Federal Court Cour fédérale

Date: 20170619

Docket: T-1159-16

Citation: 2017 FC 604

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 19, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JIMMY BILODEAU-MASSÉ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. *Introduction*

[1] Under subsection 52(1) of the *Constitution Act, 1982*, adopted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In this case, does the Federal Court have jurisdiction to rule

on the validity of subsections 140(1) and (2) of the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA], and, if it does, would it be appropriate to grant declaratory relief today in this case?

[2] At issue is the extent of the obligations of the Parole Board of Canada [the Board] with respect to natural justice, the law and/or the *Canadian Charter of Rights and Freedoms* – Part I of the *Constitution Act, 1982* [*Charter*], when, following the suspension of a long-term supervision order [LTSO], it decides under subsection 135.1(6) of the CCRA to maintain the suspension of the LTSO and/or to recommend that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code*, RSC 1985, c. C-46.

[3] Subsection 140(1) of the CCRA stipulates that a hearing is mandatory in the cases listed in paragraphs (a) to (e) of subsection (1). However, according to subsection 140(2) of the CCRA, the Board has the discretion to hold a hearing in other cases, which includes a post-suspension hearing following the suspension of an LTSO (section 135.1 of the CCRA).

[4] These provisions are reproduced below:

140(1) The Board shall conduct the review of the case of an offender by way of a hearing, conducted in whichever of the two official languages of Canada is requested by the offender, unless the offender waives the right to a hearing in writing or refuses to attend the hearing, in the following classes of cases:	140(1) La Commission tient une audience, dans la langue officielle du Canada que choisit le délinquant, dans les cas suivants, sauf si le délinquant a renoncé par écrit à son droit à une audience ou refuse d’être présent :

(a) the first review for day parole pursuant to subsection 122(1), except in respect of an offender serving a sentence of less than two years;	a) le premier examen du cas qui suit la demande de semi-liberté présentée en vertu du paragraphe 122(1), sauf dans le cas d’une peine d’emprisonnement de moins de deux ans;
(b) the first review for full parole under subsection 123(1) and subsequent reviews under subsection 123(5), (5.01) or (5.1);	b) l’examen prévu au paragraphe 123(1) et chaque réexamen prévu en vertu des paragraphes 123(5), (5.01) et (5.1);
(c) a review conducted under section 129 or subsection 130(1) or 131(1) or (1.1);	c) les examens ou réexamens prévus à l’article 129 et aux paragraphes 130(1) et 131(1) et (1.1);
(d) a review following a cancellation of parole; and	d) les examens qui suivent l’annulation de la libération conditionnelle;
(e) any review of a class specified in the regulations.	e) les autres examens prévus par règlement.
(2) The Board may elect to conduct a review of the case of an offender by way of a hearing in any case not referred to in subsection (1).	(2) La Commission peut décider de tenir une audience dans les autres cas non visés au paragraphe (1).

[5] The applicant, Jimmy Bilodeau-Massé, is a long-term offender subject to an LTSO. In this case, the Board maintained the suspension of the LTSO and recommended that an information be laid charging the applicant with an offence under section 753.3 of the *Criminal Code*. In addition, in exercising the discretion conferred upon it under subsection 140(2) of the CCRA, it determined that an oral hearing was not warranted in this case, hence this application for judicial review and declaratory relief.

[6] The Attorney General of Canada is the respondent in this case. In accordance with section 57 of the *Federal Courts Act*, RSC 1985, c. F-7, a notice of constitutional question was duly served on the respondent, as well as on the attorney general of each province, though they decided not to participate in the hearing. It is not disputed that subsection 91(27) of the *Constitution Act, 1867* confers on Parliament exclusive jurisdiction over criminal law and procedure (except the constitution of courts of criminal jurisdiction), that the provisions of the CCRA and the *Criminal Code* on the supervision of long-term offenders in the community fall under federal jurisdiction, and that the legality of any decision by the Board may be reviewed by the Federal Court under sections 18 and 18.1 of the *Federal Courts Act*.

[7] This Court heard the parties' submissions on the merits concurrently with the application for judicial review and declaratory judgment of another long-term offender regarding a similar decision by the Board, raising the same questions of administrative and constitutional law (see *Blacksmith v Attorney General of Canada*, 2017 FC 605).

[8] At the hearing, counsel for the two applicants stated that the applicants were abandoning any claim regarding the violation of section 9 of the *Charter*, which provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." Nevertheless, counsel for the applicants argues that the lack of guarantee of a post-suspension hearing violates section 7 of the *Charter* [constitutional question]. For one, the suspension of the LTSO and the resulting reincarceration affect the offender's residual liberty. Moreover, the principles of fundamental justice require that the offender be able, <u>in all cases</u>, to appear in person before the Board for a post-suspension hearing. The hearing must be held prior to the expiration of the statutory time

limit of 90 days set out in section 135.1 of the CCRA, unless the offender waives this right in writing or refuses to attend the hearing. In addition, the two applicants argue that the Board also breached procedural fairness, or otherwise rendered an unreasonable decision, by refusing to hold a post-suspension hearing, which warrants Court intervention.

[9] Although the Federal Court has jurisdiction to decide the constitutional question and make a formal declaration of invalidity, the respondent defends the constitutionality of subsections 140(1) and (2) of the CCRA. The Board acted under the authority of the law. The discretion to hold a hearing granted to the Board in subsection 140(2) of the CCRA does not violate section 7 of the *Charter*: the offender's freedom is not involved, and the discretion to hold a post-suspension hearing is not incompatible with the principles of fundamental justice. The Court must interpret the legislation in a manner that is consistent with these principles. A hearing is not necessarily required <u>in all cases</u>. Because the authority to hold a post-suspension hearing is not removed, subsections 140(1) and (2) of the CCRA do not violate section 7 of the *Charter*. Additionally, any violation is justifiable under section 1. Regardless, there was no breach of procedural fairness, and the impugned decision by the Board is reasonable in all regards.

[10] The standard of correctness applies to the review of the constitutional question, to the determination of the legal scope of the rules of natural justice or procedural fairness, as well as to the question as to whether — given the particular facts of the case — the Board breached procedural fairness by maintaining the suspension of the LTSO and recommending that an information be laid charging the offender with an offence under section 753.3 of the *Criminal*

Code, without having held a hearing. At the same time, the standard of reasonableness applies to the review of the Board's determinations regarding the case (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] SCJ No. 9; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] SCJ No. 12 [*Khosa*]; *Gallone v. Canada (Attorney General)*, 2015 FC 608, [2015] FCJ No. 598 at paragraph 7 [*Gallone*]; *Laferrière v. Canada (Attorney General)*, 2015 FC 612, [2015] FCJ No. 578 [*Laferrière FC*]).

[11] In light of the particular facts of the case and the applicable federal statutory provisions, and having considered all of the parties' submissions and the relevant case law, I am satisfied that the Federal Court has jurisdiction to decide the constitutional question. It is also appropriate to issue a declaratory judgment on the constitutionality of subsections 140(1) and (2) of the CCRA and clarifying the extent of the Board's obligations under the principles of fundamental justice. The immediate result of the declaratory judgment that follows these reasons will be to bind the parties to the case and the tribunal against which it is rendered.

II. ***Background***

[12] The applicant is single and has no children. He is currently 24 years old. He has various cognitive limitations and the mental age of a child in elementary school. He has attention deficit hyperactivity disorder, conduct disorders, borderline personality disorder and a potential autism spectrum disorder. He is unable, partially and permanently, to ensure the protection of his person, to exercise his civil rights and to administer his property. Since 2015, the applicant has been under the protection of the Public Curator of Quebec.

[13] The applicant's record shows persistent criminal behaviour since his criminal record began in 2008 and a violence problem characterized by a strong, immature and explosive personality. However, despite his intellectual disability, the applicant does not have any psychiatric pathology that could explain his violent behaviour. The problem seems to be that when he gets bored or is facing a situation he feels is unfair, he tends to break the rules or demonstrate disruptive behaviour. Reintegration potential, accountability and motivation are all assessed as low. That being said, medication plays a key role in managing the risk the applicant poses to himself and society.

[14] On January 23, 2012, the applicant was charged with assault with a weapon and assault causing bodily harm against two staff members of the Institut universitaire en santé mentale de Québec. On January 22, 2012, he hit a nurse on the head twice with an iron bar while she was sitting at the station. He was also charged with uttering death threats the following day against another staff member and for failing to comply with an undertaking to be of good behaviour. The applicant pleaded guilty to these criminal charges.

[15] On February 25, 2013, the Court of Quebec ordered a pre-sentence psychiatric assessment as well as a dangerous or long-term offender assessment. The applicant was found to be responsible for his actions. On July 17, 2013, the Court of Quebec sentenced him to nine months in prison, in addition to the time already served on remand. At that time, he was declared a long-term offender.

[16] The applicant is under the legal authority of the Correctional Service of Canada [Service] and is subject to an LTSO that will expire in 2019. Specifically, the Board imposed on him supervision conditions it considered reasonable and necessary to protect society and facilitate his reintegration. The LTSO, which was amended a few times, stipulates that he must reside at the Martineau Community Correctional Centre [CCC], a specialized centre for offenders with mental health issues; participate in a treatment program to address his risk factors; and take medication as prescribed by a health practitioner. He was released into the community on April 16, 2014.

[17] The Service suspended the applicant’s community supervision multiple times as a result of various breaches of these conditions. Each time, he was reincarcerated at the Regional Mental Health Centre at Archambault Institution.

[18] Although post-suspension interviews were conducted with Service representatives and the applicant’s case was referred to the Board three times, he appeared before the Board in person only once. This was in August 2015. On that occasion (the sixth suspension), the Board recommended that an information be laid under section 753.3 of the *Criminal Code*. Charges for breach of LTSO were laid in September 2015. During the applicant’s appearance, his counsel requested a reassessment. He was declared fit to appear. In October 2015, the case was postponed, and the applicant was released on a promise to appear. He returned to the Martineau CCC on October 19, 2015, under a residency condition.

[19] On October 31, 2015, the applicant’s LTSO was suspended a seventh time. The applicant had stolen the medical identity cards of two other offenders and had demonstrated threatening or

intimidating behaviour — actions that he later said he regretted. The case was referred to the Board, which agreed to moderate. On January 13, 2016, the Board conducted a paper review and decided to cancel the suspension of the LTSO, while formally advising the applicant that it was dissatisfied with his behaviour and expected the supervisors not to tolerate any further misconduct. Given the regret the applicant expressed, the Board did not recommend that additional charges be laid against him under section 753.3 of the *Criminal Code*.

[20] On March 30, 2016, the Service suspended the applicant's supervision for the eighth time. The applicant had threatened a resident of the unit and had attempted to strangle another. He then fled from the unit. He was found several hours later. While fleeing, he hit and damaged a vehicle.

[21] On April 14, 2016, the applicant was confronted with the facts alleged against him during a post-suspension interview conducted by an authorized Service representative. The Service maintained the suspension and referred the case to the Board.

[22] On April 22, 2016, the Service prepared an "Assessment for Decision" [Assessment], including a recommendation that an information be laid charging the applicant with an offence under section 753.3 of the *Criminal Code*. The Assessment, which must be read in conjunction with the most recent correctional plan update and the applicant's criminal profile, was shared with the applicant in late May 2016.

[23] On June 5, 2016, counsel for the applicant submitted written representations to the Board, while requesting an in-person post-suspension hearing on the ground that the applicant [TRANSLATION] “has limited intellectual abilities, and his situation raises serious questions about the appropriate medication and treatment for his condition.” Counsel also submitted the report prepared by Dr. Pierre Gagné, Director of the Clinique médico-légale de l'Université de Sherbrooke, indicating that the applicant’s medication was not appropriate for his situation and therefore impeded his ability to comply with his LTSO conditions.

[24] The request for a post-suspension hearing was based on two arguments:

a) Subsection 140(2) of the CCRA — which provides for a discretionary post-suspension hearing for offenders subject to an LTSO — violates sections 7 and 9 of the *Charter* [the *Charter* argument]; and

b) The hearing is all the more important in the applicant’s case in order to ensure procedural fairness, because he has limited intellectual abilities and his situation raises serious questions about the appropriate medication and treatment for his condition [the administrative law argument].

[25] The Board considered the information in its possession to be [TRANSLATION] “reliable and relevant” and enabled it to make an [TRANSLATION] “informed decision.” With regard to the *Charter* and administrative law arguments, the Board said nothing in its June 7, 2016, decision except that it had [TRANSLATION] “read all of the representations from [counsel for the

applicant],” but ultimately did not share her opinion because [TRANSLATION] “[i]t finds that a hearing is not warranted.” The Board noted that the specialists agreed that, despite his intellectual disability, the applicant had no psychiatric illness and was responsible for his actions. Examining his behaviour in terms of public safety and the protection of society, the Board maintained the suspension of the LTSO and recommended that a new information be laid under section 753.3 of the *Criminal Code*, finding that no supervision program could adequately protect society against the applicant’s risk of recidivism and that, by all appearances, he had failed to comply with his supervision conditions.

[26] That decision is the subject of this application.

[27] On June 21, 2016, new criminal charges were brought against the applicant for breach of LTSO.

[28] On November 10, 2016, the applicant pleaded guilty to those charges and received a concurrent sentence of 18 months in prison.

III. *Mootness of certain questions raised or of certain remedies sought by the applicant*

[29] Recall that under subsection 18(1) of the *Federal Courts Act*, subject to section 28, the Federal Court has exclusive original jurisdiction (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any

proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal. In addition, subsections 18.1(3) and (4) of the *Federal Courts Act* authorize the Court to declare invalid or unlawful or quash a decision of a federal board, commission or other tribunal and, if applicable, to refer the matter back for determination in accordance with such directions as it considers to be appropriate — meaning that the Court may order that a hearing be held in cases of breach of natural justice or procedural fairness, and particularly of violation of the law.

[30] Moreover, in accordance with the well-established principles on prerogative writs and other discretionary remedies, a court of law may refuse to hear an application or to decide a question that has become moot (*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]). And, even when an unlawful act was committed and a dispute still exists between the parties, the appropriate remedy is left to the Court's discretion. For example, the Federal Court may issue a declaration in lieu of any other judicial remedy (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] SCJ No. 2 at paragraph 43 [*MiningWatch Canada*]; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] SCJ No. 3 at paragraphs 2 and 46-47).

[31] During the hearing before this Court, counsel for the applicant was confronted with the question as to whether this application for judicial review had become moot — either partially or totally — following the filing of charges under section 753.3 of the *Criminal Code* and her client's subsequent conviction. The questionable actions that resulted in the suspensions of the

LTSO — including the one in spring 2016 that led to the impugned decision in this case — are not really at issue.

