Court file no. 32487

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

BRADLEY HARRISON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL FOR ONTARIO,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Interveners

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PART I:
STATEMENT OF FACTS

Overview of Ontario's Position

1. On April 24, 2008 this Court heard appeals in *Grant* and *Shepherd.*[1] These cases raised the question of whether the trial fairness prong of *Collins*[2] requires automatic exclusion where conscriptive or derivative conscriptive evidence is compelled as a result of a *Charter* breach. The Attorneys General urged this Court to eschew the automatic exclusionary approach to the trial fairness analysis under s.24(2) of the *Charter* because, among other things, it fails to accord with the meaning and purpose of the provision. Section 24(2) requires careful consideration of "all the circumstances" in the context of each individual case before a decision can be made about whether "admission of the [evidence] in the proceedings would bring the administration of justice into disrepute".

2. As the judgments in *Grant* and *Shepherd* remain under reserve, Mr. Harrison comes before this Court, as of right, and asks for what amounts to an automatic exclusionary rule for evidence gathered as a result of serious *Charter* breaches involving what he describes as deliberate police misconduct. For many of the same reasons articulated in *Grant* and *Shepherd,* it is Ontario's position that s.24(2) was never intended to operate in this rigid, formulaic fashion. Instead, it is a provision that requires trial judges to take into account "all of the circumstances" of each *Charter* breach and its relationship to the criminal case before the court and the repute of the administration of justice at large. Any automatic exclusionary approach pertaining to the seriousness of breaches - even deliberate breaches - is fundamentally at odds with the intent and purpose of the provision. (Equally, Ontario accepts that any automatic inclusionary approach based on the seriousness of offences must be rejected.)

3. The legal principles articulated in the judgment of Associate Chief Justice O'Connor and Justice MacPherson are true to the meaning and purpose of s.24(2) of the *Charter.* Read in context, their judgment properly emphasizes the need to consider all of the circumstances before determining admissibility. While they acknowledge that deliberate police misconduct will weigh heavily in

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[1] *R. v. Grant* (2006), 81 O.R. (3d) 1 (C.A.), leave to appeal granted [2007] S.C.C.A. No. 99; *R. v. Shepherd,* [2007] S.J. No. 119 (C.A.), leave to appeal granted [2007] S.C.C.A. No. 246.

[2] *R. v. Collins*, [1987] 1 S.C.R. 265.

calibrating the seriousness of the breach, they properly observe that such a finding does not and should not automatically end the inquiry.[3] The Attorney General for Ontario agrees.

PART II:
POINTS IN ISSUE

4. The appellant raises six distinct points in issue. They translate into questions about when exclusion should occur under s.24(2). The answer to these many questions, individually and combined, lies in the inherently flexible and multi-factored approach provided by the framers of the *Charter* and supported by this Court's jurisprudence.

PART III:
BRIEF OF ARGUMENT

Overview

5. The difficulty with the dissenting judgment below and the appellant's position in this Court is that, while they express concern that the seriousness of the offence cannot be allowed to "overwhelm the s.24(2) analysis at the expense of the consideration of other factors", the underlying premise of their position is susceptible to this very type of criticism.[4] To the extent that they critique the trial judge and majority judgment for allowing the seriousness of the offence to overwhelm the inquiry, one might reasonably suggest that they allow what they perceive to be the seriousness of the *Charter* breaches to trump all other considerations. They say that, where officers engage in flagrant and brazen *Charter* breaches, any result other than the exclusion of evidence will serve to condone, rather than condemn, the state's conduct and, as such, bring the administration of justice into disrepute.[5] This is not so. It is wrong to suggest that a single factor, like the motivations behind an officer's conduct, should dictate the result of a s.24(2) inquiry. There are important factors for consideration that extend beyond the deliberate actions of an officer in calibrating the seriousness of a *Charter* breach and determining how the administration of justice is best served by admission or exclusion of evidence.[6] In the end, it is Ontario's position that when the framers of the *Charter*

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[3] *Reasons for Judgment of the Court of Appeal for Ontario*, Appellant's Record, Vol. I, p. 59, para. 63.

