexuelles en cause dans le présent cas. Il n'est pas possible de déduire que, à partir du moment où la plaignante ne s'est pas opposée au massage dans le contexte d'une entrevue d'emploi, il y avait «suffisamment de preuve» pour appuyer la prétention que l'accusé ait pu croire sincèrement qu'il avait la permission d'amorcer le contact sexuel. Ce qui voudrait dire que le fait d'accepter de recevoir un massage équivaut à consentir à des attouchements sexuels. Cela refléterait le mythe selon lequel on peut présumer que les femmes sont toujours disponibles ou consentantes jusqu'à ce qu'elles résistent. Madame le juge McLachlin a reconnu, dans l'arrêt *R. c. Esau*, [1997] 2 R.C.S. 777, au par. 82, que des mythes sur le viol ne peuvent être invoqués pour fonder une défense de croyance erronée au consentement:

> Il faut prendre soin d'éviter les fausses suppositions ou les «mythes» qui peuvent nous induire en erreur pour déterminer si la conduite de la plaignante constitue un fondement suffisant pour soumettre la défense de croyance sincère mais erronée au consentement à l'appréciation du jury. L'un de ces mythes est l'idée stéréotypée que la femme qui résiste ou qui dit non peut, en fait, être consentante.

En outre, je suis d'accord avec le juge en chef Fraser, à la p. 278 de ses motifs, que la défense de croyance erronée au consentement n'a aucune vraisemblance [TRADUCTION] «compte tenu des objections verbales clairement exprimées par la plaignante».

Qui plus est, l'al. 273.2*b*) empêche l'accusé de soulever la défense de croyance au consentement s'il n'a pas pris de «mesures raisonnables», dans les circonstances qu'il connaissait alors, pour s'assurer du consentement de la plaignante. À l'instar de la défense de croyance sincère mais erronée au consentement, cette disposition avait été invoquée devant le juge du procès, qui aurait dû lui donner plein effet. Ce dernier a commis une erreur de droit en n'appliquant pas l'al. 273.2*b*), qui exprimait le droit applicable au pays au moment du procès, que l'affaire ait été ou non fondée sur cet alinéa. Tel que l'écrit Madame le juge McLachlin dans l'arrêt *Esau*, précité, au par. 50 de ses motifs, auxquels j'ai souscrit:

98

Major J. [for the majority] does not consider s. 273.2. This may be because it was not argued on the appeal or in the proceedings below. With respect, I do not believe that the force of s. 273.2 may be avoided on that ground. Parliament has spoken. It has set out minimum conditions for the defence of mistaken belief in consent. If those conditions are not met, the defence does not lie.

Le juge Major [pour la majorité] ne tient pas compte de l'art. 273.2. C'est peut-être parce que cette disposition n'a pas été invoquée dans le cadre de l'appel ni en première instance. Il ne me paraît pas possible de se soustraire à la force de l'art. 273.2 pour ce motif. Le législateur s'est exprimé. Il a prévu des conditions minimales pour invoquer la défense de croyance erronée au consentement. Si ces conditions ne sont pas remplies, ce moyen de défense est irrecevable.

99 I agree entirely with Fraser C.J. that, unless and until an accused first takes reasonable steps to assure that there is consent, the defence of honest but mistaken belief does not arise (see *R. v. Daigle*, [1998] 1 S.C.R. 1220; *Esau, supra, per* McLachlin J. dissenting; and J. McInnes and C. Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995), 29 *U.B.C. L. Rev.* 341). In this case, the accused proceeded from massaging to sexual contact without making any inquiry as to whether the complainant consented. Obviously, interpreting the fact that the complainant did not refuse the massage to mean that the accused could further his sexual intentions is not a reasonable step. The accused cannot rely on the complainant's silence or ambiguous conduct to initiate sexual contact. Moreover, where a complainant expresses non-consent, the accused has a corresponding escalating obligation to take additional steps to ascertain consent. Here, despite the complainant's repeated verbal objections, the accused did not take any step to ascertain consent, let alone reasonable ones. Instead, he increased the level of his sexual activity. Therefore, pursuant to s. 273.2(*b*) Ewanchuk was barred from relying on a belief in consent.

Je suis entièrement d'accord avec le juge en chef Fraser que la défense de croyance sincère mais erronée ne peut être soulevée que dans les cas où l'accusé a d'abord pris des mesures raisonnables pour s'assurer de l'existence du consentement (voir *R. c. Daigle*, [1998] 1 R.C.S. 1220; *Esau*, précité, motifs de dissidence du juge McLachlin; et J. McInnes et C. Boyle, «Judging Sexual Assault Law Against a Standard of Equality» (1995), 29 *U.B.C. L. Rev.* 341). En l'espèce, l'accusé est passé du massage au contact sexuel sans chercher à savoir si la plaignante y consentait. De toute évidence, déduire du fait que la plaignante n'avait pas refusé le massage qu'elle permettait à l'accusé de donner suite à ses intentions sexuelles n'est pas une mesure raisonnable. L'accusé ne peut pas compter sur le silence ou le comportement ambigu de la plaignante pour entreprendre un contact sexuel. En outre, lorsqu'une plaignante manifeste son absence de consentement, l'accusé a l'obligation correspondante de prendre des mesures supplémentaires pour s'assurer du consentement de la plaignante. En l'espèce, malgré les objections verbales répétées de la plaignante, l'accusé n'a pris aucune mesure pour s'assurer du consentement de cette dernière, encore moins des mesures raisonnables. Au contraire, il a plutôt intensifié son activité sexuelle. Par conséquent, conformément à l'al. 273.2*b*), Ewanchuk n'était pas autorisé à invoquer sa croyance au consentement.

100 Major J., at para. 43, relies on this Court's decision in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, to describe the nature of the defence of honest but mistaken belief. In *Pappajohn*, the majority held that this defence does not need to be based on reasonable grounds as long as it is honestly held. That approach has been modified by the enactment of s. 273.2(*b*) which introduced the "reasonable

Au paragraphe 43 de ses motifs, le juge Major se fonde sur l'arrêt de notre Cour *Pappajohn c. La Reine*, [1980] 2 R.C.S. 120, pour décrire la nature de la défense de croyance sincère mais erronée. Dans *Pappajohn*, les juges de la majorité ont statué qu'il n'était pas nécessaire que cette défense soit fondée sur des motifs raisonnables, pourvu que la croyance soit sincère. Cette approche a été modi-

steps" requirement. Therefore, that decision no longer states the law on the question of honest but mistaken belief in consent.

I wish to point out that, on the facts as found at trial, s. 273.1(2) also applies to this case. Coupled with the reasonable steps requirement of s. 273.2(*b*), s. 273.1(2) restricts the circumstances in which an accused could claim that he had a mistaken belief in the complainant's agreement to engage in the impugned sexual activity. Particularly relevant to this case, s. 273.1(2)(*d*) states that no consent is obtained where "the complainant expresses, by words or conduct, a lack of agreement . . . ". Here, the complainant clearly expressed her lack of consent by saying "no" three times. The application of that provision acknowledges that when a woman says "no" she is communicating her non-agreement, regardless of what the accused thought it meant, and that her expression has an enforceable legal effect. It precludes the accused from claiming that he thought there was an agreement. That provision was in force at the time of trial and could not be ignored by the trial judge.

Disposition

Like my colleague Major J., I would allow the appeal, enter a conviction and send the matter back to the trial judge for sentencing.

The following are the reasons delivered by

McLACHLIN J. — I agree with the reasons of Justice Major. I also agree with Justice L'Heureux-Dubé that stereotypical assumptions lie at the heart of what went wrong in this case. The specious defence of implied consent (consent implied by law), as applied in this case, rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent (see L'Heureux-Dubé J.). On appeal, the idea also surfaced that if a

fiée par la promulgation de l'al. 273.2*b*), qui a introduit la condition relative aux «mesures raisonnables». En conséquence, cet arrêt n'énonce plus le droit applicable sur la question de la croyance sincère mais erronée au consentement.

Je tiens à souligner que, compte tenu des faits tels que prouvés au procès, le par. 273.1(2) s'applique également au présent cas. Conjugué à la condition relative aux mesures raisonnables prévue par l'al. 273.2*b*), le par. 273.1(2) limite le nombre de situations dans lesquelles un accusé peut prétendre avoir cru erronément à l'accord de la plaignante à l'activité sexuelle reprochée. L'alinéa 273.1(2)*d*), qui est particulièrement pertinent en l'espèce, précise qu'il n'y a pas de consentement de la part de la plaignante lorsque celle-ci «manifeste, par ses paroles ou son comportement, [son] absence d'accord . . .». En l'espèce, la plaignante a clairement manifesté son absence de consentement en disant «non» à trois reprises. L'application de cette disposition reconnaît que, lorsqu'une femme dit «non», elle communique son absence de consentement, indépendamment de ce que l'accusé croyait qu'elle signifiait, et que cette manifestation de volonté a un effet juridique contraignant. Elle empêche l'accusé de prétendre qu'il croyait qu'il y avait consentement. Cette disposition était en vigueur au moment du procès et le juge du procès ne pouvait l'ignorer. 101

Dispositif

À l'instar de mon collègue le juge Major, je suis d'avis d'accueillir le pourvoi, d'inscrire une déclaration de culpabilité et de renvoyer l'affaire au juge du procès pour détermination de la peine. 102

Version française des motifs rendus par

LE JUGE McLACHLIN — Je souscris aux motifs du juge Major. Je conviens également avec le juge L'Heureux-Dubé que l'existence de stéréotypes est au cœur même du problème survenu dans la présente affaire. Le moyen de défense spécieux fondé sur le consentement tacite (consentement supposé par la loi), tel qu'il a été appliqué en l'espèce, repose sur la présomption voulant que, à moins qu'elle proteste ou résiste, une femme est «répu- 103

woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law.