[32] However, counsel for the applicant argues that her client continues to be subject to an LTSO, meaning that the problematic situation alleged in this application for judicial review and declaratory relief is likely to recur more than once (for proof, one need only look at the number of suspensions of the LTSO in this case). Furthermore, other offenders are in a similar situation, which is notably the case for the applicant in the other case heard concurrently (*Blacksmith v. Attorney General of Canada*, 2017 FC 605). The suspensions of the LTSO are frequent, and the statutory time limit of 90 days for review is very short. In addition, the applicants make it a compelling question of law: because credibility issues are often at play before the Board, the principles of fundamental justice protected under section 7 of the *Charter* require that an oral post-suspension hearing be held when an LTSO is suspended. This is not frivolous: *Charter* and/or administrative law arguments are serious and warrant acknowledgement and an adequate response by this Court.

[33] Counsel for the respondent does not challenge this rhetoric that the offender must return to square one if this Court does not clarify the issue raised by the applicants in the meantime.

[34] I agree with counsel.

[35] Quashing the June 7, 2016 decision and referring the matter back to the Board for redetermination could no longer have any practical or legal effect on what was already

accomplished; the fact remains that criminal charges were laid and that the applicant was found guilty of committing the offence set out in section 753.3 of the *Criminal Code*. However, the Court can still do something useful by deciding the real issue in this case: is the offender automatically entitled to an oral hearing as in the cases referred to in subsection 140(1) of the CCRA?

[36] The *Charter* and/or administrative law arguments were debated at length at the hearing, so, at first glance, it would seem appropriate to issue a declaratory judgment to clarify the question at issue. More often than not — when it would serve no useful purpose to quash a decision or order the resumption of an administrative process — in exercising judicial discretion, a declaratory judgment is a valid alternative remedy to prevent the repetition of systemic administrative practices that violate the law (*MiningWatch Canada* at paragraphs 50-52), or even the *Charter* or the *Canadian Bill of Rights*, SC 1960, c. 44 (*Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177 at paragraphs 76-79, 81-85 and 124-125 [*Singh*]); *Re Singh and M.E.I.*, 1986 CanLII 3950 (FCA), [1986] 3 FCR 388 at paragraphs 8-9). For a recent example of a declaratory judgment of general application from the Federal Court affecting an entire group of people who challenged the constitutionality and/or validity of certain provisions of the *Citizenship Act*, RSC 1985, c. C-29, as amended by the *Strengthening Canadian Citizenship Act*, SC 2014, c. 22, see: *Hassouna v. Canada (Citizenship and Immigration)*, 2017 FC 473, [2017] FCJ No. 544. In addition to prohibiting the Minister of Citizenship and Immigration from applying subsections 10(3) and (4) of the *Citizenship Act*, RSC 1985, c. C-29, as amended, against the applicants, because those subsections are incompatible with the *Canadian Bill of Rights*, SC 1960, c. 44, the Court declared subsections 10(1), (3) and (4) to be inoperative,

because they violate paragraph 2(e) of the *Canadian Bill of Rights* in a manner that cannot be avoided by interpretation. In so doing, the Court stayed judgment for a period of 60 days or for any other period that the Court may authorize at the request of one of the parties.

[37] However, a declaration of unconstitutionality is a discretionary remedy (*Operation Dismantle v. The Queen*, [1985] 1 SCR 441 at page 481 [*Operation Dismantle*], citing *Solosky v. The Queen*, [1980] 1 SCR 821 [*Solosky*]) and can be "an effective and flexible remedy for the settlement of real disputes" (*R v. Gamble*, [1988] 2 SCR 595 at page 649 [*Gamble*]). Therefore, a court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paragraph 46 [*Khadr*]). This Court must first ascertain that it has jurisdiction over the issue, and, if it does, be satisfied that its declaratory judgment may have a useful effect on the application of the CCRA when the Service refers a case to the Board following the suspension of an LTSO.

IV. ***Federal Court's jurisdiction to grant declaratory relief with respect to a constitutional and administrative issue***

[38] Firstly, I am satisfied that this Court has jurisdiction to render a declaratory judgment on the constitutional validity, applicability or operability of subsections 140(1) and (2) of the CCRA, as well as on the extent of the Board's obligations under the principles of fundamental justice and/or administrative law.

A. *Words conferring jurisdiction*

[39] The Federal Court, a successor to the Exchequer Court of Canada, established in 1875, was maintained in 1970 as an "additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada" (section 4 of the *Federal Courts Act*). With the status of "a superior court of record having civil and criminal jurisdiction" (section 4 of the *Federal Courts Act*), the Federal Court may grant declaratory relief against any federal board, commission or other tribunal (subsection 18(1) of the *Federal Courts Act*) or against the Crown, including an officer, servant or agent of the Crown for anything done or omitted to be done in the performance of the duties of that person (section 17 of the *Federal Courts Act*). However, to better understand the genesis of the Federal Court's jurisdiction, it is appropriate to review the background, without repeating everything that might have been said on this topic in previous decisions (for example *Felipa v. Canada (Citizenship and Immigration)*, 2010 FC 89 [*Felipa FC*], reversed by 2011 FCA 272 though for reasons unrelated to the historical analysis of the Court's jurisdiction).

[40] In 1875, the legislation creating the Exchequer Court gave it concurrent original jurisdiction in ". . .any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown," while the procedure was in principle "regulated by the practice and procedure of Her Majesty's Court of Exchequer at Westminster" (see sections 58 and 61 of the *Supreme and Exchequer Court Act*, SC 1875, c. 11). At that time, in England, the Court of Exchequer was a high court (*Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, section 3, 4). While the Exchequer Court's jurisdiction was originally limited to revenue-related actions against the federal government, over the years, it

gradually extended to actions against the Crown, in addition to admiralty matters, suits between citizens regarding industrial property (now intellectual property), and tax, citizenship and railway cases.

[41] Long before the Federal Court was granted statutory jurisdiction in 1970 to review the legality of decisions by a federal board, commission or other tribunal (section 18 of the *Federal Courts Act*), aside from the petition of right procedure, it was possible to obtain a declaratory judgment from the Exchequer Court as additional relief against the Crown, by bringing an ordinary action against the Attorney General of Canada. For example, in *Jones et Maheux v. Gamache*, [1969] SCR 119 [*Jones et Maheux*], the Supreme Court of Canada ruled that the Exchequer Court had jurisdiction to issue a declaration of nullity of the General By-laws of the Quebec Pilotage Authority establishing classes of pilots — the pilotage authority for the district of Quebec being the Minister of Transport. In his action, the plaintiff said that important and prejudicial restrictions in the exercise of his profession were inflicted upon him as a direct consequence of the application of the invalid by-laws. Ultimately, the Supreme Court dismissed without costs the action against the individual defendants, but, at the same time, allowed the plaintiff's action against the Minister of Transport as "officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer" (paragraph 29(c) of the *Exchequer Court Act*, RSC 1952, c. 98).

[42] The Supreme Court's conclusion in 1968 in *Jones et Maheux* is unsurprising and is consistent with a long line of case law. Initially, the declaratory judgment was a discretionary remedy that could be granted in England by the Courts of equity, long before the adoption in

1850 of the *Chancery Act* (U.K.), 13 & 14 Vict., c. 35 and in 1852 of the *Chancery Procedure Amendment Act* (U.K.), c. 86, as well as the clarifications made in 1883 by the rules committee established under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, on the declaratory authority of the High Court of Justice. The Court of Exchequer in England also had equitable jurisdiction to issue declaratory judgments against the Crown (Lazar Sarna, *The Law of Declaratory Judgments*, Thomson Carswell, Fourth edition, 2016 at pages 9-10 and 24-25 [Sarna]).

[43] That being said, it is important not to confuse the declaratory jurisdiction of the Courts of equity with that of the superior courts in prerogative writs. This important distinction was highlighted in 1975 by Justice Addy, who explained the following in *B v Canada (Commission of Inquiry Relating to the Department of Manpower and Immigration)*, [1975] FC 602 at paragraphs 14 to 17:

> [14] At common law, the prerogative writs of prohibition, *certiorari* and *mandamus* (i.e., the old prerogative writ of *mandamus* as opposed to equitable *mandamus* to enforce a legal right or as contrasted with the equitable mandatory order or injunction) were granted exclusively by the common law Courts of the King's or Queen's Bench and constituted a class of process by which inferior bodies, including those which are an emanation of the Crown, were answerable to the controlling jurisdiction of superior Courts. The proceedings, leading to the issue of such prerogative writs, could not be instituted by ordinary action for the simple reason that the Courts and the judicial bodies, who were subject to such process being used against them, were not liable to be sued; the only persons liable to be sued were individuals and corporations. Therefore, the proceedings for prerogative writs had to be instituted by special application to the Court by way of motion: see *Rich v. Melancthon Board of Health* (1912), 2 D.L.R. 866, 26 O.L.R. 48, and *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1952] 3 D.L.R. 162 at pp. 167-8, [1952] O.R. 366 at p. 379).

> [15] On the other hand, relief by way of injunction, declaratory judgment, mandatory injunction or equitable mandatory order were exclusive equitable remedies and the proceedings were instituted in the Court of Chancery by means of a bill in equity. The Exchequer Court in England originally possessed also the equitable jurisdiction to issue declaratory judgments against the Crown.
>
> [16] A true distinction between these remedies became obscured to some extent when the Courts of equity and of common law were fused and, in more recent years, the distinction became further obscured because in most jurisdictions all of these remedies, whatever may have been their origin, are now enforceable in the same manner, that is, by way of direct order of the Court. Furthermore, where the proceedings for the prerogative common law remedies, for the reasons previously stated, could be initiated only by special application to the Court, in certain Courts today such as the Federal Court of Canada (see Rule 603), the proceedings may now be instituted by way of a statement of claim.
>
> [17] But neither the fact that all the above-mentioned remedies may now be obtained from the same forum, nor the fact that the relief may be initiated by means of the same type of proceedings, nor the fact that the method of enforcing all of these remedies (by Court order) is identical, in any way changes or alters their basic nature or purpose, and it is still the law that where prohibition or *certiorari* lies neither injunction nor any other equitable remedy such as specific performance, mandatory injunction or equitable mandamus will lie and the converse is equally true: see *Hollinger Bus, supra*, and *Howe Sound Co. v. Int'l Union of Mine, Mill & Smelter Workers (Canada), Local 663* (1962), 33 D.L.R. (2d) 1, [1962] S.C.R. 318, 37 W.W.R. 646).
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> [My emphasis.]

[44] Furthermore, declaratory action has been particularly useful in cases where the validity of a procedure or the legality of an action undertaken by the Crown was challenged by a subject. This method was confirmed in *Dyson v. Attorney General*, [1911] 1 KB 410 (CA) [*Dyson*], where the Court of Appeal of England declared that a tax notice sent to the plaintiff (and to eight million other people) was not authorized by law. In that case, the defendant was the Attorney General, not the Crown, because for centuries before the English Court of Chancery, and

particularly before a court of equity, it was the Attorney General who defended the interests of the Crown (*Jones et Maheux* at pages 129-131, citing *Dyson*). As could be expected, the declaratory action against the Crown became commonplace in Canada, Australia and New Zealand (*Liebmann v. Canada (Minister of National Defence)*, [1994] 2 FC 3 (TD). In 1970, in transferring the supervisory jurisdiction over federal boards, commissions or other tribunals, Parliament took care to specify in section 18 of the *Federal Court Act*, RSC 1970 (2nd Supp.), c. 10, that in addition to the prerogative writs mentioned in the Trial Division, the Federal Court could render a declaratory judgment. The declaratory powers of a court of equity and a superior court were then concentrated in one federal court.

[45] Incidentally, apart from questions of interest or mootness, the Supreme Court of Canada had already recognized before the patriation of the Constitution, in *Thorson v. Attorney General of Canada*, [1975] 1 SCR 138 at pages 157-159, the right of taxpayers to invoke the interposition of a court of equity to challenge the constitutionality of legislation involving expenditure of public money where no other means of challenge was open. This continued with the coming into force of the *Charter*. For example, following the bringing of a declaratory action before the Trial Division, the Federal Court of Appeal allowed the appeal of a taxpayer, who had been unsuccessful at trial, who was challenging the constitutionality of section 231.4 of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), and summonses issued by tax authorities pursuant to that provision. The Federal Court of Appeal ruled that they were inoperative under subsection 52(1) of the *Constitution Act, 1982* (*Del Zotto v. Canada*, [1997] 3 FC 40, 147 DLR (4th) 457 (CA), rev'd on other grounds, [1999] 1 SCR 3).

[46] In *A.G. Can. v. Law Society of B.C.*, [1982] 2 SCR 307 [*Jabour*], with regard to the declaratory action, the Supreme Court noted that "[t]his form of action takes on much greater significance in a federal system where it has been found to be efficient as a means of challenging the constitutionality of legislation" (page 323) [my emphasis]. While avoiding saying that the Federal Court did not have jurisdiction under section 17 of the *Federal Courts Act* to make a "Dyson" declaration (page 326), the Supreme Court took a pragmatic approach: the jurisdiction found in section 17 does not remove "[t]he jurisdiction of superior courts, and indeed other courts in the provinces, to review the constitutionality of federal statutes" (page 327) [my emphasis].

[47] In *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88 [*Windsor FCA*], Justice Stratas explains in paragraphs 56 to 58 how the Exchequer Court was able, since its establishment in 1875, like other Canadian courts, to review the validity of legislation for various proceedings against the Crown:

> [56] In 1875, the Exchequer Court of Canada was created. Like all courts, it had to act according to law, interpreting and applying the law. At the time of the Exchequer Court's birth, one law on the books was the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict. c. 63. Under section 2 of that Act, all Canadian courts, including the Exchequer Court, had to declare "void and inoperative" any federal or provincial laws inconsistent with those of the Parliament of the United Kingdom, including the *British North America Act, 1867*: see also the discussion in *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721 at page 746, 19 D.L.R. (4th) 1. The Exchequer Court recognized this power and understood that in appropriate cases it could decline to apply legislation that conflicted with a law of the Parliament of the United Kingdom: see, e.g., *Algoma Central Railway Co. v. Canada* (1901), 7 Ex. C.R. 239 at pages 254-255, rev'd on other grounds (1902), 1902 CanLII 76 (SCC), 32 S.C.R. 277, aff'd [1903] A.C. 478 (P.C.). Even before the Exchequer Court came into existence, other Canadian courts regularly exercised the power to declare

> legislation invalid or inoperative: see, e.g., *R. v. Chandler* (1868), 2 Cart. 421, 1 Hannay 556 (N.B.S.C.); *Pope v. Griffith* (1872), 2 Cart. 291, 16 L.C.J. 169 (Que. Q.B.); *Ex p. Dansereau* (1875), 2 Cart. 165 at page 190, 19 L.C.J. 210 (Que. Q.B.); *L'Union St. Jacques v. Belisle* (1872), 1 Cart. 72, 20 L.C.J. 29 (Que. Q.B.), rev'd (1874), L.R. 6 P.C. 31 (P.C.). Thus, from the very outset, all Canadian courts, including the Exchequer Court, could measure legislation up against laws of the Parliament of the United Kingdom, including the *British North America Act, 1867*, and determine whether they were invalid or inoperative.
>
> [57] From 1875 to 1982, the doctrines of paramountcy and interjurisdictional immunity developed as part of the jurisprudence under sections 91 and 92 of the *British North America Act, 1867*. For example, as early as 1895, the doctrine of paramountcy was described as being "necessarily implied in our constitutional act," one that had to be followed under the *Colonial Laws Validity Act, 1865*: *Huson v. Township of South Norwich* (1895), 1895 CanLII 1 (SCC), 24 S.C.R. 145 at page 149. These constitutional doctrines became part of the law that all Canadian courts, including the Exchequer Court, were bound to apply.
>
> [58] And so the Exchequer Court did. In one case, it found that provincial water rights legislation, the *Water Clauses Consolidation Act, 1897*, R.S.B.C., c. 190, could not apply to lands owned by the federal Crown that fell under exclusive federal jurisdiction under subsection 91(1A) of the *Constitution Act, 1867*: *The Burrard Power Company Limited v. The King*, (1909), 12 Ex. C.R. 295, aff'd 1910 CanLII 48 (SCC), [1910] 43 S.C.R. 27, aff'd [1911] A.C. 87 (P.C.). In another case, it found that federal legislation, the *Soldier Settlement Act, 1917*, 9-10 Geo. V, c. 71, was *intra vires* the federal Parliament and if it conflicted with provincial legislation, it would prevail: *R. v. Powers*, [1923] Ex. C.R. 131 at page 133.

