EB-2019-0242

ONTARIO ENERGY BOARD

ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO (AMPCO)

Application for Review of an Amendment to the Independent Electricity System Operator Market Rules

SUPPLEMENTARY BRIEF OF AUTHORITIES TO AMPCO REPLY TO SUBMISSIONS ON MOTION FOR STAY

GOWLING WLG (CANADA) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto, Ontario
M5X 1G5

Ian A. Mondrow
Tel: 416-369-4670
ian.mondrow@gowlingwlg.com

Laura Van Soelen
Tel: 416-862-3646
laura.vansoelen@gowlingwlg.com

INDEX

EB-2019-0242
Supplementary Brief of Authorities to
AMPCO Reply to Submissions on Motion for Stay

TAB A

Falkiner v. Ontario (Attorney General), 1996 Carswell Ont 62 (Div. Ct)

1996 CarswellOnt 62
Ontario Court of Justice (General Division) [Divisional Court]

Falkiner v. Ontario (Attorney General)

1996 CarswellOnt 62, [1996] O.J. No. 48, 60 A.C.W.S. (3d) 277, 7 W.D.C.P. (2d) 69, 87 O.A.C. 374

In the matter of Ontario Regulations 409/95 and 410/95

In the matter Of the Canadian Charter of Rights and Freedoms, s. 24, Constitution Act, 1982, R.S.C. 1985, Appendix II, No. 44, as amended

Sandra Elizabeth Falkiner, Claude Marie Cadieux, Cynthia Pauline Johnston and Deborah Ann Sears, Applicants v. The Attorney General of Ontario, Respondents

Steele, J.

Judgment: January 11, 1996
Docket: Doc. 810/95

Counsel: *Raj Anand* and *Chantal Tie*, for the Applicants.
Janet E. Minor and *Lori Sterling*, for the Respondents.

Subject: Civil Practice and Procedure; Public; Constitutional

Related Abridgment Classifications

Public law
V Social programs
V.1 Welfare benefits
V.1.b Entitlement
V.1.b.ii Marital status

Remedies
II Injunctions
II.7 Injunctions in specific contexts
II.7.k Injunctions involving Crown or government entities

Headnote

Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts

Social Assistance --- Welfare benefits — Entitlement — Marital status
Regulations in public interest and expensive to suspend — Motion to suspend application of regulations pending judicial review dismissed — Family Benefits Act Regulations, R.R.O. 1990, Reg, 366 — Family Benefits Act, R.S.O. 1990, c. 151.

Four applicants were women in need whose children had received benefits under the Family Benefits Act, and who had their benefits terminated under the new regulations, or had been threatened with termination because the women each had a man residing with them in the same dwelling. Applicants had brought proceedings for judicial review, seeking a declaration that the new regulations were ultra vires the province and infringed the Charter. In the present proceeding, applicants moved for an interim order suspending the application of the regulations pending the final determination of the judicial review. Held, the

motion was dismissed. The court had to assume that the regulations promoted the public interest. Also, there would be a considerable expense in suspending them. Although there was also a public interest in applicants' position, it was narrower and more individualistic than that of the regulations. Accordingly, the motion was to be dismissed.

Spousal Relationship under Family Benefits Act Regulations — Canadian Charter of Rights and Freedoms — Family Benefits Act Regulations, R.R.O. 1990, Reg. 366, ss. 1(1)(d), 2(7)(b) — Family Benefits Act, R.S.O. 1990, c. 151.

Four applicants were women in need whose children had received benefits under the Family Benefits Act, and who had their benefits terminated under the new regulations, or had been threatened with termination because the women each had a man residing with them in the same dwelling. Applicants had brought proceedings for judicial review, seeking a declaration that the new regulations were ultra vires the province and infringed the Charter. Section 2(7)(b) of the regulations stated that a person was eligible for benefits if the person was not residing in the same dwelling place as his or her spouse by reason of separation with no reasonable prospect of reconciliation. Section 1(1)(d) defined spouse as a person of the opposite sex to an applicant, residing in the same dwelling, if the person was providing financial support to applicant or vice versa, or if they had a mutual arrangement regarding their financial affairs. Applicants argued that, given the wording of s. 2(7)(d) relating to no reasonable prospect of reconciliation, even if the man moved out there would be no assurance that the benefits would be renewed. In the present proceeding, applicants moved for an interim order suspending the application of the regulations pending the final determination of the judicial review. Held, the motion was dismissed. To be a spouse under the provision of s. 1(1)(d) of the regulations, that spouse had to reside in the same dwelling place as applicant. Therefore, the provisions of s. 2(7)(d) relating to reconciliation had no application to any of applicants.

***Steele, J.*:**

1 This is a motion for an interim order to suspend the application of certain Ontario Regulations pending the final determination of the application for judicial review which requests declarations that they are *ultra vires* and are contrary to ss.2(d), 7 and 15(1) of the *Canadian Charter of Rights and Freedom* and in the alternative that the regulations are of no force and effect with respect to the applicants and in the alternative that an order should be granted excluding the applicants from such Regulations until such time as they would have been determined to be "spouses" under the law as it was immediately prior to October 1, 1995.

2 The regulations in question are:

Under the Family Benefits Act

3 1. R.R.O. 1990 Reg 366 amended by Ontario Regulation 410/95

4 Section 1(1) "spouse" means,

> (d) a person of the opposite sex to the applicant or recipient who is residing in the same dwelling place as the applicant or recipient if, [1(1)(d)(iv)] (O. Reg. 409/95, eff. October 1, 1995)
>
> > (i) the person is providing financial support to the applicant or recipient, (O. Reg. 409/95, eff. October 1, 1995)
> >
> > (ii) the applicant or recipient is providing financial support to the person, or (O. Reg. 409/95, eff. October 1, 1995)
> >
> > (iii) the person and the applicant or recipient have a mutual agreement or arrangement regarding their financial affairs, and (O. Reg. 409/95, eff. October 1, 1995)
>
> the social and familial aspects of the relationship between the person and the applicant or recipient amount to

cohabitation. (O. Reg. 409/95, eff. October 1, 1995)

. . . . .

(3) For the purposes of clause (d) of the definition of "spouse" in subsection (1), unless the applicant or recipient provides evidence to satisfy the Director to the contrary, it is presumed that if a person of the opposite sex to the applicant or recipient is residing in the same dwelling place as the applicant or recipient, the person is the spouse of the applicant or recipient. (O. Reg. 409/95, eff. October 1, 1995)

. . . . .

2.(7) A person who is resident in Ontario and who is a person in need is eligible for an allowance and other benefits calculated in accordance with the Act and this Regulation if,

(a) he or she is a parent of a dependent child who resides in the same dwelling place as him or her; (O. Reg. 409/95, eff. October 1, 1995)

(b) he or she has no spouse or is not residing in the same dwelling place as his or her spouse by reason of separation with no reasonable prospect of reconciliation; (O. Reg. 409/95, eff. October 1, 1995)

The applicants do not challenge paragraph (a) of subsection (1).

Under the General Welfare Assistance Act

5 2. R.R.O. 1990 Reg. 537 as amended by Ontario Regulation 410/95

6 Section 1(1)(d), s.1(3) which are worded the same as s.1(1) and 1(3) of Regulation. 366 and they also challenge s.7(8).

7.(8) No person is eligible for assistance as the head of a family whose spouse is absent unless the absence of the spouse is by reason of separation with no reasonable prospect of reconciliation. (O. Reg. 410/95, eff. October 1, 1995).

The basic difference in the regulations challenged from the prior regulations is that a person receiving family benefits under the former regulations could have a person of the opposite sex living in the dwelling for up to 3 years without losing the benefits under the Act.

7 Counsel are in substantial agreement that the test for granting an interim order under the Charter has been set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 to the following effect:

(a) there must be a serious Charter case to be tried that is not frivolous and vexatious.

(b) the applicants must show that they will suffer irreparable harm if the relief is not granted prior to the hearing; and

(c) the balance of convenience, taking into account public interest, favours retaining the *status quo* until the court has disposed of the legal issues.

8 The question of irreparable harm and the public interest was further considered *in R.J.R. Macdonald Inc. v. Canada (AG) (1990)*, [1994] 1 S.C.R. 311 at pp.341-2, 344 and 346:

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". ...

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
>
> . . . . .
>
> ... Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.
>
> . . . . .
>
> ... "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.
>
> We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. ...
>
> . . . . .
>
> When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.
>
> . . . . .
>
> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result form the restraint of that action.
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.
>
> Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted form the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 44 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcohol*, [1986] 2 S.C.R. ix.
>
> . . . . .
>
> Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

9 In addition, in that same case the court summarized in part at pp.348-9 as follows:

> At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted.

> 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.
>
> The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

There are four individual applicants from the various parts of the province with different factual situations who have applied to this court. The common factor among them is that they are women in need with children who have received benefits under the *Family Benefits Act* and under the new regulations they have been terminated or threatened with termination of such benefits because they have a man residing in the same dwelling place. On behalf of each of the applicants it was argued that there would be irreparable harm to each of them if they were denied family benefits. It was also argued that they were representative of most if not all persons receiving family benefits. It was argued by the respondent that if the male resident moved out that the applicants would in all probability be entitled to the continuation or renewal of the benefits. Contrary to this the applicants argued that because of the wording of s.2(7)(b) relating to "no reasonable prospect of reconciliation" that even if the male moved out that there was no assurance that the benefits would be renewed. In my opinion to be a spouse under the provisions of s.1(1)(d) that spouse must in fact reside in the same dwelling house. For this reason I believe that the provisions of s.2(7)(b) relating to reconciliation have no application to any of the applicants. I therefore dismiss this argument.

Applying the Test

(a) A Serious Case

10 There are similarities between the issues in the present motion and the one heard by Boland J. in *Masse et al. v. Attorney General of Ontario* (September 29, 1995, unreported). After hearing counsel for the applicants I indicated that it appeared that there was a serious Charter case to be tried. The threshold is low and no matter how weak the case may be, if it is not frivolous or vexatious it must be considered to be a serious case. In view of the decision in *Masse* counsel for the respondent did not seriously argue this point, although she indicated that she did not entirely agree with that decision. I find that the applicants have met the first part of the test.

(b) Irreparable Harm

11 As of December 19, 1995, there were approximately 5,598 individuals denied *Family Benefits Act* assistance or general *Welfare Act* assistance, not including individuals denied benefits in Toronto, Hamilton and Peel Regions where the information is not yet available. Each of the applicants has provided evidence alleging irreparable harm and it was argued that they were typical of many others. I will deal with them later in these reasons. The respondent has submitted evidence that the impugned Regulations are in the public benefit because they are designed to reduce the deficit of the province and are in keeping with the statement made by the Minister of Finance and a statement in the speech from the throne made on behalf of the present government of its intention to reduce the deficit of the province in many ways and that it would tighten requirements for welfare eligibility. It was submitted that since October 1, 1995, the savings has been in excess of $10 million without including the savings from the 3 very large population areas mentioned above.

12 The respondents have made out a case that the Regulations are in the public interest of the government and that irreparable harm to the public interest would result from any order suspending them. However, this is not the only matter to be considered. The applicants may show the suspension of the Regulations would itself provide a public benefit (see *R.J.R.*

Macdonald Inc. v. Canada Attorney General at p.349, *supra*). There is a public benefit in sustaining *Family Benefits Act* allowances. This is in the holding together of family units and in financially assisting a single parent supporting a child. The applicants allege that they are suffering a financial loss as a result of the Regulations. In my opinion, this loss can be recovered if the Regulations are subsequently declared invalid by this Court. However, their loss is not only financial, it includes the breakdown of many existing living arrangements. These can be considered irreparable on a personal basis because it could mean that the beneficiary would have to commit to a relationship that she does not wish to make with the "spouse" or that the man would have to leave the dwelling. In the case of all 4 applicants considerable personal hardship can or will be experienced by the Regulations. The particular hardship will vary in each instance. However, the essential ingredients to be considered in all cases is whether or not the relationship between the persons amounts to cohabitation as well as what is their financial relationship. The facts of each case vary and those of persons other than the four applicants is unknown. In every case there is an appeal to the Social Assistance Review Board if any *Family Benefits Act* recipient considers themselves improperly treated in the first instance.

13 In considering the balance of inconvenience and the irreparable hardship this court must assume that the Regulations promote the public interest. On the facts of this case there will be a considerable expense allowing the Regulations to be suspended. It must then consider the inconvenience to the applicants and others like them and weigh these two concepts to come to a conclusion. This is not an enviable position for a court to be placed in. Having considered the matter I conclude that the Regulations should not be suspended. The purpose of the Regulations is to promote the public interest. To overcome this the applicants must present a strong case. While there is also a public interest in the position of the applicants, it is a narrower and more individualistic interest than that of the Regulations. A stay or injunction is an extraordinary remedy and should be granted sparingly.

14 The test is not as strongly in favour of the respondent with respect to the alternative argument that the applicants be individually exempted from the Regulations. However in considering the matter I view the position of the beneficiary of the Family Benefit Allowance as the primary person. The effect upon the male resident is not as important. I am not satisfied that any of the applicants are exceptional circumstances to be specifically treated, except possibly for the fact that three of them asked for advice and were given assurances that their benefits would not be prejudiced by having an individual male move into the residence before such move was made. The case workers gave advice based on the former Regulations which allowed for a three-year residence period. However, many people arrange their personal and financial affairs based on existing laws. When the laws change they must re-arrange their affairs to comply with them. In my opinion there is no contract involved in the granting of family benefit assistance and therefore there is no reason why these three applicants should be treated differently than those who did not obtain prior advice.

15 For these reasons the application is dismissed. The respondent does not ask for costs.

End of Document

EB-2019-0242
Supplementary Brief of Authorities to
AMPCO Reply to Submissions on Motion for Stay

TAB B

R. v. McIntosh, [1995] 1 S.C.R. 686

Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. 1425445 Ontario Ltd. | 2012 CarswellOnt 17288, 106 W.C.B. (2d) 414 | (Ont. C.J., Mar 30, 2012)

1995 CarswellOnt 4
Supreme Court of Canada

R. v. McIntosh

1995 CarswellOnt 4, 1995 CarswellOnt 518, [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16, 178 N.R. 161, 21 O.R. (3d) 797 (note), 26 W.C.B. (2d) 201, 36 C.R. (4th) 171, 79 O.A.C. 81, 95 C.C.C. (3d) 481, J.E. 95-457, EYB 1995-67422

R. v. BEVIN BERVMARY McINTOSH

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: November 28, 1994
Judgment: February 23, 1995
Docket: Doc. 23843

Counsel: *Michael Bernstein* and *Alexander Alvaro*, for the Crown.
Russell S. Silverstein and *Michelle Levy*, for respondent.

Subject: Criminal

Related Abridgment Classifications

Criminal law
XXI Defences
XXI.17 Self defence or defence of another
XXI.17.d Miscellaneous

Headnote

Criminal Law --- Defences — Self-defence — Effect of provocation

Defences — Self-defence — Defence under s. 34(2) of Criminal Code being available to initial aggressor and words "without having provoked the assault" not to be read in — No ambiguity on face of provision and accused to be given more favourable interpretation even if result being illogical and absurd — Legislation required to clarify Criminal Code self-defence regime.

The accused gave the deceased an amplifier and other equipment to repair. Over the next eight months the accused made several attempts to retrieve the equipment but the deceased actively avoided him. Informed that the deceased was working outside, the accused obtained a kitchen knife and approached the deceased. According to the accused, he told the deceased "Get my fucking amp because I need it. Go suck your mother and bring my fucking amp". According to the accused, the deceased pushed him and a struggle followed. Then the deceased picked up a dolly, raised it to head level, and came at the accused. The accused reacted by stabbing the deceased with the kitchen knife. He then threw the knife down and fled. He later turned himself in to police.

At the accused's trial on a charge of second degree murder, the trial judge, in instructing the jury on the defence of self-defence, told them that s. 34(2) of the *Criminal Code* would not be applicable if they found that the accused had been the initial aggressor, having provoked the deceased. His defence would be the more restricted defence in s. 35, applying to those

who had provoked the assault and requiring that the accused have retreated as far as it was feasible. The jury found the accused guilty of the lesser offence of manslaughter. The trial judge imposed a sentence of two and one-half years.

The accused's appeal against conviction was allowed by the Ontario Court of Appeal. The court held that the trial judge had erred in holding that s. 34(2) was not applicable to an initial aggressor who had provoked the deceased. The words "with- out having provoked the assault" should not be read into s. 34(2). The Crown appealed.

Held:

The appeal was dismissed.

Per Lamer C.J.C. (Sopinka, Cory, Iacobucci and Major JJ. concurring)

Sections 34 and 35 of the *Criminal Code* are highly technical and excessively detailed provisions deserving of much criticism. These provisions overlap and are internally inconsistent. They are unbelievably confusing. Legislation is required to clarify the *Criminal Code* self-defence regime.