[4] *Ibid.*, at p. 81, para. 150.

[5] *Ibid.*, at p. 80, para. 147.

[6] Where the word "deliberate" is used in this factum, it should not be read as either implicitly or explicitly taking a position on the facts of this case.

said that trial judges should have regard to "all the circumstances" in their s.24(2) determinations, they meant it, regardless of the seriousness of the offence or breach. The majority judgment had regard to all of these circumstances.

There Is No Trump Card When It Comes to the Reputation of the Administration of Justice

6. In recent years, this Court has made reference to the fact that there exists no automatic exclusionary rule and that all three *Collins* factors must be considered in each case. Of particular note are *Buhay, Mann*, and the concurring judgment of LeBel J. in *Orbanski*.[7] According to LeBel J., the admissibility inquiry is a "delicate and nuanced" one which strives to find a "proper balance between competing interests and values at stake in the criminal trial, between the search for truth and the integrity of the trial ...".[8] An approach that allows the seriousness of the offence or seriousness of the breach to trump all is antithetical to the demands of this sophisticated inquiry.

7. Section 24(2) of the *Charter* represents a specific choice by its framers to provide a remedial provision that rejects both the American rule of automatic exclusion [9] and the Canadian pre-*Charter* rule that favoured inclusion based on principles of relevance and reliability of evidence.[10] The provision requires trial judges to have "regard to all the circumstances" and determine whether the admission of the evidence in the criminal trial will bring the "administration of justice into disrepute". In *Collins,* this Court provided a "structured discretion to assess the impact of the breach of constitutional rights on the obtaining of the evidence in order to determine whether it should be excluded".[11] Three broad categories for consideration of the relevant circumstances were provided: effect of the admission of the evidence on the fairness of the trial, seriousness of the violation, and effect of admission on the repute of the administration of justice.[12] Trial judges are obliged to

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[7]*R. v. Buhay*, [2003] 1 S.C.R. 631 *per* Arbour J. at para. 71; *R. v. Mann,* [2004] 3 S.C.R. 59 *per* Iacobucci J. at para. 57; *R. v. Orbanski*; *R. v. Elias*, [2005] 2 S.C.R. 3 *per* LeBel J. at para. 95.

[8]*R. v. Orbanski, supra, per* LeBel J. at paras. 93-94.

[9]Although, in recent years, the American approach has been moving further away from the automatic exclusionary approach. See, for instance, *Hudson v. Michigan*, 547 U.S. 586; 126 S.Ct. 2159 (2006). See James Stribopoulos, *"Lessons From the Pupil: A Canadian Solution to the American Exclusionary Rule* (1999), 22 B.C. Int'l & Comp. L.Rev. 77 for a review of the exclusionary rule in the United States.

[10]*R. v. Wray,* [1971] S.C.R. 272.

[11]*R. v. Orbanski, supra, per* LeBel J. at para. 90.

[12]*R. v. Law*, [2002] 1 S.C.R. 227 *per* Bastarache J. at para. 33; *R. v. Buhay, supra, per* Arbour J. at paras. 41-42.

consider each of these categories.[13] Multiple considerations may inform the categories and they must be approached on a case-by-case basis.

Calibrating the Seriousness of the Breach

8. There is no end to the myriad considerations that trial judges have regard to when considering how to calibrate the seriousness of a *Charter* breach. With respect, the appellant and dissenting judgment below incorrectly emphasize, to the exclusion of all other considerations, the bad faith of the officer who commits the *Charter* breach. While the officer's state of mind is an important consideration when determining where to place the breach on the seriousness line, it is not the sole consideration. A finding of bad faith does not lead to an inexorable conclusion of the most serious breach known to law. While it remains a highly relevant consideration in the s.24(2) inquiry, trial judges must have regard to all of the other circumstances that inform the seriousness of the breach. For instance, the seriousness of intentional *Charter* breaches may be diminished where officers act in exigent or urgent circumstances,[14] without any lawful alternative,[15] or in the absence of physical violence, force, or coercion.[16]

The Impact of the* Charter *Breach on the Individual Informs the Seriousness Inquiry

9. Associate Chief Justice O'Connor and Justice MacPherson correctly determined that it is important to consider the actual impact of a *Charter* breach on an individual in order to understand the true seriousness of the state conduct. In doing so, they emphasized the fact that Mr. Harrison's privacy interest related to a rented motor vehicle and boxes within that vehicle, over which he had disavowed any ownership.[17] They also emphasized the relatively short duration of the arbitrary

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[13] *R. v. Law, supra, per* Bastarache J. at para. 33.