[48] In this case, the nexus between the Federal Court and the constitutional issue here arising is obviously the judicial review proceeding under section 18 of the *Federal Courts Act* against the decision by the Board, which in turn arises from the valid LTSO suspension proceedings clearly commenced by the Service pursuant to the CCRA. Devoid of any artifice, this is what enables this Court to intervene in the resolution of the very real dispute between the parties

today. And, at the risk of repeating myself, the Federal Court's jurisdiction to grant declaratory relief against the Crown in an action (subsection 17(1) and definition of "relief" in section 2 of the *Federal Courts Act*), or against any federal board, commission or other tribunal in an application for judicial review (section 18 of the *Federal Courts Act*), seems indisputable, unless that jurisdiction is otherwise assigned to the Federal Court of Appeal (subsections 28(1) and (3) of the *Federal Courts Act*).

[49] With regard to the judicial review of a Board decision on administrative law grounds, the Federal Court has exclusive original jurisdiction (*Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] SCJ No. 37 at paragraphs 63-64 [*Strickland*], citing *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 SCR 626 at paragraphs 2 and 17, and *Canada v Paul L'Anglais*, [1983] 1 SCR 147 at pages 153-154 and 162 [*Paul L'Anglais*]). Therefore, there is nothing in the law preventing the Federal Court from deciding any constitutional question that could incidentally be raised in this case. Indeed, the case has already been heard: it is not a question today of granting the Federal Court <u>exclusive</u> jurisdiction to administer the "laws of Canada" when the validity or applicability of an Act of the Parliament of Canada is disputed by an interested party. Instead, it is a matter of <u>concurrent</u> jurisdiction.

[50] The Supreme Court also specified the following in *Northern Telecom v. Communication Workers*, [1983] 1 SCR 733 at page 741 [*Northern Telecom*]:

> It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their

> statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction. . . .
>
> [My emphasis.]

[51] A final determination has already been made: In spite of section 18 of the *Federal Courts Act,* the provincial superior courts have concurrent jurisdiction with the Federal Court when a plaintiff claiming damages against the Crown needs to attack a law or order by a federal board, commission or other tribunal to establish their cause of action, and adjudication of that allegation is a necessary step in disposing of the claim for relief against the Crown (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] SCJ No. 62 at paragraphs 6, 67, 75 and 80). Furthermore, section 18 of the *Federal Courts Act* does not remove the power of provincial superior courts to grant traditional administrative law remedies for reasons directly related to the division of powers (*Paul L'Anglais* at pages 152-153).

[52] It could have ended there. However, questions of jurisdiction are compelling. To avoid a ping-pong effect, it is in the interests of justice that the Federal Court's jurisdiction and powers be clear to all parties, the final adjudicator being the Supreme Court.

B. *The Supreme Court's* obiter dictum *in* Windsor

[53] Although "[t]he notion that each phrase in a judgment of [the Supreme] Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience" (*R v. Henry*, 2005 SCC 76), this Court nevertheless raised, on its own initiative, the question of the Federal Court's jurisdiction to render a declaratory judgment on a constitutional issue. This Court also considered

the respective positions of the parties in the case on the legal significance, if any, of the Supreme Court of Canada's general comments in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 SCR 617 [*Windsor SCC*], in response to what the Federal Court of Appeal wrote on this subject in its judgment and which was already discussed above.

[54] The issue in *Windsor* was related to the application of a municipal by-law to a company operating a federal undertaking. Specifically, the issue was to determine whether the three branches of the test established by the Supreme Court of Canada in *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 SCR 752 [*ITO*] had been met: (1) a statute grants jurisdiction to the Federal Court, (2) federal law nourishes the grant of jurisdiction and is essential to the disposition of the case, and (3) that federal law is constitutionally valid. The Canadian Transit Company [Canadian Transit], incorporated by a special Act of Parliament, was seeking declaratory relief under paragraph 23(c) of the *Federal Courts Act* against the City of Windsor [Windsor]. Windsor had issued over 100 repair orders against 114 properties purchased between 2004 and 2013 as part of a project to expand the Ambassador Bridge. Canadian Transit refused to comply, arguing that the bridge facilities are federal undertakings to which municipal by-laws do not apply. Canadian Transit wanted to obtain a Court declaration that the bridge was to be considered a “federal undertaking” and therefore could not be subject to municipal by-laws. Windsor responded by bringing a motion to strike the application for declaratory relief on the ground that the Property Standards Committee was already dealing with the repair orders, while the Ontario Superior Court of Justice was hearing several appeals by the two parties regarding the demolition orders. The Attorney General of Canada was not the respondent, nor did the case

involve the interests of the Crown or the decision of a federal board, commission or other tribunal.

[55] The majority of the Supreme Court decided that the Federal Court clearly lacked jurisdiction to hear the application for declaratory relief. Therefore, the trial judge did not err in striking the notice of application, and the Federal Court of Appeal ought not to have intervened (*Windsor SCC* at paragraph 72). Justices Moldaver and Brown, who were dissenting, were satisfied that paragraph 23(c) of the *Federal Courts Act* provided the required statutory grant of jurisdiction, and that federal law was essential to the disposition of the case. However, the two dissenting judges would have remitted the matter to the Federal Court to determine whether it should stay the proceedings pursuant to section 50 of the *Federal Courts Act* to allow the matter to be litigated in the Ontario Superior Court of Justice (*Windsor SCC* at paragraphs 73 and 119, citing *Strickland* at paragraphs 37-38). Justice Abella, who was also dissenting, found that even though the Federal Court has concurrent jurisdiction with the Ontario Superior Court of Justice, it should not exercise it (*Windsor SCC* at paragraphs 122-131).

[56] While it is already established that the Federal Court can make findings of constitutionality at first instance in a case where it has jurisdiction under an Act of Parliament (section 26 of the *Federal Courts Act*), and the Federal Court of Appeal can do the same in an appeal from a judgment by the Federal Court (section 27 of the *Federal Courts Act*), the Supreme Court nevertheless seems to question the existence of the Federal Courts' plenary power to issue a formal declaration of invalidity as sought today by the applicant in his application for judicial review and his notice of constitutional question.

[57] Paragraphs 70 and 71 of Justice Karakatsanis' reasons in *Windsor SCC* read as follows:

> [70] Since the *ITO* test is not met, it is also unnecessary to consider the Federal Court of Appeal's holding that the Federal Court has the remedial power to declare legislation to be constitutionally invalid, inapplicable or inoperative. I decline to comment on this issue, except to say this. There is an important distinction between the power to make a constitutional finding which binds only the parties to the proceeding and the power to make a formal constitutional declaration which applies generally and which effectively removes a law from the statute books (see, e.g., *R. v. Lloyd*, 2016 SCC 13 (CanLII), [2016] 1 S.C.R. 130, at para. 15; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, at p. 592; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 316).
>
> [71] The Federal Court clearly has the power, when the *ITO* test is met, to make findings of constitutionality and to give no force or effect in a particular proceeding to a law it finds to be unconstitutional. The Federal Court of Appeal in this case appears to have held that the Federal Court also has the power to make formal, generally binding constitutional declarations. My silence on this point should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion.
>
> [My emphasis.]

[58] These general comments are found at the very end of Justice Karakatsanis' reasons, suggesting they are of high importance. However, here, the Supreme Court's "silence" "should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion." The Supreme Court is therefore sending a message to the Federal Courts and all readers of *Windsor SCC*, without formally setting aside or allowing the comments in paragraphs 47 to 70 regarding the opinion of Justice Stratas in *Windsor FCA*. It is an obligatory silence, an aside that encourages reflection and opens the debate on the Federal Court's remedial power to declare legislation to be constitutionally invalid, inapplicable or inoperative. Clearly, this is a significant challenge.

[59] Because the doxa — whose precedential value seems to be disputed today — is the Federal Court of Appeal's affirmation in *Windsor FCA* at paragraph 64: ". . .the ability of the [Federal Courts] to use section 52 of the *Constitution Act, 1982* where the *ITO-Int'l Terminal Operators test* is met is undoubted. . ." [my emphasis]. However, the Federal Court of Appeal is not alone in saying this. Generally speaking, parties and litigants have not really disputed the ability of the Federal Court (the Federal Courts since 2003) to issue a formal declaration of invalidity since the *Constitution Act, 1982* came into force.

[60] To use a metaphor, this Court is now facing a truly Shakespearean dilemma. To be or not to be a superior court: that is the question. From an existential standpoint, this problem ultimately affects the social self and the jurisdiction of this federal court, unique in Canada. It is also a compelling question. Failing to recognize today the ability to use section 52 of the *Constitution Act, 1982* — when the *ITO* test is met — is likely to cause major inconveniences for litigants who come before the Federal Court seeking relief, and serious problems with judicial control above and below, considering that, in the case of a material error, a court of appeal can not only render the judgment that should have been rendered by the trial judge but also refer the case back to them for redetermination if the evidence in the record is insufficient or needs to be supplemented. However, we must not forget that in all *Charter* cases, the issue of justification of the infringement of the protected right, according to the section 1 test, very often requires a factual demonstration from the attorneys general.

[61] The problem, as the Attorney General of Canada explains in his additional submissions, is that Supreme Court is itself a court created under section 101 of the *Constitution Act, 1867*.

Recall that in 1875, the Supreme Court was constituted and established "in and for the Dominion of Canada [as] a Court of Common Law and Equity. . ." and which "shall have, hold, and exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada" (sections 1 and 15 of the *Supreme and Exchequer Court Act*). It was maintained as a "court of law and equity. . .as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada" (section 3 of the *Supreme Court Act*, RSC 1985, c. S-26). In addition, the appellate powers of the Supreme Court are limited by federal law in that it must "give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded" (section 45 of the *Supreme Court Act*). In other words, its own jurisdiction depends on that of the court appealed against.

[62] However, as the Attorney General of Canada points out, a number of constitutional challenges to federal legislation, initiated in Federal Court with no application other than declaratory, have been appealed all the way to the Supreme Court of Canada. It is revealing to note that the Supreme Court then ruled on the constitutionality of the provisions on the basis that it had the required jurisdiction. Specifically, in *Labatt v Canada*, [1980] 1 SCR 914, the Supreme Court rendered a judgment declaring unconstitutional provisions of the *Food and Drugs Act*, RSC 1970, c. F-27, with respect to the division of powers. In *Corbiere v. Canada*, [1999] 2 SCR 203, the Supreme Court rendered a judgment declaring a provision of the *Indian Act*, RSC 1985, c. I-5 unconstitutional under the *Charter*. The declaration of unconstitutionality was suspended for a certain period, though the Supreme Court left no doubt that the declaration would apply to all after the period of suspension expired (see pages 226-227 for the majority; pages 284-285 for the minority). In *Egan v. Canada*, [1995] 2 SCR 513, the majority of the Supreme Court

rendered a judgment declaring a provision of the *Old Age Security Act*, RSC 1985, c. O-9 constitutional under the *Charter*. The minority — albeit consisting of four judges — would have declared the provision invalid while suspending the unconstitutionality for a certain period after which the declaration would have taken effect against all (page 625).

[63] In *Windsor SCC*, since the *ITO* test was not met, the Supreme Court found that section 23 of the *Federal Courts Act* did not allow the Federal Court to grant relief. Moreover, pragmatically, the parties argue that, in this case, the three branches of the *ITO* test are met and that the Federal Court therefore has plenary power to make a declaration of invalidity under section 52 of the *Constitution Act, 1982*:

a) Firstly, sections 18 and 18.1 of the *Federal Courts Act* provide for judicial review and provide that a declaratory judgment may be granted as relief against any federal board, commission or other tribunal and/or the Attorney General of Canada. This Court's superintending and reforming power with regard to judicial review therefore extends to the Board, which is responsible for reviewing any request to suspend an LTSO for long-term offenders.

b) Secondly, the CCRA is a valid federal statute that sets out all of the Board's powers with regard to long-term offenders (sections 99.1 to 135.1 of the CCRA) as well as its obligations of procedural fairness (section 100 and paragraph 101(a) of the CCRA). In this regard, federal law plays an essential role in this case, one that

involves the Federal Court's jurisdiction to review the legality of Board decisions.

c) Thirdly, although the Constitution is not one of the "laws of Canada" referred to in section 101 of the *Constitution Act, 1867*, the fact remains that the constitutional question raised in this case is directly related to the application of a federal law for which the Federal Court has jurisdiction. Consequently, the Federal Court has jurisdiction under sections 18 and 18.1 of the *Federal Courts Act* to rule on the constitutionality of subsections 140(1) and (2) of the CCRA in this application for judicial review and to issue a declaration of invalidity, if applicable.

[64] I agree with the general reasoning of the parties, which I find difficult to dispute from a statutory and constitutional standpoint.

[65] In fact, I am satisfied that all branches of the *ITO* test are met. I would add that the constitutionality of section 18 of the *Federal Courts Act*, which grants the Federal Court original and general supervisory jurisdiction over federal boards, commissions or other tribunals, is not in dispute in this case. Nor does the applicant raise any constitutional questions relating to the division of legislative powers or the application of the constitutional doctrines of interjurisdictional immunity and federal paramountcy, which posed a problem in *Windsor*. Furthermore, the Federal Court's jurisdiction to make constitutional declarations is, of course concurrent with that of other provincial superior courts (*Jabour*).

[66] It is therefore appropriate to ascribe limited weight to the *obiter* in paragraphs 70 and 71 of *Windsor SCC*. That being said, in the event that there is still doubt as to the Federal Court's statutory or constitutional ability to declare, as a remedy, that legislation is constitutionally invalid, inapplicable or inoperative, I believe it is necessary to demonstrate in this judgment why the Federal Court can indeed make a formal declaration of invalidity even though it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*. It is not a matter of placing particular emphasis on historical happenstance or philosophical or political speculation, but of giving credit to Parliament's legal reason and intent, which only an informed and prospective reading of the Constitution and its guiding principles can magnify.