The defence of self-defence under s. 34(2) is available to an initial aggressor, and the words "without having provoked the assault" should not be read in. No ambiguity arose on the face of the statutory provision and, under the golden rule of literal construction, it should be interpreted in a manner consistent with its plain meaning. The contextual approach to statutory interpretation lent no support to the Crown's position for three reasons. First, Parliament's intent was unclear. Second, it did not generally mandate courts to read words into a statutory provision. That would be tantamount to amending what was a legislative, not a judicial function. Third, the overriding principle governing the interpretation of penal provisions is that where two interpretations of a provision which affect the liberty of the subject are available, the court should adopt the one more favourable to the accused. There was no ambiguity on the face of s. 34(2) and the section should be enforced even though the interpretation might seem illogical in light of s. 35 and might lead to some absurdity. The interpretation was consistent with the clear wording of the section and would provide certainty for citizens.

It had not been necessary to instruct the jury as to s. 37. There was no room for it in this case as the defence was covered by ss. 34 and 35.

Per McLachlin J. (dissenting) (La Forest, L'Heureux-Dubé and Gonthier JJ. concurring)

The trial judge had correctly not left s. 34(2) to the jury. The point of departure for interpretation is not the plain meaning of the words but the intention of Parliament. The words of s. 34(2) permitted doubt as to Parliament's intent, and it was necessary to examine the history of the section, practical problems and absurdities resulting from particular interpretations. On such an analysis, it was clear that Parliament intended s. 34(2) to apply only to unprovoked assaults, and the omission of the words "without having provoked the assault" was most likely an oversight. Parliament's intention was to reflect the long-standing common law distinction between justifiable homicide, where the killer had not provoked the aggression, and excusable homicide, where he had. In the latter case, the killer must have retreated as far as possible. Sections 34(1) and (2) did not impose a duty to retreat and therefore dealt with justifiable homicide. Section 35 did impose a duty to retreat and dealt with excusable homicide. The obligation to retreat from provoked assault has stood the test of time and should not be lightly discarded. Life is precious; the justification for taking it must be defined with care and circumspection.

The trial judge had correctly declined to leave s. 37 with the jury. Section 37 had no application where death or grievous bodily harm had occurred.

Annotation

R. v. McIntosh re-establishes the canon of construction that penal provisions must be strictly applied. The court agrees that, where there are two reasonable interpretations of a provision affecting the liberty of the subject, the interpretation most favourable to the accused should be adopted. The minority does not contest this principle but takes the position that in this case there was no real ambiguity and hence only one reasonable interpretation. The court makes no mention of the position of Cory J. in *R. v. Hasselwander*, [1993] 2 S.C.R. 398, 20 C.R. (4th) 277, 152 N.R. 247, 62 O.A.C. 285, 81 C.C.C. (3d) 471, at pp. 284-285 C.R. (La Forest and Gonthier JJ. concurring), that the rule of strict construction has a "subsidiary role" to the

provision in s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 that:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Parliament should act promptly on Chief Justice Lamer's strong call to reform our "unbelievably confusing" provisions governing self-defence in ss. 34(1), 34(2), 35 and 37. It is quite extraordinary that these unduly complex and conflicting provisions have been intact so long despite widespread dissatisfaction by judges. If judges are baffled, pity juries and pity accused who are at the mercy of laws that few pretend to understand.

Parliament should not be swayed by the minority view of McLachlin J., that established common law and policy considerations favour retaining a much more restricted defence of self-defence contained in s. 35 for initial aggressors, including the requirement of a duty to retreat. It is not clear why 19th century English jurisprudence, reflecting a purported distinction between situations of justification and excuse, should continue to rule.

Imposing a duty to retreat on the initial aggressor is inconsistent with the clear trend of Canadian courts over the years to allow flexibility in judging claims of self-defence. Although there is a proportionality requirement in s. 34(1), courts have repeatedly emphasized that defenders cannot be expected, with the benefit of hindsight, to measure with nicety the degree of force necessary to repel an attack. There are no automatic requirements that the defender cannot strike the first blow or, apart from the rule in s. 35, that the defender cannot succeed if he or she could have retreated. Courts have tended to bend over backwards to instruct only on ss. 34(1) and (2), which are quite confusing enough without the complexities of ss. 35 and 37.

The Supreme Court in *R. v. Lavallee*, [1990] 1 S.C.R. 852, 76 C.R. (3d) 329, [1990] 4 W.W.R. 1, 55 C.C.C. (3d) 97, 108 N.R. 321, 67 Man. R. (2d) 1, and reasserted in *R. c. Pétel*, [1994] 1 S.C.R. 3, 26 C.R. (4th) 145, 162 N.R. 137, 59 Q.A.C. 81, 87 C.C.C. (3d) 97, has urged that the reasonableness test be applied with special sensitivity in situations where the defender is trapped in an abusive relationship. It may well be that a trier of fact ought to be less sympathetic to self-defence by an aggressor. But it is highly questionable whether there should be a rigid rule that the aggressor is always subject to a much restricted defence. In some cases, a rule like that in s. 35 might lead to injustice. Take the context of self-defence in an abusive relationship. It will often be difficult to determine in a volatile fight who the initial aggressor was. If the trier of fact decides that the initial aggressor on this occasion was the victim of the abusive relationship surely there should be no rigid requirement of a duty to retreat from one's home?

It is time for the *Criminal Code* to reflect approaches in other jurisdictions, which do not distinguish in advance between situations of fatal and non-fatal self-defence, defences of those under protection and defence of strangers, and self-defence by an aggressor and simple self-defence. There is much to be said for the approach of the Canadian Bar Association Task Force, *Principles of Criminal Liability: Proposals for a new General Part of the Criminal Code of Canada* (1992), pp. 71-80, who suggest a simple defence of self-defence, modelled on a proposed New Zealand Crimes Bill:

Every person is justified in using, in self-defence or in the defence of another, such force as, in the circumstances as that person believes them to be, it is reasonable to use.

Such a formulation captures the need for flexibility which our courts have tried to find within the straight-jackets of present *Criminal Code* complexity and requirement. Unfortunately, the 1993 Government White Paper (Department of Justice, *Proposals to Amend the Criminal Code (General Principles)* (1993)) is far too cautious in drafting a defence that includes a mechanical and restrictive requirement that the accused's acts must be "reasonable" and "proportionate" to the harm sought to be avoided.

It is time for the Minister of Justice to initiate a long overdue reform. The most advisable strategy might be to appoint a Task Force to finalize a Bill on a coherent General Part defining forms of fault, act requirements and defences such as self-defence.

Don Stuart

Table of Authorities

Cases considered:

Per Lamer C.J.C. (Sopinka, Cory, Iacobucci and Major JJ. concurring)

Altrincham Electric Supply Ltd. v. Sale Urban District Council (1936), 154 L.T. 379 (H.L.) — *considered*

Estabrooks Pontiac Buick Ltd., Re (1982), 44 N.B.R. (2d) 201, 116 A.P.R. 201, 144 D.L.R. (3d) 21, 7 C.R.R. 46 (C.A.) — *considered*

Marcotte v. Canada (Deputy Attorney General), [1976] 1 S.C.R. 108, 19 C.C.C. (2d) 257, 3 N.R. 613, 51 D.L.R. (3d)

259 — *applied*

R. v. Baxter (1975), 33 C.R.N.S. 22, 27 C.C.C. (2d) 96 (Ont. C.A.) — *referred to*

R. v. Bolyantu (1975), 29 C.C.C. (2d) 174 (Ont. C.A.) — *referred to*

R. v. Chamberland (1988), 65 Alta. L.R. (2d) 175, 96 A.R. 1 (C.A.) — *referred to*

R. v. Merson (1983), 4 C.C.C. (3d) 251 (B.C. C.A.) — *referred to*

R. v. Nelson (1992), 13 C.R. (4th) 359, 71 C.C.C. (3d) 449, 8 O.R. (3d) 364, 54 O.A.C. 14 (C.A.) — *applied*

R. v. Stubbs (1988), 28 O.A.C. 14 (C.A.) — *applied*

Per McLachlin J. (dissenting) (La Forest, L'Heureux-Dubé and Gonthier JJ. concurring)

Marcotte v. Canada (Deputy Attorney General), [1976] 1 S.C.R. 108, 19 C.C.C. (2d) 257, 3 N.R. 613, 51 D.L.R. (3d) 259 — *considered*

R. v. Alkadri (1986), 70 A.R. 260, 29 C.C.C. (3d) 467 (C.A.) [leave to appeal to S.C.C. refused (1986), 29 C.C.C. (3d) 467n, 74 A.R. 320 (note), 72 N.R. 367 (note)] — *considered*

R. v. Bolyantu (1975), 29 C.C.C. (2d) 174 (Ont. C.A.) — *considered*

R. v. Deruelle, [1992] 2 S.C.R. 663, 15 C.R. (4th) 215, 38 M.V.R. (2d) 1, 139 N.R. 56, 75 C.C.C. (3d) 118, 94 D.L.R. (4th) 638, 114 N.S.R. (2d) 1, 313 A.P.R. 1 — *considered*

R. v. Merson (1983), 4 C.C.C. (3d) 251 (B.C. C.A.) — *considered*

R. v. Nelson (1992), 13 C.R. (4th) 359, 71 C.C.C. (3d) 449, 8 O.R. (3d) 364, 54 O.A.C. 14 (C.A.) — *referred to*

R. v. Squire (1975), 31 C.R.N.S. 314, 10 O.R. (2d) 40, 26 C.C.C. (2d) 219 (C.A.) [reversed [1977] 2 S.C.R. 13, 10 N.R. 25, 29 C.C.C. (2d) 497, 69 D.L.R. (3d) 312] — *considered*

R. v. Stubbs (1988), 28 O.A.C. 14 (C.A.) — *referred to*

R. v. Wigglesworth, [1987] 2 S.C.R. 541, 60 C.R. (3d) 193, [1988] 1 W.W.R. 193, 61 Sask. R. 105, 81 N.R. 161, 29 Admin. L.R. 294, 24 O.A.C. 321, 45 D.L.R. (4th) 235, 32 C.R.R. 219, 37 C.C.C. (3d) 385*considered*
R. v. Z. (D.A.), [1992] 2 S.C.R. 1025, 16 C.R. (4th) 133, 5 Alta. L.R. (3d) 1, 140 N.R. 327, 76 C.C.C. (3d) 97, 131 A.R. 1, 25 W.A.C. 1 — *considered*

Stock v. Frank Jones (Tipton) Ltd., [1978] 1 W.L.R. 231, [1978] 1 All E.R. 948 (H.L.) — *considered*

Sussex Peerage Case (1844), 11 Cl. & Fin. 85, 8 E.R. 1034 (H.L.) — *considered*

Statutes considered:

Crimes Act, 1961, (New Zealand), S.N.Z. 1961, No. 43 [re-en. S.N.Z. 1980, No.63] —

s. 48(2) [re-en. S.N.Z. 1980, No. 63, s. 2]

Criminal Code, 1892, The, S.C. 1892, c. 29 —

s. 45

s. 46

Criminal Code, R.S.C. 1906, c. 146 —

s. 53(1)

s. 53(2)

Criminal Code, R.S.C. 1927, c. 36 —

s. 53(1)

Criminal Code, S.C. 1953-54, c. 51 —

s. 34

s. 34(1)

s. 34(2)

s. 35

Criminal Code, R.S.C. 1985, c. C-46 —

s. 19

s. 34

s. 34(1)

s. 34(2)

s. 35

s. 35(*c*)

s. 36

s. 37

Appeal from judgment reported at (1993), 24 C.R. (4th) 265, 15 O.R. (3d) 450, 65 O.A.C. 199, 84 C.C.C. (3d) 473 (C.A.) allowing appeal from conviction on charge of manslaughter.

***Lamer C.J.C. (Sopinka, Cory, Iacobucci* and *Major JJ.* concurring):**

I. Factual Background

1 On February 7, 1991, Basile Hudson, who made his living repairing appliances and electronic equipment, was stabbed to death by the respondent. The circumstances surrounding Hudson's death arose during the summer of 1990 when the respondent, a 26-year-old man, was working as a disc jockey. He gave the deceased, who lived in the same neighbourhood, an amplifier and other equipment to repair. Over the next eight months, the respondent made several attempts to retrieve his equipment, but the deceased actively avoided him. On one occasion, the respondent, armed with a knife, confronted the deceased and told him he would "get him" if the equipment were not returned. On another occasion, the deceased fled through the back exit of his home when the respondent appeared at the front door.

2 On the day of the killing, the respondent's girlfriend saw the deceased working outside and informed the respondent. The respondent obtained a kitchen knife and approached the deceased. Words were exchanged. The respondent testified that

he told the deceased, “Get my fucking amp because I need it. Go suck your mother and bring my fucking amp.” According to the respondent, the deceased pushed him, and a struggle ensued. Then the deceased picked up a dolly, raised it to head level, and came at the respondent. The respondent reacted by stabbing the deceased with the kitchen knife. He then threw the knife down and fled the scene. Later that day, after consulting with a lawyer, the respondent turned himself in.

3 On November 25, 1991, the respondent appeared in the Ontario Court (General Division) before Moldaver J. and a jury on a charge of second degree murder. He entered a plea of not guilty, and took the position at trial that the stabbing of the deceased was an act of self-defence. The jury found the respondent guilty of the lesser and included offence of manslaughter. He was sentenced to two and one- half years’ imprisonment.

4 The respondent appealed his conviction to the Ontario Court of Appeal on the ground that the trial judge erred in instructing the jury that s. 34(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, was not applicable in the event they found that the respondent had been the initial aggressor, having provoked the deceased. The Court of Appeal allowed the respondent’s appeal, set aside the conviction and ordered a new trial: (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199.

5 The Crown now appeals to this court, arguing that the Ontario Court of Appeal erred when it reached the conclusion that self-defence as defined in s. 34(2) of the*Criminal Code* is available to accused persons who are initial aggressors.

II. Relevant Statutory Provisions

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

6

Defence of Person

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(*a*) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(*b*) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of

preserving himself from death or grievous bodily harm arose.

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

III. Decisions Below

A. Ontario Court, General Division

7 Moldaver J. first charged the jury with respect to self-defence under s. 34(1), and then turned to the application of s. 34(2). The portion of the charge with respect to s. 34(2) which the Court of Appeal found to be in error is the following:

> Moving on from there, you will notice, ladies and gentlemen, that the words "without having provoked the assault", which we saw in s. 34(1), do not appear in s. 34(2). If you take a look on your paper and you look at s. 34(1), you will see the words "without having provoked the assault". You will not see those words in s. 34(2).
>
> However, as a matter of law, I direct you that those words are to be read into s. 34(2). You will see the reason for this when we deal with s. 35, but for the present time you must accept that the words "without having provoked the assault" are to be read into s. 34(2).

8 Moldaver J. then charged the jury with respect to s. 35. After reading s. 35 to the jury, Moldaver J. stated:

> Now, for the purposes of this case, ladies and gentlemen, this section relates to a situation where the accused has, without justification, provoked an assault upon himself. It defines the nature and scope of the force which a person may use to defend himself after he has provoked an assault upon himself and the steps he must take before the force used in response can be justified.

B. Ontario Court of Appeal

9 Austin J.A. (Goodman and McKinlay JJ.A. concurring) considered two issues: (1) was the trial judge in error in reading the words "without having provoked the assault" into s. 34(2) of the *Criminal Code*?; and (2) was the trial judge in error in not leaving s. 37 to the jury as a basis on which they could have found that the respondent was acting in self-defence?

10 In resolving the first issue, Austin J.A. felt that it was unnecessary to consider the history of s. 34, principles of statutory interpretation, the law in other jurisdictions, and the views of academics. Instead, the focus should be on the structure of s. 34, and Canadian jurisprudence. In Austin J.A.'s view, the problem with s. 34(2) (i.e., that it does not include the words "without having provoked the assault", whereas s. 34(1) does) has been apparent from the very first *Criminal Code* provisions dating from 1892. For this reason, legislative history did not resolve the problem.

11 Austin J.A. then considered the relevant case law. The Crown relied on the following cases for the proposition that "without having provoked the assault" should be read into the provision: *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 [33 C.R.N.S. 22] (Ont. C.A.); *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174 (Ont. C.A.); *R. v. Merson* (1983), 4 C.C.C. (3d) 251 (B.C. C.A.); *R. v. Chamberland* (1988), 96 A.R. 1 (C.A.). The respondent relied on the following cases to support his position that provocation is irrelevant to s. 34(2): *R. v. Stubbs* (1988), 28 O.A.C. 14; *R. v. Nelson* (1992), 71 C.C.C. (3d) 449 [13 C.R. (4th) 359].

12 Austin J.A. determined that the cases relied on by the Crown did not directly confront the issue he had to consider, and were "broad brush" statements concerning the interrelationship between ss. 34 and 35 of the *Criminal Code*. In contrast, the issue was addressed in the two cases on which the respondent relied. In both of those cases, the Ontario Court of Appeal had concluded that provocation is not relevant to s. 34(2). These cases, in his opinion, were conclusive.