104 I join my colleagues in rejecting them.

Appeal allowed.

Solicitor for the appellant: The Attorney General for Alberta, Edmonton.

Solicitors for the respondent: Royal, McCrum, Duckett & Glancy, Edmonton.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitors for the interveners the Women's Legal Education and Action Fund and the Disabled Women's Network Canada: Oleskiw, Anweiler, Toronto; Dale Gibson Associates, Edmonton.

Solicitors for the intervener the Sexual Assault Centre of Edmonton: Witten, Binder, Edmonton.

tée» consentir (voir les motifs du juge L'Heureux-Dubé). En Cour d'appel, l'idée selon laquelle les femmes qui ne s'habillent pas discrètement sont réputées consentir a également fait surface. De tels stéréotypes sont bien enracinés dans bon nombre de cultures, y compris la nôtre. Ils n'ont cependant plus leur place en droit canadien.

Je m'associe à mes collègues pour les rejeter.

Pourvoi accueilli.

Procureur de l'appelante: Le procureur général de l'Alberta, Edmonton.

Procureurs de l'intimé: Royal, McCrum, Duckett & Glancy, Edmonton.

Procureur de l'intervenant le procureur général du Canada: Le procureur général du Canada, Ottawa.

Procureurs des intervenants le Fonds d'action et d'éducation juridiques pour les femmes et le Réseau d'action des femmes handicapées du Canada: Oleskiw, Anweiler, Toronto; Dale Gibson Associates, Edmonton.

Procureurs de l'intervenant le Sexual Assault Centre of Edmonton: Witten, Binder, Edmonton.

TAB 10

PAKAS 10-12, 16-18/22

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Indexed as:

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (T.D.)

Rothmans, Benson & Hedges Inc. (Plaintiff)
v.
Attorney General of Canada (Defendant)

[1990] 1 F.C. 74

[1989] F.C.J. No. 446

Court File No. T-1416-88

Federal Court of Canada - Trial Division

Rouleau J.

Heard: Toronto, April 7, 1989.
Judgment: Ottawa, May 19, 1989.

Practice -- Parties -- Intervention -- Canadian Cancer Society seeking to intervene in action attacking constitutionality of legislation prohibiting advertising of tobacco products -- As no express provision in Federal Court Rules for intervention, necessary to look to practice in provincial courts -- Ontario Rules permitting intervention of nonparty claiming interest in subject-matter of proceeding, provided no delay or prejudice -- "Interest" broadly interpreted in constitutional matters -- Criteria justifying intervention -- Objection that addition of party lengthening proceeding rejected -- Intervention of party with special knowledge and expertise permitted to give courts different perspective on issue, particularly where first-time Charter arguments involved -- Nature of issue and likelihood of useful contribution by applicant to resolution of action without prejudice to parties key considerations -- Application allowed.

This was an application by the Canadian Cancer Society to intervene in an action attacking the constitutionality of the Tobacco Products Control Act, which prohibits the advertising of tobacco products in Canada. The Society's primary object is cancer research and education of the public. It contended that it had special knowledge and expertise relating cancer to the consumption of tobacco products and that it had sources of information which may not have been available to the other parties. It also argued that it had a special interest with respect to the issues, and that its overall capacity to collect, comment upon and analyze all the data related to cancer, tobacco products and the advertising of those products would be helpful to the Court. The plaintiff opposed the application on the grounds that extensive hearings had been held prior to passage of the legislation, and that any information which the Society may have is in the public domain. Finally, it was argued that the ap-

plicant would be putting forward the same evidence and arguments as the Attorney General, thus unnecessarily protracting the proceedings.

Held, the application should be allowed.

[page75]

As there is no Federal Court Rule expressly permitting intervention, Rule 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules or to the practice and procedure for similar proceedings in provincial courts. The Ontario Rules of Civil Procedure permit the intervention of a nonparty who claims an interest in the subject-matter of the proceeding, provided this will not delay or prejudice the proceedings. The "interest" required has been widely interpreted, particularly where Charter and other constitutional issues have been raised. Recent cases have outlined several criteria to be considered in an application for intervention, but generally the interest required to intervene in public interest litigation has been recognized in an organization which is genuinely interested in, and possesses special knowledge and expertise related to, the issues. The objection that the addition of a party would lengthen the proceedings was rejected in that courts are familiar with lengthy and complex litigation including a multiplicity of parties. Also, even though one of the parties may be able to adequately defend a certain public interest, the intervention of parties with special knowledge and expertise has been permitted to place the issue in a slightly different perspective which would assist the court, particularly when first-time Charter arguments are involved. Interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues have also been allowed. The key considerations are the nature of the issue, and the likelihood of the applicant being able to make a useful contribution to the resolution of the action without causing injustice to the immediate parties.

Applying the above principles, the applicant should be allowed to intervene as it has a genuine interest in the issues and could assist the Court by putting the issues in a different perspective as it has special knowledge and expertise relating to the public interest questions. The application should also be allowed to offset any public perception that the interests of justice are not being served because of possible political influence being asserted by the tobacco industry.

Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.).
Criminal Code, R.S.C. 1970, c. C-34, ss. 246.6 (as enacted by S.C. 1980-81-82-83, c. 125, s. 19), 246.7 (as enacted idem).
Federal Court Rules, C.R.C., c. 663, R. 5.
Rules of Civil Procedure, O. Reg. 560/84, RR. 13.01, 13.02 [page76] (as am. by O. Reg. 221/86, s. 1).
Tobacco Products Control Act, S.C. 1988, c. 20.

Cases Judicially Considered

Applied:
R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.).

Re Schofield and Minister of Consumer and Commercial Relations (1980), 112 D.L.R. (3d) 132; 28 O.R. (2d) 764; 19 C.P.C. 245 (C.A.).
G.T.V. Limousine Inc. v. Service de Limousine Murray Hill Ltée, [1988] R.J.Q. 1615 (C.A.).

Counsel:

Edward P. Belobaba and P. Lukasiewicz, for the plaintiff.
Karl Delwaide and Andre T. Mecs, for the proposed intervenor.
Paul J. Evraire, Q.C., for the defendant.

Solicitors:

Gowling & Henderson, Toronto, for the plaintiff.
Deputy Attorney General of Canada, for the defendant.

The following are the reasons for order rendered in English by

1 **ROULEAU J.**:-- This is an application brought by the Canadian Cancer Society ("Society") seeking an order allowing it to intervene and participate in the action. The issue relates to an attack by the plaintiff on the constitutional validity of the Tobacco Products Control Act, S.C. 1988, c. 20 which prohibits the advertising of tobacco products in Canada.

2 The plaintiff, Rothmans, Benson & Hedges Inc., initiated this action by way of statement of claim filed on July 20, 1988 and amended on October 24, 1988.

3 The Canadian Cancer Society is described as the largest charitable organization dedicated to public health in Canada. As recently as 1987 it was made up of approximately 350,000 active volunteer members who were responsible for the raising of some $50,000,000 annually, which money was primarily directed to health and related fields. The Society's primary object is cancer research; it is also involved in the distribution of [page77] scientific papers as well as pamphlets for the purpose of enlightening the general public of the dangers of the disease. For more than 50 years this organization has been the driving force investigating causes as well as cures. In the pursuit of its objectives, and, with the endorsement of the medical scientific community, it has been instrumental in establishing a correlation between the use of tobacco products and the incidence of cancer; its persistence has been the vehicle that generated public awareness of the danger of tobacco products. As a result of the Society's leadership and inspiration, the research results and the assembling of scientific data gathered from throughout the world, it has provided the authorities and its public health officials with the necessary or required evidence to press the government into adopting the legislation which is complained of in this action.

4 The applicant maintains that the constitutional facts underlying the plaintiff's amended statement of claim that will be adduced in evidence, analyzed and discussed before the Court are essentially related to health issues. It has special knowledge and expertise relating cancer to the consumption of tobacco products. It further contends that it has sources of information in this matter to which the other parties in the litigation may not have access.

5 The Canadian Cancer Society urges upon this Court that it has a "special interest" with respect to the issues raised in the litigation. That knowledge and expertise and the overall capacity of

the applicant to collect, comment upon and analyze all the data related to cancer, tobacco products and the advertising of those products, would be helpful to this Court in the resolution of the litigation now before it. It is their opinion that it meets all the criteria set out in the jurisprudence which apply in cases where parties seek to be allowed to intervene.