C. *The Federal Court is a "superior court" for the purposes of the exercise of the jurisdiction under section 18 of the* Federal Courts Act

[67] For present purposes and to avoid burdening the text, the term "Federal Court" may also, depending on the context, refer to the Federal Court of Appeal. There was an obvious practical reason behind the creation of the Exchequer Court in 1875 and the creation, in 1970, of the Federal Court, which has a broader jurisdiction: the better administration of the "laws of Canada." Federal law has no boundaries and can be applied indiscriminately throughout Canada. In this regard, not only is the Federal Court the only court of first instance with national jurisdiction in Canada, but its judgments can be executed throughout the country. This is reflected in the Federal Court's mission, which is to deliver justice and assist parties to resolve their legal disputes throughout Canada, in either official language, in a manner that upholds the rule of law and that is independent, impartial, equitable, accessible, responsive and efficient.

[68] Access to justice, an essential pillar of the rule of law, has become the single biggest challenge facing courts across Canada. This reality is well explained by dissenting judges Moldaver and Brown in *Windsor SCC*, in paragraphs 77 to 79:

> [77] The history of the Federal Court reveals that it was intended by Parliament to have broad jurisdiction. The Exchequer Court, created in 1875, initially had limited jurisdiction: it could hear certain claims against the Crown, and eventually, claims relating to patents, copyrights, public lands, and railway debts (*The Supreme and Exchequer Court Act*, S.C. 1875, c. 11; *Exchequer Court Act*, R.S.C. 1970, c. E−11, ss. 17 to 30). During the 20th century, however, it became apparent that the Exchequer Court could not deal with many matters that transcended provincial boundaries, and that confusion, inconsistency, and expense tended to accompany litigation of these national matters in the provincial superior courts.
>
> [78] These problems prompted Parliament in 1970 to replace the Exchequer Court with the Federal Court, and to expand the Federal Court's jurisdiction (*Federal Court Act*, S.C. 1970-71-72, c. 1). According to the Minister of Justice, the Federal Court was designed to achieve two objectives: first, ensuring that members of the public would "have resort to a national court exercising a national jurisdiction when enforcing a claim involving matters which frequently involve national elements"; and second, making it possible for "litigants who may often live in widely different parts of the country to [have] a common and convenient forum in which to enforce their legal rights" (*House of Commons Debates*, vol. V, 2nd Sess., 28th Parl., March 25, 1970, p. 5473).
>
> [79] These purposes are better served by a broad construction of the Federal Court's jurisdiction. We acknowledge that the Federal Court is not without jurisdictional constraints. A broad construction of the Federal Court's statutory grant of jurisdiction cannot exceed Parliament's constitutional limits and intrude on provincial spheres of competence. …
>
> [My emphasis.]

[69] In short, justice is not in competition with itself: access to justice must prevail in every case, which favours a broad construction of the jurisdiction conferred on this Court by the

Federal Courts Act. In this sense, the Federal Court is part of the solution, and it would be wrong to want to associate it with the problem of the increasing number of jurisdictions. When it created a national court of first instance, Parliament could very well have left it to the courts mentioned in section 129 of the *Constitution Act, 1867*, and to the other provincial courts created under subsection 92(14) of the *Constitution Act, 1867*, to exercise their traditional jurisdiction in civil and criminal matters, while making adjustments over time, if necessary, for the purposes of the "laws of Canada." But what characterizes the Federal Court is not only its nature as a national court (trial and appeal). Its composition also ensures national continuity (section 5.3 of the *Federal Courts Act*) and the maintenance of Canadian bijuralism (common law and civil law). However, like section 6 of the *Supreme Court Act*, section 5.4 of the *Federal Courts Act* provides for effective representation of Quebec, with a minimum and large number of judges (at least five judges of the Federal Court of Appeal and at least 10 judges of the Federal Court) who must have been judges of the Court of Appeal or of the Superior Court of Quebec or members of the Bar of Quebec. It is an eloquent legislative demonstration of Parliament's wish to create a pan-Canadian court that is particularly well adapted to Canada's reality and bijuralism.

[70] In *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Reference re Supreme Court*], the Supreme Court pointed out that section 6 of the *Supreme Court Act* "reflects the historical compromise that led to the creation of the Supreme Court" (paragraph 48), whereas its purpose "is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights" (paragraph 49). Incidentally, the Supreme

Court noted in this regard that section 5.4 of the *Federal Courts Act*, "in many ways reflects s. 6 of the *Supreme Court Act* by requiring that a minimum number of judges on each court be drawn from Quebec institutions. The role of Quebec judges on the federal courts is a vital one" (paragraph 60) [my emphasis].

[71] When we consider the role, mission and "implied powers [the Federal Court] and its predecessors have had for almost a century-and-a-half to determine the constitutional validity, operability and applicability of laws before it" (*Windsor FCA* at paragraph 73), we have a better understanding of the Federal Court of Appeal's conclusion in *Windsor FCA.* As Mr. Justice Stratas clearly stated in paragraph 47, "as long as the test in *ITO-Int'l Terminal Operators* is met, the Federal Court has jurisdiction to make declarations in constitutional matters, such as declarations of invalidity." Regarding sections 18 and 28 of the *Federal Courts Act*, in order to truly exercise their superintending and reforming function regarding the legality of decisions by any federal board, commission or other tribunal, the Federal Courts must perforce be able to declare inoperative and/or unconstitutional any provision inconsistent with the Constitution, the supreme law of Canada.

[72] The grant of jurisdiction under the *Federal Courts Act* should not be interpreted in a narrow fashion under the pretext that this Court is a statutory court rather than an inherent jurisdiction court (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626 at paragraphs 24 *et seq*. [*Canadian Liberty Net*]). The historical primacy of the "superior courts" fuels the synecdoche associated with the vague, immanent concept in the judicial sphere of "inherent jurisdiction." But that is not all, because there are many other (federal and

provincial) ordinary courts that exercise, at trial or on appeal, concurrent jurisdiction in civil and criminal matters. Moreover, I do not believe that the Federal Courts (Federal Court of Appeal and Federal Court) can be legally equated with provincial inferior courts or specialized federal or provincial administrative tribunals, whose sole remedial power is limited to refusing to apply a law inconsistent with the Constitution based on the principle of the rule of law (*R v. Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 at paragraphs 15–16 [*Lloyd*]).

[73] On the one hand, there is the "narrow view" articulated by Madam Justice Wilson in *Roberts* — as previously expressed by Bora Laskin (who later became Chief Justice of Canada) — to the effect that "[the] omnicompetence of provincial superior courts was fed by a decision of the Privy Council [*Board v. Board*, [1919] AC 956 (P.C.) [*Board*]], suggestive of inherent superior court jurisdiction, that (to use its words) "if the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of justice"" (cited in *Canadian Liberty Net* at paragraph 29).

[74] On the other hand, and this is the one that I retain today, there is the more modern view — which is consistent with the evolving nature of the Constitution — that the "purpose of the doctrine of inherent jurisdiction . . . is simply to ensure that a right will not be without a superior court forum in which it can be recognized" [my emphasis]. In this case, the Supreme Court in *Canadian Liberty Net*, after distinguishing *Board*, clearly opted for a dynamic and pragmatic interpretation of the Federal Court's legislative jurisdiction. Sections 96 to 101 of the *Constitution Act, 1867* relating to judicature must be read as a coherent whole. It is worthwhile

noting that the tenure of "superior court" judges set out in section 99 of the *Constitution Act, 1867* is not limited to judges of the provincial superior courts appointed by the Governor General under section 96 of the *Constitution Act, 1867*. It also includes judges of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada (*Valente v. The Queen*, [1985] 2 SCR 673 at paragraph 29). Also, according to subsection 35(1) of the *Interpretation Act*, R.S.C., 1985, c. I-21, the term "superior court" means these four courts mentioned above created under section 101 of the *Constitution Act, 1867*.

[75] Canada was still a colony before Confederation. There was an element of unpredictability in 1867 when the Parliament of the United Kingdom adopted the *British North America Act*, 30-31 Vict., c. 3 (U.K.) (which in 1982 became the *Constitution Act, 1867*). Although the provinces of Canada (Ontario and Quebec), Nova Scotia and New Brunswick wanted to establish a Federal Union to form one Dominion (*Puissance*) under the crown of the United Kingdom of Great Britain and Ireland, with a constitution based on the same principles as that of the United Kingdom, the constitution was only repatriated in 1982. In fact, the sovereignty of Canada and the other Dominions was only legally enshrined by the *Statute of Westminster, 1931*, R.S.C 1970, App. II, No. 26. Canada has changed a great deal in 150 years. In other words, if realities change, so do the courts. This is a reflection of Canada, the provinces and the territories. The Supreme Court and the Exchequer Court were both created in 1875 under the same Act, and both courts were able to share the same judges for a few years (see section 60 of *The Supreme and Exchequer Court Act*).

[76] Although section 129 of the *Constitution Act, 1867* explicitly provides for the continued existence of the courts in the provinces of Ontario, Quebec, Nova Scotia and New Brunswick at the time of the union, they may subsequently be repealed, abolished or altered by the competent authorities. The Constitution is "… a living tree capable of growth and expansion within its natural limits", and it should be interpreted as such (*Edwards v Canada (Attorney General)*, [1930] AC 124 at p. 136). This is why the Judicial Committee of the Privy Council (for the United Kingdom) adopted a broad interpretation in 1947 when it confirmed the Parliament of Canada's power to terminate appeals in London (including any direct appeals permitted by provincial legislation). After the provisions of the *Statute of Westminster* came into force, there was no legal impediment, given Parliament's jurisdiction under section 101 of the *Constitution Act, 1867*, that the Supreme Court should exercise exclusive ultimate appellate civil and criminal jurisdiction (*Attorney General for Ontario v Attorney General for Canada*, [1947] AC 127 [*Abolition of Privy Council Appeals Reference*]).

[77] Also, it is not disputed in this case that a superior court is one which has supervisory jurisdiction over lower courts and other inferior tribunals. A superior court also has plenary jurisdiction to determine any matter arising out of its original jurisdiction and is subject only to appellate review. In other words, it is not subject to the writs of other superior courts (*Felipa FC* at paragraphs 59–62. This point was not overruled by the Court of Appeal). Not surprisingly, and well before the Constitution was repatriated in 1982, the Supreme Court had already recognized that Parliament had full authority to transfer to a court established under section 101 of the *Constitution Act, 1867* superintending power over federal agencies, which until then had been exercised by the Court of King's Bench, and the Superior Court in Quebec as courts of law

(*Three Rivers Boatman Limited c. Conseil Canadien des Relations Ouvrières et al*, [1969] RCS 607 at p. 616). The inherent jurisdiction of provincial superior courts is meaningful today only because it overlaps with other jurisdictions of federal or provincial legislative origin, and because it is exercised in a residual manner if a jurisdiction is not otherwise exercised by another tribunal of the Canadian federation. In short, all of today's Canadian courts came into existence as a result of statutory changes. These changes are exactly what enables them to provide better justice.

[78] As a result, as the Supreme Court noted in *Canadian Liberty Net*, "[i]n a federal system, the doctrine of inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court" (at paragraph 35). Thus, because this involves the Federal Court's general administrative jurisdiction over federal administrative tribunals, "[t]his means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction" (*Canadian Liberty Net* at paragraph 36) [my emphasis]. If section 44 of the *Federal Courts Act* gives the Federal Court jurisdiction to grant an injunction in enforcing the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, this is all the more reason to argue that in the context of an action against the Crown or an application for judicial review, the inherent or residual jurisdiction of the provincial superior courts in matters involving the constitution or *habeas corpus* in no way affects the "plenary jurisdiction" exercised by the Federal Court under sections 17 and 18 of the *Federal Courts Act*.

[79] In this case, the federal Courts exercise a vital front-line role in the Canadian federation. Federalism and constitutionalism are two fundamental constitutional principles (*Reference re Secession of Quebec*, [1998] 2 SCR 217 at paragraph 32). They go hand in hand and are complementary, as are the other unwritten constitutional principles of the Constitution (democracy, rule of law and respect for minorities). Either the inherent jurisdiction theory of the provincial superior courts has the effect of depriving the Federal Court of jurisdiction "over an area where it is otherwise explicitly given extensive powers of supervision" (*Canadian Liberty Net* at paragraph 25); or "the language of the Act is completely determinative of the scope of the Court's jurisdiction" (*Canadian Liberty Net* at paragraph 26 citing *Roberts v Canada*, [1989] 1 SCR at p. 331 [*Roberts*]). In the area of judicial review, the Federal Court plays an essentially interventionist role in all forms of federal government activity, as it must maintain the rule of law, which of course authorizes it to make formal declarations of invalidity.

[80] As the Supreme Court pointed out in *Reference re Supreme Court Act* at paragraph 89: "The existence of an impartial and authoritative judicial arbiter is a necessary corollary [of subsection 52(1) of the *Constitution Act, 1982*]. The judiciary has become the "guardian of the Constitution (*Hunter*, at p. 155, per Dickson J.)." In Canada, the courts – whose independence is constitutionally protected – exercise supervisory jurisdiction, which is essential to maintaining the democratic character of our institutions and respect for the rule of law. The lower courts must submit to their authority – which of course includes the federal boards. As the Supreme Court pointed out in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 [*Martin*], the Constitution is the supreme law of Canada and, by virtue of subsection 52(1) of the *Constitution Act, 1982*, the question of

constitutional validity inheres in every legislative enactment. From this principle flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. Consequently, the power to rule on a legal issue is the power to rule on it by applying only valid laws. Thus, in principle, a legislative provision inconsistent with the *Charter* is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects (see *Martin* at paragraphs 28 and 35). Like the other superior courts in Canada, within its jurisdiction, the Federal Court plays an essential and vital role of plenary supervision in the Canadian federation.

[81] But it is still true today that a judge of a lower inferior provincial court (*Séminaire de Chicoutimi v. La Cité de Chicoutimi*, [1973] SCR 681, 1972 CanLII 153 (SCC)); *R c Big M Drug Mart Ltd*, 1985 SCC 69, [1985] 1 SCR 295) or an arbitration board exercising powers under provincial legislation (*Douglas/Kwantlen Faculty Assn v. Douglas College*, [1990] 3 SCR 570, 1990 CanLII 63 (SCC)), is not entitled to make a formal declaration of invalidity. This is normal, because this type of court does not exercise a general supervisory function over government activities. However, this is not the case when a judicial declaration is made by "superior court judges of inherent jurisdiction and courts with statutory authority" (*Lloyd* at paragraph 15).