13 Austin J.A. then turned to the second issue. He disagreed with the respondent that s. 37 of the *Criminal Code* should be put to the jury in every case where self-defence might arise. He noted that counsel for the respondent had been invited to suggest a scenario which would not be covered by ss. 34 and 35, and which might therefore be covered by s. 37. No scenario was put forward. There was therefore no basis on which s. 37 could have been put to the jury.

14 As a result, the court set aside the respondent's conviction and ordered a new trial.

IV. Analysis

15

A. Introduction

16 This case raises a question of pure statutory interpretation: is the self-defence justification in s. 34(2) of the *Criminal Code* available where an accused is an initial aggressor, having provoked the assault against which he claims to have defended himself? The trial judge, Moldaver J., construed s. 34(2) as not applying in such a circumstance. The Ontario Court of Appeal disagreed.

17 The conflict between ss. 34 and 35 is obvious on the face of the provisions. Section 34(1) begins with the statement, "Every one who is unlawfully assaulted without having provoked the assault ...". In contrast, s. 34(2) begins, "Every one who is unlawfully assaulted ...". Missing from s. 34(2) is any reference to the condition, "without having provoked the assault". The fact that there is no non- provocation requirement in s. 34(2) becomes important when one refers to s. 35, which explicitly applies where an accused has "without justification provoked an assault ...". Therefore, both ss. 34(2) and 35 appear to be available to initial aggressors. Hence, the issue arises in this case of whether the respondent, as an initial aggressor raising self-defence, may avail himself of s. 34(2), or should be required instead to meet the more onerous conditions of s. 35.

18 As a preliminary comment, I would observe that ss. 34 and 35 of the *Criminal Code* are highly technical, excessively detailed provisions deserving of much criticism. These provisions overlap, and are internally inconsistent in certain respects. Moreover, their relationship to s. 37 (as discussed below) is unclear. It is to be expected that trial judges may encounter difficulties in explaining the provisions to a jury, and that jurors may find them confusing. The case at bar demonstrates this. During counsel's objections to his charge on ss. 34 and 35, the trial judge commented, "Well, it seems to me these sections of the *Criminal Code* are unbelievably confusing." I agree with this observation.

19 Despite the best efforts of counsel in the case at bar to reconcile ss. 34 and 35 in a coherent manner, I am of the view that any interpretation which attempts to make sense of the provisions will have some undesirable or illogical results. It is clear that legislative action is required to clarify the *Criminal Code*'s self-defence regime.

B. Did the Trial Judge Err in Charging the Jury that s. 34(2) of the Criminal Code is not Available to an Initial Aggressor?

(i) Section 34(2) is not Ambiguous

20 In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the

task of interpretation does not arise (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 29).

21 While s. 34(1) includes the statement, "without having provoked the assault", s. 34(2) does not. Section 34(2) is clear, and I fail to see how anyone could conclude that it is, on its face, ambiguous in any way. Therefore, taking s. 34(2) in isolation, it is clearly available to an initial aggressor.

22 The Crown has asked this court to read into s. 34(2) the words, "without having provoked the assault". The Crown submits that by taking into consideration the common law of self-defence, legislative history, related *Criminal Code* provisions, margin notes, and public policy, it becomes clear that Parliament could not have intended s. 34(2) to be available to initial aggressors. Parliament's failure to include the words, "without having provoked the assault" in s. 34(2) was an oversight, which the Crown is asking this court to correct.

23 The Crown labels its approach "contextual". There is certainly support for a "contextual approach" to statutory interpretation. Driedger, in *Construction of Statutes* (2nd ed. 1983), has stated the modern principle of contextual construction as follows (at p. 87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament ... Lord Atkinson in *Victoria (City) v. Bishop of Vancouver Island* [[1921] A.C. 384, at p. 387] put it this way:
>
> > In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

Driedger then reduces the principle to five steps of construction (at p. 105):

> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
>
> 2. The words of the individual provision to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.
>
> 3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.
>
> 4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in *pari materia*, or the general law, then an unordinary meaning that will produce harmony is to be given the words, *if they are reasonably capable of bearing that meaning*.
>
> 5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected. [Emphasis added.]

24 Certainly, interpreting statutory provisions in context is a reasonable approach. However, a "contextual approach" lends no support to the Crown's position. First, the contextual approach takes as its starting point the intention of the legislature. However, given the confused nature of the *Criminal Code* provisions related to self-defence, I cannot imagine how one could determine what Parliament's intention was in enacting the provisions. Therefore, it seems to me that in this case one is prevented from embarking on a contextual analysis ab initio.

25 The Crown argues that it was Parliament's intention that neither s. 34(1) nor s. 34(2) be available to initial aggressors, and that it was a mere oversight that the words chosen in s. 34(2) do not give effect to this intention. I would have thought it would be equally persuasive to argue that Parliament intended both ss. 34(1) and (2) to be available to initial aggressors, and that Parliament's mistake was in *including* the words "without having provoked the assault" in s. 34(1).

26 Parliament's intention becomes even more cloudy when one refers to s. 45 of *The Criminal Code, 1982*, S.C. 1892, c. 29, which was the forerunner of ss. 34(1) and 34(2):

> 45. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; *and every one so assaulted* is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. [Emphasis added.]

There is a clear ambiguity in this provision. Does the expression "everyone so assaulted" refer to "every one unlawfully assaulted", or to "every one unlawfully assaulted, not having provoked such assault"? This question is academic, since Parliament appears to have resolved the ambiguity in its 1955 revision of the *Criminal Code*, S.C. 1953-54, c. 51. The first part of the former s. 45 was renumbered s. 34(1), and the second part became s. 34(2). The new s. 34(2) omitted any reference to a non-provocation requirement.

27 If Parliament's intention is to be implied from its legislative actions, then there is a compelling argument that Parliament intended s. 34(2) to be available to initial aggressors. When Parliament revised the *Criminal Code* in 1955, it could have included a provocation requirement in s. 34(2). The result would then be similar to s. 48(2) of the New Zealand *Crimes Act, 1961*, S.N.Z. 1961, No. 43 (repealed and substituted 1980, No. 63, s. 2) which was virtually identical to s. 34(2) save that it included an express non-provocation requirement:

> 48. ...
>
> (2) Every one unlawfully assaulted, *not having provoked the assault*, is justified in repelling force by force although in so doing he causes death or grievous bodily harm, if ... [Emphasis added.]

The fact that Parliament did not choose this route is the best and only evidence we have of legislative intention, and this evidence certainly does not support the Crown's position.

28 Second, the contextual approach allows the courts to depart from the common grammatical meaning of *words* where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. I would agree with Pierre-André Côté's observation in his book *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 231, that:

> Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say.

The Crown is asking this court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to *amending* s. 34(2), which is a legislative and not a judicial function. The contextual approach provides no basis for the courts to engage in legislative amendment.

29 Third, in this case we cannot lose sight of the overriding principle governing the interpretation of penal provisions. In *Marcotte v. Canada (Deputy Attorney General)*, [1976] 1 S.C.R. 108, DicksonJ. (as he then was) stated the principle as follows, at p. 115:

> Even if I were to conclude that the relevant statutory provisions were ambiguous and equivocal ... I would have to find for the appellant in this case. It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the

> construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced.

Section 34(2), as a defence, acts as a "subtraction" from the liability which would otherwise flow from the criminal offences contained in the *Criminal Code*. *Criminal Code* provisions concerning offences and defences both serve to define criminal culpability, and for this reason they must receive similar interpretive treatment.

30 This principle was eloquently stated by La Forest J.A. (as he then was) in *Re Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201 (C.A.), at p. 210:

> There is no doubt that the duty of the courts is to give effect to the intention of the Legislature as expressed in the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect. This follows from the constitutional doctrine of the supremacy of the Legislature when acting within its legislative powers. The fact that the words as interpreted would give an unreasonable result, however, is certainly ground for the courts to scrutinize a statute carefully to make abundantly certain that those words are not susceptible of another interpretation. For it should not be readily assumed that the Legislature intends an unreasonable result or to perpetrate an injustice or absurdity.
>
> This scarcely means that the courts should attempt to reframe statutes to suit their own individual notions of what is just or reasonable.

31 It is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation. By this same reasoning, where such a provision is, on its face, favourable to an accused, then I do not think that a court should engage in the interpretive process advocated by the Crown for the sole purpose of narrowing the provision and making it less favourable to the accused. Section 34(2), on its face, is available to the respondent. It was, with respect, an error for the trial judge to narrow the provision in order to preclude the respondent from relying on it.

32 I therefore conclude that s. 34(2) is not an ambiguous provision, and is available to an initial aggressor. I find myself in agreement with the Ontario Court of Appeal, which has reached a similar conclusion in its rulings in *Stubbs*, supra, *Nelson*, supra, and in the case at bar.

(ii) Even Though s. 34(2) May Give Rise to Absurd Results, the Crown's Interpretation Cannot be Adopted

33 It is important to reiterate that there is no ambiguity on the face of s. 34(2). The Crown's argument that the provision is ambiguous relies on legislative history, the common law, public policy, margin notes, and the relationship between ss. 34 and 35. The Crown alleges that it would be absurd to make s. 34(2) available to initial aggressors when s. 35 so clearly applies. Parliament, the Crown submits, could not have intended such an absurd result, and therefore the provision cannot mean what it says. Essentially, the Crown equates absurdity with ambiguity.

34 The Crown asks this court to resolve the absurdity/ambiguity by narrowing s. 34(2) so that it does not apply in the case of an initial aggressor. If the Crown is correct, then an initial aggressor could only rely on s. 35 of the *Criminal Code*, which imposes more onerous requirements. In particular, s. 35(*c*) only allows an initial aggressor to raise self-defence where:

> (*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

35 The respondent takes the position that if there is ambiguity, it must be resolved in the manner most favourable to accused persons. As a result, s. 34(2) must be made available to initial aggressors.

36 I am of the view that the Crown's argument linking absurdity to ambiguity cannot succeed. I would adopt the following proposition: where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted

by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be (*Maxwell on the Interpretation of Statutes*, supra, at p. 29). The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.

37 In *Altrincham Electric Supply Ltd. v. Sale Urban District Council* (1936), 154 L.T. 379 (H.L.), Lord Macmillan criticized the view that absurdity alone would justify the rejection of a literal interpretation of a statutory provision. He emphasized that an "absurdity approach" is generally unworkable because of the difficulty of developing criteria by which "to judge whether a particular enactment, if literally read, is so absurd that Parliament cannot have intended it to be so read ..." (p. 388). He then proceeded, at p. 388, to outline what I believe to be the correct approach to statutory interpretation where absurdity is alleged:

> ... if the language of an enactment is ambiguous and susceptible of two meanings, one of which is consonant with justice and good sense while the other would lead to extravagant results, a court of law will incline to adopt the former and to reject the latter, even although the latter may correspond more closely with the literal reading of the words employed.

38 Thus, only where a statutory provision is ambiguous, and therefore reasonably open to two interpretations, will the absurd results flowing from one of the available interpretations justify rejecting it in favour of the other. Absurdity is a factor to consider in the interpretation of ambiguous statutory provisions, but there is no distinct "absurdity approach".

39 However, assuming for the moment that absurdity by itself is sufficient to create ambiguity, thus justifying the application of the contextual analysis proposed by the Crown, I would still prefer a literal interpretation of s. 34(2).

40 As stated above, the overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons. Moreover, in choosing between two possible interpretations, a compelling consideration must be to give effect to the interpretation most consistent with the terms of the provision. As Dickson J. noted in *Marcotte*, supra, when freedom is at stake, clarity and certainty are of fundamental importance. He continued, at p. 115:

> If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

Under s. 19 of the *Criminal Code*, ignorance of the law is no excuse to criminal liability. Our criminal justice system presumes that everyone knows the law. Yet we can hardly sustain such a presumption if courts adopt interpretations of penal provisions which rely on the reading-in of words which do not appear on the face of the provisions. How can a citizen possibly know the law in such a circumstance?

41 The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law.

42 I would agree that some absurdity flows from giving effect to the terms of s. 34(2). One is struck, for example, by the fact that if s. 34(2) is available to an initial aggressor who has killed or committed grievous bodily harm, then that accused may be in a better position to raise self-defence than an initial aggressor whose assault was less serious. This is because the less serious aggressor could not take advantage of the broader defence in s. 34(2), as that provision is only available to an accused who "causes death or grievous bodily harm". Section 34(1) would not be available since it is explicitly limited to those who have not provoked an assault. Therefore, the less serious aggressor could only have recourse to s. 35, which imposes a retreat requirement. It is, in my opinion, anomalous that an accused who commits the most serious act has the broadest defence.

43 Even though I agree with the Crown that the interpretation of s. 34(2) which makes it available to initial aggressors may be somewhat illogical in light of s. 35, and may lead to some absurdity, I do not believe that such considerations should lead this court to narrow a statutory defence. Parliament, after all, has the right to legislate illogically (assuming that this does

not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly.

44 What is most important in this case is that s. 34(2) applies on its face to initial aggressors, and is therefore open to such an interpretation. This interpretation is more favourable to accused persons than the alternative advanced by the Crown. Moreover, this interpretation is consistent with the clear wording of s. 34(2), thus providing certainty for citizens. Although I appreciate the efforts of the Crown to underscore the problems with the *Criminal Code*'s self-defence regime through a broad historical, academic and policy-based analysis, I suspect that very few citizens are equipped to engage in this kind of interpretive approach. Rare will be the citizen who will read ss. 34 and 35, and recognize the logical inconsistencies as between the two provisions. Rarer still will be the citizen who will read the provisions and conclude that they are inconsistent with the common law, or with Parliament's intention in 1892, or with margin notes. Given that citizens have to live with the *Criminal Code*, and with judicial interpretations of the provisions of the Code, I am of the view that s. 34(2) must be interpreted according to its plain terms. It is therefore available where an accused is an initial aggressor, having provoked the assault against which he claims to have defended himself.

C. Section 37 of the Criminal Code

45 Before concluding, I will briefly address the respondent's argument related to s. 37 of the *Criminal Code*. Section 37, itself a distinct justification, contains a general statement of the principle of self-defence:

> 37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.
>
> (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

46 Section 37 adds to the confusion surrounding ss. 34 and 35, since it appears to make the self-defence justification available to an accused in any circumstance where the force used by that accused was (i) necessary, and (ii) proportionate. If s. 37 is available to an initial aggressor (and there is no indication that it is not), then it would appear to be in conflict with s. 35. Moreover, it is difficult to understand why Parliament would enact the specific and detailed justifications in ss. 34 and 35, yet then make available a broad justification in s. 37 which appears to render ss. 34 and 35 redundant.

47 Although Parliament's intention in enacting s. 37 is unclear, at the very least the provision must serve a gap-filling role, providing the basis for self-defence where ss. 34 and 35 are not applicable. The respondent, though taking the position that Moldaver J. erred in not putting s. 37 to the jury at his trial, has been unable to advance a scenario under which ss. 34 (as interpreted above) and 35 would not afford him a defence. Therefore, there appears to be no room left for s. 37 in this case.

48 The respondent has suggested that s. 37 should be put to the jury in all cases because it outlines the basic principles of self-defence, and this will be helpful to the jury. However, a trial judge can explain these principles without resort to s. 37, since these principles form the foundation of ss. 34 and 35.

D. Conclusion

49 With respect, Moldaver J. erred in instructing the jury at the respondent's trial that s. 34(2) was not available to an initial aggressor. I therefore am in agreement with the Ontario Court of Appeal. The appeal is dismissed, the respondent's conviction set aside and a new trial ordered.

***McLachlin J.* (dissenting) (*La Forest, L'Heureux-Dubé*] and *Gonthier JJ.* concurring):**

Introduction

50 This case raises the issue of whether a person who provokes another person to assault him can rely on the defence of self-defence, notwithstanding the fact that he failed to retreat from the assault he provoked. The Chief Justice would answer this question in the affirmative. I, with respect, take a different view.

51 The accused McIntosh was a disc jockey. He had given some sound equipment to the deceased to repair. Over the next eight months, McIntosh tried to get the equipment, without success. On one occasion, McIntosh told the deceased he would "get him" if the equipment were not returned. On another occasion, the deceased fled though the back door when McIntosh appeared at his front door. On the day of the killing, McIntosh, armed with a kitchen knife, ordered the deceased to return the equipment. According to McIntosh, the deceased responded by pushing him. They struggled. The deceased picked up a dolly, raised it to head level, and came at the respondent. McIntosh stabbed him, threw the knife down, and fled.