6 The plaintiff, Rothmans, Benson & Hedges Inc., opposes the application for standing. It argues that prior to the promulgation of the Tobacco Products Control Act, the Legislative Committee of the [page78] House of Commons and the Standing Senate Committee on Social Affairs and Technology held extensive hearings into all aspects of the proposed legislation. In the course of those hearings, the committees received written representations and heard evidence from numerous groups both in favour of and opposed to the legislation, including the applicant; that studies commissioned by the Cancer Society relevant to the advertising of tobacco products are all in the public domain; that no new studies relating directly to tobacco consumption and advertising have been initiated nor is it in possession of any document, report or study relating to the alleged relationship between the consumption of tobacco products and advertising that is not either in the public domain or accessible to anyone who might require it.

7 Finally, the plaintiff argues that the applicant's motion should be denied on the grounds that it is seeking to uphold the constitutionality of the Tobacco Products Control Act by means of the same evidence and arguments as those which will be put forward by the defendant, the Attorney General of Canada. Their intervention would unnecessarily lengthen the proceeding and it is open to the applicant to cooperate fully with the defendant by providing viva voce as well as documentary evidence in order to assist in providing the courts with full disclosure of all facts which may be necessary to decide the ultimate issue.

8 There is no Federal Court Rule explicitly permitting intervention in proceedings in the Trial Division. In the absence of a rule or provision providing for a particular matter, Rule 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules [C.R.C., c. 663] or to the practice and procedure for similar proceedings in the courts of "that province to which the subject matter of the proceedings most particularly relates".

9 Rule 13.01 of the Ontario Rules of Civil Procedure [O. Reg. 560/84] permits a person not a party to the proceedings who claims "an interest in [page79] the subject matter of the proceeding" to move for leave to intervene as an added party. The rule requires of the Court to consider "whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding". Rule 13.02 [as am. by O. Reg. 221/86, s. 1] permits the Court to grant leave to a person to intervene as a friend of the Court without becoming a party to the proceeding. Such intervention is only permitted "for the purpose of rendering assistance to the court by way of argument".

10 In addition to the gap rule, one must be cognizant of the principles of law which have been established by the jurisprudence in applications of this nature. In constitutional matters, and more particularly, in Charter [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.)] issues, the "interest" required of a third party in order to be granted intervenor status has been widely interpreted in order to permit interventions on public interest issues. Generally speaking, the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

11 There can be no doubt as to the evolution of the jurisprudence in "public interest litigation" in this country since the advent of the Charter. The Supreme Court appears to be requiring somewhat less by way of connection to consider "public interest" intervention once they have been persuaded as to the seriousness of the question.

12 In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:

(1) Is the proposed intervenor directly affected by the outcome?

[page80]

(2) Does there exist a justiciable issue and a veritable public interest?
(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
(4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
(5) Are the interests of justice better served by the intervention of the proposed third party?
(6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

13 The plaintiff has argued that adding a party would lengthen the proceedings and burden the courts unnecessarily, perhaps in some instances leading to chaos. In G.T.V. Limousine Inc. v. Service de Limousine Murray Hill Ltée, [1988] R.J.Q. 1615 (C.A.), the Court noted that it was quite familiar with lengthy and complex litigation including a multiplicity of parties. This did not lead to injustice and would certainly provide the presiding judge with additional points of view which may assist in enlightening it to determine the ultimate issue. Such an objection is really of very little merit.

14 I do not choose at this time to discuss in detail each of the criteria that I have outlined since they have all been thoroughly analyzed either individually or collectively in recent jurisprudence.

15 The courts have been satisfied that though a certain "public interest" may be adequately defended by one of the parties, because of special knowledge and expertise, they nevertheless allowed the intervention.

16 As an example, in R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.), the Legal Education and Action Fund ("LEAF") applied to intervene in the appeal from a decision quashing the committal for trial on a charge of sexual assault on the grounds that sections 246.6 and 246.7 of the Criminal Code [R.S.C. 1970, c. C-34 (as enacted by S.C. 1980-81-82-83, c. 125, s. 19)] were inoperative because they infringed section 7 and paragraph 11(d) of the Charter. LEAF is a federally [page81] incorporated body with an objective to secure women's rights to equal protection and equal benefit of the law as guaranteed in the Charter through litigation, education and research. The respondents opposed the application on the grounds that the interests represented by LEAF were the same as those represented by the Attorney General for Ontario, namely, the rights of victims of sexual assault, and that the intervention of LEAF would place a further and unnecessary burden on the respondents. The Court concluded that it should exercise its discretion and grant LEAF the right of

intervention. In giving the Court's reasons for that decision, Howland C.J.O. stated as follows, at pages 397-398:

> Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.
>
> The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.

17 Other courts have been even more emphatic in pointing out that when it comes to first-time Charter arguments, the Court should be willing to allow intervenors in order to avail itself of their assistance. This is especially true where those proposed intervenors are in a position to put certain aspects of an action into a new perspective which might not otherwise be considered by the Court or which might not receive the attention they deserve. In Re Schofield and Minister of Consumer and Commercial Relations (1980), 112 D.L.R. (3d) 132; 28 O.R. (2d) 764; 19 C.P.C. 245 (C.A.), Thorson J.A. made the following comments in this regard, at pages 141 D.L.R.; 773 O.R.; 255-256 C.P.C.:

[page82]

> It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any "direct sense", within the meaning of that expression as used by LeDain, J., in Rothmans of Pall Mall et al. v. Minister of National Revenue et al. (1976), 67 D.L.R. (3d) 505, [1976] 2 F.C. 500, [1976] C.T.C. 339, and repeated with approval by Heald, J., in the passage in the Solosky case [infra] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.
>
> The fact that such situations may not arise with any great frequency or that, when they do, the Court's discretion may have to be exercised on terms and conditions such as to confine the intervener to certain defined issues so as to avoid

> getting into the merits of the lis inter partes, does not persuade me that the door should be closed on them by a test which insists on the demonstration of an interest which is affected in the "direct sense" earlier discussed, to the exclusion of any interest which is not affected in that sense.

18 Certainly, not every application for intervenor status by a private or public interest group which can bring different perspective to the issue before the Court should be allowed. However, other courts, and notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the court in a unique way in making its decision will overcome the absence of a direct interest in the outcome. What the Court must consider in applications such as the one now before it is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

19 Applying these principles to the case now before me, I am of the opinion that the applicant should be granted intervenor status. Certainly, the Canadian Cancer Society has a genuine interest in the issues before the Court. Furthermore, the applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge [page83] and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General. The applicant has, after all, invested significant time and money researching the issue of advertising and its effects on tobacco consumption and I am of the opinion that it will be a most useful intervenor from the Court's point of view.

20 The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest. In this particular case, I think it is important that the applicant be allowed to intervene in order to offset any perception held by the public that the interests of justice are not being served because of possible political influence being asserted on the Government by those involved in the tobacco industry.

21 Finally, allowing the application by the Canadian Cancer Society will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties involved. The participation by the applicant may well expand the evidence before the Court which could be of invaluable assistance.

22 Referring back to my criteria, I am convinced that the Canadian Cancer Society possesses special knowledge and expertise and has general interest in the issues before the Court. It represents a certain aspect of various interests in society which will be of assistance. It is a question of extreme importance to certain segments of the population which can be best represented in this debate.

23 For the foregoing reasons, the application by the Canadian Cancer Society for leave to be joined in the action by way of intervention as a defendant is granted. Costs to the applicant.

qp/d/qladj

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Indexed as:

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (F.C.A.)

Between
Rothman's, Benson & Hedges Inc., Plaintiff (Appellant), and
The Attorney General of Canada, Defendant (Respondent), and
Canadian Cancer Society, Intervenor
And Between
Rothman's, Benson & Hedges Inc., Plaintiff, and
The Attorney General of Canada, Defendant

[1989] F.C.J. No. 707

[1989] A.C.F. No 707

[1990] 1 F.C. 90

[1990] 1 C.F. 90

103 N.R. 391

45 C.R.R. 382

17 A.C.W.S. (3d) 28

Action Nos. A-277-89, A-301-89

Federal Court of Appeal
Ottawa, Ontario

Hugessen, MacGuigan and Desjardins JJ.

August 17, 1989

Practice -- Parties -- Intervention -- Public interest litigations.

Edward P. Belobaba and Barbara L. Rutherford, for the Appellant.
Gerry N. Sparrow, for the Respondent.
Karl Delwaide and Andre T. Mecs, for the Intervenor.

The judgment of the Court was delivered by

HUGESSEN J. (Orally):-- These two appeals, which were heard together, are from orders made by Rouleau J. granting, in the case of the Canadian Cancer Society (CCS), and denying, in the case of the Institute of Canadian Advertising (ICA), leave to intervene in an action brought by Rothmans, Benson & Hedges Inc. (Rothmans) against the Attorney General of Canada attacking the constitutionality of the Tobacco Products Control Act (TCPA) (S.C. 1988 c. 20).