[82] Because this involves the particular jurisdiction granted under the *Federal Courts Act*, professor Lemieux clearly noted that [TRANSLATION]: "The Federal Court can be characterized as a superior court. However, unlike provincial superior courts, this superior court

is of legislative origin” (Denis Lemieux, "La nature et la portée du contrôle judiciaire," in Collection de droit 2016–2017, École du Barreau du Québec, vol. 7, *Droit public et administratif*, Cowansville, Éditions Yvon Blais, 2016, at p. 208). I also share the Attorney General of Canada’s view that section 96 of the *Constitution Act, 1867* does not constitute a constitutional impediment, because section 101 of the same Act contains the terms: “notwithstanding anything in this Act” (*Abolition of Privy Council Appeals Reference* at paragraph 19). To reason otherwise would mean that a federal institution that plays a leading role in the Canadian federation would be annihilated from the Canadian landscape. Notwithstanding belated constitutional revisionism, as the Supreme Court itself stated in 1984: "[t]o conclude otherwise would, in paraphrase of the *Jabour* decision, *supra*, leave a federal court established 'for the better administration of the laws of Canada' in the position of having to participate in the execution and administration of such laws without the authority, let alone the duty, of first assuring itself that the statute before the Court is a valid part of the 'laws of Canada'" (*Northern Telecom* at p. 744).

[83] In conclusion, although it is not a “superior court” within the meaning of section 96 of the *Constitution Act, 1867*, the Federal Court is nevertheless comparable to a superior court when it exercises general supervisory power over federal boards under section 18 of the *Federal Courts Act* (*Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 RCS 228 at pp. 232–233, 1973 CanLII 184 (SCC)). The same applies when it deals with a matter under section 17 of the *Federal Courts Act*. The Federal Court therefore has jurisdiction to make a formal declaration of invalidity in a matter where the constitutional question is validly raised, which is the case here.

D. *The intention of Parliament expressed in section 57 of the Federal Courts Act is to allow the Federal Courts to grant binding declaratory relief in constitutional matters*

[84] Canada does not have a single or specialized (provincial or federal) judicial authority that would be responsible for reviewing the legality of laws and regulations to the exclusion of any court with jurisdiction in civil or criminal matters. In enacting section 57 of the *Federal Courts Act*, Parliament established the statutory framework under which, for the better administration of federal laws and regulations, a constitutional question may be validly argued before the Federal Court of Appeal or the Federal Court or a federal board, and consequently – before the Supreme Court itself, when an appeal has been authorized. We can also imagine that the explicit reference in subsection 57(1) of the *Federal Courts Act* to provincial statutes or regulations targets those particular cases where their application is likely to conflict with a federal law or one of the regulations (*Windsor FCA* at paragraphs 53–54).

[85] Service of a notice of constitutional question to the Attorney General of Canada and the attorney general of each province is mandatory (subsection 57(1) of the *Federal Courts Act*). Not only is the attorney general entitled to adduce evidence and make submissions in respect of the constitutional question, once that attorney general has made submissions, <u>he or she is deemed to be a party to the proceedings</u> for the purpose of any appeal in respect of the constitutional question (ss. 57(4) and (5) of the *Federal Courts Act*). Section 19.2 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2, establishes similar requirements. The requirement for a notice of constitutional question is also set out in several provincial laws, although the requirement to serve a notice, where a federal provision is at issue, is limited to the Attorney General of Canada and the Attorney General of the province in question (for example, in Quebec, see the new

sections 76 and 77 of the *Québec Code of Civil Procedure*, CQLR c C-25.01 [CCP], formerly section 95).

[86] The statutory notice of constitutional question allows courts of law – whose judges enjoy a guarantee of independence (unlike those of administrative tribunals) – to declare invalid a law or a regulation that contravenes the Constitution. As the Supreme Court of Canada noted in *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241 at paragraph 48:

> In our constitutional democracy, it is the elected representatives of the people who enact legislation. <u>While the courts have been given the power to declare invalid laws</u> that contravene the Charter and are not saved under s. 1, <u>this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity</u>. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, <u>it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts</u> or tribunal from which the appeals arise.
>
> [My emphasis.]

[87] Furthermore, the Supreme Court of Canada has a well-established discretion, albeit one that is narrow and should be exercised sparingly, to address the merits of a constitutional issue when proper notice of constitutional question has been given at the appeal stage, even though the issue was not properly raised in the courts below (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 SCR 3 [*Guindon*]). Since January 1, 2017, the new rule 33 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, provides that in the case of an appeal that raises an issue in respect of

the constitutional validity or applicability of a statute, regulation or common law rule, or the inoperability of a statute or regulation, a notice of constitutional question shall be filed.

[88] Accordingly, the Parliament of Canada clearly intended to allow the Federal Courts to grant binding declaratory relief in constitutional matters. Otherwise, section 57 of the *Federal Courts Act* would no longer have any practical utility, and the notice of constitutional question required by Parliament to allow the Attorney General to support the validity of the impugned provision and adduce evidence would be supererogatory.

V. ***Federal Court's discretion to grant declaratory relief with respect to a constitutional and administrative issue***

[89] Secondly, I am satisfied in this case that this Court should exercise its discretion to grant declaratory relief with respect to the constitutional validity, applicability or operability of subsections 140(1) and (2) of the CCRA, an with respect to the extent of the Board's obligations under the principles of fundamental justice and/or administrative law.

A. *General principles*

[90] Whether this Court should exercise its discretion to grant reparation – including declaratory relief – will depend in particular on its assessment of the respective roles of the courts and administrative bodies, the circumstances of each case and whether there is an adequate alternative (*Strickland* at paragraphs 37-45; *Khosa* at paragraphs 36-40; *Harelkin v. University of Regina*, [1979] 2 SCR 561 at p. 575 and *Solosky* at pp. 830−831; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at pp. 90, 92-

93 and 96; and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 at pp. 77-80).

[91] It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction. (*Northern Telecom* at paragraph 12). Furthermore, no one questions that s. 18 of the *Federal Courts Act* does not withdraw the authority of the provincial superior courts to grant the traditional administrative law remedies against federal boards, commissions and tribunals on division of powers grounds (*Strickland* at paragraph 64; *Paul L'Anglais* at pp. 152–163), nor the residual power they possess in matters of *habeas corpus*.

[92] It is worthwhile noting that in 1875, the Supreme Court itself had "concurrent jurisdiction with the Courts or Judges of several Provinces, to issue the writ of *Habeas Corpus ad subjiciendum*, for the purpose of an enquiry into the cause of commitment, in any criminal case under any Act of the Parliament of Canada, or in any case of demand for extradition" (section 51 of the *Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*). But because Parliament in 1970 omitted to mention *habeas corpus* in subsection 18(1) of the *Federal Courts Act* – even if it explicitly stipulated in subsection 18(2), that a writ of *habeas corpus* can be issued in relation to any member of the Canadian Forces serving outside Canada – we can nevertheless ask ourselves whether this Court should today refuse to rule on the

constitutional question given the particular expertise that provincial superior courts may possess in matters of *habeas corpus* (*Strickland* at paragraph 40; *Reza v. Canada*, [1994] 2 SCR 394 [*Reza*]).

[93] The Supreme Court of Canada already noted in *R v. Miller*, [1985] 2 SCR 613 at p. 624 [*Miller*], that Parliament had intended to leave "the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority with the provincial superior courts." Considering Parliament's intention and the importance of *certiorari* in aid to the effectiveness of *habeas corpus*, it concluded that provincial superior courts had jurisdiction to issue *certiorari* in aid of *habeas corpus* to determine the validity of an incarceration. In *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 [*May*], the Court reaffirmed this principle, which it did again just recently in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502 [*Khela*].

[94] Since the reasonableness of the decision to detain a person should be regarded as an element of its lawfulness, the provincial superior court may consider the reasonableness of a detention in an application for *habeas corpus* – even if in fact, but not in form, it examines the legality of the conduct and the orders of the federal board from the standpoint of administrative law (*Khela* at para. 65). Also, where the offender has chosen to apply for a writ of *habeas corpus*, he may <u>also</u> apply to a provincial superior court for a ruling on the constitutionality of the legislative provisions at issue (*Cunningham v. Canada*, [1993] 2 SCR 143 [*Cunningham*]). Following the same logic, the Federal Court will be able to do the same when the offender chooses to apply for judicial review of an action of the Service or a final decision of the Board. A

conclusion is once again necessary: no court can claim to be in a better position than the other to rule on the question of the constitutional validity of a provision of the CCRA.

B. *The appropriate remedial option belongs to the offender*

[95] Given their vulnerability and the realities of confinement in prisons, offenders must, despite concerns about conflicting jurisdiction, have the ability to choose between the forums and remedies available to them (*May* at paragraphs 66−67; *Khela* at paragraph 44). As the Supreme Court of Canada very succinctly put it in *May*, “[t]he [remedial] option belongs to the applicant” (at paragraph 44).

[96] Subject to the possible application of the doctrine of issue estoppel, there is, in principle, nothing that prevents an offender who is subject to an LTSO from concurrently addressing a provincial superior court and the Federal Court, first, to apply for a writ of *habeas corpus* to have the lawfulness of his detention reviewed as a result of a change in an LTSO (*Laferrière c Centre correctionnel communautaire Marcel-Caron*, 2010 QCCS 1677; *Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCS 4228; *Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCA 1081), and second, to file an application for judicial review before the Federal Court to challenge the merits of a Board decision restricting his residual liberty as a result of a further review of the conditions of the LTSO (*Laferrière FC*). Of course, the same flexibility also applies to cases of suspension of an LTSO by the Service and post-suspension review by the Board under section 135.1 of the CCRA.

[97] Preferring not to apply to the Superior Court of Québec for a writ of *habeas corpus* during the period when he was returned to a penitentiary following the suspension of the LTSO, the applicant addressed the Federal Court to have the Court quash the Board's final decision and make a declaration of invalidity.

[98] In this case, the applicant is criticizing the time limits of the current LTSO post-suspension review procedure, which means that the offender cannot, in practice, have a decision to suspend an LTSO quashed when the case is referred to him by the Service. The Service has 30 days from the suspension of the LTSO to submit its assessment to the Board and forward the content to the offender through a Procedural Safeguard Declaration (subsection 135.1(5) of the CCRA). In accordance with the *Decision-Making Policy Manual for Board Members* [Manual], the Board's review will not be completed until at least 15 days from the date on which the Procedural Safeguard Declaration is signed in order to allow the offender or his assistant to make written submissions. The Manual also states that the Board's review of the case will occur as soon as practicable, and within 60 days of the return to custody. Although subsection 135.1(2) of the CCRA limits the reincarceration of an offender to 90 days, the offender's counsel submits that the statutory time limit is almost always reached through the applicable procedures, insofar as the case proceeds to the Board review stage. However, during this 90-day period, the applicant is subject to an order restricting his residual liberty without being guaranteed an in-person hearing, because in-person hearings are held at the Board's discretion.

[99] The respondent does not really dispute the time limits at issue or the fact that it may be difficult in practice to obtain a final decision – within 90 days of the suspension of the LTSO.

Because of these very short time limits, it is practically impossible for the applicant to apply to the Superior Court of Quebec for a writ of *habeas corpus*, especially since the Court will not have time and will not be in a better position than the Federal Court to make a declaration of unconstitutionality. In practice, a long-term offender who has been returned to custody will return to the community after 90 days, unless the offender has been charged, and a provincial judge has meanwhile ordered the offender's detention pending trial or refused to release the offender on bail. The fact that the offender is in preventive detention following the filing of a criminal charge for the offence set out in section 753.3 of the *Criminal Code*, is, however, extrinsic to the Board's decision under section 135.1 of the CCRA. The Attorney General is not bound by a Board recommendation.

C. *The conditions for having a full debate and deciding on the questions of administrative and constitutional law have been met in this case*

[100] According to case law, this Court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paragraph 46 [Khadr]). All of these criteria have been met in this case.

[101] First, the lawfulness of the actions of the Service or of the Board's decisions can be reviewed by this Court at first instance under sections 18 and 18.1 of the *Federal Courts Act*. This of course includes the question of whether the enabling legislative or regulatory provisions pursuant to which they initiated an action or made a decision are consistent with the Constitution.

[102] Second, the constitutional question raised by the applicant is unprecedented and is not currently being argued before another tribunal. This is not a theoretical question, whereas the constitutionality of the statutory provision – subsection 140(2) of the CCRA – continues to cause problems between the parties.

[103] Third, because the offender is subject to an LTSO, the applicant has a genuine interest in having the Court determine the constitutionality of subsections 140(1) and (2) of the CCRA when the Board conducts a post suspension review pursuant to section 135.1 of the CCRA. Also, the declaratory relief sought in this case by the applicant will have immediate practical effect and will apply at once because the Board will have to comply with the ruling. In this case, the Board's position has been forcefully argued by the Attorney General of Canada who is a party to the proceeding.

D. *Binding effect of a declaration of constitutional invalidity or inoperability*

[104] I say this as an aside, but upon closer examination, the *obiter dictum* in paragraph 70 and 71 of *Windsor SCC* also seemed to question the binding character, both at the horizontal and interjurisdictional level, of a constitutional declaration, whatever it may be. If this applies to parties involved in private law litigation, where interests are necessarily limited, the question may nonetheless arise in a public law dispute where the respondent is the Government itself represented by the Attorney General. There is the doctrine of *stare decisis*, but there is also the authority of *res judicata* between both parties. Given that this Court has jurisdiction in this matter and for the other reasons outlined above, I am of the view that it is not necessary to use my discretion and refer the matter to the Superior Court of Québec.

[105] The questions asked in *Windsor SCC* reflected some comments in *Strickland*, which was decided a year earlier. In *Strickland*, the appellants brought an application for judicial review in the Federal Court seeking a declaration that the *Federal Child Support Guidelines*, SOR/97-175 were unlawful as they were not authorized by s. 26.1(2) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). In exercising her discretion, the judge at first instance had refused to hear the issue on its merits: in matters of family law, the provincial superior courts were better placed than the Federal Court to decide whether the Federal Guidelines contravened the *Divorce Act*. In the final analysis, the Supreme Court rejected the appellant's position that the alternative remedy of litigation in the provincial superior courts was inefficient and would give rise to multiple proceedings.

[106] But beyond a number of practical considerations that are not relevant in this case, Cromwell J. noted in paragraph 53:

> [53] The appellants' position overlooks the fact that a ruling of the Federal Court on this issue would not be binding on any provincial superior court. Thus, regardless of what the Federal Court might decide, before the ruling could have any practical effect, the issue would have to be re-litigated in the superior courts, or, alternatively, litigated up to this Court. Even if there were a binding ruling that the *Guidelines* were unlawful, a proliferation of litigation would be inevitable. It would be for the provincial courts to decide the impact of the illegality of the *Guidelines* on particular support orders and that could only be done in the context of a multitude of individual cases. …
>
> [My emphasis.]

