File Number: 38785

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

RYAN CURTIS REILLY

Applicant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
ATTORNEY GENERAL OF ALBERTA, RESPONDENT
Pursuant to s. 40 of the *Supreme Court Act*, RSC 1985, c S-26

JASON R. RUSSELL
Justice and Solicitor General
Crown Prosecution Service
Appeals Branch
3rd Floor, Bowker Bldg.
9833 - 109 Street
Edmonton, AB T5K 2E8
Phone: (780) 422-5402
Fax: (780) 422-1106
Email: jason.russell@gov.ab.ca

Counsel for the Respondent

D. LYNNE WATT
Gowling WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowling.com

Ottawa Agent for Counsel for the Respondent

DEBORAH R. HATCH
1740, 10123 – 99 Street
Edmonton, Alberta T5J 3H1
Phone: (780) 474-2888
Fax: (780) 655-1059
Email: dhatch@hatch.law

COLLEEN BAUMAN
Goldblatt Partners LLP
Suite 500, 30 Metcalfe Street
Ottawa, ON K2P 0R3
Phone: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

-AND-

MICHAEL BATES
Ruttan Bates
600, 630 – 6th Avenue SW
Calgary, AB T2P 0S8
Phone: (403) 237-0025
Fax: (403) 237-0566

-AND-

ANDREA SERINK
Serink Law Office
Suite 600, 630 6 Avenue SW
Calgary, AB T2P 0S8
Phone: (403) 719-7500
Fax: (403) 719-3669

Counsel for the Applicant **Ottawa Agent for Counsel for the Applicant**

TABLE OF CONTENTS

TAB		PAGE
1.	**MEMORANDUM OF ARGUMENT**	1
	Part I: Overview / Statement of Facts	1
	A. Overview	1
	B. The Alberta Crown Bail Project and the *Charter* Breach	3
	C. Trial Judge's decision to grant a stay	4
	D. Alberta Court of Appeal Decision	5
	Part II: Questions in Issue	10
	A. Proposed questions in issue	10
	B. Response	10
	Part III: Argument	11
	A. The court did not exceed its jurisdiction to set aside the stay	11
	B. The court did not rewrite the test in *R v Babos*	11
	C. The court applied the correct standard of review	12
	D. The court was correct that a stay was unreasonable	12
	E. This case does not raise any issues that have not already been addressed by this court	14
	Part IV: Submissions on Costs	15
	Part V: Orders / Relief Sought	16
	Part VI: Table of Authorities & Statutes Relied Upon	17

Part I: Overview / Statement of Facts

A. Overview

1. This appeal does not involve any questions of law of national importance. It involves the narrow issue of whether the judge erred in granting a stay under s. 24(1) of the *Charter* for a *Charter* breach occasioned by the Applicant not being brought before a Justice of the Peace (JP) for almost 36 hours after his arrest, contrary to s. 503(1)(a) of the *Criminal Code*. The issue was resolved by applying well settled law on stays as a remedy under s. 24(1).

2. The Alberta Court of Appeal applied this existing jurisprudence and found that the trial judge committed several errors in imposing the stay and found that the stay was clearly unreasonable.

3. The Appeal decision does not raise any novel questions of law that this Court has not already addressed in other cases. The resolution of this appeal would involve the application of this Court's existing jurisprudence to the circumstances of this case. Moreover, a stay in this case is clearly unreasonable, if for no other reason than the existence of other available remedies to address the prejudice caused by the breach.

4. The trial judge failed to consider the Crown's failing in proper context resulting in an overstatement of the seriousness of the Crown's misconduct.

5. The Alberta Government had implemented a new bail system to address numerous problems identified with the old bail system. In designing the new system the Alberta Government consulted with all stakeholders for input on how to remedy the problems that had been identified. Numerous possible solutions were identified, each having different consequences and unknown outcomes. There was not always consensus among stakeholders consulted about which solution was best or the likely effect that a solution would have on bail hearings before JPs.

6. Based on the consultation with stakeholders the Crown designed a new bail system. The new system fundamentally altered the manner in which bail hearings before JPs are conducted. Bail hearings were moved from a physical hearing office to a virtual one where bail hearing are

conducted by way of video link or telephone. And Crown prosecutors, instead of police officers, conduct all bail hearings before JPs. It was not possible to know in advance whether the new system would be 100% adequate and designing a bail system able to handle any possible volume of bail demand is a very difficult task. There is nothing to suggest the Crown was negligent in designing the new bail system or that it deliberately created a new bail system with insufficient resources to succeed.