It is common ground that the plaintiff's attack is primarily Charter based, invoking the guarantee of freedom of expression in s. 2(b). There can also be no doubt, given the prohibitions contained in the TCPA, that such attack is best met by a s. 1 defence and that it is on the success or failure of the latter that the outcome of the action will depend.

We are all of the view that Rouleau J. correctly enunciated the criteria which should be applicable in determining whether or not to allow the requested interventions. This is an area in which the law is rapidly developing and in a case such as this, where the principal and perhaps the only serious issue is a s. 1 defence to an attack on a public statute, there are no good reasons to unduly restrict interventions at the trial level in the way that courts have traditionally and properly done for other sorts of litigation. A s. 1 question normally requires evidence for the Court to make a proper determination and such evidence should be adduced at trial (see Canadian Labour Congress and Bhindi (1985) 17 D.L.R. 4th 193.) Accordingly we think that, in any event for the purpose of this case, Rouleau J. was right when he said "the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issue raised." (A.B. p. 186 in file A-277-89).

As far as the intervention by the CCS is concerned we have not been persuaded that Rouleau J. committed any reviewable error in finding that it met the test thus enunciated. It is our view, however, that the intervention by the CCS should be restricted to s. 1 issues, that it be required to deliver a pleading or Statement of Intervention within 10 days and permitted to call evidence and to present argument in support thereof at trial. Any questions relating to discovery or otherwise to matters of procedure prior to trial should be determined either by agreement between the parties or on application to the Motions Judge in the Trial Division. The appeal by Rothmans will therefore be allowed for the limited purpose only of varying the Order as aforesaid.

As far as concerns the requested intervention by ICA we are of the view that justice requires that this application be granted as well. The Motions Judge recognized that ICA has an interest in the litigation but seemed to feel that its position and expertise were no different from that of the plaintiff Rothmans. With respect we disagree. The ICA's position in this litigation extends beyond the narrow question of advertising of tobacco products to more general questions relating to commercial free speech. In a s. 1 assessment of the justification and reasonableness of limits imposed upon a Charter guaranteed freedom that position may contribute importantly to the weighing and balancing process. Its appeal will therefore be allowed and leave to intervene granted on the same terms as those indicated above for the CCS.

In our view this is not a case for costs in either Division.

HUGESSEN J.

TAB 11

CHAPTER ONE

Introduction: Feminist Adventures in Law

Radha Jhappan

The gateway to a fresh millennium seems a fair vantage point from which to survey the path recently taken in women's struggle for legal equality in Canada.[1] Among many of those hitherto excluded from the full perquisites of citizenship, the hope for social justice was somewhat refreshed by the entrenchment of equality and other rights in the Canadian constitution in 1982.[2] Yet disenchantment was soon to follow, induced by years of constitutional litigation that, with some notable exceptions, has seemingly packed the winners' circle with those already privileged by their structural positions, their socioeconomic, racial, gender, heterosexual, and able-bodied statuses. These results, together with feminist and left critiques of liberal law, rights, and the legal system (each discussed below), have produced, in some quarters, overwhelmingly negative assessments of the possibility of using law in pursuit of social justice. And yet, in spite of it all, members of oppressed groups (especially women) continue to engage with law to advance their various political / social justice goals. The authors in this collection explain in different ways and from distinctive points of view some of the reasons why this is so.

This book is a response to three main questions in fact, each of which runs through the chapters implicitly if not explicitly. First, should women persevere with the legal project despite its manifest perils? Second, by what measures and from whose point of view have women's litigation strategies been successful or unsuccessful? Third, what can we learn from the strategies pursued to date and how might they be improved in future struggles? These guiding motifs of enquiry provide a backdrop to the volume as a whole, while each of the chapters raises and responds to a range of additional questions specific to its particular subject.

The term 'law' is used in differing senses by the authors in this collection, from the traditional understanding of law as a body of customary or enacted rules recognized by a community as binding (constitutional, statutory, and common or civil law), to law as an institutional system of decision-making distinct from the political sphere of legislatures, governed by its own philosophies, norms, procedures, operating principles, methodologies, and discourses, and populated by specialized practitioners to whom access is granted. In this sense, law is about the fundamental ground rules governing the settling of disputes within a polity in an institutional locus distinct from that of political bodies such as legislatures. 'Law' is also used by some of the authors in this collection in a more postmodernist vein to refer to a site of struggle wherein marginalized discourses compete with hegemonic ones to shape social relations of power.

Women's legal strategies in Canada have been many, varied, creative and, in many cases, path-breaking. They have consisted of three basic kinds of action: the lobbying of policy-makers for fresh policies and laws or amendments to existing ones; participation at various levels in the drafting of legal instruments (including specific statutory, regulatory, administrative, and human rights acts, as well as constitutional provisions); and litigation deploying federal and provincial human rights codes, statutes, and latterly the *Canadian Charter of Rights and Freedoms* (hereafter the *Charter*) to challenge the constitutionality of other legal/policy instruments. The choice of strategy will be influenced by a range of considerations, including: the source of law (e.g., whether common law or statutory provisions are involved, or whether the project is to defend protective legislation or common law rules or to challenge discriminatory ones under constitutional law); calculation of the chances for success of lobbying over litigation, for example, given the considerable resource mobilization required for each; opportunities for participation at the drafting stage; and assessment of the political climate, including the openness of the governing party to equality claims.

The chapters in this collection analyse these types of legal strategy differentially, although the majority of them focus more on litigation than on lobbying and women's roles in the crafting of legislation, and more on constitutional (i.e., *Charter)* than non-constitutional litigation. The book's focus on litigation, especially of the constitutional variety, is a result of several factors, including: the novel opportunities the *Charter* created for after-the-fact contestation of laws and policies on constitutional grounds; the fact that many issues raised at tribunal or human rights commission levels ultimately have been settled by the courts, some of them at the highest level (the Supreme Court of Canada); the fact that some of the laws women lobbied for or participated in drafting have been subjected to *Charter* challenges by others; and the wide-ranging significance for many women of losses and wins at that level, especially as they have affected other political strategies. Nevertheless, although many of the chapters concentrate on constitutional litigation, most incorporate discussions of lower court, tribunal, and human rights, and non-constitutional cases as appropriate to the areas of law in question, and some focus on other non-litigation legal and political strategies as well.

The choice to draw out the litigation strand of women's legal activism of the 1980s and 1990s is not an attempt to give it pride of place among the numerous other legal strategies used, let alone among the very wide range of political strategies women have exercized before and during the period. Of these, litigation is but a small (though significant) element, invariably preceded, accompanied, and succeeded by intense movement activism on many different fronts. Legal strategies are political strategies trained upon particular sites of struggle that may require more esoteric methodologies, but they are no less political for it.

My purposes in this introductory chapter are twofold. The first is to outline and respond to analyses of some of the key hazards facing women and other marginalized groups who attempt to mobilize law, particularly constitutional law, in support of social equality and justice. These hazards are illustrated practically by the records of both political and legal activism, where women have mourned important losses even as they have celebrated significant gains on each front. It is the litigation record, however, that has drawn the lion's share of attention in recent years, with constitutional litigation under the *Charter* attracting substantial media coverage, public attention, and academic analysis. Indeed, in the Canadian context, *Charter* litigation has sparked a novel theoretical debate among feminist and left scholars on the problems and possibilities of law, rights, and the legal system under liberalism. The discussion and critique of this debate presented below, therefore, address the first two questions driving this collection in a general fashion, though my arguments should by no means be taken as representative of the positions of all of the authors in the volume.

The second purpose of this introduction is to outline the scope and

contents of the book, first by addressing and explaining some of the significant absences and omissions of the text, and then by describing what is present via brief synopses of the chapters.

1 The Hazards of Mobilizing Law for Equality and Justice Claims

a The Record of Constitutional Litigation

The *Charter of Rights* has undoubtedly been the most significant change to the Canadian legal/constitutional system since 1867. Since its passage in 1982, Canadians have generally regarded it as a salutary development.[3] Yet, the benefits expected to accrue to the various groups of women, racialized peoples, lesbians and gays, and people with disabilities who supported (and in some cases lobbied vigorously for) inclusion of equality rights, have been diffuse, unpredictable, and sometimes contradictory since section 15 came into effect in 1985. In fact, since it is the record of *constitutional* litigation that has sparked much of the contemporary scepticism or outright pessimism about the possibility of using law for progressive social change, it is important to examine that record before turning to the theoretical debates about its significance in the two sections that follow.