[107] A cogent argument would have to answer the following question, if the roles were reversed and the same constitutional issue were decided by a provincial superior court: to what extent would a declaration of invalidity by a superior court (or provincial court of appeal) legally

bind other provincial and statutory courts, including the Federal Court and the Federal Court of Appeal? To ask the question is to answer it. The answer is "no" if we consider the question from the standpoint of the doctrine of *stare decisis*. But this does not necessarily mean that the persuasive character of a ruling rendered in another jurisdiction will be set aside pursuant to the rules of judicial comity (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th Ed (Markham, Ontario: LexisNexis 2015) [Lange] at pp. 499–500, referring to *Fording Coal Limited v. Vancouver Port Authority*, [2006] BCJ No 900 (CA) at paragraphs 14–17, citing *Morguard Investment Ltd v. De Savoye*, [1990] 3 SCR 1077; *Toronto Auer Light Co v. Colling* (1898), 31 OR 18).

[108] If we now consider the verticality of the doctrine of stare decisis, in a unitary state, everyone knows his rank – as in a chain of command. Because, overall, while the doctrine of *stare decisis* provides some legal certainty while permitting the orderly development of the law in incremental steps (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] S.C.J. No. 5 at paragraph 44, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] S.C.J. No. 72 at paragraph 42) – it is more difficult to apply in the Canadian federation because of the limits of the jurisdictional or territorial competence of the Canadian courts. This is why we need a supreme court. But from a horizontal standpoint, as the Supreme Court of Canada pointed out in *Wolf v. The Queen*, [1975] 2 SCR 107 at page 109: "A provincial appellate court is not obliged, as a matter either of law or of practice, to follow a decision of the appellate court of another province, unless it is persuaded that it should do so on its merits or for other independent reasons" [My emphasis]. These comments were echoed after the *Charter* came into force in 1982 by the Court of Appeal of British Columbia in a criminal case where the accused based his

appeal on a declaration of invalidity of a provision of the *Criminal Code* made by the Court of Appeal for Ontario (*R v. Pete*, [1998] BCJ No 65 at paragraph 5). Similarly, it can be said that the Federal Court or the Federal Court of Appeal is not bound by the declaration of invalidity of provincial courts of appeal unless it is satisfied that it must follow that decision on the basis of its intrinsic value or other independent reasons.

[109] Ultimately, the (provincial or statutory) superior courts and the (provincial or statutory) intermediate courts do not have the final word with respect to the evolution of Canadian law (common law or civil law). The Supreme Court of Canada does. Regarding this point, as the Supreme Court pointed out in *Reference re Supreme Court* at paragraph 85: "Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system." But as the Supreme Court itself explained, the role of the Court of Canada was further enhanced as the 20th century unfolded following the abolition in 1975 of appeals as of right to the Court in civil cases (paragraph 86).

[110] But getting back to the present, we are not discussing the evolution of common law or civil law in this case. From a strictly practical point of view, what is essential in an administrative and constitutional matter such as the one before us is that the declaration of invalidity sought by a party can bind the Attorney General of Canada once the Federal Court decision has become final and all appeal mechanisms have been exhausted. In particular, this

applicant is complaining about a breach of the *Charter*. As s. 32 of the *Charter* dictates, the *Charter* applies to governments and legislatures: “Its purpose is to provide a measure of protection from the coercive power of the state and a mechanism of review to persons who find themselves unjustly burdened or affected by the actions of government” (*Young v. Young*, 1993 SCC 34, [1993] 4 SCR 3). Under subsection 24(1) of the *Charter*, in the event of a violation of section 7 of the *Charter*, the Federal Court also has jurisdiction to order appropriate remedies with regard to the review of the lawfulness of any decision made by the government or a federal board (*Singh* at paragraphs 75–78; *Operation Dismantle* at paragraphs 28 and 69; *RWDSU v. Dolphin Delivery Ltd.*, 1986 SCC 5, [1986] 2 SCR 573 at paragraph 34).

[111] We should also revisit the concept of *lis inter partes*, which is essential to the application of *res judicata*, or even issue estoppel or abuse of process, since disputes must eventually come to an end. The Attorney General of Canada is party to this case. Pursuant to subsection 2(2) of the *Department of Justice Act*, R.S.C., 1985, c. J-2, the Minister is *ex officio* Her Majesty’s Attorney General of Canada, in that the Minister holds office during pleasure and has the management and direction of the Department. Furthermore, section 4 stipulates that the Minister is the official legal adviser of the Governor General and the legal member of the Queen’s Privy Council for Canada and shall see that the administration of public affairs is in accordance with law and advise on the legislative Acts. Under subsection 4.1(1), the Minister shall examine whether the Bills and regulations are inconsistent with the purposes and provisions of the *Charter*. Finally, paragraph 5(1)(d) dictates that the Attorney General of Canada shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada. There is really nothing new in this

legislative expression. The Attorney General of Canada and the Attorneys General of the provinces, collectively, are the descendants of the Attorney General of England (section 135 of the *Constitution Act, 1867*). An important aspect of the Attorney General of England's traditional constitutional role is to protect the public interest in the administration of justice. However, in Canada, the Attorney General is charged with duties that go beyond the management of prosecutions. Unlike England, the Attorney General is also the Minister of Justice and is generally responsible for drafting the legislation tabled by the government of the day (*Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at paras. 24–27; *Canada (Attorney General) v. Cosgrove*, 2007 FCA 103, [2007] 4 FCR 714 at paras. 34–36 – Supreme Court appeal denied 2007 SCC 66738). This is another notable aspect of the constitutional evolution of Canadian institutions.

[112] It is safe to say that in constitutional cases, the effect of declarations of inoperability made by a court of law pursuant to section 52 of the *Constitution Act, 1982* is not trivial (Sarna at pp. 151–153). It goes without saying that the issue of whether such a declaration should be suspended – in order not to create a legislative vacuum – is a consideration in the public interest which may be studied by the trial judge after having heard the representations of the parties, including of course, those of the Attorney General. Eventually, depending on whether a judicial declaration has been made at first instance, a party may appeal to an intermediate court of appeal, and the constitutional question may ultimately be decided by the Supreme Court.

[113] Similarly, if the court of law considers, in exercising the remedial power set out in subsection 24(1) of the *Charter* – that a declaration, rather than a particular concrete remedy, is

appropriate and just under the circumstances, it should not be assumed that such a judicial declaration will not have any meaningful effect from a practical standpoint. In *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] 2 SCR 139, 2015 SCC 21, the Supreme Court pointed out that judicial declarations are often made under section 23 of the *Charter*, the minority language education provision that guarantees minority language rights holders the right to have their children receive primary and secondary school instruction in English or French.

[114] At paragraph 65, Karakatsanis J. noted in this regard:

> That said, there is a tradition in Canada of state actors taking *Charter* declarations seriously: see, e.g., P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 40–37. As this Court noted in *Doucet-Boudreau*, "[t]he assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully" (para. 62). Indeed, this represents one reason why courts often choose to issue declarations in the context of s. 23 (M. Doucet, "L'article 23 de la *Charte canadienne des droits et libertés*" (2013), 62 S.C.L.R. (2d) 421, at pp. 462–63).
>
> [My emphasis.]

[115] At the risk of repeating myself, the Attorney General of Canada was validly constituted as the respondent in this application for judicial review and judicial declaration – which alleges that subsections 140(1) and (2) of the CCRA are inconsistent with the constitutional right guaranteed in section 7 of the *Charter*. In this case, the Government of Canada will be bound by this Court's ruling, once the decision has become final and all appeal mechanisms have been exhausted. I am therefore satisfied that any declaratory relief in this case may have a meaningful effect. If a party is dissatisfied, it can still appeal to the Federal Court of Appeal or even to the Supreme Court.

[116] Consequently, it would not be in the best interests of justice to ask the applicant to have the Superior Court of Québec address this point in order to resolve the constitutional question now before the Federal Court. Considering the costs already incurred by the parties and that this Court is equally well placed to settle the question involving the CCRA, this is not a case where the Court should exercise its discretion to stay these proceedings pursuant to section 50 of the *Federal Courts Act*.

VI. ***Merits of the parties' arguments on the constitutional question***

[117] It is now a matter of determining whether subsections 140(1) and (2) of the CCRA violate section 7 the *Charter*, which states that everyone has the "right to life, liberty and security of the person" and the right not to be deprived thereof except "in accordance with the principles of fundamental justice."

A. *Issue*

[118] To a large extent, the *Charter* argument and the administrative law argument meet without merging. On the one hand, if the statutory provisions at issue are inconsistent with section 7 and cannot be justified under section 1 of the *Charter*, the Court may provide declaratory relief under section 52 of the *Constitution Act, 1982*. On the other hand, if the legislative discretion to hold a hearing is not in itself inconsistent with section 7 of the *Charter*, and it is rather the Board's use of this discretion that is problematic, the Court may prescribe a remedy that it considers appropriate and just, under subsection 24(1) of the *Charter*, which may include granting declaratory relief under section 18 of the *Federal Courts Act*.

[119] In general, the onus is on the applicant to prove two things: first, that he has suffered or may suffer prejudice to his right to life, liberty and security of person; and, second, that the breach violated or did not conform to the principles of fundamental justice. If the claimant succeeds, the government bears the burden of justifying the deprivation under s. 1, which provides that the rights guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at paragraph 12 [*Charkaoui*]).

B. *Positions of the parties*

[120] At the risk of repeating myself, here is a brief summary of the positions of the parties. The applicant argues that subsection 140 (2) of the CCRA, which gives the Board discretion to hold a hearing, must be declared invalid or inoperative in the case of long-term offenders subject to an LTSO. The respondent counters that the discretion granted under subsection 140(2) of the CCRA is not the problem. Rather, the problem lies with the Board’s duty, derived from the principles of fundamental justice, to exercise that power in a manner consistent with section 7 of the *Charter*.

[121] As indicated above, the outcome of the dispute depends on the discretion to hold a hearing under subsection 140(2) of the CCRA. The constitutional argument was formally raised by the applicant before the Board, but the Board preferred not to address it in the contested decision. We should keep in mind here that in addition to the judgments rendered by the Superior Court of Québec and the Appeal Court of Québec in *Canada (Procureur général) c Way*, 2015

QCCA 1576 [*Way CA*], confirming 2014 QCCS 4193 [*Way CS*], counsel for the applicant cited in her written submissions of June 5, 2016, in support of her requisition for hearing before the Board, various decisions of the Supreme Court of Canada and the provincial superior or appellate courts (*Gamble*; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21–28 [*Baker*]; *R v. Gatza*, 2016 ABPC 37 [*Gatza*]; *R v. Bourdon*, 2012 ONCA 256 [*Bourdon*]; *Regina v. Cadeddu* (1982), 4 CCC (3d) 97 (Ont. HC) [*Cadeddu*]; *Illes v. The Warden Kent Institution*, 2001 BCSC 1465; *Swan v. Attorney General of British Columbia* (1983), 35 CR (3d) 135) [*Swan*]), and a recent Federal Court decision (*Gallone*) which confirmed the right to an oral hearing in such a case. None of these decisions were considered by the Board in the decision under review.

[122] Relying on the case law cited above and the reasoning of the Superior Court and the Court of Appeal of Québec in *Way*, the applicant argues that the same finding of invalidity or inoperability of subsections 140(1) and (2) of the CCRA is required in the case of long-term offenders whose LTSO has been suspended by the Service and whose case has been referred to the Board under section 135.1 of the CCRA. A hearing must be held, unless the offender waives this right in writing or fails to attend the hearing.

[123] The respondent counters these arguments by stating that the declaration of invalidity made in *Way* does not apply in this case, because the reasoning of the Superior Court and the Court of Appeal of Québec does not support the applicant's arguments. The respondent notes that an in-person post-suspension hearing was never automatically granted by law to the offender whose LTSO was suspended under section 135.1 of the CCRA. Also, there are major differences

between the suspension of an LTSO and the suspension, cancellation, termination or revocation of parole or statutory release by the Board.

[124] The applicant replies that the respondent's narrow interpretation of subsections 140(1) and (2) of the CCRA is inconsistent with the fundamental right to be heard, and submits that in all cases where an LTSO is suspended, the long-term offender's residual liberty is in fact restricted. Also, everything in the case law indicating that it is important that the prisoner be able to submit his own version of the facts to the Board suggests that any type of *ex parte* hearing is very suspect (*Swan*; *Cadeddu*; *Conroy and the Queen*, [1983] 5 CCC (3d) 501, 1983 CanLII 3066 (ONSC); *Re Lowe and the Queen*, [1983] 5 CCC (3d) 535 (BCSC), 1983 CanLII 328 (BCSC).

C. *Legal framework governing long-term supervision orders*

[125] This has already been explained. Actions taken by the Service and decisions made by the Board with respect to supervision of long-term offenders fall within the authority of the Parliament of Canada. The applicable guidelines are found in the *Criminal Code* and the CCRA. An overview follows.

[126] First, section 753.1 of the *Criminal Code* allows a judge, at the time of sentencing, to declare a person a "long-term offender" [offender]. At the expiration of the sentence, the offender is then subject to an LTSO for a period that does not exceed 10 years. It is important to note that the purpose of any such conditional release is to contribute to the maintenance of a just, peaceful and safe society by making appropriate decisions as to the timing and conditions of

release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens (section 100 of the CCRA).

[127] On the other hand, it is up to the Board to establish the specific conditions of the LTSO. These conditions remain valid for the period that the Board specifies (subsection 134.1(3) of the CCRA). This notwithstanding, the general conditions set out in subsection 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations], are applicable, with necessary modifications, to the offender supervised by an LTSO (subsection 134.1(1) of the CCRA).

[128] The Board may, at any time during the supervision period, vary or remove any such conditions (subsection 134.1(4) of the CCRA). Additionally, an offender who is required to be supervised, a member of the Board or, on approval of the Board, the offender's parole supervisor, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant (subsection 753.2(3) of the *Criminal Code*).

[129] Administrative and penal mechanisms are in place to limit or otherwise control the residual liberty of the offender supervised by an LTSO with a view to ensuring the offender complies with the conditions of the LTSO.

[130] First, subsection 134.2(1) of the CCRA provides that an offender supervised by an LTSO shall comply with any instructions given by a member of the Board or a person designated, by name or by position, by the Chairperson of the Board or by the Commissioner, or given by the offender's parole supervisor, respecting any conditions of long-term supervision in order to prevent a breach of any condition or to protect society. Meanwhile, subsection 753.3(1) of the *Criminal Code* provides that an offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

[131] Second, when an offender fails to comply with a condition of an LTSO, the Service may suspend the community supervision and authorize the recommitment of the offender to custody for a period not exceeding 90 days (subsections 135.1(1) to (4) of the CCRA). In this circumstance, the Correctional Service Canada *Commissioner's Directive no. 715-2* concerning the post-release decision process [Directive] provides that the Service shall review the case. The LTSO is suspended only when an offender's risk is assessed as unmanageable in the community. If applicable, a warrant of suspension of conditional release is issued. A post-suspension interview is then conducted to advise the offender of the details of the suspension and provide him/her an opportunity to explain his/her conduct.

[132] Third, if the Service does not cancel the suspension, the offender's case may be referred to the Board for review (subsection 135.1(5) of the CCRA). Where an officer of the Service finds that the suspension should be continued, the officer forwards to the Board an "Assessment for Decision" and shares any nonconfidential information from the assessment with the offender.