52 It was open to the jury to find, in this scenario, that McIntosh had provoked the assault by threatening the deceased while armed with a knife. This raised the question of which of the self-defence provisions of the *Criminal Code* apply to a person who provokes the aggression that led to the killing. The answer depends on the inter pretation accorded to ss. 34 and 35 of the *Criminal Code*, R.S.C. 1985, c. C-46, which codify self-defence in Canada. Section 35 clearly applies where the accused initiated the aggression; however, it contains a requirement that the accused have attempted to retreat, and might not have assisted McIntosh. Sections 34(1) and 34(2), on the other hand, contain no requirement to retreat. Section 34(1) clearly does not apply to the initial aggressor. The debate, in these circumstances, focused on s. 34(2). If McIntosh could avail himself of s. 34(2), he would be entitled to rely on self-defence, notwithstanding findings that he provoked the fight and did not retreat.

53 The trial judge instructed the jury that s. 34(2) would not apply if they found that McIntosh had provoked the fight in which he killed the deceased. In his view, only s. 35 was available to an initial aggressor. The jury returned a verdict of guilty of manslaughter. McIntosh appealed on the ground that the trial judge erred in telling the jury that s. 34(2) did not apply to the initial aggressor. The Court of Appeal agreed and ordered a new trial: (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199. The Crown now appeals to this court, arguing that the trial judge correctly instructed the jury that s. 34(2) is not available to persons who provoke the attack which led to the killing.

54 A second issue arose with respect to s. 37 of the *Criminal Code*. The trial judge declined to put it to the jury, on the ground that counsel had not indicated how it could be applied to the evidence in the case. The Court of Appeal agreed.

Analysis

55

1. Does Section 34(2) of the Criminal Code Apply to a Person Who Provokes an Attack?

56 McIntosh raises one main argument. It is this. Section 34(1) states expressly that it does not apply to people who have provoked the assault from which they defended themselves. Section 34(2), by contrast, does not expressly exclude provokers. Therefore, s. 34(2) must be read as applying to people who have provoked the assault from which they defended themselves. In order to prevent s. 34(2) from applying to initial aggressors, it would be necessary to "read in" to s. 34(2) the phrase found in s. 34(1): "without having provoked the assault". On this basis, it is argued that the provisions contain no ambiguity. It is further argued that even if they did contain an ambiguity, it must be resolved in favour of the accused, following the principle that an ambiguity in penal provisions should be resolved in the manner most favourable to accused persons.

57 Section 34(1), as mentioned, contains the phrase "without having provoked the assault". It reads:

> **Self-defence against unprovoked assault**
>
> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

58 Section 34(2), on the other hand, contains no such phrase. It reads:

> **Extent of justification**
>
> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
>
> (*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

59 Section 35 specifically refers to initial aggressors or provocateurs. It reads:

> **Self-defence in case of aggression**
>
> 35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if
>
> (*a*) he uses the force
>
> (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and
>
> (ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;
>
> (*b*) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and
>
> (*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

60 At first blush the argument seems attractive that the absence of the phrase "without having provoked the assault" in s. 34(2) makes it applicable to all cases of self-defence, even those where the accused provoked the attack. Yet, a closer look at the language, history and policy of ss. 34 and 35 of the *Criminal Code* suggests that this argument should not prevail.

61 The Chief Justice starts from the premise that "the language of the statute is plain and admits of only one meaning" (p. 181). From this he concludes that "the task of interpretation does not arise" (p. 181). I cannot agree. First, the language is not, with respect, plain. The facial ambiguity of s. 34(2) is amply attested by the different interpretations which it has been given by different courts. But even if the words were plain, the task of interpretation cannot be avoided. As *Driedger on the Construction of Statutes* (3rd ed. 1994) puts it at p. 4, "no modern court would consider it appropriate to adopt that meaning, however 'plain', without first going through the work of interpretation".

62 The point of departure for interpretation is not the "plain meaning" of the words, but the intention of the legislature. The classic statement of the "plain meaning" rule, in the *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, 8 E.R. 1034 (H.L.), at p. 1057, makes this clear: "the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act." To quote *Driedger*, at p. 3, "[t]he purpose of the legislation must be taken into account, even where the meaning appears to be clear, and so must the consequences." As Lamer C.J.C. put it in *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025, at p. 1042: "the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation". The plain meaning of the words, if such exists, is a secondary interpretative principle aimed at discerning the intention of the legislator. If the words admit of

only one meaning, they may indeed "best declare the intention of the lawgiver" as suggested in the *Sussex Peerage Case* at p. 1057, but even here it is the intention, and not the "plain meaning" which is conclusive. But if, as in the case of s. 34(2), the words permit of doubt as to the intention of Parliament, other matters must be looked to to determine that intention.

63 I also depart from the Chief Justice on his application of the proposition that "where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation". This court in *Marcotte v. Canada (Deputy Attorney General)*, [1976] 1 S.C.R. 108, at p. 115, made it clear that this rule of construction applies only where "real ambiguities are found, or doubts of substance arise" (per Dickson J. (as he then was)). If the intention of Parliament can be ascertained with reasonable precision, the rule has no place. As La Forest J. put it in *R. v. Deruelle*, [1992] 2 S.C.R. 663, at pp. 676-77:

> In the court below, the majority suggested that any ambiguity in a penal provision should be resolved in favour of the accused ... While it is true that s. 254(3) is not a model of clarity, in this instance the intent of Parliament is sufficiently clear that there is no need for the aid of that canon of statutory construction.

64 In summary, then, I take the view that this court cannot evade the task of interpreting s. 34(2). The court's task is to determine the intention of Parliament. The words of the section, taken alone, do not provide a clear and conclusive indication of Parliament's intention. It is therefore necessary to look further to determine Parliament's intention to the history of the section and the practical problems and absurdities which may result from interpreting the section one way or the other. These considerations lead, in my respectful view, to the inescapable conclusion that Parliament intended s. 34(2) to apply only to unprovoked assaults. This in turn leads to the conclusion that the trial judge was correct in declining to leave s. 34(2) with the jury.

The History of s. 34(2)

65 Self-defence at common law rested on a fundamental distinction between cases where no fault was attributable to the killer, and cases where the killing was partly induced by some fault of the killer. Where the killer was not at fault — that is where he had not provoked the aggression — the homicide was called "justifiable homicide". Where blame could be laid on the killer, as where he had provoked the aggression, on the other hand, the homicide was called "excusable homicide". (See E.H. East, *A Treatise of the Pleas of the Crown* (1803), vol. 1; William Blackstone, *Commentaries on the Laws of England* (1769), Book IV.)

66 Justifiable homicide and excusable homicide attracted different duties. In the case of justifiable homicide, or homicide in defending an unprovoked attack, the killer could stand his ground and was not obliged to retreat in order to rely on the defence of self-defence. In the case of excusable homicide, on the other hand, the killer must have retreated as far as possible in attempting to escape the threat which necessitated homicide, before he could claim self-defence. In other words, unprovoked attacks imposed no duty to retreat. Provoked attacks did impose a duty to retreat.

67 The two situations recognized at common law — justifiable homicide and excusable homicide — were codified in the first Canadian *Criminal Code* in 1892, S.C. 1892, c. 29, in ss. 45 and 46. Section 45 when enacted in 1892 differed from its modern equivalent, s. 34, in that it was not divided into two subsections. Rather, it consisted of two parts divided by a semi-colon. The wording too was slightly different. Its wording indicated that the phrase at the heart of this appeal — "not having provoked the assault" — was applicable to both halves of the section. Section 45 read:

> **Self-defence against unprovoked assault**
>
> 45. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is more than is necessary for the purpose of self-defence; and every one so assaulted is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

68 The 1892 Code was clear and conformed to the common law on which it was based. An accused who had not provoked the assault was a semi-person "unlawfully assaulted". He was entitled to stand his ground and need not retreat. An accused who had provoked the assault, on the other hand, was covered by s. 46 and could not claim to have acted in self-defence unless he retreated.

69 In 1906 the *Criminal Code* underwent a general revision. One of the policies of the revision was to divide longer provisions into subsections. In accordance with this policy, s. 45 became ss. 53(1) and (2). The wording, however, remained identical. The marginal note to s. 53(1) read "Self defence. Assault.", and the marginal note to s. 53(2) read "Extent justified." In 1927, while the section remained identical in wording and numbering, the marginal note to s. 53(1) reverted to "Self-defence against unprovoked assault".

70 In 1955, in the course of another general revision, S.C. 1953-54, c. 51, s. 53 became s. 34. The words "Every one so assaulted is justified, though he causes" in the second subsection were removed, and the words "Everyone who is unlawfully assaulted and who causes" were substituted. The second subsection was further divided into two paragraphs, but all else remained the same. Section 35, like the former s. 46, dealt with provoked assault. As might be expected, s. 34 imposed no requirement of retreat; s. 35 did. Thus the common law distinction between justifiable homicide and excusable homicide was carried forward.

71 One incongruity, however, emerged with the 1955 revision. The phrase "so assaulted" in the second part of the old s. 45 had clearly referred back to the phrase in the first part "unlawfully assaulted, not having provoked such assault". In 1955, however, when "Every one so assaulted" was replaced in the severed subsection by "Every one who is unlawfully assaulted", the clear reference back that had been present in the older versions became less clear. The phrase "not having provoked such assault", which in the old s. 45 had modified or explained the term "unlawfully assaulted" in both the first and second part of the section, was thus effectively deleted from s. 34(2).

72 History provides no explanation for why the explanatory phrase was omitted from s. 34(2). Certainly there is no suggestion that Parliament was attempting to change the law of self-defence. The more likely explanation, given the history of the changes, is inadvertence. In the process of breaking the old s. 45 into two subsections and later substituting new words for the old connector "so assaulted", and in the context of the significant task of a general revision of the entire Code, the need to insert the modifying phrase "not having provoked such assault" in the newly worded subsection was overlooked.

73 The marginal notes accompanying ss. 34 and 35 support the view that the omission of the phrase "without having provoked the assault" in the 1955 Code was inadvertent and that Parliament continued to intend that s. 34 would apply to unprovoked assaults and s. 35 to provoked assaults. The note for s. 34 is "Self defence against unprovoked assault/Extent of justification", for s. 35 "Self defence in case of aggression", namely assault or provocation. While marginal notes are not part of the legislative act of Parliament, and hence are not conclusive support in interpretation, I agree with the view of Wilson J. in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at pp. 556-58, that they may be of some limited use in gleaning the intention of the enactment. Inasmuch as they do indicate an intention, they clearly support the interpretation suggested by the above discussion.

74 Parliament's retention of the phrase "unlawfully assaulted" in both s. 34(1) and s. 34(2) provides yet further confirmation of the view that Parliament did not intend to remove the long-standing distinction between provoked and unprovoked assault. The meaning of that phrase, in the context of the two sections, is indicated by its conjunction with the phrase "not having provoked the assault" which modified "unlawfully assaulted" in the 1892 codification. This phrase in the 1892 codification suggests that "unlawfully assaulted" in the context of that section meant "not having provoked the assault". There is no reason to suppose that the meaning of the phrase "unlawfully assaulted" changed in the intervening years. If so, then on its plain wording s. 34(2) applies only to an unprovoked assault, even in the absence of the phrase "without having provoked the assault".

75 Parliament's intention to retain the long-standing distinction between provoked and unprovoked assault in the context of self-defence is also confirmed by the fact that neither s. 34(1) nor s. 34(2) imposes a duty to retreat, indicating that these provisions deal with the common law category of justifiable homicide, contrasted with the excusable homicide of s. 35.

76 Taking all this into account, can it be said that Parliament intended to change the meaning of s. 34(2) in the 1955 codification, thus abrogating sixty years of statutory criminal law, based on hundreds of years of the common law? I suggest not. To effect such a significant change, Parliament would have made its intention clear. This it did not do. If the word "unlawful" is given its proper meaning, it is unnecessary to read anything into the section to conclude that it does not apply to provoked assaults. Alternatively, if it were necessary to read in the phrase "without having provoked the assault", this would be justified. *Driedger* at p. 106 states that a court will be justified in making minor amendments or substituting one phrase for another where a drafting error is evidenced by the fact that the provision leads to a result that cannot have been intended. Redrafting a provision, it suggests at p. 108, is acceptable where the following three factors are present: (1) a manifest absurdity; (2) a traceable error; and (3) an obvious correction. All three conditions are filled in the case at bar. In a similar vein, Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), suggests that words may be read in to "express what is already implied by the statute" (p. 232). This condition too is met in the case of s. 34(2).

77 The argument that Parliament intended to effect a change to the law of self-defence in 1955 rests finally on the presumption that a change in wording is intended to effect substantive change. But this presumption is weak and easily rebutted in Canada, where making formal improvements to the statute book is a minor industry. This is particularly the case where, as in this case, there is evidence of a drafting error: *Driedger*, at pp. 450-51.

78 I conclude that the intention of Parliament is clear and that s. 34(2), read in its historical context, applies only to unprovoked assaults.

The Jurisprudence

79 For many years after the 1955 amendments to the *Criminal Code*, ss. 34 and 35 were interpreted in the way that the history of the sections and the marginal notes suggest. In two 1975 cases, the Ontario Court of Appeal made broad statements to the effect that s. 34 was available only to the victims of unprovoked assaults. In *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174, at p. 176, the Ontario Court of Appeal (per Kelly, Lacourciere and Zuber JJ.A.) stated:

> The trial Judge did not instruct the jury as to the effect of s. 35 of the *Criminal Code* and in our view, he should have so done. Section 34 entitles one to defend himself from an unlawful assault that he has not provoked. Section 35 deals with the right of a person to defend himself from an assault which he has provoked. Section 35 should have been left with the jury in the event that they were of the view that Bolyantu had provoked an assault (either actual or believed) by Stimac.

In *R. v. Squire* (1975), 26 C.C.C. (2d) 219 [31 C.R.N.S. 314] (Ont. C.A.), at p. 233 [C.C.C., p. 328 C.R.N.S.], Martin J.A. for the court distinguished between the situation where the deceased had been provoked and hence had a "legal right" to strike back, and a situation where he had not been provoked, in which case the deceased's strike would be "unlawful". In the former case, s. 35 governed, in the latter s. 34.

> It is clear that a blow struck justifiably in self-defence by the deceased cannot afford provocation, since it is something that the deceased "had a legal right to do", within the proviso to s. 215(3) of the *Code*. In such circumstances the blow is not a wrongful act.
>
> *The case of a person who has willingly engaged in a fight without any necessity for defending himself falls within the provisions of s. 35 of the Code* which establishes the conditions necessary to justify the subsequent use of force in self-defence by one who has without justification assaulted another or who has without justification provoked an assault upon himself. *It is difficult to see how in such circumstances one who has actually and willingly begun to fight could be said to be the victim of an unprovoked assault under s. 34.* [Underlining added; italics in original.]

80 The British Columbia Court of Appeal has followed the same approach. In *R. v. Merson* (1983), 4 C.C.C. (3d) 251, at p. 255, it stated, per Nemetz C.J.B.C. (in dissent, but not on this point):

> Generally speaking, s. 34 provides a defence of self-defence to a victim. Section 35 provides such a defence to the aggressor.

And per Taggart J.A., at p. 266:

> Unlike s. 34, s. 35 is available to an accused notwithstanding the fact that he initiates the conflict by assaulting, or by provoking an assault by, the other combatant.

The Alberta Court of Appeal has taken the same view in *R. v. Alkadri* (1986), 29 C.C.C. (3d) 467, at p. 470, per Kerans J.A.:

> If he did not provoke that assault, the killing is justified under s. 34(2) if the jury has a doubt whether the accused caused the death under reasonable apprehension of death and in the belief he had no choice. If, on the other hand, the jury views the accused as the original aggressor, he can only invoke s. 35 and the jury must additionally ask itself both whether he did not, before the threat to his life arose, himself try to kill and whether he had, after he started the fight, retreated from it as far as was feasible.

81 More recently, the Ontario Court of Appeal in two cases, *R. v. Stubbs* (1988), 28 O.A.C. 14, and *R. v. Nelson* (1992), 71 C.C.C. (3d) 449 [13 C.R. (4th) 359], took the view that the court took in this case, that s. 34(2) is available to an aggressor. Viewed in the historical continuum, these decisions represent a departure from the settled view at common law and throughout most of the first century of the Canadian *Criminal Code* that both branches of s. 34 apply only in the situation of justifiable assault, that is where the accused did not provoke the fight that led to the killing.

Policy Considerations

82 The interpretation of ss. 34 and 35 which I have suggested is supported by policy considerations. The Crown argues that it would be absurd to make s. 34(2) available to aggressors when s. 35 so clearly applies. Parliament, it argues, could not have intended such a result. More practically, as the Chief Justice notes, the sections read as McIntosh urges may lead to absurd results. If s. 34(2) is available to an initial aggressor who has killed or committed grievous bodily harm, then that accused may be in a better position to raise self-defence than an initial aggressor whose assault was less serious; since s. 34(2) is only available to an aggressor who "causes death or grievous bodily harm", the less serious aggressor would not fall under its ambit. The less serious aggressor, forced to rely on s. 35, would have no defence in the absence of retreat. It is anomalous, to use the Chief Justice's word, that an accused whose conduct is the more serious has the broader defence.