7. This new system had been implemented in Edmonton for about 5 months at the time of the Applicant's arrest. At this time the new bail system still did not have its full complement of bail office staff or JPs, as a result of the time required to hire new personnel and appoint new JPs. The new bail system did not reach its full staffing complement until 2 months after the Applicant's arrest, which limited the implementation committee's ability to evaluate the adequacy of the new system and determine whether the system as designed would ultimately be adequate.

8. During implementation of the new system, an implementation team continued to regularly consult stakeholders in an effort to identify and correct causes of delay in the system. It was also still actively implementing solutions to problems it had already identified by the implementation team. Despite continued efforts to optimize the bail system, the issue of over-holds, though improved, has not been eliminated.

9. In this context, the Government's failure, though unacceptable, does not amount to egregious misconduct that requires the court to dissociate itself from through a stay of proceedings.

B. The Alberta Crown Bail Project and the *Charter* Breach

10. In 2015 the Alberta Government conducted a review of its existing bail system. A report was prepared, which recommended that a number of changes be made. In response, the Alberta Government created a project team to create a new bail system to address the problems identified with the old system.

11. A key recommendation was that all bail hearings before JPs be conducted by Crown prosecutors. Under the old bail system senior police officers represented the Crown at bail hearings before JPs. The new system also eliminated a physical hearing office and replaced it with a virtual one in which bail hearings were conducted by video link or telephone.

12. In developing the new bail process the Government conducted stakeholder meetings involving the judiciary, JPs, law enforcement agencies, Crown prosecutors, defence counsel, Legal Aid and the Public Prosecution Service of Canada. There was no consensus among stakeholders about how best to design the new bail system.

13. The new bail hearing system was introduced in October 25, 2016 as a pilot project and eventually implemented province-wide by June 2017.

14. During the implementation of the new bail system an implementation team consisting of members of the Edmonton Police Service (EPS), Crown prosecutors for the Crown bail office, staff working at the Crown bail office and any other interested stakeholders assessed the functioning of the new system and attempted to identify problems effecting efficiency and implement solutions to those problems. The team met daily for the first couple of months, later reducing meetings to 3 times per week and by February 3, 2017 to 2 times per week.

15. The implementation team identified various problems and bottle necks in the new system that were contributing to delays bringing detainees before a before a JP and implemented changes to address the problems identified. It then monitored the results of the changes and continued its efforts to optimize the new system. Numerous changes have been made to the new system by the implementation team.

16. The Applicant was arrested in Edmonton on April 4, 2017, about five months after the new bail system was implemented in Edmonton, but before the new system had been implemented province-wide. At the time of trial in March 2018 the new bail system had only been in operation province-wide for about 9 months.

17. Changes have continued to be made to the bail system since the Applicant's trial.[1] Duty counsel was added to the process, which coincided with an initial marked increase in the number of overholds,[2] followed by a reduction in the number of overholds.

C. Trial Judge's decision to grant a stay

18. The trial judge found that there is a systemic and ongoing problem with people not being taken before a JP within 24 hours in the new bail system. She noted that since its start the number of detainees not being taken before a JP within 24 hours increased and that the routine over-holding of detainees was egregious. The judge further found that even though efforts are being made to address the problem, the problems have persisted and the explanation provided for why the problems continued is inadequate. She found that the increased rate of over-holds under the new system was indicative of a "willingness to trample on" *Charter* rights and *Criminal Code* provisions.[3]

19. The judge further found that the over-holding problem was symptomatic of other problems including the lack of duty counsel funding despite the recommendation in the review report that duty counsel be funded and also police being too risk adverse in exercising their discretion to release.

20. Despite a lack of evidence that the absence of duty counsel contributed to the delay and the fact there was also no duty counsel provided under the old bail system, it was the judge's view that it was incumbent on the state to ensure the necessary resources are provided to Legal Aid as recommended in the Irving report to resource the hearing office with duty counsel. She

[1] ***R v Reilly***, 2019 ABCA 212 at para 16-18
[2] *Ibid.*
[3] ***R v Reilly***, 2018 ABPC 85 at para 65

found the failure to initially provide Legal Aid representation is unfair and leaves the majority of detainee without legal representation when they are in a very vulnerable position.[4]

21. The judge concluded that the ongoing systemic problem reflected by the evidence amounted to the clearest of cases and the only appropriate remedy was a stay. She found society's interest in "ensuring that rights set out in the *Charter* are respected and not flagrantly disregarded" favour a stay despite society's interest in adjudicating the charges on the merits given the seriousness of the charges and the fact domestic assault is a serious societal problem. Other remedies such a reduction of sentence would not be sufficient.