[14] *R. v. Ross,* [1989] 1 S.C.R. 3 *per* Lamer J. (as he then was) at p. 17; *R. v. Manninen,* [1987] 1 S.C.R. 1233 *per* Lamer J. (as he then was) at p. 1245; *R. v. Burlingham,* [1995] 2 S.C.R. 206 *per* Iacobucci J. at para. 46; *R. v. Grant,* [1993] 3 S.C.R. 223 *per* Sopinka J. at p. 260; *R. v. Wise,* [1992] 1 S.C.R. 527 *per* Cory J. at pp. 544-46; *R. v. Wong,* [1990] 3 S.C.R. 36 *per* LaForest J. at p. 57-58.; *R. v. Collins, supra, per* Lamer J. (as he then was) at pp. 283-84; *R. v. Therens,* [1985] 1 S.C.R. 613 *per* LeDain J. at p. 652.

[15] *R. v. Grant, supra, per* Sopinka J. at p. 260; *R. v. Wong, supra, per* LaForest J. at p. 58; *R. v. Collins, supra, per* Lamer J. (as he then was) at pp. 283-84; *R. v. Feeney,* [1997] 2 S.C.R. 13 *per* Sopinka J. at para. 76.

[16] *R. v. Wise, supra, per* Cory J. at p. 546.

[17] *Judgment of the Court of Appeal for Ontario,* Appellant's Record, Vol. I, pp. 55-56, paras. 44-46.

detention.[18] The dissenting judgment and appellant take issue with this approach.[19] They are wrong to do so. The actual impact of a *Charter* breach on an individual's privacy or liberty interests is simply another factor for trial judges to consider when determining the seriousness of breaches. This is true whether the breach is deliberate or not.

10. As it relates to the impact of a s.8 breach, this Court has repeatedly held that there are differing degrees of privacy. In *Tessling,* Justice Binnie provided a rough hierarchy of personal and territorial privacy interests that move from the body, to the home, to (in "diluted measure") the perimeter around the home, commercial space, "private cars", and, "at the bottom of the spectrum", prisons.[20] When an admissibility inquiry arises in respect of evidence gathered in the context of an unconstitutional search, the location and type of search will be inevitably relevant to determining the seriousness of the breach. For instance, leaving aside all other considerations that may inform the seriousness of a breach, no one could seriously suggest that a non-constitutionally compliant rectal search,[21] strip search,[22] or home search[23] is the same as a non-constitutionally compliant search of a rented motor vehicle.[24] The degree of intrusiveness into the privacy of the individual before the court is a live and important consideration on any s.24(2) inquiry.

11. With respect, the dissenting judgment is wrong to suggest that this consideration is "less relevant" where the breaches are "flagrant, brazen and not in good faith".[25] There is no jurisprudential support for this proposition and it runs contrary to a long line of authority from this Court that suggests that the impact of the breach on the individual is an important consideration for purposes of ascertaining the seriousness of the breach. This Court has never suggested that this

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[18] *Ibid.*, p. 55, para. 43.

[19] *Ibid.*, p. 76, para. 133. See paras. 43-50 of the appellant's factum.

[20] *R. v. Tessling,* [2004] 3 S.C.R. 432 at paras. 21-22.

[21] *R. v. Greffe,* [1990] 1 S.C.R. 755 *per* Lamer J. (as he then was) at pp. 795-96.

[22] *R. v. Golden*, [2001] 3 S.C.R. 679.

[23] *R. v. Silveira*, [1995] 2 S.C.R. 297.