83 Common sense suggests that ss. 34 and 35 set out two situations, each with its corresponding defence. The broader defence of s. 34, not requiring retreat, goes naturally with the less serious category of conduct by the accused, namely, the situation where the accused is unlawfully attacked, not having provoked the assault. The narrower defence of s. 35 similarly goes naturally with the more serious conduct by the accused, the situation where the accused as aggressor provoked the assault.

84 While I agree with the Chief Justice that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear indication to the contrary, the courts must impute a rational intent to Parliament. As Lord Scarman put it in *Stock v. Frank Jones Tipton Ltd.*, [1978] 1 W.L.R. 231 (H.L.), at p. 239: "If the words used by Parliament are plain, there is no room for the 'anomalies' test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake." That, in my view, describes this case. Indeed, as noted earlier, the law goes so far as to permit a missing provision to be read in where absurdity, traceable error and obvious correction combine.

85 Not only is the result McIntosh argues for anomalous; to my mind it is unwise and unjust. The common law has for centuries insisted that the person who provokes an assault and subsequently kills the person he attacks when that person responds to the assault must retreat if he wishes to plead self-defence. Otherwise, a person who wished to kill another and escape punishment might deliberately provoke an attack so that he might respond with a death blow. People who provoke attacks must know that a response, even if it is life-threatening, will not entitle them to stand their ground and kill. Rather, they must retreat. The obligation to retreat from provoked assault has stood the test of time. It should not lightly be discarded. Life is precious; the justification for taking it must be defined with care and circumspection.

Conclusion on Section 34(2)

86 In summary, the history, the wording and the policy underlying s. 34(2) all point to one conclusion

87 Parliament did not intend it to apply to provoked assault. It follows that the trial judge did not err in limiting s. 34(2) in this way in his instructions to the jury.

2. Should s. 37 of the Criminal Code Have Been Left with the Jury?

88 Section 37 refers to two aspects of defence of the person self- defence and defence of others. With respect to defence of others, the section is unique, and its meaning is therefore clear. I agree with the Chief Justice that the purpose of s. 37 in the self-defence context is not readily apparent and appears to conflict with s. 35, insofar as it applies to an initial aggressor. However, again the section must be viewed in keeping with the overall scheme of self-defence established by Parliament. Section 37 gives a broad overview of the principles of self-defence. Sections 34 and 35 deal with the common law of justifiable and excusable homicide. They thus deal with death and grievous bodily harm. It must therefore be assumed that ss. 34 and 35 exclusively dictate the application of the principles laid out in s. 37 where death or grievous bodily harm has occurred. Where death or grievous bodily harm has not occurred, the principles of s. 37 apply without the focus and direction provided by ss. 34 or 35. It follows that the trial judge was correct in declining to leave it to the jury.

Conclusion

89 I would allow the appeal and restore the conviction.

Appeal dismissed.

TAB C

Amormino v. Ontario (Police Services Board), 2015 ONSC 7165 (Div. Ct.)

2015 ONSC 7165
Ontario Superior Court of Justice (Divisional Court)

Amormino v. Ontario (Police Services Board)

2015 CarswellOnt 18105, 2015 ONSC 7165, 261 A.C.W.S. (3d) 209, 341 O.A.C. 267, 345 C.R.R. (2d) 221

Detective Constable Salvatore Amormino (OPP), Applicant and Police Services Board (OPP), Superintendent Robin D. Mcelary-Downer (Force Adjudicator-OPP), Commissioner of Provincial Police (OPP) J.V.M. (Vince) Hawkes, Minister of Community Safety and Correctional Services, Attorney General of Ontario, OPP Association (Karl Walsh), Respondents

M.A. Sanderson J.

Heard: November 17, 2015
Judgment: November 27, 2015
Docket: Toronto 551/14

Counsel: Rocco Galati, for Applicant
Christopher Diana, for Respondents, Superintendent Robin D. McElary-Downer, Commission of Provincial Police (OPP) J.V.N. (Vince) Hawkes, Minister of Community and Safety Correctional Services

Subject: Civil Practice and Procedure; Constitutional; Public; Human Rights

Related Abridgment Classifications

Administrative law
XII Practice and procedure
XII.2 Judicial review
XII.2.g Stay of proceedings

Headnote

Administrative law --- Practice and procedure — Miscellaneous
In his application for judicial review, applicant police officer challenged constitutionality of disciplinary proceedings — Applicant brought motion for stay of disciplinary proceedings until after his application for judicial review had been heard and decided — Motion granted — There was serious issue to be tried — Further reputational harm could occur if stay were not granted and disciplinary proceedings were to go forward before application for judicial review were to be decided — Any such reputational harm could not be cured later, even by award of monetary damages — Balance of convenience was in favour of short stay requested — Delay in hearing being sought would likely be three months or less — Delay of three months or less would be unlikely to seriously undermine public confidence in police service's disciplinary process — Before certain date, all parties had apparently been prepared to agree that disciplinary proceedings should not commence until after application for judicial review had been heard and decided.

Table of Authorities

Cases considered by *M.A. Sanderson J.*:

Adriaanse v. Malmo-Levine (1998), 1998 CarswellNat 2628, 161 F.T.R. 25, 1998 CarswellNat 4107 (Fed. T.D.) —

considered

Bennett v. British Columbia (Superintendent of Brokers) (1993), 77 B.C.L.R. (2d) 145, (sub nom. *Doman v. British Columbia (Securities Commission))* 22 B.C.A.C. 300, (sub nom. *Doman v. British Columbia (Securities Commission))* 38 W.A.C. 300, 1993 CarswellBC 54 (B.C. C.A. [In Chambers]) — considered

Browne v. Ontario Civilian Commission on Police Services (2001), 2001 CarswellOnt 4157, (sub nom. *Sadaka v. Houde)* 207 D.L.R. (4th) 415, 151 O.A.C. 302, (sub nom. *Ontario (Civilian Commission on Police Services) v. Browne)* 56 O.R. (3d) 673 (Ont. C.A.) — considered

Burnham v. Metropolitan Toronto Chief of Police (1987), 81 N.R. 207, (sub nom. *Burnham v. Metropolitan Toronto Police)* [1987] 2 S.C.R. 572, (sub nom. *Burnham v. Ackroyd)* 45 D.L.R. (4th) 309, (sub nom. *Burnham v. Toronto Police Force)* 24 O.A.C. 367, (sub nom. *Burnham v. Ackroyd)* 29 Admin. L.R. 94, (sub nom. *Burnham v. Ackroyd)* 37 C.C.C. (3d) 115, (sub nom. *Burnham v. Ackroyd (Chief of Police))* 32 C.R.R. 250, 1987 CarswellOnt 947, 1987 CarswellOnt 975 (S.C.C.) — referred to

Cannon v. Royal Canadian Mounted Police Assistant Commissioner (1997), 1997 CarswellNat 2118, (sub nom. *Cannon v. Canada (Assistant Commissioner, RCMP))* [1998] 2 F.C. 104, (sub nom. *Cannon v. Royal Canadian Mounted Police (Assistant Commissioner))* 139 F.T.R. 91, 6 Admin. L.R. (3d) 246, 1997 CarswellNat 2755 (Fed. T.D.) — referred to

Copello v. Canada (Minister of Foreign Affairs) (1998), 1998 CarswellNat 1762, 152 F.T.R. 110, 1998 CarswellNat 4783 (Fed. T.D.) — referred to

Douglas v. Canada (Attorney General) (2014), 2014 FC 1115, 2014 CarswellNat 4664, 2014 CF 1115, 2014 CarswellNat 5319 (F.C.) — referred to

Marler v. Law Society of Upper Canada (2009), 2009 CarswellOnt 800, 247 O.A.C. 68 (Ont. Div. Ct.) — considered

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), 38 D.L.R. (4th) 321, 73 N.R. 341, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, [1987] D.L.Q. 235, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272 (S.C.C.) — considered

Mussani v. College of Physicians & Surgeons (Ontario) (2004), 2004 CarswellOnt 5433, 193 O.A.C. 23, 22 Admin. L.R. (4th) 53, 248 D.L.R. (4th) 632, 74 O.R. (3d) 1, 125 C.R.R. (2d) 340 (Ont. C.A.) — considered

R. v. Schmidt (2014), 2014 ONCA 188, 2014 CarswellOnt 2796, 119 O.R. (3d) 145, 318 O.A.C. 53, 304 C.R.R. (2d) 126 (Ont. C.A.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Smoling v. Canada (Ministry of Health & Welfare) (1992), 95 D.L.R. (4th) 739, 8 Admin. L.R. (2d) 285, (sub nom. *Smoling v. Canada (Minister of National Health & Welfare))* 56 F.T.R. 297, 45 C.P.R. (3d) 239, 1992 CarswellNat 215 (Fed. T.D.) — considered

Toth v. Canada (Minister of Employment & Immigration) (1988), 86 N.R. 302, 6 Imm. L.R. (2d) 123, 1988 CarswellNat 64, 1988 CarswellNat 1571 (Fed. C.A.) — referred to

Trimm v. Durham Regional Police Force (1987), 81 N.R. 197, [1987] 2 S.C.R. 582, 45 D.L.R. (4th) 276, 24 O.A.C. 357, 29 Admin. L.R. 106, 37 C.C.C. (3d) 120, 32 C.R.R. 244, 1987 CarswellOnt 949, 1987 CarswellOnt 977 (S.C.C.) — referred to

Trumbley v. Metropolitan Toronto Police Force (1987), 81 N.R. 212, 24 O.A.C. 372, *(*sub nom. *Trumbley v. Metropolitan Toronto Police)* [1987] 2 S.C.R. 577, *(*sub nom. *Trumbley v. Fleming)* 29 Admin. L.R. 100, 32 C.R.R. 254, *(*sub nom. *Trumbley v. Metropolitan Police Force)* 37 C.C.C. (3d) 118, 45 D.L.R. (4th) 318, 1987 CarswellOnt 948, 1987 CarswellOnt 976, 63 O.R. (2d) 733, 63 O.R. (2d) 733 (note) (S.C.C.) — referred to

Wilson v. British Columbia (Medical Services Commission) (1988), 30 B.C.L.R. (2d) 1, 41 C.R.R. 276, 34 Admin. L.R. 235, [1989] 2 W.W.R. 1, 53 D.L.R. (4th) 171, 1988 CarswellBC 304 (B.C. C.A.) — referred to

York (Region) Board of Education v. Markham (Town) (1992), 13 M.P.L.R. (2d) 313, *(*sub nom. *Board of Education of York Region v. Markham (Town))* 60 O.A.C. 212, 1992 CarswellOnt 517 (Ont. Div. Ct.) — referred to

Statutes considered:

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

s. 2(b) — considered

s. 2(d) — considered

s. 7 — considered

s. 11(d) — considered

Police Services Act, R.S.O. 1990, c. P.15
Generally — referred to

Pt. V — referred to

s. 73 — considered

s. 83(1) — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22
s. 9 — referred to

MOTION by applicant for stay of disciplinary proceedings until after his application for judicial review had been heard and decided.

***M.A. Sanderson J.*:**

Introduction

1 The Applicant, an Ontario Provincial Police Officer, seeks a stay of his misconduct hearing under Part V of the *Police Services Act*, (hereinafter "the disciplinary proceedings") scheduled to start on December 14, 2015, until after his Application for Judicial Review in this Court has been heard and decided.

2 The hearing of the Application for Judicial Review is scheduled for December 7, 2015.

3 In his Application for Judicial Review, the Applicant has challenged the constitutionality of the disciplinary proceedings. On the Application for Judicial Review, his counsel intends to submit that in the disciplinary proceedings he cannot receive a fair and impartial hearing. Under the disciplinary proceedings, the OPP "investigates" and "substantiates" an

allegation and refers it to Adjudication. The Adjudicator is a Superintendent of the OPP. The prosecutor is usually an OPP officer.

4 He also intends to allege, in effect, that the complaints against the Applicant to be heard at the disciplinary proceedings are retributive, have been brought in bad faith, in response to the Applicant's own complaints against a number of individuals, and to deflect attention from their own improper conduct.

5 The Respondents oppose the request for a stay.

Facts

6 The Applicant is 63 years old.

7 He alleges that before 2012 he had excellent performance reviews at the OPP. It was only after July 30, 2010, when he began an 18-month investigation (Project Savage) that his difficulties began.

8 He alleges that as a result of Project Savage, charges were laid against three men, Jamal Ahmand Hazime ("Hazime") (including impersonation, 16 counts of forgery, 16 counts of drawing a forged document, 16 counts of uttering a forged document, 16 counts of obtaining instrument), Sahbi (Alex) Bakir ("Bakir") (including 15 counts of forgery, 15 counts of drawing a forged document, 15 counts of uttering a forged document, 15 counts of obtaining instrument), Souheil (Daniel) Yazbek ("Yazbek") (including, 1 count of public mischief, 2 counts of forgery, 2 counts of drawing a forged document, 2 counts of uttering a forged document, 2 counts of obtaining instrument).

9 The Applicant alleges that by the time Hazime, Bakir and Yazbek were arrested, the investigation had revealed that vehicles were being fraudulently delivered to the Congo and that approximately $300,000 per month was being laundered and sent there for eventual use by a listed terrorist group.

10 In April of 2012, an eight week hearing at the Ontario Motor Vehicle Industry Council ("OMVIC") was convened with respect to the licences of Bakir and Yazbek. The Applicant and six (6) victim witnesses testified. A lawyer named Liddle represented both Bakir and Yazbek.

11 On November 27, 2012 the criminal charges against Bakir were withdrawn. The Applicant alleges there were no prior discussions with any police investigators.

12 The Regional Deputy Crown Attorney on the case between September and November, 2011, Renee Puskus ("Puskus") was at the time married to Liddle. The Applicant complained about the withdrawal of the charges and what he perceived to be a conflict of interest.

13 He alleges that the withdrawal of the Bakir chargers was followed by the return from Lebanon of Hazime, on June 5, 2013, to plead to his charges and to receive a $300 fine. He alleges that that result had been pre-arranged by the Crown Attorneys without any consultation with the investigative team.

14 The Applicant alleges that the criminal charges were dropped to protect Puskus and her husband against the consequences of obvious conflict of interest and, "in all likelihood a compromise of the investigation", and to prevent the Applicant and other police officers from further complaining about that conflict of interest.

15 The Applicant alleges that following the dropping of the charges and his complaints, Puskus began investigating him. On August 7, 2013, without being advised he was being investigated, and without being advised of his rights or given the opportunity to seek and retain legal counsel, the Applicant was suspended "pending criminal investigation" and was barred from the Court-house and Crown Attorney's office.

16 By November 14, 2013, the OPP had concluded that there was no basis for criminal charges against the Applicant.

17 However, in 2013, Crown Attorneys Costa, Brown, Garson, and Puskus made "internal" complaints about the

Applicant to the Professional Standards Bureau of the OPP, including two allegations of neglect of duty, insubordination, discreditable conduct [that allegedly occurred on April 11, 2013], one allegation of deceit [alleged to have occurred on September 19, 2012 and April 15, 2013], and one charge of discreditable conduct [that allegedly occurred on November 21, 2013].

18 Counsel for the OPP presented a very different version of the facts. He submitted that internal complaints against the Applicant were not limited to matters that arose out of Project Salvage. He denied the allegations about the conduct of the Crown Attorneys. He submitted that the complaints included allegations that the Applicant had improperly conducted police database queries, that he had wrongfully disclosed confidential information to persons not authorized to have such information, and that he had done so for his personal benefit in relation to his bailiff business. The Applicant was also alleged to have acted deceitfully by knowingly giving false evidence at an OMVIC hearing.

19 Counsel for the OPP alleged various incidents of investigative misconduct against the Applicant, including knowingly submitting inaccurate information on judicial authorizations, improperly interviewing Crown witnesses, providing misleading information to the Crown Attorney's office, disclosing confidential information from a prosecution to his business partner and by criticizing various local lawyers (including comments related to sexual orientation) and the Windsor Police Service.

20 Many of the allegations, including the two public complaints, related to the Applicant's involvement in a bailiff business and his allegedly improper dealings with individuals involved in that business. For instance, the Applicant is alleged to have inappropriately utilized OPP resources in his personal business, as well as having failed to properly investigate his now former business partner.

21 Not all matters to be heard in the disciplinary proceedings arose as a result of internal complaints. A public complainant has alleged that the Applicant deliberately acted in such a way so as to harm his economic interests.

22 On February 14, 2014, the *Police Service Act* proceedings came before an Adjudicator.

23 On May14, 2014, pre hearing motions were scheduled for December 2014, and the hearing was scheduled for January and February 2015.

24 In September 2014, Mr Galati advised he would be seeking Judicial Review and on consent of the OPP, an adjournment of the disciplinary proceedings was granted pending the Applicant's Application for Judicial Review. The parties agreed that pre hearing motions would be heard in June and July 2015, and the hearing itself would commence in September 2015.

25 By December 23, 2014, the Applicant had received 18801 pages of disclosure including prosecution brief and notes.

26 The Applicant's Application for Judicial Review was perfected on April 29, 2015. To accommodate the schedules of counsel, the hearing was set for December 7, 2015.