D. Alberta Court of Appeal Decision

22. The Alberta Court of Appeal applied the correct standard of review set out in *R v Babos*, [2014] 1 SCR 309 at para 48-49, stating that appellate review is not precluded where the reasoning reflects errors of principle, relies on irrelevant factors, or the remedy selected is unreasonable.[5]

23. The appeal court identified a number of errors with judge's analysis and selection of remedy.[6]

24. It found the trial judge based the decision to impose a stay on the existence of systemic problems with the new bail system, but the remedy was excessive as an individual remedy and did not address the systemic problem beyond merely denouncing it.[7] The Court noted that if the Applicant was entitled to a stay because of the systemic misconduct then virtually anyone held over 24 hours would also be entitled to a stay. The judge's reasoning was dismissive of the seriousness of the charges as a factor in selecting remedy.[8] When addressing prejudice to the integrity of the justice system under the residual category "remedies must be directed towards that harm" (*R v Piccirilli*, sub nom *R v Babos* at para 39) and "the purpose of the right being protected must be promoted: courts must craft responsive remedies" (*Doucet-Boudreau v Nova*

[4] *Ibid*. at para 66
[5] ***R v Reilly***, 2019 ABCA 212 at para 23
[6] *Ibid*. at para 24
[7] *Ibid*. at para 24
[8] *Ibid*. at para 34

Scotia (Department of Education), 2003 SCC 62). The appeal court found that the integrity of the justice system is not served by universally exonerating individuals accused of serious crimes as an *in terrorem* message to the Crown.[9]

25. It found the trial judge also erred in imposing a stay as an individual remedy because there are clearly other fit remedies to address the violation of his individual *Charter* rights, such as a reduction of sentence.[10] It noted that if the appeal only concerned the discrete breach of the Applicant's rights a stay would not be appropriate under the test set out in *R c Piccirilli*, sub nom. *R v Babos*, 2014 SCC 16.[11]

26. It found the judge also considered a number of irrelevant factors in determining remedy. The trial judge in characterizing the Crown's conduct as egregious, faulted the Crown for not having provided duty counsel at the time of the Applicant's detention. There was no breach of s. 10(b) alleged or found and no evidence that the failure to provide duty counsel contributed to any delay in bringing the Applicant before a JP. The failure to provide duty counsel was irrelevant to whether to grant a stay. In assessing Crown conduct the judge also considered evidence that under the new system there was an increase in the frequency that police holding cells were at full capacity, even though this is not relevant to the alleged breach.[12] The judge was also wrong to fault the Crown and police for not taking the Applicant before a Provincial Court Judge before the 24 hours period expired, given there was no mechanism in place for doing so or any evidence that would have speeded up the process or that it is a viable option for dealing with the overhold problem. The judge also relied on a number of collateral issues in granting the stay such as an increase in the number of people on remand since 1980 to 2012, the risk adverse exercise of police discretion to release people arrested resulting in increased demand for bail hearings, and the increase in charges despite the crime rate declining. The court of appeal noted that the present proceeding was not an opportunity to collaterally attack every bail denial in Alberta or address deficiencies in the exercise of police discretion to release.

[9] *Ibid*. at para 35
[10] *Ibid*. at para 24, 31, 32
[11] *Ibid*. at para 31
[12] *Ibid*. at para 39

27. It found the trial judge also erred in relying on statements made by the Alberta Court of Appeal in *R v GTD*, 2017 ABCA 274 in relation to the exclusion of evidence under s. 24(2) to justify imposing a stay under s. 24(1), since that case dealt with the exclusion of evidence that would not result in a termination of the prosecution.[13]

28. It found the judge mischaracterized the seriousness of the Crown's conduct. Although the record supports the conclusion that the Crown's efforts to speed up the new bail process and eliminate "24 hour violations" have, to date, been ineffective, it does not support the conclusion that the government was indifferent to the problem. The trial judge went too far in concluding that government displayed a "willingness to trample on *Charter* rights" or that rights were being "flagrantly disregarded" as the judge concluded. The appeal court noted that there is a difference between being ineffective at solving a problem, being indifferent to the problem, and deliberately perpetuating the problem. The appeal court further observed the following facts lessened the severity of Crown misconduct at issue: the high complexity of the task of implementing a new bail system, Crown having consulted with all stake holders, no suggestion the Crown planners were negligent in designing the new system, and no suggestion the Crown deliberately failed to provide adequate resources for the new bail system to succeed.[14]