A statistical analysis of the first one hundred Charter decisions from the Supreme Court of Canada showed a success rate for all *Charter* claims in 1984 and 1985 at 67 per cent, but this rate declined markedly to 27 to 32 per cent between 1988 and 1992.[4] More recently, James Kelly's analysis of the first 352 Supreme Court *Charter* decisions from 1984 to 1997 shows that, in general, Charter claimants won 118 cases (or 34 per cent), lost 217 cases (or 61 per cent), while 17 cases (or 5 per cent) were inconclusive.[5] The highest success rates were for Aboriginal rights claims under section 35 of the *Charter* (46 per cent, or 6 of 13 cases), followed by language and minority language education rights claims (41 per cent, or 7 of 17 cases), legal rights (32 per cent, or 85 of 266 cases), fundamental freedoms (27 per cent, or 14 of 52 cases), equality rights (20 per cent or 7 of 35 cases), democratic rights (20 per cent or 1 of 5 cases), and mobility rights (17 per cent, or 1 of 6 cases), while claimants in each of two cases brought under the multiculturalism and gender equality sections (27 and 28) were unsuccessful.[6]

The success rate for equality claims has increased in recent years, but only slightly. For example, a statistical study published in 1992 showed that although the number of equality rights cases decided by the Supreme Court increased sharply in 1990 (13 cases), only two were successful from the claimant's point of view, so that the overall success rate for equality claims remained at 20 per cent.[7] Moreover, up to 1991, only two sex equality cases were decided by the Supreme Court, both involving claims by men that the section of the *Criminal Code* which made it illegal for men to have intercourse with female persons under the age of fourteen years infringed their equality rights.[8] As Kelly's figures show, then, the overall success rate for equality claims from 1985 to 1997 was approximately 20 per cent, only slightly higher than the rate for the 1980s.[9]

Statistical analyses such as those cited above must be read cautiously for several reasons. First, they focus exclusively on cases definitively resolved by the Supreme Court of Canada, and do not include the decisions of lower courts, human rights boards, or administrative tribunals, or cases not appealed (for any number of reasons) which therefore stand as precedents. Second, these statistical analyses do not include decisions on applications for leave to appeal; when an application is denied, the case is effectively decided by freezing the appellate court result.[10] Nor do the statistics usually include: cases decided without reasons; cases decided together with others raising similar issues; those decided on the basis of non-entrenched rights (e.g., through the *Canadian Bill of Rights*, 1960); cases dealing with non-*Charter* constitutional rights (such as those found in the *Constitution Act, 1867*, or Aboriginal rights in the *Constitution Act, 1982*); and cases ultimately decided on non-*Charter* grounds (such as the division of powers).[11]

In fact, to my knowledge, there has been only one in-depth study of sex equality cases at various levels of court, and that is now more than a decade old. This study, by Gwen Brodsky and Shelagh Day,[12] followed Kathleen Lahey's oft-cited analysis that showed that as early as two years after section 15 came into effect, male complainants were making and winning ten times as many equality claims as women.[13] In their analysis of 591 reported and unreported decisions from all levels of court between 1985 and 1989, Brodsky and Day showed that women had been neither the chief initiators nor the predetermined beneficiaries of sex equality claims. Of forty-four sex equality cases, thirty-five (or 79 per cent) had been made by or on behalf of men, with only nine made by or on behalf of women.[14] The authors noted that these figures represented only those claims explicitly framed as sex equality issues; the picture would have looked much worse for women if many other cases framed in different ways but still having serious impacts on sex

equality had been included (e.g., men's challenges to sexual assault laws and to women's reproductive freedom via 'fetal rights' claims).

According to Brodsky and Day's study, up to 1989, the section 15 cases had been 'baffling and disappointing,' as they were not about systemic inequality but 'about drunk driving, marketing boards, the regulation of airline landing fees, and the manufacture of pop cans.'[15] The case record showed that the equality section had not been used as anticipated by its framers and those who supported it (mostly traditionally subordinated social groups), but had been commandeered by a range of unexpected claimants including, for example, criminals claiming a right to trial by judge instead of jury; drunk drivers claiming discrimination because of variations in provincial laws; drivers protesting mandatory seat-belt laws; male academics seeking the suspension of mandatory retirement; men trying to get access to the few benefits available to women (such as welfare benefits for single mothers, or maternity benefits for adoptive parents) or contesting affiliation and child support orders against men only; and assorted dangerous offenders, sex offenders, rapists, and other accused criminals challenging criminal procedures (including rape shield laws), sentencing, prison, and release.[16] Unfortunately, no follow-up study comparable to that by Brodsky and Day has been conducted, so we do not know what the data for the decade since 1989 might show. More recent data focus on ultimate resolutions of cases at the Supreme Court level, thus accounting for only a small proportion of the cases decided in the lower courts. Our sense of the fate of equality issues before the courts is therefore partial, particularly if we take into account that many cases argued on grounds other than equality may nevertheless have significant effects on women's equality rights.

Given the limitations of the data available, it is perhaps not surprising that most commentaries on equality rights claims tend to focus on cases settled by the Supreme Court of Canada, and particularly those argued in terms of constitutional rights. Because the highest Court's decisions are both definitive and (usually) open to influence by a host of competing intervenors (not to mention being easily accessible as texts in libraries and online databases), they receive most of the academic and public attention. This does not mean, however, that they are the most significant for the everyday lives of women and other marginalized groups. Nor does it mean that they are not subject to further action by legislatures, which may open up fresh opportunities for political struggle. Nevertheless, Supreme Court cases have been

important focal points for feminist litigators and activists because they can set the parameters of public policy-making by fleshing out the content of otherwise indeterminate constitutional rights and articulating, on a case-by-case basis, the fundamental principles with which statutory law must be consistent. As such, constitutional litigation at the highest level is attractive to feminist activists and litigators, who have made use of the opportunity to participate as litigants or intervenors where other political strategies have not produced desired results, or where gains made through those means are under attack from others.

Many of the essays in this volume discuss constitutional cases decided by the Supreme Court, particularly those that featured interventions by equality-seeking groups. In fact, much discussion in this volume is devoted to the interventions of the Women's Legal Education and Action Fund (LEAF) in constitutional equality litigation. Founded in 1985 following feminist successes in lobbying for the inclusion of equality rights in the 1982 *Constitution Act* (in sections 15 and 28), LEAF was originally (and more or less remains) an organization of feminist lawyers 'dedicated to litigation of *Charter* issues before Canada's highest courts' to 'ensure that the promise of section 15 [is] converted into tangible gains.'[17] Although some of its activities are geared towards educating the public (and the judiciary) about women's equality issues, the bulk of its work has focused on the litigation efforts of LEAF's legal committee, whose mandate is to 'select and manage LEAF's litigation ... working toward the development of a comprehensive theory of substantive equality for all women [and] developing fundamental principles of legal analysis.'[18] A non-profit organization run by a national board of directors and relying mostly on volunteers, LEAF has branches across Canada, and has been working in recent years to form coalitions with other women's organizations and to increase representation of non-lawyers in the work of the legal committee. As the lead feminist equality rights intervenor, participating in more equality-related cases than any other social movement organization, LEAF has played a critical role in coaxing the Supreme Court away from its previously formalist understanding of equality to a more nuanced, contextualized, and substantive vision. Although the courts' adherence to the latter approach is often unreliable,[19] LEAF has nevertheless played a very significant role in the evolution of constitutional equality jurisprudence in the *Charter* era.

Since 1985, LEAF has participated in what are regarded as important cases in different areas of law. In fact, of the twenty-three *Charter* cases

in which LEAF intervened at the Supreme Court level between 1985 and 1996, the organization was on the winning side in seventeen of them (by my estimation, four were losses and one was an inconclusive result). This is an impressive record for an organization whose approach has challenged so many of the legal system's habitually sexist (and racist) constructions of rights.

LEAF's 'wins' (or cases that were 'successful' according to the claimant involved and to LEAF litigators) include the first major equality rights decision, *Andrews*,[20] in which the Supreme Court of Canada adopted LEAF's innovative view that equality should be understood as a substantive, rather than merely a procedural right. In the area of reproductive freedom, although LEAF had not intervened in the 1988 *Morgentaler*[21] decision that decriminalized abortion (creating a negative liberty though not a positive right to abortion), it did so in *Daigle v. Tremblay*,[22] a defensive civil law action brought under the *Quebec Charter of Human Rights and Freedoms*, which ultimately resulted in the Supreme Court of Canada's definitive rejection of fetal and paternal rights claims. This finding was confirmed more recently in *Winnipeg Child and Family Services*,[23] which upheld the liberty rights of a pregnant woman who had been apprehended to 'protect' her fetus against the effects of her glue-sniffing.