27 On April 30, 2015, the hearing was rescheduled for November and December 2015.

28 On September 24, 2015,counsel for the Applicant moved before Superintendent Robin McElary-Downer for a further adjournment, asking that the pre hearing motions be scheduled to commence seven days after the Divisional Court hearing, by then scheduled for December 7, 2015, and that the commencement of the hearing be scheduled to start 60-90 days thereafter.

29 Superintendent McElary-Downer granted the adjournment request in part, ordered that the pre hearing motions commence on December 14, 2015, and that the hearing be scheduled immediately after sufficient time had been allowed to decide on the motions. If there were no motions, the hearing would commence on December 14, 2015.

30 The Applicant then brought this motion in this Court.

The Test for a Stay

31 It is uncontested that a stay may be obtainable of on-going administrative hearings pending judicial review [see: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.); *Toth v. Canada (Minister of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123 (Fed. C.A.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.); *Copello v. Canada (Minister of Foreign Affairs)*, [1998] F.C.J. No. 1301 (Fed. T.D.); *York (Region) Board of Education v. Markham (Town)*, [1992] O.J. No. 3755 (Ont. Div. Ct.); *Douglas v. A.G.C.*, 2014 FC 776; *Douglas v. Canada (Attorney General)*, 2014 FC 1115 (F.C.)].

32 Counsel agreed that in determining whether a stay should be granted, the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at para. 43 should be applied. A stay should only be granted where the Applicant can establish: That there is a serious issue to be tried; That the applicant would suffer irreparable harm if a stay were not granted; and that the balance of convenience favours the applicant.

Serious Issue to be Tried

33 The threshold for this part of the test is low. So long as the underlying application is neither frivolous nor vexatious, the first part of the test will ordinarily be met.

34 The parties agreed that the Applicant here has met the low threshold required by the jurisprudence with respect to this part of the test.

Irreparable Harm

35 Irreparable harm is harm that either cannot be quantified in monetary terms, or that cannot be remedied by a subsequent order [see: *RJR MacDonald*, supra, at paras. 58-60]

36 Counsel for the Applicant submitted that if a stay is not granted, there will be irreparable harm on 2 planes: (1) to the administration of justice — breach of the Constitution; (2) to the Applicant — damage to his reputation.

37 Counsel for the Applicant submitted that he has and will continue to suffer irreparable harm if the disciplinary proceedings are not stayed until after the release of the decision on his Application for Judicial Review. Reputational and psychological integrity and damage is protected under s.7 of the Charter.

38 He cited *Copello v. Canada (Minister of Foreign Affairs)*, [1998] F.C.J. No. 1301 (Fed. T.D.), at para 5,where the Federal Court wrote at paragraph 5:

> [5] As to the second branch of the test, irreparable harm, the evidence though thin, is uncontradicted that the applicant and his family will suffer serious harm to their personal and professional lives if they are made to leave this country on Tuesday next. That harm is by its nature not one that is compensable in damages.

39 He also referred to *Douglas v. Canada (Attorney General)*, [2014] F.C.J. No. 1149, 2014 FC 1115 (F.C.) where the Court wrote at para 42:

> 42 There is consistent authority to the effect that harm to an individual's personal or professional reputation amounts to irreparable harm. In a previous decision imposing a stay on the Inquiry Committee proceedings, Douglas v. Attorney General (Canada), 203 F.C. 776 at paras 24-28, Justice Snider accepted that the disciplinary proceedings risked harming the Applicant's reputation and dignity interests. While the issues in the application and motion before Justice Snider were different, I have reached a similar conclusion.

40 He also cited *Douglas v. A.G. Canada* [2013] F.C. 766 where the Court, held at para 24:

> [24] The Applicant alleges that her personal and professional reputation would suffer irreparable harm if the proceedings before the Inquiry Committee are permitted to continue. I observe that the good reputation of an individual is a significant interest, closely connected to the concept of human dignity, underlying all Charter rights (*Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at 1175, 1179, 126 DLR (4th) 129).
>
> [25] The present case is similar to Adriaanse et al v Malmo-Levine et al (1998), 161 FTR 25 at paras 21-22, [1998] FCJ No 1912 (TD) [Malmo-Levine] and Bennett s' British Columbia (Superintendent of Brokers) (1993), 77 BCLR (2d) 145. [1993] BCJ No 246 at para 17 (CA) [Bennett]. In Malmo-Levine, the Federal Court stayed a hearing investigating the misconduct of RCMP officers because of the allegations of bias made on judicial review and the harm to the reputations of the officers that would follow if a stay was not granted. In Bennett, the British Columbia Court of Appeal found irreparable harm where the applicants could be called on to testify and their credibility could be challenged in the context of a very public hearing before the Securities Commission, if the proceedings were allowed to continue (see also. Via Rail Canada Inc v. Cairns et al (2000), 261 N.R. 24a t para 6, 26 Admin LR (3d) 52 (FCA)).
>
> . . .
>
> [28] Further, as noted in *Smoling v Canada (Minister of National Health and Welfare) et al* (1992). 56 FTR 297, 8 Admin LR (2d) 285 [Smoling], a person's professional reputation is deeply implicated in the context of proceedings where a person's livelihood may be at stake. In Smoling. Justice Rothstein. as he then was, identified irreparable harm in the context of a judicial review of proceedings against a doctor regarding prescriptions written for narcotics. Justice Rothstein stated "1 am satisfied that Dr. Smoling may suffer grave and permanent consequences to his professional career and that he has satisfied the irreparable harm test" (Smoling, above at para 19). In my opinion, this case raises a very similar issue, given the nature of the public inquiry, the nature of the evidence noted above and the consequences to the legal career of the Applicant if the hearing is permitted to continue.

41 Counsel for the OPP submitted that the Applicant's speculation that proceeding with the disciplinary hearings may cause damage to his reputation and that dismissal from his employment could cause him irreparable harm, cannot substantiate irreparable harm.

42 He also submitted that while there may be evidence at the disciplinary hearing that may cause embarrassment to the Applicant, any possible damage to his reputation has already occurred The Notices of Hearing against the Applicant and the particulars of the allegations contained therein are public documents *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 9; *Police Services Act*, R.S.O. 1990, c. P.l5, s. 83 (I).

43 He distinguished the facts in *Douglas*, supra, at paras. 45, 50-51. He submitted that in *Douglas*, the moving party sought a stay in respect of the admissibility of certain personal and embarrassing photographs. Once admitted into evidence, they would, at a minimum, have been viewed by members of the Inquiry Committee. The irreparable harm would be caused by the dissemination of the photographs during the hearing.

44 He also submitted that the moving party in *Douglas* had sought a stay only in respect of the admissibility of the photos. The Applicant here is seeking to stay the entire proceeding.

45 Counsel for the OPP submitted that if the Applicant's employment is terminated prior to the determination of the underlying application, he can appeal to the Ontario Civilian Police Commission.

46 He referred to *Marler v. Law Society of Upper Canada*, [2009] O.J. No. 654 (Ont. Div. Ct.), where the Divisional Court considered granting a stay of Law Society disciplinary proceedings. In refusing the lawyer's request for a stay, the Court wrote at para 9:

> In my view, the applicant has not shown that there will be irreparable harm. He is continuing the practice of law. If, at the end of the discipline hearing he is found guilty of professional misconduct, he has a right to appeal to the Appeal Tribunal. If at the end of the day he is found not guilty, there will have been no harm in any event. If it should transpire that he is found guilty and that he was denied a fair hearing, any efforts that may turn out to have been wasted may be made the subject of a costs award if the circumstances justify it.

Balance of Convenience

47 Counsel for the Applicant submitted that the balance of convenience rests with the Applicant. Here no request is being made to stay legislation as in *Metro Stores* or as in *RJR*. The Applicant is seeking only to temporarily stay a hearing.

48 He cited *Douglas v. A.G. Canada* [2013] F.C. 776 where, in the context of staying an individual hearing, the Court ruled, with respect to balance of convenience, that:

> [32] Regulatory bodies have no vested interest in the outcome of any judicial review-' and CJC' Policies and the Judges Act require the Inquiry Committee to comply with procedural fairness.
>
> [33] In the circumstances, I do not find that the delay in resolving the underlying proceedings is determinative of the balance of convenience. I recognize that harm to the administration of justice may result from unreasonable delay of an inquiry into the behaviour of a judge. In this particular case, there has been a lengthy delay in resolving the application for judicial review, partly attributable to complicated procedural issues raised by a number of parties. With my expectation that there will be an ongoing cooperation by all parties, I am confident that the matter will be concluded in a reasonable length of time.
>
> [34] Finally, staying these proceedings has a direct effect on the Applicant only and does not have wide-reaching consequences. If all else is equal, then the status quo should be preserved pending judicial review and the stay should be granted.

49 Counsel for the Applicant submitted that in all constitutional cases, the public interest is a "special factor" which must be considered and given appropriate weight. He cited the reasoning of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) as follows:

> **D. The Balance of Inconvenience and Public Interest Considerations**
>
> 62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.
>
> 63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at p. 408, that:
>
> > [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
>
> He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."
>
> 64 The decision in Metropolitan Stores, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280, at pp. 303-4:
>
> > Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and

> weighed in the balance, along with the interests of the private litigants.
>
> 1. The Public Interest
>
> Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:
>
> > While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.
> >
> > It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.
> >
> > We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application...

50 In response to the submission of counsel for the OPP that the strength of the Applicant's Application for Judicial Review is a relevant criterion under balance of convenience, counsel for the Applicant submitted that he has a good case on the merits. He noted that on the constitutional issues, the OPP association has joined with the Applicant in the Application for Judicial Review.

51 The OPP Association's factum on the Judicial Review Application includes the following:

> There is merit to the argument that the discipline process created by Part V of the Police Services Act violates the Applicant's constitutional right to procedural fairness. The statutory process is deeply flawed and does not constitute a fair and independent adjudicative process.
>
> Although the common law principles that require a duty of fairness, independence and freedom from bias may be overridden by statute, legislation is always subject to the constitution. Not all Charter protections may be available in the context of a disciplinary proceeding under Part V of the Police Services Act. Section 11 does not apply to police disciplinary proceedings where an officer does not face a penal consequence such as imprisonment...Disciplinary proceedings are civil not criminal in nature.
>
> Section 7, in contrast, may apply to police discipline. The Supreme Court has left open the possibility that s7 of the Charter may apply to professional disciplinary proceedings. Pearlman v. Law Society (Manitoba) 1991 2 SCR 869 at para 30.
>
> Two threshold requirements must be satisfied to engage section 7: first, there must be a deprivation of "life, liberty or security of the person"; and, second, that deprivation must be contrary to the "principles of fundamental justice".
>
> The section 7 "liberty" interest is interpreted broadly and in accordance with the principles and values underlying the

> Charter as a whole, including human dignity, personal autonomy and choice in matters of fundamental personal importance.
>
> In accordance with this interpretive framework, the majority of the Supreme Court has recognized that liberty extends beyond freedom from physical restraint, and is engaged where "state compulsions or prohibitions affect important and fundamental life choices."
>
> A person's choice of profession or employment should be recognized as an inherently personal choice striking at the heart of one's dignity and personal autonomy...
>
> ...The Supreme Court has recognized a broad range of personal choices that engage the section 7 liberty interest. Although the pursuit of one's profession without unreasonable state interference has not yet been recognized to engage section 7 liberty interests, members of the Supreme Court have recognized the related right of an individual to choose where to live...
>
> The inherently personal choice of where to live... is similar to the inherently personal choice of what profession to pursue; both choices implicate personal values in the ordering of one's private affairs, and both choices may have an impact on other deeply personal matters at the heart of one's dignity and autonomy... If the choice of where to live is a decision that engages section 7, then the choice of what profession to pursue should be too.
>
> The Supreme Court has found that the section 7 "security of the person" interest may be engaged where there is "serious state-imposed psychological stress". The stress must arise directly from the state action or inaction, and the psychological prejudice must be serious.
>
> The fact that the Applicant's ability to pursue his chosen profession will be determined through the Part V discipline process under the PSA, which does not constitute a fair and independent adjudicative process, is something which could, objectively, cause psychological stress sufficient to engage section 7 of the Charter.

52 Counsel for the OPP argued that the potential factors to consider on an analysis of balance of convenience are numerous, and will vary in each case. He submitted that the public interest is a consideration and that there is a strong public interest in carrying out, with diligence, disciplinary proceedings against a police officer [see: *Douglas v. Canada (Attorney General)*, [2014] F.C.J. No. 1149 (F.C.), at para 49-50].

53 He cited *Browne v. Ontario Civilian Commission on Police Services*, [2001] O.J. No. 4573 (Ont. C.A.) at paras. 66-69, where the Ontario Court of Appeal concluded [at para 67] that the general legislative purpose of the *Police Services Act* is to increase public confidence in the provision of police services.

54 He submitted that pursuant to section 73 of the *Police Services Act*, the Commissioner of the OPP is statutorily obliged to deal "promptly" with public complaints. The public complainant has the statutory right to a prompt hearing.

55 Counsel for the OPP also submitted that in assessing the balance of convenience, the Court can consider the merits of the underlying application.

56 Counsel for the OPP submitted that notwithstanding the OPP's agreement that there is a serious issue to be tried, the Applicant's likelihood of success on the Application is low.

57 He submitted that while there are other components to the Application for Judicial Review, the primary issue to be decided is whether or not the prosecution of the Applicant under Part V of the *Police Services Act* violates sections 7 and 11 (d) of the Charter. There is no jurisprudence to support that position. Existing jurisprudence supports the opposite conclusion. The Supreme Court of Canada confirmed in a trilogy of cases that section 11 (d) of the Charter does not apply to the police discipline process in Ontario [see: *Cannon v. Royal Canadian Mounted Police Assistant Commissioner*, [1997] F.C.J. No. 1552 (Fed. T.D.) at paras. 37-38; *Trimm v. Durham Regional Police Force*, [1987] 2 S.C.R. 582 (S.C.C.) at para. 5; *Burnham v. Metropolitan Toronto Chief of Police*, [1987] 2 S.C.R. 572 (S.C.C.) at para. 5; *Trumbley v. Metropolitan Toronto Police Force*, [1987] 2 S.C.R. 577 (S.C.C.) at para. 5].

58 Counsel for the OPP also cited *Mussani v. College of Physicians & Surgeons (Ontario)* (2004), 74 O.R. (3d) 1 (Ont. C.A.), a decision of the Ontario Court of Appeal. Blair JA wrote at para 37:

> [37] The Supreme Court of Canada has said that s7 of the Charter "is not confined to the penal context" and "can extend beyond the sphere of criminal law, at least where there is "state action which directly engages the justice system and its administration Blencoe v. British Columbia (Human Rights Commission) [2000] 2 S.C.R. 307 at paras 45-46.

59 He submitted that in *Mussani*, the Ontario Court of Appeal has held that Dr. Mussani was trying to protect the right to practice his profession and that there is no constitutional right to practice a profession unfettered by the applicable rules and standards that regulate that profession. Serious disciplinary measures are not prohibited by the Charter. Stigma arising out of disciplinary proceedings does not deprive a person of security of the person.

60 Counsel for the OPP submitted that in *R. v. Schmidt*, [2014] O.J. No. 1074 (Ont. C.A.), at para 38, although Sharpe JA for the Ontario Court of Appeal did not foreclose the possibility that S7 may evolve to protect certain economic rights, such as a basic minimum level of subsistence, the Court rejected the proposition that s7 protects freedom of contract or the right to engage in the economic activity of one's choice.

61 He did not comment on the submission of counsel for the Applicant that his claim goes beyond his right to practice his profession and extends to protection of his reputation and as such is covered by s7 of the Charter.

Application of the 3 Part Test-Conclusion

62 Part 1 - There is a serious issue to be tried. The Applicant's Application for Judicial Review is not frivolous or vexatious.

63 Part 2 - I have considered the submission of counsel for the OPP that the Applicant has failed to establish irreparable harm.

64 I have considered the submission of counsel for the OPP that the Applicant can only speculate on the outcome of the Disciplinary proceedings. If he is successful, there will be no reputational harm. If he is successful, the Applicant will benefit from being cleared of the allegations being made against him. If he is unsuccessful, then he can appeal to the Ontario Civilian Police Commission. In any event, the damage to his reputation has already occurred. Here the allegations have been in the public domain for some time. Reputational harm and psychological stress has already occurred.

65 At the same time, I have also considered the reasoning set out, for instance, in *Adriaanse v. Malmo-Levine* [1998 CarswellNat 2628 (Fed. T.D.)], *Bennett v. British Columbia (Superintendent of Brokers)* [1993 CarswellBC 54 (B.C. C.A. [In Chambers])] and *Smoling v. Canada (Ministry of Health & Welfare)* [1992 CarswellNat 215 (Fed. T.D.)], mentioned earlier and authorities to the effect that damage to reputational harm that cannot be subsequently cured constitutes irreparable harm. I accept that further reputational harm could occur if the stay were not granted and the disciplinary proceedings were to go forward before the Application for Judicial Review were to be decided. Any such reputational harm could not be cured later, even by an award of monetary damages.