The offender may make written representations and request a meeting in person with the Board. However, as explained below, the decision to hold a hearing is discretionary in this case (subsections 140(1) and (2) of the CCRA).

[133] The Board shall, on the referral to it of the case, review the case and, before the end of the maximum period of 90 days, may: 1) cancel the suspension, if the Board is satisfied that, in view of the offender's behaviour while being supervised, resumption would not constitute a substantial risk by reason of the offender reoffending before the expiration of the period; 2) where the Board is satisfied that no appropriate program of supervision can be established that would adequately protect society from the risk of the offender reoffending, and that it appears that a breach has occurred, recommend that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code* (subsection 135.1(6) of the CCRA).

[134] If the Board recommends that an information be laid, the Service shall make the recommendation to the Attorney General who has jurisdiction in the place in which the breach of the condition occurred – in other words, the provincial Crown (subsection 135.1(7) of the CCRA). The presumption of innocence applies to this step (subsection 11(d) of the *Charter*), while the person charged has a right not to be denied reasonable bail without just cause (subsection 11(e) of the *Charter*). An offender that does not pose a risk may consequently request conditional release pending the hearing of his/her case.

[135] If the offender is found guilty of an offence referred to in section 753.3 of the *Criminal Code*, then the judge is responsible for determining, among the entire range of sentencing

options, the sentence proportional to both the gravity of the offence and the degree of responsibility of the offender. The breach of an LTSO is not governed by a separate sentencing code or system. Time spent in preventive detention following indictment of the offender is taken into account although not necessarily time elapsed during the LTSO suspension period (maximum 90 days).

D. *Hearing before the Board: Mandatory or discretionary?*

[136] Section 140 of the CCRA describes the cases in which a hearing before the Board is mandatory or discretionary. The text of section 140 is cited above (paragraph 4).

[137] Subsection 140(1) of the CCRA stipulates that a hearing is mandatory in the cases listed in paragraphs (a) to (e) of subsection (1). However, according to subsection 140(2) of the CCRA, a hearing is at the Board's discretion in other cases, which includes a post-suspension hearing following the suspension of an LTSO (section 135.1 of the CCRA).

[138] The specific cases in which a hearing is mandatory are set out by the Quebec Court of Appeal in *Way CA* in paragraphs 41 to 48. I am taking the liberty of reproducing this list from *Way CA* while disregarding the footnotes.

[139] Under paragraph (a), the Board shall hold a hearing for the first review for day parole of the parties in question. In cases where the offender served a sentence of less than two years, the Board is not required to hold a hearing.

[140] Under paragraph (b), the Board shall hold a hearing when reviewing the case of every offender who is serving a sentence of two years or more and who is not within the jurisdiction of a provincial parole board for the purpose of deciding whether to grant full parole. It shall also hold a hearing in relation to further review subsequent to a decision not to grant full parole or day parole or where a review was not conducted because the offender advised the Board that they do not wish to be considered for full parole. This further review is conducted within two years of the decision. The Board also holds a hearing when conducting another review concerning the cancellation or termination of parole. This further review is also conducted within two years of the cancellation or termination.

[141] Under paragraph (c), the Board shall hold a hearing when reviewing the case of an offender "who is serving a sentence of two years or more that includes a sentence imposed for an offence set out in Schedule I or II or an offence set out in Schedule I or II that is punishable under section 130 of the *National Defence Act*." Sections 129, 130 and 131 of the CCRA appear under the "Detention during Period of Statutory Release" heading.

[142] Under paragraph (d), the Board shall hold a hearing for "a review following a cancellation of parole." It is to be noted that in 2012, paragraph 140(1)(d) of the CCRA was amended by section 527 of the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 [2012 amendments]. These legislative changes came into force on December 1, 2012 (see SI/2012-88). Previously, paragraph 140(1)(d) of the CCRA provided that the Board was to hold a hearing for a review following "suspension, cancellation, termination or revocation of parole or following a suspension, termination or revocation of statutory release."

[143] Under paragraph (e) and under the Regulations, the Board shall hold a hearing where an offender applies for an unescorted temporary absence if the Board has not yet granted a first unescorted temporary absence or a first day parole and where the offender is serving, in a penitentiary, a sentence of life imprisonment imposed as a minimum punishment or commuted from a sentence of death, or a sentence of detention for an indeterminate period (subsection 164(1) of the Regulations). The Board shall also hold a hearing in cases where an offender applies for an escorted temporary absence on certain specific grounds if the Board has not yet granted a first unescorted temporary absence and the offender is serving a sentence of life imprisonment as a minimum punishment or commuted from a sentence of death (subsection 164(2) of the Regulations).

[144] Lastly, neither the Act nor the Regulations define the terms "cancellation," "termination" or "revocation." Cancellation may be said to take place where authorization for release is withdrawn before it takes effect (for example, subsection 124(3) of the CCRA). Termination and revocation occur following release. Termination occurs when "the undue risk to society is due to circumstances beyond the offender's control" (subsection 135(7) of the CCRA), while revocation occurs in all other cases.

E. *Declaration of invalidity in Way*

[145] On August 26, 2014, the Superior Court of Québec granted an application for *habeas corpus* and *mandamus* in aid and declaratory relief submitted by two offenders whose day parole or full parole had been revoked by the Board without calling the offenders to an oral hearing (*Way SC*).

[146] In the opinion of the Superior Court, the 2012 amendments represent a significant departure from a longstanding tradition of recognizing and protecting the right of offenders to be heard before major decisions are made concerning their potential re-release. In fact, the Superior Court concludes that the legislative changes of 2012 resulted in deprivation of the two offenders' residual liberty, contrary to principles of fundamental justice. Under these circumstances, detention of the two offenders was illegal. Section 527 of the *Jobs, Growth and Long-term Prosperity Act* and new paragraph 140(1)(d) of the CCRA were consequently declared inoperative on the grounds that these provisions violate section 7 of the *Charter* and cannot be saved pursuant to section 1.

[147] On October 1, 2015, the judgment in *Way SC* was affirmed by the Court of Appeal of Québec (*Way CA*). The Court of Appeal noted that [TRANSLATION] "in the implementation of the parole system, every decision has significant impact on an offender's life," while [TRANSLATION] "revocation can have a number of serious consequences, notably a longer period of imprisonment and the loss of employment": *Way* at para 64, citing a comment from Laskin J., dissenting, in *Mitchell v. R.*, [1976] 2 SCR 570 on page 584 [*Mitchell*] affirmed by the Supreme Court in *Singh* on pages 209-210.

[148] Now, although flexibility must be shown when it comes to analyzing procedural fairness with respect to the parole process (*Mooring v. Canada (National Parole Board)*, [1996] 1 SCR 75 at paras 25-26 (SCC) [*Mooring*]), the Court of Appeal of Quebec also notes, at paragraph 72:

> [72] […] [TRANSLATION] it is difficult not to observe that the amendment set out in section 527 of the [*Jobs, Growth and Long-term Prosperity Act*] creates an arbitrary situation. Apart from the financial savings sought by Parliament, there is no rational basis

> for making a different procedure applicable to decisions having similar impact on different offenders. Moreover, it is unfair to allow a hearing for an offender whose parole is cancelled before it has begun and to let the [Board] decide without limitation as to this benefit, while an offender's parole is suspended or revoked after the offender has earned this benefit.

[149] Ultimately, the Court of Appeal of Québec concludes that there was no analytical error in the Superior Court's reasoning, whether in relation to the violation of section 7 of the *Charter* or its justification pursuant to section 1.

[150] On April 21, 2016, the Supreme Court granted leave to appeal the decision in *Way CA*. On June 16, 2016, it formulated two constitutional questions concerning the violation of section 7 of the *Charter* and justification of any such violation pursuant to section 1. On September 7, 2016, however, the Attorney General of Canada withdrew its appeal and the case was closed.

[151] On March 27, 2017, at the hearing for the present application for judicial review and declaratory relief, counsel for the respondent indicated that the Board is complying henceforth, across Canada, with the declaration of invalidity in *Way SC* despite the fact that the provisions declared inoperative by the Superior Court of Québec (section 527 of the *Jobs, Growth and Long-term Prosperity Act* and paragraph 140(1)(d) of the CCRA) had not been officially repealed by Parliament. As a consequence, in practice, the Board automatically holds a hearing in all cases involving the suspension, cancellation, termination or revocation of an offender's parole or statutory release. However, it does not do so in cases referred to it by the Service

following the suspension of an LTSO, when the decision as to a post-suspension hearing is made on a case-by-case basis.

[152] This Court is not bound by provincial judgments. Notwithstanding this, it examined the persuasive character of the judgments rendered in Quebec in *Way* to determine whether similar reasoning could be applied to the suspension of an LTSO. Although the 2012 amendments to section 140 of the CCRA were declared unconstitutional, in my humble opinion, there are significant reasons for distinguishing the *Way* case from the case at hand.

[153] First, in the case of long-term offenders, community supervision is based on the sentence handed down by a court of criminal jurisdiction, not a decision of the Board. The Board can in no way vary of its own motion the sentence passed.

[154] Second, whereas parole is, among other factors, granted to an offender for good behaviour during detention, the LTSO is a consequence of the offender's behaviour based on the seriousness of his or her crimes or on the offender's repetitive behaviour (section 753.1 of the *Criminal Code*). Additionally, the procedure applicable to the violation of a condition of an LTSO illustrates the primary objective, this being to protect society from the danger posed by putting the offender back into the community. The LTSO is initially suspended by the Service, which obtains a warrant of recommitment. After meeting in person with the offender, the Service makes a decision as to the continuation or cancellation of the suspension. If the Service opts to continue the suspension, the case is referred to the Board. The Board must render a decision within the statutory time limit of 90 days, after which suspension of the LTSO cannot be

continued and the offender must be released (unless, of course, the offender is charged in the meantime and the Attorney General opposes the offender's release).

[155] Third, the material evidence in the file of this Court – which appears to be either absent or not considered in *Way* – does not lead me to conclude that any major issues of credibility remain or are determining factors in the decision of the Board under section 135.1 of the CCRA. As such, pursuant to section 9.1 of the Manual, when making a determination on whether to cancel the suspension or recommend that an information be laid pursuant to subsection 135.1(6) of the CCRA, Board members assess all relevant information, including:

a. the offender's progress towards meeting the objectives of the correctional plan, including addressing the risk factors and needs areas;

b. information that the offender has demonstrated behaviour that may present a substantial risk to the community by failing to comply with one or more conditions (including time unlawfully at large and since re-incarceration);

c. reliable and persuasive information that a breach of condition has occurred;

d. whether the offender understood the full implications of the condition, or whether an explanation for failing to comply with the condition could be argued;

e. any documented occurrences of drug use, positive urinalysis results or failures or refusals to provide a sample; and

f. history and circumstances of breaches, suspensions or revocations during this or previous periods of conditional release or long-term supervision and any alternative interventions attempted to manage the risk.

[156] Fourth, a recommendation to lay a charge pursuant to section 753.3 of the *Criminal Code* does not bind the Attorney General. More importantly, the offender is entitled to the presumption of innocence. They will have an oral hearing with a judge and may argue all means of defence to have the accusation dropped.

[157] Fifth, the 2012 amendments in no way altered the situation of long-term offenders. The illogical nature of these changes was a determining factor in *Way* in terms of questioning the different treatment of offenders already on parole. In this case, the post-suspension hearings were always at the discretion of the Board when a case was referred to it following the suspension of an LTSO.

[158] In addition, although this Court considered the conclusions and reasoning of the Superior Court of Québec and the Court of Appeal in *Way*, it must draw its own conclusions concerning the constitutionality of the discretion provided by subsection 140(2) of the CCRA with respect to a post-suspension review concerning a long-term offender whose LTSO has been suspended by the Service.

F. *Deprivation of offender's residual liberty*

[159] To summarize from the start: first, the applicant claims that the suspension of an LTSO by the Service and ensuing recommitment to custody both represent significant restrictions on the residual liberty of the offender under community supervision (*Gallone* at para 17, *R. v. Gamble*, [1988] 2 SCR 585; *Illes v The Warden Kent Institution*, 2001 BCSC 1465). According to the applicant, the right to residual liberty is more important in the context of an LTSO than the right of an offender on day parole or on full parole. This is because an offender under community supervision has finished serving their sentence, unlike an offender on parole. The applicant cites further the importance of the principle of reintegration into society supporting the long-term supervision system.

[160] I generally agree with the applicant. When an LTSO is suspended, the offender's residual liberty is indeed restricted for a period of up to 90 days. The respondent submits that recommitment of a long-term offender to custody is expressly permitted under section 135.1 of the CCRA. Now, the Board's exercise of discretion as to holding a hearing, as provided in subsection 140(2) of the CCRA, does not restrict the offender's residual liberty in any way. In any case, the deprivation of an individual's liberty must be sufficiently serious to justify protection under the *Charter* (*Cunningham v. Canada*, [1993] 2 SCR 143 at p. 151). In the present case, any deprivation of the offender's liberty beyond the statutory period of 90 days is not attributable to the Board's recommendation, at least, not significantly enough to claim violation of section 7 of the *Charter* (*Huynh v. Canada,* [1996] 2 FCR 976).

[161] The respondent's argument is not convincing. It is not my role to decide whether the restriction of a long-term offender's residual liberty is greater or lesser than that resulting from the suspension of parole. As noted by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*], the LTSO represents a form of conditional release governed by the CCRA, and its purpose is consequently to contribute to the maintenance of a just, peaceful and safe society, facilitating the rehabilitation and reintegration of offenders (at para 47). In this regard, the Court notes at paragraph 48:

> [48] Reading the *Criminal Code*, the *CCRA* and the applicable jurisprudence together, we can therefore identify two specific objectives of long-term supervision as a form of conditional release: (1) protecting the public from the risk of reoffence, and (2) rehabilitating the offender and reintegrating him or her into the community. The latter objective may properly be described as the ultimate purpose of an LTSO, as indicated by s. 100 of the *CCRA*, though it is inextricably entwined with the former. […]
>
> [My emphasis.]

[162] The mechanisms of the CCRA in relation to community supervision of a long-term offender constitute a whole. The various steps leading to deprivation of an offender's residual liberty cannot be artificially isolated. Suspension of an LTSO, recommitment to custody and even the subsequent indictment of the offender must be considered overall from the viewpoint of their practical effects on the offender. With respect to the first phase of the review required under section 7 of the *Charter*, the issue is not whether the existence of discretion as to holding a hearing goes against the principles of fundamental justice but instead whether the individual's right to liberty is engaged. Such is the case in this instance when considering the adverse application of the legislative mechanisms in question. One day the offender is released under

community supervision; the next, following allegations of violation of the LTSO, the Service issues a warrant and the offender is recommitted to custody for a period of up to 90 days.