LEAF has intervened in two recent cases that were ultimately successful at the Supreme Court: *Vriend*,[24] in which it was found that Alberta's *Individual Rights Protection Act*, which excludes sexual orientation from the prohibited grounds of discrimination, violates section 15 of the *Charter*; and *M. v. H.*,[25] which found that Ontario's *Family Law Act*, in defining 'spouse' as heterosexual, is discriminatory. In addition, LEAF has been involved in a range of cases that dealt with sex/gender discrimination specifically, including: *Brooks*,[26] which found the exclusion of pregnant women from the employee group health insurance plan to be sex discrimination, thus overturning the *Bliss*[27] decision; *Janzen*,[28] which recognized sexual harassment as sex discrimination; *Canadian Newspapers*,[29] which upheld a publication ban on the identity of sexual assault complainants; *Butler*,[30] in which the Supreme Court of Canada upheld the obscenity provisions of the Criminal Code on the grounds that degrading and dehumanizing pornography offends women's equality rights; *Shewchuck*,[31] which upheld allegedly discriminatory child support and paternity determinations as they served to place the financial burden of care for children on fathers rather than on the state; and *Conway*,[32] in which privacy rights of male prisoners were found not to be violated by the employment of female prison guards. LEAF was also on the winning side when it intervened in: *Keegstra*,[33] which upheld the Criminal Code's provision against the 'willful promotion of hatred'; *Eldridge*,[34] in which a provincial health scheme was found to discriminate against hearing-impaired individuals in that it did not provide for sign language translation services; and *R. v. S. (R.D.)*,[35] which rejected an accusation of bias against an African-Canadian judge who had noted the existence of systemic racism in the context of a criminal trial.

While LEAF's consitutional litigation record is formidable, it must be seen in context. First, it represents a tiny fraction of the cases decided in lower courts on equality and various other grounds that nevertheless have substantial effects on women's equality. Second, not all of the cases have been decided on s. 15 / equality grounds (*Morgentaler* and *Daigle*, e.g.), and even in those that have, the Court has not necessarily accepted LEAF's version of equality as opposed to those of the many other groups intervening or, indeed, the Court's own deference to the formalist tradition. Moreover, while it is arguable that at least some Supreme Court (and lower court) decisions have delivered significant gains to women in general or at least to some classes of women, few of LEAF's interventions have enjoyed unanimous support from women's organizations. Indeed, some of LEAF's positions have been extremely contentious among feminists, with its radical feminist pro-censorship approach to pornography in *Butler*, for example, precipitating a particularly fractious politic within Canadian women's move- ments.[36] In fact, the contestations of many of its positions played a significant role in LEAF's decision in the early 1990s to build coalitions and to intervene in cases in conjunction with other organizations to integrate more complex and intersectional analyses into its model of equality.[37]

In addition, LEAF's 'wins' at the level of high constitutional law are offset by the losses, among them: the now infamous *Seaboyer*[38] decision that struck down the rape shield law that had prevented accused rapists from using their alleged victims' past sexual history to imply consent; the *Canadian Council of Churches*[39] decision that upheld changes to the *Immigration Act* that made it more difficult to make refugee claims; *Schacter*,[40] which complicated the maternity benefits scheme under the *Unemployment Insurance Act*; the *Thibaudeau*[41] decision that upheld the *Income Tax Act*'s provision that allowed non-custodial parents (98 per cent of whom are men) to deduct child support payments from their taxable income, while custodial parents were taxed both on

their own portion of child support *and* that of the non-custodial parent; and the *O'Connor*[42] decision that allowed a Roman Catholic bishop accused of raping a number of young First Nations students in a residential school in the 1960s access to their therapeutic and school records. As well as these cases, there were others in which neither LEAF nor other feminist organizations intervened and in which equality was nowhere raised as an issue, but which damaged gender equality anyway; the *Daviault*[43] decision in which the Supreme Court accepted extreme intoxication as a defence for rape is a case in point. It should be noted that some of these 'losses' were subsequently addressed by corrective legislation on the part of legislatures,[44] but such corrections cannot be assumed.

The inconsistency of the courts' responses to equality, together with the discordant responses to the nature of constitutional interventions among feminists, signal the need to interrogate the very meaning of 'success' and 'failure.' While the discussion above referred to cases as 'wins' or 'losses' from the point of view of the litigants and/or of LEAF counsel, it was not intended to suggest that cases are so handily categorized. Virtually every 'win' is contestable *within* as well as outside of the terms of feminist theory and practice, especially as feminist politics have become increasingly complex with the development of such antiliberal analyses as critical race theory, postmodernism, and poststructuralism. The chapters in this volume engage, in different ways, the question, 'what constitutes a win and in whose view?' As noted above, LEAF is not the only constitutional litigator, and its approach to equality is by no means hegemonic within the community of so-called equality-seekers.

b Feminist Critiques of Law

The overall results of constitutional litigation have been explained by some progressive social activists, and in various bodies of literature, as the inevitable proceeds of a liberal legal system that conceals both social injustices and its elite-serving design behind a veil of neutrality. For example, in recent years, significant intellectual challenges to the positivism of traditional academic disciplines have been mounted by feminists, antiracists, postmodernists, and deconstructionists. In particular, for several decades feminist legal scholars have been developing feminist theories of law, approaches that explicitly reject the 'malestream' approach of patriarchal legal positivism as well as positivist law itself. Such scholarship challenges the liberal, individualistic, non-contextual approach to law, and rejects the canonization of orthodox notions such as formal equality, equality of opportunity, and the public/private dichotomy. Rather than viewing law as the impartial application of standard principles over genderless legal subjects, feminist theorists regard law as an integral, formalized carrier of patriarchal relations.

At the same time, mainstream feminism has been rigorously critiqued on the grounds that the 'essential woman' assumed by much feminist discourse turns out to be a white, middle-class, heterosexual, able-bodied (and, in the Canadian/American context, English-speaking) woman. Women of colour, Aboriginal women, women with disabilities, lesbians, and non-anglophone women have expanded feminist legal theory to recognize that the law is not only a carrier of patriarchal relations, but also of racial hierarchy, heterosexism, ablism, and Anglo-dominance, among other things.

In view of these analyses, not surprisingly, many feminists have questioned the utility of law as an instrument for addressing women's inequality, and some have become increasingly sceptical about what Carol Smart terms 'the siren call of law.'[45] Such scholars note, for example, that Canadian women's organizations (among others) fought hard for the constitutional entrenchment of substantive equality rights beyond the formal rights that had produced such unsatisfactory results under the *Canadian Bill of Rights*. Since 1985, however, experience shows that *Charter* provisions in general, and equality rights provisions in particular, have been used disproportionately by the advantaged and by men. Hence, women's legal strategies have tended to be reactive rather than proactive. A number of activists and scholars have even suggested that women's engagement with law has been counterproductive: it has largely pursued the interests of white, middle-class, heterosexual, able-bodied, English-speaking women at the expense of marginalized women; it has overinvested intellectual and other resources in the legal project to the detriment of struggles on other fronts; it is not clear that the gains have outweighed the costs; it has bought into the individualization of women's rights; and it has 'legalized' the political struggle and legitimized the 'malestream' judicial system.

However, these alarms notwithstanding, the collection of original essays in *Women's Legal Strategies in Canada* is guided by the assumption that despite its pitfalls for different women, law is an important (though often 'malevolent') site for feminist struggle. To the extent that the law

itself creates, reinforces, or at the very least, fails to intervene in the inequality and subjugation of women, it exerts its power in concrete consequences for women's daily life experiences. Moreover, law is not a monolith that exists independently of human volition, but instead is fashioned and refashioned by human beings with varying agendas and for specific purposes. Since privileged interests have used the law and (latterly the *Charter*) to roll back gains women have made on both political and legal fronts, feminists will spurn engagement in the development of jurisprudence at their peril. Non-legal political strategies per se are insufficient: the law exists, it participates in the subjugation of oppressed groups, and, therefore, it must be tackled as one important element of a multipronged approach to an inclusive feminist vision.

c *Left Critiques of Law, Rights, the* Charter, *and the Courts*

Well before the *Charter* was entrenched into the constitution in 1982, debates about the nature of law and rights had been ongoing, though not especially prominent, features of feminist and left politics and scholarship in Canada. They were to take on a salience and distinctive tenor among feminists in the process leading to the entrenchment of the *Charter*, however, as the novel potential for challenging the constitutionality of laws by means of an equality rights clause presented new strategic possibilities for women to attack a wide range of discriminatory laws and policies their political struggles had not managed to shift. While the organized left (in the form of political parties and the labour movement) paid scant attention to the coming of the *Charter*, however, as noted above, the legal left and adherents of the critical legal studies (CLS) school have been vehement critics of it, and have scorned, in particular, women's resort to law, and especially to *Charter* rights. Their critiques, relying in part on a series of important losses in the courts of claims made by traditionally socially marginalized groups,[46] raise the question of whether there is really any point in those groups resorting to law at all. It is a crucial question to which I shall respond after outlining the CLS/left position.

The Canadian legal left has been strongly influenced by the critical legal studies school that is primarily American in origin, and that has become particularly visible since the 1970s. Drawing upon several intellectual traditions, the CLS school's understanding of law weaves elements of Marxism with strands of Weber's social theory, poststructuralism and postmodernist discourse analysis. These latter threads

notwithstanding, CLS nevertheless offers a compelling, largely neo-Marxist/socialist, class analysis of power. It asks whose world views and whose material and ideological interests are represented in law, the legal system, processes, and discourse, and it concludes that wealthy, class privileged, and corporate interests are the beneficiaries of a system designed to serve them and legitimate their power. In fact, the legitimation thesis is the crux of the CLS analysis of law; rights claims are seen as playing into the liberal/capitalist mythology of freedom, fairness, due process, impartiality and opportunity.