66 Part 3 - Balance of Convenience. On balance of convenience, the results in every case must turn on the specific facts in that case.

67 I have considered the interests of the Applicant, the public complainant, the public, the OPP and the OPP Association.

68 There is the private interest of the Applicant in a stay to avoid further possible irreparable reputational harm pending the determination of his Charter rights and his rights to procedural fairness.

69 There is the private interest of the public complainant in having his complaints resolved expeditiously. I note that the reasons of Superintendent McElary-Downer include the following at p13:

> Although the public complainant was initially opposed to the adjournment, he can understand it to an extent now that he has heard the argument...The biggest issue the public complainant struggles with is the location of the hearing...

70 There is the interest of the public in having concerns of public complainants resolved promptly, as required under s 73 of the *Police Services Act*. It has been over two years since the first Notice of Hearing involving a public complainant was served on the Applicant.

71 There is the interest of the public involving public confidence in the OPP's protection of the public, using the disciplinary process.

72 There is the interest of the OPP in the prompt resolution of internal complaints involving police.

73 I have considered the likely impact of the stay sought upon those interests. The delay in the hearing being sought will likely be three months or less, depending on when the Divisional Court releases its decision.

74 I am of the view that a delay of three months or less would be unlikely to seriously undermine public confidence in the OPP disciplinary process.

75 I have also considered the fact that despite the competing interests set out above, before September 24, 2015, all parties were apparently prepared to agree that the disciplinary proceedings should not commence until after the Application for Judicial Review had been heard and decided.

76 I have considered the fact that the Judicial Review hearing could have already occurred had all counsel been prepared to make themselves available earlier. Dates were available with the Divisional Court, but counsel for the Association could not be present until December 7, 2015.

77 I have considered the submission of counsel for the OPP that the merits of the Judicial Review Application are relevant to the determination of the balance of convenience and that the Applicants submissions have little merit.

78 I have considered the submission of counsel for the Applicant and for the OPP to be made on the Application for Judicial Review.

79 I have considered, for instance, that counsel for the OPP Association intends to advocate that the disciplinary process here is "deeply flawed" and that section 7 may apply to it.

80 Counsel for the Applicant and the OPP Association will submit that the principles of fundamental justice in the administrative law context guarantee procedural fairness, including the right to an independent and impartial hearing, the right to know the case to be made against oneself, and the right to answer that case. For s. 7 of the Charter to be satisfied, each of them must be met in substance.

81 They will submit that discipline proceedings in which the Commissioner is responsible for the investigation, the decision to commence discipline proceedings, the appointment and direction of the prosecutor and where the adjudication of the alleged misconduct issues is by an adjudicator or delegate appointed by the Commissioner, are neither independent nor impartial.

82 I have considered that both counsel for the Applicant and the OPP Association will submit that this case is not, as the OPP contends, simply about economic interests. They will argue as a matter of constitutional law, that "the value placed on a person's work is more than just a matter of dollars and cents". They will submit that "the Supreme Court of Canada has consistently held that an individual's employment engages fundamental issues of personal identity and is not solely a pecuniary interest and that the Supreme Court's recent jurisprudence in respect of sections 2(b) and (d) of the Charter has recognized that the ability to assert oneself in the workplace engages human dignity, liberty and autonomy. The Supreme Court has observed, [referring to its section 2(d) jurisprudence], that "[c]learly the arc bends increasingly toward workplace justice."

83 They will submit that it would be inconsistent with established jurisprudence on the interpretation of the Charter to hold that issues integral to one's employment or profession are of fundamental personal importance and a matter of personal dignity, liberty and autonomy for the purpose of some Charter protections, but not for others where they are merely pecuniary or economic interests.

84 They will submit that although some provincial Superior Courts have held that section 7 interests of life, liberty and security of the person do not protect "economic interests", including the right to work or practice a profession, other provincial Superior Courts have come to the opposite conclusion [see: *Wilson v. British Columbia (Medical Services Commission)* [1988 CarswellBC 304 (B.C. C.A.)]].

85 I have here set out the arguments of the OPP, the Applicant, and the OPP Association on the merits of the Judicial Review Application, only because counsel for the OPP has submitted that the merits of the Application for Judicial Review are so low that that should be a factor in my assessment of the balance of convenience. While I accept that in some cases an assessment of the merits could affect an assessment of the risks associated with granting or refusing a stay, apart from on part 1 of the test-serious issue to be tried, an assessment of the merits of the Judicial Review Application has not been a significant factor in reaching my conclusions on this stay application.

Summary of Conclusions

86 Here, there is a serious issue to be tried. The Applicant could be irreparably harmed if the stay were not granted. The balance of convenience in the unique circumstances here is in favour of the short stay requested, given the history of the proceedings to date, including the lengthy delay that prior to September 24, 2015 was with the consent of the OPP, given the scheduled hearing of the Application for Judicial Review on December 7 of this year, and given the other factors mentioned earlier.

Disposition

87 The stay is granted until after the Application for Judicial Review has been heard and decided.

88 Costs of the motion for a stay of the police discipline proceedings are reserved to the panel of this Court hearing the Application for Judicial Review.

Motion granted.

EB-2019-0242
Supplementary Brief of Authorities to
AMPCO Reply to Submissions on Motion for Stay

TAB D

Martell v. Canada (Attorney General), 2019 FC 737

2019 FC 737, 2019 CF 737
Federal Court

Martell v. Canada (Attorney General)

2019 CarswellNat 2469, 2019 CarswellNat 2470, 2019 FC 737, 2019 CF 737, 306 A.C.W.S. (3d) 834

LESTER MARTELL (Applicant) and ATTORNEY GENERAL OF CANADA (Respondent)

Sylvie E. Roussel J.

Heard: May 9, 2019
Judgment: May 24, 2019
Docket: T-563-19

Counsel: Richard W. Norman, Michel P. Samson, Sian G. Laing, for Applicant
Catherine M.G. McIntyre, for Respondent

Subject: Civil Practice and Procedure; Constitutional; Natural Resources; Public; Human Rights

Related Abridgment Classifications

Remedies
II Injunctions
II.7 Injunctions in specific contexts
II.7.k Injunctions involving Crown or government entities

Headnote

Remedies --- Injunctions — Injunctions in specific contexts — Injunctions involving Crown or government entities
Applicant held owner-operator licence which authorized him to fish lobster, he held licence since 1978, he fished licence personally on full-time basis until medical condition prevented him from doing so, and he then received authorization to use medical substitute operator — Deputy Minister of Department of Fisheries and Oceans Canada (DFO) denied applicant's request for further extension of his use of medical substitute operator, and applicant applied for judicial review — Applicant brought motion for stay of Deputy Minister's decision and mandatory injunction ordering DFO to authorize use of medical substitute operator — Motion granted — Applicant met elevated standard of strong prima facie case — Applicant claimed that impugned decision was arbitrary, unjust and unconstitutional as it severely circumscribed protection afforded by s. 15(1) of Canadian Charter of Rights and Freedoms to be free from discrimination based on physical disability, including chronic medical conditions — Respondent failed to respond to applicant's argument of discrimination, and it remained undisputed — There was nothing to suggest that applicant's discrimination argument was considered by Deputy Minister or that proper proportionality analysis was conducted balancing applicant's Charter protections and objectives of policy — Applicant sought authorization to use medical substitute operator until 2021, and allowing injunctive relief would not be determining outcome of judicial review — Applicant's economic loss for current fishing season could be quantified, but evidence was undisputed that if he was not authorized to use substitute operator for this fishing season, he would have to either transfer or sell his licence — Sale or transfer of licence would constitute irreparable harm to applicant who had been fishing licence since 1978, he would be limited in pursuing other employment opportunities and he would be deprived of future income — Applicant would also not be able to transfer licence to one of his grandchildren, and inability to carry out succession plan constituted irreparable harm — Balance of convenience favoured applicant, as granting interlocutory relief would be maintaining status quo, and it had not been demonstrated that it would have additional or undue impact on DFO and lobster fishing industry — If applicant was successful on underlying judicial review application, immediate and continuing

irreparable harm that arose from inability to fish current season outweighed inconvenience suffered by DFO.

Table of Authorities

Cases considered by *Sylvie E. Roussel J.*:

Calin v. Canada (Public Safety and Emergency Preparedness) (2018), 2018 FC 731, 2018 CarswellNat 3678, 2018 CF 731, 2018 CarswellNat 3801, 47 Admin. L.R. (6th) 25 (F.C.) — considered

Doré c. Québec (Tribunal des professions) (2012), 2012 SCC 12, 2012 CarswellQue 2048, 2012 CarswellQue 2049, (sub nom. *Doré v. Barreau du Québec)* 343 D.L.R. (4th) 193, 34 Admin. L.R. (5th) 1, (sub nom. *Doré v. Barreau du Québec)* 428 N.R. 146, [2012] 1 S.C.R. 395, (sub nom. *Doré v. Barreau du Québec)* 255 C.R.R. (2d) 289 (S.C.C.) — considered

Gateway City Church v. Minister of National Revenue (2013), 2013 FCA 126, 2013 CarswellNat 1314, 2013 D.T.C. 5100 (Eng.), 2013 CAF 126, 2013 CarswellNat 3097, 445 N.R. 360 (F.C.A.) — referred to

Hislop v. Canada (Attorney General) (2007), 2007 SCC 10, 2007 CarswellOnt 1049, 2007 CarswellOnt 1050, 358 N.R. 197, 222 O.A.C. 324, 37 R.F.L. (6th) 1, 278 D.L.R. (4th) 385, 84 O.R. (3d) 800 (note), (sub nom. *R. v. Hislop)* 153 C.R.R. (2d) 173, (sub nom. *Canada (Attorney General) v. Hislop)* [2007] 1 S.C.R. 429 (S.C.C.) — considered

Loyola High School v. Quebec (Attorney General) (2015), 2015 SCC 12, 2015 CSC 12, 2015 CarswellQue 1533, 2015 CarswellQue 1534, 79 Admin. L.R. (5th) 177, 382 D.L.R. (4th) 195, 468 N.R. 323, [2015] 1 S.C.R. 613, 331 C.R.R. (2d) 24 (S.C.C.) — considered

Madeley v. Canada (Minister of Public Safety and Emergency Preparedness) (2016), 2016 FC 634, 2016 CarswellNat 2321, 10 Admin. L.R. (6th) 87, 2016 CF 634, 2016 CarswellNat 11546 (F.C.) — referred to

R. v. Canadian Broadcasting Corp. (2018), 2018 SCC 5, 2018 CSC 5, 2018 CarswellAlta 206, 2018 CarswellAlta 207, [2018] 2 W.W.R. 431, 11 C.P.C. (8th) 221, 63 Alta. L.R. (6th) 1, 417 D.L.R. (4th) 587, 44 C.R. (7th) 1, 358 C.C.C. (3d) 143, [2018] 1 S.C.R. 196 (S.C.C.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Statutes considered:

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

s. 15 — considered

s. 15(1) — considered

Federal Courts Act, R.S.C. 1985, c. F-7
s. 18.2 [en. 1990, c. 8, s. 5] — considered

Immigration and Refugee Protection Act, S.C. 2001, c. 27
Generally — referred to

Rules considered:

Federal Courts Rules, SOR/98-106
R. 373(1) — considered

Tariffs considered:

Federal Courts Rules, SOR/98-106
Tariff B, Table, column III — referred to

Regulations considered:

Fisheries Act, R.S.C. 1985, c. F-14
Fishery (General) Regulations, SOR/93-53

s. 23(2) — considered

MOTION by applicant for mandatory injunction authorizing use of medical substitute operator.

***Sylvie E. Roussel J.*:**

I. Introduction

1 The Applicant, Mr. Lester Martell, is the holder of an Owner-Operator licence which authorizes him to fish lobster in Nova Scotia. He has held this licence since 1978 and has fished the licence personally, on a full-time basis, until a medical condition prevented him from doing so. Indeed, since 2009, Mr. Martell has received authorization to use a substitute operator given his inability to be on the fishing vessel full-time. On or around March 6, 2019, the Deputy Minister of the Department of Fisheries and Oceans Canada [DFO] denied Mr. Martell's request for a further extension of his use of a medical substitute operator.

2 On April 2, 2019, Mr. Martell filed a notice of application for judicial review in this Court wherein he seeks, *inter alia*, an order setting aside the Deputy Minister's decision on the basis that it is unreasonable because the Deputy Minister failed to acknowledge or consider his constitutionally protected right to be free from discrimination pursuant to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 As the lobster fishing season for Lobster Fishing Area 30 [LFA 30] was set to commence on May 18, 2019, Mr. Martell brought this motion, pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 and subsection 373(1) of the *Federal Courts Rules*, SOR/98-106. He seeks an order staying the Deputy Minister's decision and, in the alternative, a mandatory interlocutory injunction ordering the DFO to authorize the use of a medical substitute operator.

4 Mr. Martell's motion proceeded before me in Halifax, Nova Scotia on May 9, 2019. After hearing the submissions of both parties, I reserved judgment on Mr. Martell's motion. On May 17, 2019, I granted Mr. Martell's motion with reasons to follow.

5 These are my reasons for granting Mr. Martell's motion for interlocutory relief.

II. Background

A. The DFO's Owner-Operator Policy

6 Beginning in the 1970s, the DFO introduced over a period of time the Owner-Operator policy in Eastern Canada. The policy was formally adopted in 1989 across the entire Eastern Canada inshore and its key elements were incorporated into subsections 11(6) to 11(8) of the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* [1996 Policy].

7 The goal of the Owner-Operator policy is to maintain an economically viable inshore fishery by keeping the control of

licences in the hands of independent owner-operators in small coastal communities and to allow them to make decisions about the licence issued to them. To achieve this, the Owner-Operator policy requires licence holders to personally fish the licences issued in their name. This means that the licence holder is required to be on board the vessel authorized to fish the licence.

8 Subsection 23(2) of the *Fishery (General) Regulations*, SOR/93-53 creates an exception to the Owner-Operator policy where the licence holder is unable to engage in the activity authorized by the licence "because of circumstances beyond the control of the holder or operator." In such circumstances, a fishery officer or a DFO employee engaged in the issuance of licences may, on the request of the licence holder or the holder's agent, authorize another person to carry out the activity authorized under the licence.

9 Over time, the DFO developed policy guidance with respect to situations that may be considered "circumstances that are beyond" the control of the licence holder. In particular, subsection 11(11) of the 1996 Policy provides guidance in instances where the licence holder is ill:

> (11) Where the holder of a licence is affected by an illness which prevents him from operating a fishing vessel, upon request and upon provision of acceptable medical documentation to support his request, he may be permitted to designate a substitute operator for the term of the licence. Such designation may not exceed a total period of five years.
>
> (11) Si le titulaire d'un permis est affecté d'une maladie qui l'empêche d'exploiter son bateau de pêche, il peut être autorisé, sur demande et présentation de documents médicaux appropriés, à désigner un exploitant substitut pour la durée du permis. Cette désignation ne peut être supérieure à une période de cinq années.

10 In 2008, the DFO introduced flexibility in the application of the five (5) year limit in order to respond to a global economic downturn, and in the hopes of enhancing economic support for the industry.

11 By 2015, the DFO resumed strict compliance of the five (5) year limit following concerns expressed by licence holders and their representatives, including the Canadian Independent Fish Harvester's Federation in the inshore fleet, that the DFO's substitute operator designations were being abused by some licence holders.

B. Mr. Martell's Request for Authorization to Use a Medical Substitute Operator

12 Mr. Martell is eighty-five (85) years old. He has been fishing since 1947. He owns an Owner-Operator licence to fish lobster in LFA 30, situated on the Northeast coast of Nova Scotia. He employs four (4) full-time seasonal employees — three (3) deckhands and one (1) captain — who crew his vessel and assist him to fish the licence. Since holding the licence, he has fished it personally on a full-time basis up until 2009.

13 In or around 2009, Mr. Martell began experiencing problems with his knees which caused him excruciating pain and difficulty with balance. He underwent knee replacement surgery in 2009 which resulted in surgical complications. In 2012, he underwent a second replacement surgery for his other knee. He continues to experience difficulties with his balance.

14 In 2009, as a result of his knee problems, Mr. Martell requested and received authorization to use a medical substitute operator. His requests have been granted on a yearly basis since 2009 by the DFO.

15 In May 2015, Mr. Martell received notice from the DFO that the approval for his request for the 2015 season extended beyond the five (5) year period set out in the 1996 Policy and that further approval would be assessed on a case-by-case basis.

16 On May 10, 2016, Mr. Martell was advised that his request for a medical substitute operator for the 2016 season was approved but that future requests would not be considered.