[24] Equally, in an arbitrary detention context, surely it cannot be reasonably suggested that the length of the detention does not matter. There is a vast difference between an improper, but fleeting, investigative detention and one that lasts a few hours.

[25] *Judgment of the Court of Appeal for Ontario*, Appellant's Record, Vol. I, p. 76, para. 133.

"circumstance" should only be considered where officers have been found to have acted in good faith.

12. As noted in *Belnavis,* involving a s.8 breach in relation to a motor vehicle: "Obviously, the degree of the seriousness of the breach will increase the greater the expectation of privacy."[26] In *Caslake,* this unanimous Court concluded that one of the criteria to consider when calibrating the seriousness of the *Charter* breach is the "individual's expectation of privacy in the area searched" and that "[t]here is a lesser expectation of privacy in a car than there is in one's home or office, or with respect to their physical person."[27] The converse is also true. For instance, this Court has consistently recognized that s.8 *Charter* breaches that relate to dwelling places are considered more serious.[28] When O'Connor A.C.J.O. and MacPherson J.A. said that "entering the appellant's home without a warrant ... may well have tipped the balance in favour of exclusion", they were simply acknowledging the reality that the location of search and degree of privacy interest interfered with is one of the "circumstances" that must be considered, regardless of whether the police exercise good or bad faith in their conduct.

Systemic Conduct Aggravates the Seriousness of the Breach

13. The appellant complains that the accused should not have to establish that a breach was "borne of a general police policy or systemic police abuse of constitutional rights" for a finding of seriousness to flow.[29] Ontario agrees. The dissenting judgment suggests that police misconduct should not be reduced to "constitutional insignificance" or a "minor or *de minimis*" level, simply because "only one police officer, acting on his own, knowingly violates a citizen's constitutional rights".[30] Ontario agrees. What Ontario does not agree with is that the majority judgment suggested anything to the contrary. The majority simply took the absence of a systemic breach or operational

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[26]*R. v. Belnavis*, [1997] 3 S.C.R. 341 *per* Cory J. at paras. 38-40.

[27]*R. v. Caslake,* [1998] 1 S.C.R. 51 *per* Lamer C.J. at para. 34. Although not specifically in respect to s.24(2) of the *Charter,* the comments of Cory J. in *R. v. Wise, supra*, at p. 534, are apposite: "although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office".

[28]*R. v. Hamill,* [1987] 1 S.C.R. 301 *per* Lamer J. (as he then was) at pp. 307-08; *R. v. Sieben,* [1987] 1 S.C.R. 295 *per* Lamer J. (as he then was) at p. 299.

[29]See appellant's factum at para. 33.

[30]*Judgment of the Court of Appeal for Ontario*, Appellant's Record, Vol. I, p. 77, para. 136.

policy into account when placing the police conduct on the seriousness line.[31] In taking this consideration into account, they did not diminish the significance of the breach, but merely observed the absence of what would have been an otherwise aggravating factor.

14. Using the chart attached to the appellant's factum as a reference point, it is clear that systemic factors sometimes will aggravate the seriousness of police conduct. In that chart, he includes numerous cases that he says support the proposition that appellate courts do not shy away from excluding significant quantities of drugs in the context of "flagrant" constitutional breaches and that the seriousness of a police officer's conduct tends to be the controlling factor in these cases. In at least four of the cases cited, systemic police conduct was an important, arguably controlling, factor in how the court settled on the seriousness of the *Charter* breach.[32] The absence of this factor that would otherwise aggravate the seriousness of police conduct is nothing more than a relevant consideration when pinpointing the seriousness of the police misconduct and how admission of evidence arising out of that conduct will impact on the repute of justice.