Although there are some differences between adherents of the CLS school and the traditional Marxist or socialist left, the similarities between their overall analyses of law and rights are overwhelming, so I will not separate the strands here. It is not the purpose of this brief discussion to detail the fine nuances of particular authors within either school; rather, my purpose is to lay down the broad strokes of their common approach, a task that necessitates a certain amount of generalization, even caricature. The following discussion is cognizant of the debate among socialist legal theorists in Canada on the question of whether liberal 'rights,' so scorned by Marx and many of his followers, are anything more than vehicles of legitimation for liberalism/capitalism. Amy Bartholomew and Alan Hunt, for example, drawing upon criticisms of CLS by women of colour, have offered a vigorous critique of the CLS antirights position, arguing that abstract liberal rights can be very useful resources for social movements.[47] Similarly, like a number of socialist feminists,[48] Joel Bakan has recently taken the position that there may be some justification for resorting to litigation in limited (and reactive rather than proactive) circumstances, conceding that 'rights ... can be an effective strategy in progressive social struggle' and that 'the *Charter* can provide immediate relief from direct state coercion or discrimination.'[49] However, for the purposes of this discussion, I am more interested in responding to the antirights/anti-*Charter*/antilitigation writers (such as Mandel, Petter, Hutchinson, and Glasbeek) whose work has targeted the legal strategies of women and other equality-seeking communities.

The CLS/left analysis of legal culture, at least in the Anglo-American democracies using the common law system, finds that: it is rule- and precedent-bound, therefore, inherently conservative and backward-looking; it is adversarial, and thus geared towards zero-sum absolute winning/losing, rather than problem-solving, mediation, or negotiation; it is abstract in methodology, and thus wipes events and actors clean of

the socioeconomic and political contexts and relationships in which they operate in the real world; it is positivist and reifies only the written provisions of black letter law and hence has no room for natural justice or natural rights; and it feigns neutrality and objectivity but is in reality built upon specific class power relations.[50] From the general character of legal liberalism to the specificities of its Canadian application, the Canadian legal left has generally bewailed the passage of the *Charter of Rights* as a capitulation to the legalization of politics and the further disempowerment of labour and oppressed groups. Left critiques of the *Charter* per se are many and varied, but their basic premises can be distilled into a few key clusters of arguments. First, it is argued that the *Charter* is a fundamentally liberal document that sees government as the enemy from which citizens have to be protected. Yet social inequality thrives, not so much in the public sphere, but in the so-called private sphere that is based on the unequal distribution of property and power, and this sphere is not touched by the *Charter* (the behaviour of private individuals and corporations is not subject to it). In fact, *Charter* rights can only be claimed when government legislation or executive acts are seen as perpetuating systemic discrimination that actually originates in the private sphere.[51] The form and character of the *Charter* thus perpetuate the myth that the state, not capitalism and the private/corporate sector, is the enemy of the people. In such a legal system, victims of capitalism (including the poor, the unemployed, the old, the injured, women, immigrants, and indigenous peoples) are treated as victims of law as they are forced to argue that it is the law that fails to provide a protection it could afford, or that the courts or administrative agencies apply and administer state schemes improperly.[52]

Second, the Canadian legal left generally objects to constitutional rights discourse on a variety of grounds. For example, the *Charter* mostly enshrines negative liberties[53] (i.e., freedom from interference by the state) rather than positive entitlements to social benefits (such as jobs, health care, social insurance, income support, collective bargaining rights), and it does not oblige government to spend money to ensure the economic well-being of citizens. The negative liberties enshrined in the *Charter* assume a robust citizenry, so that as long as they are left alone free of government interference, all will be well. Substantive inequality, however, often needs to be addressed through the redistribution of resources, and the courts are more likely to strike down legislation extending positive benefits than they are to demand that government spend in order to remedy economic inequality.[54] In fact, the question of whether governments have positive obligations under section 15 is an ongoing focus for a number of equality-seeking groups,[55] though legal left theorists usually reject the whole idea of social 'rights.'[56]

A related problem regarding rights is that *Charter* rights and freedoms are not only abstract, but also universal. They are not the exclusive instruments of dispossessed groups, but can be claimed by property owners also.[57] Because of the imbalance of resources, the wealthy actually have greater access to rights as they are able to buy the best lawyers, researchers, experts, and legal arguments, as well as call upon their networks of personal connections with policy-makers and judges.[58] In addition, the vast majority of *Charter* rights accrue to individuals rather than groups, thus pitting them against collectivities (the general populace or specific social groups): The *Charter*, therefore, reinforces the liberal illusion of disconnection, self-interest, and lack of responsibility towards others, and encourages individuals to strike out against any putative infringement of their liberty, regardless of its social purpose or effect.

The third major objection of the Canadian legal left to the *Charter of Rights* concerns the net transfer of power from legislatures to unelected, unaccountable, class-interested judges. Various studies profiling the judiciary have shown that Canadian judges are overwhelmingly male, middle to upper class, of English- or French-Canadian descent, Protestant or Catholic, over fifty years old, and active in political parties.[59] The legal left's argument is not so much that judges are wilfully and self-consciously hostile to the claims of oppressed groups (though undoubtedly some are), but that they cannot help but be biased by their social identities, their own life experiences, their indoctrination into the tradition-bound, conservative legal culture, and their mainstream ideologies that hold individuals responsible for their situations rather than social and economic structures. In view of these facts, the left lawyers would think it easier for judges to repeal the laws of nature than to overturn the hegemony of the class and economic interests of which they are both members and agents. Moreover, there is a mountain of case evidence to show how advantaged interests win, and disadvantaged groups lose quite consistently in *Charter* claims.[60]

Legal scholars of the left quite consistently conclude that pursuing social transformation through law (and particularly through bourgeois legal rights) is very nearly pointless, since the law's ultimate purpose is precisely to *prevent* radical change. Law is the codification of the status quo, courts and lawyers its collaborators, litigation its legitimation, and

reform its reinforcement. As far as the legal left is concerned, the portal to the Supreme Court, like the gates to hell in Dante's *Inferno*, might as well have engraved: 'Abandon every hope, all who enter here.'[61] The left's main prescription is, therefore, that the oppressed practise politics not law, through all the traditional avenues of political struggle, including mass mobilization, community-level organizing, unionization, demonstrations and protests, boycotts, strikes, lobbying of policy-makers, electoral politics, and so on. The mobilization of collective power in the open fora of political struggle is the path to social transformation, not the abdication of authority to narrowly trained lawyers who disguise crucial social and economic issues with technical, decontextualized legalese. *Charter* politics, they argue, has not done much for disadvantaged claimants, but has encouraged them to devote their time, energy, and scarce resources to hopeless litigation.

The legal left and the CLS school are the iconoclasts of twentieth-century liberal legalism, out to destroy its images of impartiality, fairness, equality and justice, together with the idolatory of the populace that sustains them. As such, they have done an excellent job of deconstructing law and exposing its 'deep structures' to the light of critical inquiry.

While I find the legal left/CLS analysis of law and rights well grounded and substantially correct, I am less persuaded by its political prescriptions.[62] For a start, left scholars (much like postmodernists, whom they would revile) seem to think that their work is done once they have deconstructed law. Cornel West notes that in the United States CLS offers very little in the way of 'strategies and tactics for effective social change in the larger culture and society,' but instead 'tends to limit its political praxis to pedagogical reform in elite law schools.'[63] This may be less true of the Canadian legal left, though it is difficult to see what it has offered in the way of strategies and tactics for effective social change beyond the traditional politics of class struggle outlined above. In my view, legal left scholars have posited an ultimately unsustainable dichotomy between law and politics, and they make a number of curious assumptions based on it. First, they seem to assume that social activists have a choice of *either* one *or* the other, whereas social movements have been engaging in all kinds of different struggles at various levels in multiple arenas for many years, with law being only one site, and for many groups a minor one at that. Contrary to the legal left's presumption, it is not as if women or members of other oppressed groups have given up politics in the wider political sphere to

pursue legal rights. On the contrary, they have continued their material and discursive struggles in non–state-focused sites like the workplace, the family, community organizations, and so on. Indeed, it could even be argued that with the ascendancy of provincial and federal governments determined to deal with debts and deficits by shutting down the welfare state and withdrawing funding from women's and other social movement organizations, litigation may be one of the few routes left open to social movements. The left is, of course, right in pointing out that litigation can be very costly, both in time (as appeals take years) and in money (as legal fees can run to many hundreds of thousands of dollars, depending on the case). On the other hand, regular politics costs time and money, too, often a lot of both, and often with little pay-off.