[163] In the present case, even if the Board can ultimately only make a recommendation to prosecute to the Attorney General under paragraph 135.1(6)(c) of the CCRA, it remains responsible for deciding whether suspension of the LTSO by the Service is justified to begin with. The applicant is not stating here that his recommitment to custody is in itself illegal but that the offender has a right to an oral hearing to explain his conduct. If the Board does decide within the 90-day time limit not to suspend the LTSO, then the offender will be released again. Now, paragraph 135.1(6)(a) of the CCRA provides that a suspension may be cancelled if the Board finds, in view of the offender's conduct during the supervision period, that there is not a high risk of reoffending before expiration of this period. The Board may also vary the conditions of an LTSO. Further, I am not convinced that the maximum recommitment to custody of 90 days specified in section 135.1 of the Act should be separated from the application of subsection 140(2) of the Act concerning the holding of a hearing.

[164] Having determined that the offender's right to liberty is engaged by application of the mechanisms provided in section 135.1 of the CCRA, it is now appropriate to determine whether the discretionary nature of the power granted under subsection 140(2) of the CCRA as to holding a hearing goes against principles of fundamental justice; first, however, we must identify which principles of fundamental justice are potentially applicable to the case under consideration.

G. *Variable content of obligation to act fairly*

[165] The two parties agree that the Board is required to comply with principles of fundamental justice. However, they have adopted diverging positions on the question as to whether an oral hearing before the Board is necessary in all cases involving suspension of an LTSO referred to the Board by the Service.

[166] The analysis grid proposed by the Supreme Court in *Baker* for establishing the scope of the obligation to act fairly is well known and not subject to challenge. The first factor is the nature of the decision being made, or the closeness of the administrative process to the judicial process in the process provided for, the function of the decision-making body and the determinations that must be made to reach a decision (*Baker* at para 23). The second factor is the nature of the statutory scheme, or the role of the particular decision within the statutory scheme including, for example, the appeal procedure or whether further requests can be submitted (*Baker* at para 24). The third factor is the importance of the decision to the individuals affected, or its impact on those persons and the scope of the repercussions of the decision (*Baker* at para 25). The fourth factor is the legitimate expectations concerning the procedure required or its outcome (*Baker* at para 26). The fifth factor is the choices of procedure made by the agency itself, considering the agency's expertise and the extent to which the statute leaves to the decision-maker the ability to choose its own procedures (*Baker* at para 27).

[167] In two recent instances, *Gallone* and *Laferrière FC*, the Federal Court contributed significantly toward developing the administrative law and the content of the rules of procedural fairness. When an offender under an LTSO exhibits cognitive (psychiatric) problems, or when

the reliable and convincing nature of the information examined by the Board cannot be evaluated by simple review of the case, an oral hearing should generally be held.

[168] We will begin with the *Gallone* case. Meticulously reviewing each of the five factors mentioned in the *Baker* judgment in light of the plan at issue and the impact of the Board's decision on the residual liberty of the offender whose LTSO had been suspended, Judge Tremblay-Lamer notes in paragraphs 16, 17 and 19:

> [16] In this case, it is true that the PBC acts in neither a judicial nor a quasi-judicial manner (*Mooring v Canada (National Parole Board*), [1996] 1 SCR 75 at paras 25-26) and that subsection 140(2) of the Act provides the PBC with the discretion decide whether to hold a hearing. However, greater procedural protections are required as there is no appeals process for persons subject to a long-term supervision order and the decision is final (sections 99.1 and 147 of the Act).
>
> [17] The most significant criterion in this case is the importance of the decision to the person affected. The Supreme Court in *Baker*, wrote "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para 25). In this case, not only was the applicant incarcerated following the suspension of an LTSO, the PBC also recommended that a charge be filed under section 753.3 of the *Criminal Code*. The suspension of the long-term supervision and ensuing incarceration amount to a curtailment of the applicant's residual liberty. That decision constitutes a significant factor affecting the content of the duty of procedural fairness owed the applicant by the PBC. It is an important factor that the PBC must take into account in deciding whether to hear viva voce testimony.
>
> […]
>
> [19] In addition, where the assessment of physical or mental capacities may have an impact on the type of conditions to be imposed, a hearing would be appropriate. Here, the Correctional Service's community mental health team, as well as the staff member supervising her, raised concerns about the applicant's cognitive abilities and intellectual limitations. Meeting with the applicant would have certainly allowed for an assessment of the

> grounds of the staff's concerns, in addition to hearing the applicant's explanations regarding the events leading up to the suspension, a decision which significantly restricted her residual liberty.

[169] By applying the analytical framework to the specific facts of the case, Judge Tremblay-Lamer determined that an oral hearing would be necessary. We can thus read in paragraphs 20 to 22:

> [20] To be sure, the nature of the duty of procedural fairness is flexible and depends on the circumstances. A hearing will not be required in every case. However, the factors set out in *Baker* should not remain in the abstract. They must be examined in each case in order to ensure that administrative decisions made are adapted to the type of decision and institutional context.
>
> [21] In this case, the duty of procedural fairness was particularly onerous given that, as the applicant pointed out, she was subject to highly restrictive constraints during her re-admissions (in a maximum security penitentiary, in solitary confinement 23 hours a day, with nothing in her cell but the clothes on her back).
>
> [22] In short, I am of the view that in the circumstances of this case, in particular the questions surrounding the applicant's capacities, the recommendations of the case management team and parole supervisor that the suspension be cancelled, and the significant impact to the applicant of the decision, not only not to cancel the suspension, but to recommend a criminal charge, the PBC should have held an in-person hearing. The submissions made by the applicant's counsel and by her case management team showed that the applicant may have been suffering from a psychiatric or psychological problem, which could obviously have an effect on the decision of the PBC and on the conditions to be imposed. In such circumstances, the PBC lacked sufficient, reliable and convincing information to base its decision on the record.

[170] This Court also learned of a second decision that Judge Tremblay-Lamer rendered on the same subject: *Laferrière FC*. In the latter case, the offender contested the legality of a Board decision that modified the conditions to which the applicant had been subjected within the

framework of an LTSO. This decision had been made on the record despite the request for a hearing. After evaluating the file, the Board accepted the parole supervisor's recommendation that two of the conditions be lifted: the obligation to be treated by a psychiatrist and the prohibition to enter within a perimeter of 500 metres of his spouse's home or any other location where she might be. However, the Board kept the other conditions in force.

[171] Distinguishing this latter situation from *Gallone*, Judge Tremblay-Lamer decided that the written representations were an adequate substitute for an oral hearing. Moreover, the Board has no obligation to hold a hearing at regular intervals. Thus, paragraphs 10 and 11 of *Laferrière FC* state:

> [10] […] In accordance with the factors set out in *Baker*, this is not a situation where the PBC had to hold a hearing to respect procedural fairness. This was a review of the applicant's parole conditions the outcome of which does not have as great an impact as a detention order or the suspension of parole (see *Arlène Gallone c Le procureur général du Canada*, 2015 CF 608). As noted by the Supreme Court in *Baker*, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para 25). In the matter at bar, the written representations were an adequate substitute for a hearing since no particular reason or no serious issue of credibility was raised by the applicant, either of which could have shed a different light on the PBC's decision.
>
> [11] Moreover, the applicant had no legitimate expectation that the PBC hold a hearing, and because the holding of a hearing is discretionary, the PBC was not obliged to hold a hearing at regular intervals. Also, the absence of reasons for the refusal to hold a hearing is not fatal to the decision in the particular circumstances of this case since the applicant did not raise any specific reason why a hearing should have been held and the PBC had all the required information before it. In accordance with *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court may consider that the PBC could have

> given the fact that there was nothing to justify the holding of a hearing as a reason for its refusal. Consequently, the PBC did not breach procedural fairness by not holding a hearing.

[172] As we can see, the scope of the obligation to act fairly has variable content. In terms of section 135.1 of CCRA, although the Board made only a recommendation that is in no way binding on the Attorney General, it remains true that offenders cannot appeal Board decisions to the Court of Appeal. The lack of a right to appeal favours a decisional process carried out with greater respect for principles of procedural fairness. Consequently, a hearing may or may not be necessary, everything depending on the specific circumstances of the file. Considering the legal clarifications made by the Court in 2015 in the *Gallone* and *Laferrière FC* judgments, I am satisfied that before refusing to meet with the offender in person at a post-suspension hearing, the Board must first make sure that the reliable and convincing nature of the file's information allows an informed decision to be made. The question is whether an oral hearing should be convened <u>in all cases</u>, or whether, depending on the file's specific facts, written representations would suffice.

H. *The discretion specified in subsection 140(2) of CCRA is not in itself incompatible with procedural fairness.*

[173] In *Mooring*, the Supreme Court confirmed that in evaluating the risk to society, the Board must nevertheless review all the reliable and available information. The Supreme Court concluded that the Board does not play a quasi-judicial role. Far from settling a specific debate between two opposing parties, the Board performs more investigative functions. It is not required to apply the classical rules of evidence or to hear any *viva voce* "testimony" nor does it have the power to summon witnesses. The Board also acts on the information provided by the offenders

and by the Service. In addition, the presumption of innocence does not apply before the Board (*Mooring* at paragraphs 25-26). The Board's recommendation, without being binding upon the Attorney General, may indirectly lead to the extension of confinement, given that the Attorney General may file criminal charges and prevent the offender from being released. As well, the sentence imposed for a charge under subsection 753.3(1) of the *Criminal Code* does not take into consideration the three months spent in detention under the LTSO suspension (*Gatza* at paragraph 46; *Bourdon* at paragraph 17).

[174] That being said, section 140 of CCRA does not automatically grant the right to an oral hearing in cases of an LTSO suspension and has never previously granted one. Be that as it may, administratively speaking, the Board's discretion is not absolute. Indeed, its practise is regulated by the Manual. The Manual provides instructions that the Board members cannot ignore when an offender requests an oral hearing. Thus in cases where a hearing is not required by CCRA or policy, Board members may, in any case, choose to conduct a review by way of a hearing, pursuant to subsection 140(2) of CCRA, where they believe, under the specific circumstances of the case, that a hearing is required to clarify relevant aspects of the case. The reasons for holding a discretionary hearing are recorded in the reasons for the Board's decision. In cases where the offender or a person acting in his name has requested a review by way of a hearing, the reasons for which holding a hearing was accepted or refused are also recorded (Manual, chapter 11.1, section 6). Incidentally, it can be said that providing reasons is the proper way to ensure the transparency and intelligibility of the Board's decision.

[175] Moreover, the Manual provides a number of concrete examples in which an in-person hearing might be necessary. This may include, in particular, situations in which the reliability and persuasiveness of the information being considered cannot be assessed on a file review, when there is incomplete or discordant information on file, of relevance to the review, that could be clarified at a hearing or when the information on file indicates that the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing (Manual, chapter 11.1, section 6). Although the Manual is not mandatory in nature, the examples found in the Manual lead the offender to legitimately expect that he will meet with the Board in person in this type of case – which of course includes cases in which the offender's credibility is questioned.

[176] The principles of fundamental justice do not require that an individual benefit from the most favourable procedure; instead they require that the procedure be fair (*Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 SCR 3 at paragraph 46 referring to *R v. Lyons*, [1987] 2 SCR 309 on p. 362). Contrary to the applicant's claim, section 7 of the *Charter* does not automatically and systemically require an oral hearing, even if the rights guaranteed by this provision are at issue (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraphs 121-122, [2002] 1 SCR 3). In addition, I am satisfied that the current administrative mechanisms include genuine guarantees with respect to principles of procedural fairness.

[177] Insofar as subsection 140(2) of CCRA does not legally prohibit a hearing, when this can prove necessary in the specific circumstances of the case being reviewed, the existence of such a

discretionary power is neutral and does not conflict with the principles of fundamental justice guaranteed by section 7 of the *Charter*.

VII. ***Conclusion***

[178] In conclusion, although the residual liberty of a long term offender is limited after an LTSO suspension, section 7 of the *Charter* does not oblige the Board to hold a post-suspension hearing in all cases where the Service has referred the file to it. Subsections 140(1) and (2) of CCRA do not prevent the Board from holding a post-suspension hearing in cases where it is asked to exercise the powers set out in section 135.1 of CCRA. The discretion conferred by subsection 140(2) may be applied in a manner that respects the rights guaranteed by the *Charter*, particularly when a question of credibility is a determining factor in the file. Insofar as the source of the problem reported by the applicant is not to be found in the legislation itself, but in the Board's refusal to use its discretion in a manner compatible with the principles of fundamental justice, there is no reason to declare the legislation's provisions invalid (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 at paragraphs 77, 130-139). It is enough to state that the Board must, in all respects, comply with the principles of fundamental justice and hold an in-person hearing in cases that have been discussed earlier.

[179] For these reasons, the applicant has a right to a declaratory judgment, which is mentioned in the next paragraph.

[180] In terms of exercising the jurisdiction set out in section 135.1 of CCRA, the long term offender's residual liberty is limited through the suspension of an LTSO. The Board must act

fairly before upholding the LTSO suspension and recommending that a charge referring to section 753.3 of the *Criminal Code* be laid by the Attorney General. The principles of fundamental justice oblige the Board, before it refuses to hold an in-person, post-suspension meeting with the offender, to ensure that the reliable and convincing nature of information in the file enables it to make an informed decision. When the file contains incomplete or contradictory information that is relevant to the case review or that could be clarified by the offender, a post-suspension hearing must be held. This is also the case when the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing or when a question of credibility is a determining factor in the file. Any refusal to hold an oral hearing must be given in writing. Consequently, the legislative discretion to hold a post-suspension hearing does not violate section 7 of the *Charter* Subsections 140(1) and (2) of CCRA are not constitutionally invalid or inoperative in the case of long term offenders whose file is referred to the Board following the suspension of an LTSO.

[181] The Court otherwise refuses the other compensation or statements sought by the applicant. Without costs.

JUDGMENT in file T-1159-16

RULING on the merit of this application for judicial review and declaratory judgment;

THE COURT ADJUDGES AND DECLARES:

In terms of exercising the jurisdiction set out in section 135.1 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA], the long term offender's residual liberty is limited by the suspension of a long-term supervision order [LTSO]. The Parole Board of Canada must act fairly before upholding the LTSO suspension and recommending that a charge referring to section 753.3 of the *Criminal Code*, RSC 1985, c. C-46, be laid by the Attorney General. The principles of fundamental justice oblige the Board, before it refuses to hold an in-person, post-suspension meeting with the offender, to ensure that the reliable and convincing nature of information in the file enables it to make an informed decision. When the file contains incomplete or contradictory information that is relevant to the case review or that could be clarified by the offender, a post-suspension hearing must be held. This is also the case when the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing or when a question of credibility is a determining factor in the file. Any refusal to hold an oral hearing must be given in writing. The legislative discretion to hold a post-suspension hearing does not violate section 7 of the *Canadian Charter of Rights and Freedoms*. Consequently, subsections 140(1) and (2) of CCRA are not constitutionally invalid or inoperative in the case of long term offenders whose file is referred to the Board following the suspension of an LTSO.

THE COURT REFUSES otherwise the other compensation or statements sought by the applicant;

WITHOUT costs.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

FILE:	T-1159-16
STYLE OF CAUSE:	JIMMY BILODEAU-MASSÉ V. ATTORNEY GENERAL OF CANADA
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