Effect of Admission of the Evidence on the Reputation of the Administration of Justice

15. After determining the seriousness of the *Charter* breach (and the impact of the admission of the evidence on the fairness of the proceedings), trial courts are then called upon to determine whether the administration of justice will be brought into disrepute by the admission of the evidence. The repute of justice is seen through the eyes of the reasonable member of the community. As noted by Justice Sopinka in *Calder*: "The effect on the repute of the administration of justice is to be assessed by reference to the standard of the reasonable, well-informed citizen who represents community values."[33] While those community values may provide less direction when the community is "wrought with passion or otherwise under passing stress due to current events", long-term community values are the lens through which a trial judge must typically approach the question of admissibility.[34] As Justice Lamer (as he then was) put it in *Collins*, this approach "serves as a

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[31] *Ibid.*, p. 59, para. 60.

[32] *R. v. Vu* (2004), 184 C.C.C. (3d) 545 (B.C.C.A.) *per* Donald J.A. at paras. 41-42; *R. v. Schedel*, [2003] B.C.J. No. 1430 (B.C.C.A.) *per* Esson J.A. at para. 25; *R. v. Lamy,* [1993] M.J. No. 179 (C.A.) *per* Scott C.J. *R. v. M.(A.)* (2006), 208 C.C.C. 438 (Ont. C.A.), cited in the appellant's chart, was upheld in this Court [2008] 1 S.C.R. 569. At para. 97, Binnie J. notes the "systemic" conduct of the police.

[33] *R. v. Calder,* [1996] 1 S.C.R. 660 *per* Sopinka J. at para. 34. See also: *R. v. Collins, supra,* at pp. 281-83.

[34] *R. v. Collins, supra,* at pp. 282-83.

reminder to each individual judge that his discretion is grounded in community values".[35] Part of the trial judge's task is to look beyond the individual circumstances of the indictment before the court and gauge the impact of the admission or exclusion of the impugned evidence on the long-term repute of the administration of justice.[36]

16. Factors for consideration will include reliability of the evidence, seriousness of the offence, and importance of the evidence to the prosecution. Bearing in mind all of these factors, the court must decide whether the reputation of justice is better served by admission or exclusion.[37] This requires a careful balance between the desire for truth and the need to preserve the integrity of the justice system. That is the beauty of s. 24(2) of the *Charter*. Sometimes evidence will be excluded in the most serious prosecutions known to the law because it will be the only way to protect the reputation of justice.[38] Sometimes evidence will be admitted in the face of serious breaches because that will be the only way to preserve the integrity of the administration of justice. This Court has not been and should not be apologetic for this fact. As noted by this Court in *Belnavis*: "the exclusion of reliable evidence essential to the prosecution of a significant criminal charge must, in the long term, have some adverse effect on the administration of justice".[39]

17. The difficulty with the appellant's position in this Court and the dissenting judgment below is that they assume that the reputation of justice will always be damaged more by the admission of evidence gathered in the context of serious *Charter* breaches, involving deliberate police misconduct, than by the exclusion of evidence, even where that evidence is reliable and central to a serious criminal prosecution. The rationale advanced in support of this position is that the admission of evidence gathered pursuant to a serious *Charter* violation will always be seen to

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[35] *R. v. Collins, supra,* at pp. 282-83.

[36] *R. v. Borden*, [1994] 3 S.C.R. 145 *per* Iacobucci J. at p. 169; *R. v. Bartle*, [1994] 3 S.C.R. 173 *per* Lamer J. (as he then was) at pp. 218-220; *R. v. Matheson*, [1994] 3 S.C.R. 328 *per* McLachlin J. (as she then was) in dissent at pp. 341-342; *R. v. Wise*, *supra*, *per* LaForest J. in dissent at p. 576; *R. v. Greffe, supra, per* Lamer J. (as he then was) at pp. 797-98.

[37] *R. v. Buhay, supra, per* Arbour J. at paras. 72-73; *R. v. Collins*, *supra*, *per* Lamer J. (as he then was) at p. 281.