29. It found the trial judge also overlooked the fact that at the time of the Applicant's arrest the bail regime was still in a transitional phase, with the new bail system having been in operation for only 5 months in Edmonton at the time of his arrest.[15]

30. Finally, it found the trial judge erred in not identifying the central issue of when is an individual entitled to a stay as a result of systemic problems in the criminal justice system. The judge reasoned that the systemic breaches were so serious that they completely overrode the individual circumstances of the Applicant or the seriousness of the crimes he committed. Based on that reasoning anyone held for over 24 hours would also be entitled to a stay, contrary to the rule that a stay is an exceptional remedy reserved for the clearest of cases.[16] The court noted that

[13] *Ibid*. at para 24
[14] *Ibid*. at para 26
[15] *Ibid*. at para 27
[16] *Ibid*. at para 46

the systemic nature of a *Charter* breach is nevertheless a factor to consider in selecting an appropriate individual remedy.[17]

31. The court reviewed this Court's jurisprudence on stays of proceedings noting it is an exceptional remedy that is only appropriate in extreme cases.[18] It further noted that there are two categories of case where a stay may be warranted: (1) where trial fairness is compromised, and (2) a residual category where trial fairness is not jeopardized but state misconduct undermines the integrity of the judicial process.[19] It noted that the test for a stay is the same for both categories of offence, expressly citing the test from *R v Piccirilli.*

32. The court found that the first part of the test was not engaged because the Applicant's right to a fair trial was not jeopardized and holding a trial would not perpetuate or aggravate the breach.[20] It found that the second part of the test was not met because there are clearly alternative remedies capable of redressing prejudice to the Applicant.

33. The court found that the situation engaged the third stage of the test, which requires balancing the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the society's interest in having a final decision made on the merits.

34. The court accepted that a stay would have the effect of denouncing misconduct, but only in a blunt and non-remedial manner. It found that the integrity of the justice system is not served by universally exonerating all persons accused of serious crimes as a way to send a threatening message to the Crown.[21] The court ultimately concluded that the stay was unreasonable and called for appellate intervention.[22]

35. The court of appeal then considered whether it could craft a remedy to address the systemic problem with the bail system instead of the stay imposed which was clearly

---

[17] *Ibid*.
[18] *Ibid*. at para 28
[19] *Ibid*. at para 29
[20] *Ibid*. at para 30
[21] *Ibid*. at para 35
[22] *Ibid*. at para 24

unreasonable. It ultimately concluded that it was not able to craft such a remedy based on the evidence available on the record and directed that the trial judge impose an appropriate remedy after trial.[23]

---

[23] *Ibid*. at para 47-59

Part II: Questions in Issue

A. Proposed questions in issue

36. The Applicant seeks leave to appeal on following question of law.

a. The Appeal Court erred in failing to adhere to its jurisdiction in a Crown appeal for the Applicant's stay of his criminal charges.

b. The Appeal Court erred in rewriting the test in *R v Babos*, 2014 SCC 16 by imposing a nonexistent obligation on the Applicant and any accused to establish a systemic remedy to go together with a stay of proceedings.

c. The Appeal Court failed to adhere to any standard of review, substituting its own view of the appropriate remedy and on their own motion arbitrarily assigning civil damage rates for persons not party to the Applicant's criminal proceedings.

d. The Appeal Court erred in concluding that a stay was not an appropriate remedy.

B. Response

37. The proposed questions of law either do not arise on the facts of this case or are determined by the application of the existing jurisprudence of this Court. The Alberta Court of Appeal applied this Court's jurisprudence and determined that the judge committed errors in her analysis and that a stay was a clearly unreasonable remedy in the circumstances of this case.

Part III: Argument

A. The court did not exceed its jurisdiction to set aside the stay

38. The Alberta Court of Appeal did not exceed its jurisdiction in setting aside the stay. It expressly considered whether a stay was an appropriate remedy for the breach of the Applicant's *Charter* rights in the circumstances of this case. It applied the settled standard of review for reviewing a decision to impose a stay under s. 24(1) of the *Charter*.

39. The appeal court found that the judge committed a number of errors in her assessment of remedy and also that the stay was clearly unreasonable. It found that a stay was unreasonable as a remedy for the individual *Charter* breach, even considering the systemic nature of the breach and it had to be set aside.

40. The appeal court thereafter considered whether to impose an alternative remedy under s. 24(1) of the *Charter* to address the system problem with the bail system, but concluded that it could not based on evidence before it. It accordingly exercised its discretion to return the matter to the trial judge to impose the appropriate remedy at the conclusion of trial. All comments about suitable remedies for the systemic breach were directed not at the issue of whether the stay should be set aside, but rather what remedy might be appropriate for it to impose as a remedy on the appeal.