Second, although their own analysis is about uncovering the politics behind law's neutral façade, left scholars appear (oddly) to assume that to participate in law is not already a deeply political act of which the participants (social movement organizations intervening in constitutional test cases) are keenly aware. The 'law is politics' revelation is not new to those who have been oppressed by it. Third, the legal left seems to assume that the strategy of mobilizing and lobbying policy-makers for legislative change is somehow *not* engaging with law;[64] yet it is an attempt to set new legal rules by establishing policies to be codified through legislation. It is just not *litigation*, which is apparently their primary preoccupation. Yet for groups whose voices and interests are normally excluded from the policy-making process no matter how much they lobby, litigation is merely the after-the-fact endeavour to modify or to have invalidated legislation or executive acts; as such it is a bid for retroactive input into the policy process. Why this is not as legitimate a pursuit for the left as before-the-fact lobbying is not clear. Of course, it is more open to charges of illegitimacy by privileged interests, but then, so is every gain the marginalized make by any means.

In fact, the 'political struggle' the legal left advocates may end up producing less-lasting results than litigation, to the extent that governments can easily repeal laws passed by their predecessors. One of the benefits of constitutional litigation that left scholars seem to forget concerns the power of the new type of judicial review authorized by the 1982 *Constitution Act;* if the courts strike down an act as unconstitutional, neither level of government can enact it.[65] To the extent that the courts can establish frameworks within which public policy must be

designed (though this is a double-edged sword), litigation may well ultimately save a lot of politics, time, and resources. The legal left also seems to overlook the fact that public policy-making has been rendered *less* flexible by the *Charter*, which corporate and privileged interests have used and will continue to use to thwart interventionist public policies. They will occupy, not just the equality field, but the whole *Charter*. Therefore, the strategy the legal left generally advocates would mean vacating the constitutional field in favour of those who would undo what the dispossessed have struggled for via 'politics.'

Women and other oppressed groups are not naïfs who delude themselves that a few decisions from the courts will magically fix conditions of social and economic domination; there is much evidence to the contrary, in fact. Accounts of the various conferences and meetings of the women's groups that organized to secure equality guarantees through sections 15 and 28 show that many women had serious reservations about the *Charter* and about the possible fate of the equality sections in light of their perversion under the *Canadian Bill of Rights*.[66] Even in the mid-1980s, before any major equality cases had reached the Supreme Court, feminist legal scholars and others were worried about the lower courts' construal of section 15, and they showed little faith in what the high court would do with it.[67] It should not be surprising then that today one rarely hears in social movement politics or reads in critical or (non-liberal) feminist studies anything but cautious and sometimes wholly pessimistic attitudes towards the legal project.[68]

Furthermore, although 'disadvantaged' groups have won few cases in comparison with advantaged groups, there have been more wins than left scholars admit, though many of them are in relatively discrete areas of law that do not command much public attention, but nevertheless affect *women's* lives, if not men's.[69] Although there is a range of circumstances, the most typical cases involve either an individual charged with an offence whose lawyers then pursue a constitutional attack on the criminal law, or an individual litigant who challenges a law or policy that has affected her or him directly. Social movement organizations then participate as intervenors in cases initiated by others, rarely initiating litigation themselves. This is not to deny that some cases would never go forward without the support (financial and otherwise) of social movement organizations. Nor is it to deny that such organizations look out for appropriate cases to forward their own agendas. The point is that usually cases will proceed whether they intervene or not.

In fact, one of the chief complaints and problems facing feminist organizations has been that there has been little opportunity for proactive legal actions as they have been pressed into reactive responses to cases initiated by others, often before they were ready and without the benefit of movement consultations.[70] Nevertheless, while the adversarial legal system dictates that intervenors must argue for or against a particular outcome, they are not obliged to endorse all the claims of the litigant on whose side they have ostensibly intervened. Indeed, they usually offer analyses of how the issue affects groups rather than the individual, even where these might diverge from the particular litigant's claims. Hence, given that most cases are initiated by others and will go forward regardless, constitutional cases are opportune occasions for interventions where other political strategies have failed or are simply not possible.

As for the purpose of constitutional litigation, it seems to me that the legal left has fashioned a critique from what is its own misconstruction. Certainly, if one defines its purpose as being to win legal cases, then, much like other political strategies, the litigation project has not been an unmitigated success. If the purpose is understood as being to publicize and mobilize support for particular demands, however, then it has been quite successful.[71] Sigurdson, for example, notes that various equality claimants who lost their legal cases nevertheless considered their actions successful because the publicity they generated gave them the opportunity to communicate their politics and/or to mobilize others.[72] Bad decisions (or unsuccessful actions) may have quite useful effects: many people were not aware that they did not have certain rights until the Supreme Court announced they did not have them, and such decisions may well have a politicizing effect that formal victories on narrow legal grounds would not produce. In addition, as noted above, a number of cases that have been lost at trial have nevertheless produced a policy change that at least approximated what was being claimed in the legal case. In this way, cases can be used as pressure points to induce policy shifts where efforts on other fronts have gone unrewarded, and losing a case can be a stroke of luck.

In my view, those legal left scholars who spurn constitutional litigation for oppressed groups have taken a position that is politically and practically indefensible. To criticize law as oppressive, and tell women and others not to engage with it is to ignore the fact that law as legislation has real practical impacts in the daily lives of real people. Such a position offers cold comfort to indigenous peoples, women,

people of colour, lesbians and gays, people with disabilities, and others who variously need Aboriginal rights to culture, community, and self-determination, child support, reproductive choice, physical security, jobs, labour rights, harassment-free workplaces, homes, and public spaces, promotions, social benefits, and many other things. As Razack puts it, we should 'erase the line we sometimes draw between legal and political activity and recognize that when we go to court we are fighting for our lives. We are not up against a neutral arbiter, but a powerful system of symbols, rules, and practices that combine to oppress women and other groups.'[73]

The legal left has yet to show that legal strategies, and especially litigation, are less effective than the endless political struggles that have failed to overturn a wide range of discriminatory and oppressive laws. Law may indeed be treacherous, but many left scholars seem to be suggesting that we surrender this terrain, as if challenging the power of this mighty institution that holds in place relations of domination is too dangerous for us, as if we would somehow be *more* crushed by a litigation strategy that delivers fewer victories than defeats than by living with the consequences of oppressive laws every day. The sometimes patronizing tone of their admonitions to rely on politics conveniently ignores the fact, obvious to those subjugated by the law, that it is politicians who have passed discriminatory or otherwise disadvantageous laws that are being challenged through courts, and that the political process has not been that much kinder, more accessible, or more democratic than the courts.[74] When Michael Mandel glibly asks, 'Who needs a *Charter* when you hold up 52% of the sky?'[75] he should remember that women do not hold up 52 per cent of Parliament or the provincial legislatures, just as Aboriginal peoples, racial/ethnocultural minorities, people with disabilities, and working-class Canadians continue to be severely underrepresented in Canada's political institutions relative to their proportions of the population.

It is largely because there are so many uncontrollable mega-elements to the political process (such as an ideologically receptive government, bureaucratic entry points, public support or antipathy, government's financial wherewithal, sympathetic ministers, positions of opposition parties) that marginalized groups may turn to the relatively more circumspect legal process. Here there are certainly significant impediments (availability of relevant legal instruments / constitutional provisions, favourable precedents, conservative legal culture, ideological leaning of judges, personnel and financial resources to pursue litigation, good test case material), but they are more manipulable than the mega-political variables, depending on neither timing and the political climate nor the whims of the party in power.

The socialist left naturally, and with evidence aplenty, worries that the incremental improvements in everyday conditions of life wrought by liberal reform serve only to postpone if not utterly thwart the coming of the socialist revolution. Yet, it has nevertheless supported the struggles of labour over a wide range of political *and* legal fronts (including struggles for labour laws, regulatory systems, tribunals, and the use of the courts to uphold or to challenge such regimes, though not via *Charter* challenges), even as it seeks to discourage non-economically based social movements from legal reform, especially through litigation. But given that the socialist revolution seems to be off for the moment, the left position raises the question of what subjugated groups are supposed to do while waiting for it (assuming that they should be). The question is not, as is usually posed by the left, whether law can produce social (i.e., socialist) transformation, but rather, what will happen if such groups *do not* participate in legal reform? Left scholars generally conclude that because law / the legal system is tainted, biased, fundamentally conservative, and oppressive, in other words, not a neutral or perfect instrument, it therefore ought not to be used. Yet it seems to me that that is the whole *point* – if it *were* perfect, there would be no need to use it to effect change! Their assumption is that that which we want to change is independent of the legal system, and that the legal system is somehow only regarded as a tool to be used in attempts to change 'it.' But the legal system itself is a huge part of 'it,' not independent of it, but constitutive of 'it.' How are we supposed to transform 'it' by boycotting it? Ironically, its imperfections create opportunities to alter it. If this is all the revolution we are going to get for the foreseeable future, it seems to me that subjugated groups would be ill-advised to boycott law.

2 Scope and Contents of the Book

a What Is Absent from the Text

Throughout my own process of learning I have found that what is absent from a text often says as much about the assumptions, values, positionality and world view of its creator(s) as what is present; that is, omissions generally serve as fairly good clues as to what is considered

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
Appellant (Respondent)

and

ZUNERA ISHAQ
Respondent(Applicant)

Court File No.: A-124-15

FEDERAL COURT OF APPEAL

Proceeding commenced at TORONTO

MOTION RECORD of the WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. FOR LEAVE TO INTERVENE

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