[38] *R. v. Feeney*, *supra*; *R. v. Burlingham, supra.*

[39] *R. v. Belnavis, supra, per* Cory J at paras. 45-46, quoting from Doherty J.A.'s judgment in the court below.

condone, rather than condemn, that conduct and that nothing short of court condemnation is acceptable.[40] This approach misconstrues the purpose of s.24(2) of the *Charter.*

18. The framers of the *Charter* did not speak about judicial condemnation or discipline in s.24(2) of the *Charter.* (Indeed, this Court has said that s.24(2) is not to be used as a remedy for police misconduct.[41]) Section 24(2) talks about the repute of the administration of justice. To use s.24(2) in the manner suggested by the appellant and dissent undervalues the other "circumstances" for consideration, like the societal interest in seeing serious prosecutions relating to conduct that threatens the safety and well-being of the community through to completion. While judicial condemnation may result from a decision to exclude, it should never be the controlling criteria.[42]

19. Moreover, it underestimates the fact that judicial condemnation may come in forms other than the exclusion of evidence. As noted by the majority, direct and clear factual findings about police misconduct acts as a clear condemnation in and of itself.[43] We must be careful to ensure that the law does not develop in a manner that turns s.24(2) into a sword used to punish the police for their misbehaviour. It was never intended for such use.

Deference to Trial Judges

20. Undoubtedly, trial judges are best positioned to make an admissibility call based on a consideration of "all of the circumstances". They know the context for the trial, the context of the breach, and the context of their communities. As Arbour J. held in *Buhay*: "They have a much better understanding than we do about the likely effects of their decisions on their communities and on those who enforce the law in those communities."[44] Moreover, trial judges hear and observe officers testify: "The findings of the trial judge which are based on an appreciation of the testimony of

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[40] *Judgment of the Court of Appeal for Ontario*, Appellant's Record, Vol. I, p. 80, paras. 144-47.

[41] *R. v. Collins, supra, per* Lamer J. (as he then was) at pp. 283-84. See also *R. v. Genest*, [1989] 1 S.C.R. 59, *per* Dickson C.J. at pp. 91-92.

[42] While in cases like *R. v. Kokesch*, [1990] 3 S.C.R. 3 at p. 35 and *R. v. Greffe, supra*, at p. 798, this Court speaks about not condoning police conduct through the admission of evidence, this is one of many considerations requiring exclusion in those cases.

[43] *Judgment of the Court of Appeal for Ontario*, Appellant's Record, Vol. I, p. 59, para. 59.

[44] *R. v. Buhay, supra,* at para. 70.

witnesses will therefore be shown considerable deference."[45] What will bring the administration of justice into disrepute is not a question that is easily answered with "scientific precision"[46] and, as such, great deference must be shown to trial judges in coming to these difficult conclusions.[47] As such, appellate courts should not interfere with their admissibility decisions absent an error of law or an unreasonable finding.[48] Like sentencing decisions that represent notoriously difficult balancing exercises, where reasonable people can disagree and will disagree, a similar degree of deference is owed to the s.24(2) judge. At its core, that is what the majority judgment is about.

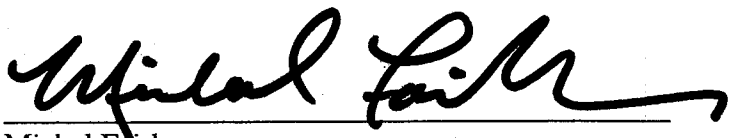
PART IV:
SUBMISSIONS ON COSTS

21. The Attorney General for Ontario makes no submissions as to costs.

PART V:
ORDER REQUESTED

22. The Attorney General for Ontario respectfully requests the appeal be dismissed.

ALL OF WHICH is respectfully submitted by



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[45] *R. v. Buhay, supra,* at para. 47; *R. v. Law, supra,* at paras. 38-41.

[46] *R. v. Hynes,* [2001] 3 S.C.R. 623, *per* McLachlin C.J. at para. 42.

[47] *R. v. Mann, supra, per* Iacobucci J. at para. 59; *R. v.Buhay, supra, per* Arbour J. at para. 44.

[48] *R. v. Law, supra,* at para. 32; *R. v. Buhay, supra,* at paras. 44-48.

PART VI:
AUTHORITIES CITED

Para(s)

PART VII:
STATUTORY PROVISIONS

None.

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for John H. Sims, Q.C.
pour Deputy Attorney General of Canada
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