17 Pursuant to sections 34 and 35 of the 1996 Policy, Mr. Martell appealed this decision to the Maritimes Region Licensing Appeal Committee [MRLAC], arguing that he should be granted credit for some fishing seasons where he did in

fact conduct fishing activities and requesting an extension to the five (5) year limit based on extenuating circumstances, including his ongoing management of the fishing activity and a lack of alternative employment opportunities. The MRLAC agreed and recommended that the 2017 year would count as his fifth (5th) year for the purposes of the application of the five (5) year limit in the 1996 Policy. On May 17, 2017, the MRLAC granted authorization to use a medical substitute operator until June 30, 2017, but did not recommend that further extensions be approved.

18 Mr. Martell appealed the MRLAC's recommendation to the Atlantic Fisheries Licensing Appeal Board [AFLAB] seeking the authorization to use a medical substitute operator up to and including the year 2021. During the appeal, and prior to the AFLAB making a recommendation to the Deputy Minister of the DFO, Mr. Martell was granted the authorization to use a medical substitute operator for the 2018 fishing season.

19 During the appeal before the AFLAB, counsel for Mr. Martell submitted that the five (5) year limit and the decision made pursuant to it were arbitrary, unjust and unconstitutional for violating his right to equality under section 15 of the *Charter*.

20 By letter dated March 6, 2019, the Deputy Minister of the DFO denied Mr. Martell's request for continued use of a medical substitute operator authorization. The Deputy Minister determined that the circumstances raised by Mr. Martell before the AFLAB, namely financial hardship and his succession plan, did not constitute extenuating circumstances that would warrant making an exception to the 1996 Policy.

21 On April 2, 2019, Mr. Martell filed an application for judicial review seeking various orders, including, *inter alia*, setting aside the Deputy Minister's decision and having him reconsider Mr. Martell's constitutionally protected rights to be free from discrimination pursuant to subsection 15(1) of the *Charter*.

22 As the upcoming lobster season was set to commence on May 18, 2019, Mr. Martell brought this motion asking the Court to stay the Deputy Minister's decision pending the determination of his application for judicial review and, in the alternative, to grant a mandatory interlocutory injunction ordering the DFO to authorize him to use a medical substitute operator pending the final resolution of the application for judicial review.

III. Analysis

A. Preliminary Matter

23 In its written submissions in response to Mr. Martell's motion, the Respondent, the Attorney General of Canada [AGC], identified two (2) issues: (1) whether Mr. Martell should be granted injunctive relief in the nature of *mandamus*; and (2) whether Mr. Martell can seek a stay of the Deputy Minister's decision to refuse the authorization for a medical substitute operator up to and including the 2021 fishing season.

24 As Mr. Martell did not seek the issuance of a writ of *mandamus* in his motion, I do not intend to address the issue of whether or not the remedy of *mandamus* was available to Mr. Martell except to mention that it has its own requirements which are different from those of a mandatory injunction (*Madeley v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 634 (F.C.) at para 29).

B. Test for Interlocutory Injunctions

25 In order to succeed on a motion seeking interlocutory injunctive relief, the moving party must meet the requirements of the conjunctive tripartite test articulated by the Supreme Court of Canada [SCC] in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 348-349 [*RJR-MacDonald*] which requires the moving party demonstrate that: (1) there is a serious issue to be tried; (2) the moving party will suffer irreparable harm if the relief is not granted; and (3) the balance of convenience favours the granting of the order.

26 In *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (S.C.C.) [*CBC*], the SCC examined the framework applicable for granting mandatory interlocutory injunctions and held that the appropriate criterion for assessing the first factor of the

RJR-MacDonald test is *not* whether there is a serious issue to be tried, but rather whether the moving party has shown a strong *prima facie* case (*CBC* at para 15). This is so because a mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put a situation back to what it should be" (*CBC* at para 15). In some cases, it is also equivalent to the relief that would be requested at trial or, in this case, the underlying application for judicial review.

27 Establishing a strong *prima facie* case entails showing a *strong likelihood* on the law and the evidence presented that, at trial or the underlying application, the moving party will be ultimately successful in proving the allegations set out in the originating notice (*CBC* at para 18).

28 In the case before me, Mr. Martell has improperly characterized the mandatory interlocutory injunction as an alternative relief. He is essentially seeking an interlocutory order that will allow him to continue earning a livelihood pending the determination of his application for judicial review. A stay of the Deputy Minister's decision alone will not grant him the authorization he requires to use a medical substitute operator for the 2019 fishing season. However, the mandatory interlocutory injunction remedy, which compels action on the part of the DFO, can capture the relief Mr. Martell is seeking in his motion. Consequently, the mandatory interlocutory injunction will not be considered as an alternative relief. Hence, to be successful, Mr. Martell must demonstrate that he meets the elevated standard of a strong *prima facie* case that he will succeed on the underlying judicial review.

29 Relying on the recent case of *Calin v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 731 (F.C.) [*Calin*], Mr. Martell's counsel submits that the Court should not impose the elevated standard of mandatory injunctions set out in *CBC* and that he should only be required to demonstrate a likelihood or probability of success on the underlying application.

30 In *Calin*, the Court considered whether it was appropriate to impose the exception to the serious issue test when applied to a mandatory interlocutory injunction for the release of a person held in detention pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Court held that the test in such circumstance should be at the level of a likelihood or probability of success of the underlying application given that the respondent did not have to take "steps to restore the status quo" or to otherwise "put the situation back to what it should be". It also noted that the individual's release from detention did not entail any "potential severe consequences" for the respondent besides concerns relating to the public interest, which were to be considered in the context of the balance of convenience factor (*Calin* at para 14).

31 Mr. Martell argues that, similarly in his case, the steps to restore the status quo or otherwise put the situation back to what it should be are neither costly nor burdensome and require very little positive action on the part of the Deputy Minister.

32 It is not necessary for me to determine whether a mitigated standard should apply in the circumstances of this case as I am of the view that the elevated standard articulated in *CBC* has been met.

(1) A strong prima facie case

33 Mr. Martell submits the matter underlying the application for judicial review meets the higher threshold of a "strong likelihood" of success because the impugned decision is arbitrary, unjust and unconstitutional as it severely circumscribes the protection afforded by subsection 15(1) of the *Charter* to be free from discrimination based on physical disability, including chronic medical conditions.

34 Mr. Martell argues that he is limited by his medical condition/physical disability and that the decision of the Deputy Minister and by extension, the decision of the AFLAB, imposes differential treatment upon him in comparison to other licence holders. Licence holders who do not suffer from a medical condition preventing them from being on board the vessel are essentially able to renew their licences indefinitely, so long as they abide by their terms and conditions. According to Mr. Martell, it is widely recognized that the DFO's practice is to reissue to a given licence holder, each year, the licence held the previous year. The licence holder can reasonably expect his or her licence to be renewed from year to year, thus providing the holder with a measure of financial stability and certainty. Alternatively, the licence holder can request that the DFO reissue the licence to another person, as a replacement for their own, thus enabling the licence holder to sell his licence or pass it on to a family member. However, he and others like him with a similar medical condition and physical disability must apply

year after year for the authorization to use a medical substitute operator and are subjected to the five (5) year limitation found in the 1996 Policy. Like him, they face the risk of being forced to give up their licence in the event of a refusal as a way to mitigate their losses.

35 Mr. Martell argues that the Deputy Minister's decision has the effect of denying him all of the privileges and entitlements of other licence holders, simply because he is physically unable to remain on board his fishing vessel for the extended periods of time often required to harvest a catch. Instead of reflecting a proportionate balancing of the *Charter* protections and statutory objectives at play as prescribed by the SCC in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 (S.C.C.) [*Doré*] and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (S.C.C.) [*Loyola*], the Deputy Minister gives no effect to Mr. Martell's right to equal benefit of the law without discrimination. Moreover, in the absence of some acknowledgment and accommodation of his disability, the decision is unreasonable and does not fall within the range of possible, acceptable outcomes.

36 Based on the material before me, I am satisfied that the first criterion for obtaining a mandatory interlocutory injunction has been met. I reach this conclusion for a number of reasons.

37 To begin with, the AGC fails to respond in its submissions to Mr. Martell's argument of discrimination, which therefore remains undisputed.

38 Furthermore, there is nothing in the motion materials demonstrating that the Deputy Minister or the AFLAB considered Mr. Martell's discrimination argument or that a proper proportionality analysis was conducted under the *Doré/Loyola* framework balancing Mr. Martell's *Charter* protections and the objectives of the 1996 Policy. To the extent that this argument was raised by Mr. Martell on appeal to the AFLAB and that the issue was not considered by the Deputy Minister, there is a strong likelihood that the decision could be set aside on this basis alone.

39 I have nevertheless considered the submissions of the AGC regarding the goals of the 1996 Policy in reaching my determination. I note from the affidavit filed by the AGC that one of the goals of the 1996 Policy is to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators in small coastal communities. Furthermore, according to the AGC's submissions, one of the purposes of creating policies to achieve this goal was to prevent large corporations from gaining access to the licences by way of agreement. To the extent that these are the goals behind the implementation of the 1996 Policy, I note from Mr. Martell's affidavit that he continues to make all operational decisions related to the fishing vessel, including matters such as storage and repairs to the vessel and gear. He also negotiates the wharf price of the catch, arranges bait and fuel purchase and is responsible for hiring and managing the crew and the fishing operation's financial affairs. Despite his inability of being on the fishing vessel full-time because of his medical condition or disability, his operations appear to be in line with the principles of the 1996 Policy.

40 I have also considered that granting a mandatory interlocutory injunction in this case will in part grant Mr. Martell the relief he is seeking in the underlying application for judicial review, being the authorization to use a substitute operator for the 2019 lobster fishing season. However, upon review of the relief sought in the notice of application for judicial review filed by Mr. Martell, I note that in addition to seeking an order setting aside the decision of the Deputy Minister, he is also seeking an order declaring that subsection 11(11) of the 1996 Policy, and specifically the five (5) year limit for designating a substitute operator, discriminates against fishermen with disabilities and is contrary to subsection 15(1) of the *Charter*. I also note from the affidavit filed by the AGC that in his appeal to the AFLAB, Mr. Martell sought authorization to use a medical substitute operator up to and including the year 2021. As a result, I am satisfied that by ordering the DFO, through its authorized representative, to allow Mr. Martell to use a medical substitute operator, the interlocutory relief will not be determining the outcome of the underlying judicial review. Mr. Martell will have to proceed with his application for judicial review failing which he will be required to seek a new exemption to the application of the policy for the 2020 fishing season as well as for the subsequent seasons.

(2) Irreparable harm

41 Under this second stage of the test, Mr. Martell submits that if the interlocutory relief he seeks is not granted, he will experience a substantial interference with his ability to earn a livelihood. Mr. Martell affirms in his affidavit that the income he receives from fishing this licence is a large portion of his total income. If he is unable to fish the licence by way of a

substitute operator, he will not only forfeit the proceeds of the 2019 season which he estimates to be in the neighbourhood of $600,000.00 based on the value of the total catch for previous years, but also those for future seasons since he will have to transfer or sell his licence in order to mitigate his losses.

42 Mr. Martell adds that if he is forced to transfer or sell his licence, it will be virtually impossible for him to re-acquire the licence or a similar licence. It is his understanding that the LFA 30 fleet is comprised of twenty (20) licence holders and that no LFA 30 licences have been sold in over ten (10) years. The loss of the licence may also result in the loss of his Core enterprise status designation, attached to his licence. This designation allows him to operate an enterprise with several licences on a vessel. Without the Core enterprise status designation, the market of purchasers is very limited.

43 Finally, Mr. Martell indicates in his affidavit that he wishes to keep the licence in his family. His grandchildren are currently attending university and wish to enter the fisheries when they have finished their education. He intends to transfer the licence to one of his grandchildren when they reach a suitable age and meet the necessary criteria set by the DFO to hold the licence. If forced to transfer the licence, he will be unable to carry out his succession plan for the benefit of his family.

44 In response, the AGC submits that to establish irreparable harm, Mr. Martell must lead clear and non-speculative evidence which goes beyond mere assertions and that the threshold is not lessened by the allegation that the Deputy Minister's decision is discriminatory. I agree. General assertions cannot establish irreparable harm. Moreover, irreparable harm refers to the *nature* of the harm rather than its *magnitude*. Additionally, irreparable harm is harm that cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other (*RJR-MacDonald* at 341; *Gateway City Church v. Minister of National Revenue*, 2013 FCA 126 (F.C.A.) at paras 15-16).

45 The AGC also submits that Mr. Martell has not established that he will suffer irreparable harm given that the nature of the harm he complains of, namely his livelihood, can be quantified in monetary terms.

46 Relying on the SCC decision in *Hislop v. Canada (Attorney General)*, 2007 SCC 10 (S.C.C.) at paragraphs 102 and 103 [*Hislop*], Mr. Martell opposes this argument by contending that if he is successful on the underlying judicial review, he will likely have no recourse to recover his lost income or licence if the DFO pleads the doctrine of qualified immunity to avoid liability. According to this doctrine, it is a general rule of public law that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional" (*Hislop* at para 102).

47 While I agree that Mr. Martell's economic loss for the 2019 fishing season can be quantified on the basis of the value of previous years, Mr. Martell's evidence is undisputed that if he is not authorized to use a substitute operator for the 2019 fishing season, the amount of the loss will be significant and he will have to either transfer or sell his licence. It is also undisputed that the number of licence holders in the LFA 30 fleet is comprised of twenty (20) licence holders and no LFA 30 fleet licences have been sold in over ten (10) years. I am satisfied that the sale or transfer of Mr. Martell's licence will constitute irreparable harm to Mr. Martell who has been fishing the licence since 1978 and who, in all likelihood will be limited in pursuing other employment opportunities and deprived of future income.

48 Moreover, I consider the inability to carry out one's succession plan to constitute irreparable harm that can support an application for a mandatory interlocutory injunction, providing the other criteria are met.

49 For these reasons, I am satisfied that Mr. Martell will suffer irreparable harm if the interlocutory relief is not granted.

(3) Balance of convenience

50 Under the third part of the test, Mr. Martell argues that the balance of convenience favours awarding the relief as substantially greater harm will be done to him than to the DFO or the public interest if the requested relief is not granted. Granting him the medical substitute operator authorization would not impose any additional financial or administrative burdens on the DFO staff or the Deputy Minister. Further, there is little to no public interest in allowing the Deputy Minister's decision to stand pending the judicial review.

51 In response, the AGC submits that the balance of convenience must favour the DFO. In support of its argument, the

AGC contends that it is within Parliament's authority to manage the fishery on social, economic or other grounds, in conjunction with steps to conserve, protect, and harvest the reserve. The 1996 Policy was adopted pursuant to that broad authority which provides broad discretion to the Minister of the DFO to manage fisheries in the public interest, and in this case, to carry out the socio-economic objective to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators. To do so, licence holders must personally fish the licence issued in their name. The 1996 Policy applies to any and all licence holders for the sake of protecting all affected stakeholders, not only those conducting fishing activities in LFA 30. In this case, Mr. Martell has been able to use a medical substitute operator designation since 2009.

52 I find that in the circumstances of this case, the balance of convenience favours Mr. Martell. While I recognize the importance of the Minister's discretion to manage the fisheries and the presumption of the public interest in enforcing policies, the fact remains that Mr. Martell has been fishing under this licence since 1978 and that he has been authorized to use a medical substitute operator since 2009. Throughout his appeals, he has been granted authorization to continue using a medical substitute operator. In my view, the granting of interlocutory relief allowing him to continue to do so will be maintaining the status quo. It has not been demonstrated that granting the requested interlocutory relief will have any additional or undue impact on the DFO and the lobster fishery industry.

53 The same cannot be said for rejecting Mr. Martell's motion.

54 If Mr. Martell is successful on his underlying application for judicial review, the immediate and continuing irreparable harm that arises from the inability to fish the 2019 season outweighs the inconvenience suffered by the DFO.

IV. Conclusion

55 For these reasons, I am satisfied that Mr. Martell has met the conjunctive tripartite test articulated in *RJR-MacDonald* to justify the granting of a stay of the Deputy Minister's decision pending the final resolution of the application for judicial review. Mr. Martell has also met the elevated threshold of establishing a strong *prima facie* case, as elaborated in *CBC*, justifying the grant of a mandatory interlocutory injunction which effectively authorizes Mr. Martell to use a medical substitute operator for the upcoming 2019 lobster season in LFA 30.

ORDER in T-563-19

THIS COURT ORDERS that:

1. The Applicant's motion is granted;

2. The decision of the Deputy Minister of the Department of Fisheries and Oceans Canada made on or around March 6, 2019 denying the Applicant's request for the continued use of a medical substitute operator is stayed until a final determination of the application for judicial review has been made;

3. The Department of Fisheries and Oceans Canada, through its authorized representative, shall authorize the Applicant to use a medical substitute operator for the upcoming 2019 lobster season in Lobster Fishing Area 30 until a final determination of the application for judicial review has been made;

4. Costs shall be payable to the Applicant and they shall be assessed in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98 106.

Motion granted.