B. The court did not rewrite the test in *R v Babos*

41. The Alberta Court of Appeal did not impose an obligation for the Applicant to establish a systemic remedy as a prerequisite for a stay. As described above, the court of appeal found that the judge erred in imposing a stay in the circumstances of this case. The court applied the test from *R c Piccirilli*, sub nom. *R v Babos* and found that the judge committed errors in her analysis and a stay was a clearly unreasonable remedy. The decision to set aside the stay was not based upon the Applicant failing to propose a remedy for the systemic problem with the new bail system. This is a misreading of the Alberta Court of Appeal's decision.

42. The court expressly considered the reasonableness of a stay as a remedy for the individual breach and expressly stated that the systemic nature of the breach was a factor to

consider in assessing remedy. After concluding that the stay had to be set aside it addressed the issue of whether it should impose a remedy under s. 24(1) to address the systemic problems with the new bail system. It concluded it could not on the evidence before it and directed that the trial judge impose an appropriate remedy after trial.

43. Had the appeal court found that a stay was reasonable it would have upheld the stay regardless of whether the parties were able to suggest an alternative remedies to address the systemic nature of the breach.

C. The court applied the correct standard of review

44. The Alberta Court of Appeal applied the standard of review recently set out by this Court in *R v Piccirilli*, sub nom. *R v Babos*. The Court's comments about potential appropriate remedies in the footnotes are *obiter* suggestions about what the court might consider appropriate as damages or sentence reduction. These comments are not binding. The appeal court decided the trial judge erred in imposing a stay. It set aside the stay and ordered that the trial court impose an appropriate remedy after trial. The appeal court did not order damages or a reduction of sentence and did not purport to decide the issue of what remedy would be appropriate in this or other cases. It did not find that damages should be a presumptive remedy.

45. Having decided to set aside the stay, the appeal court did not err in considering whether as a remedy in the appeal it should impose a remedy under s. 24(1) of the *Charter* or opine on what might be appropriate remedies.

D. The court was correct that a stay was unreasonable

46. A stay of proceedings as a remedy for a 12 hour delay in holding the Applicant's bail hearing is clearly excessive as an individual remedy for the *Charter* breach and is not appropriate as remedy in the residual category for the Crown's conduct. There are other fit remedies available to address the prejudice suffered by the Applicant as a result of the delay in his bail hearing. This alone should preclude the imposition of a stay. Moreover, the Alberta Court of Appeal is correct that the integrity of the justice system would be harmed by universally staying the charges of all offenders who did not receive a bail hearing within 24 hours as a way sending message to the Crown. Staying these charges is wholly unresponsive to the breach as it will not

affect the volume of individuals arrested.

47. This is not a case where the Crown knows how to remedy the situation but is refusing to do so, where the imposition of a stay may prompt the Crown to act. Or a case where the Crown is doing nothing to remedy the problem. The problem of delay in the new bail system is a multifaceted problem that will require multiple solutions of unknown effects and ongoing assessment of whether the solutions implemented are effective. It is counterproductive to blindly make alterations to the system. For instance, having an unlimited number of JPs or prosecutors will not solve the problem if there are other issues with the process that prevent matters from reaching the prosecutors or JPs within 24 hours. The process of systematically identifying and remedying problems with the new system necessarily takes time. Staying the charges of those not receiving bail within 24 hours will do little to speed up this process. It would however, be a windfall for offenders committing serious offences who were held longer than 24 hours before being able to speak to bail.

48. The addition of duty counsel to the process illustrates the difficulty in predicting the impact that specific changes will have on the bail system. Some stakeholders believed that it would decrease delay and other stakeholders believed it would necessarily increase delay. When duty counsel was initially added there was a marked increase in the number of overhold cases. But the numbers declined again, indicating that efforts to further refine the system were effective.

49. Viewed in the proper context, the Crown's failure to immediately implement a new bail system in which no individual is held for longer than 24 hours is not so egregious that the only way for the court to dissociate itself from that conduct is through a stay.

50. In any event, the issue of whether the Alberta Court of Appeal applied this Court's settled jurisprudence to the specific facts of this case is not an issue of national importance. Its importance is limited to the specific facts of this case.

E. This case does not raise any issues that have not already been addressed by this court

51. The Alberta Court of Appeal resolved the appeal by applying this Court's existing jurisprudence to the specific facts of this case. The proposed questions of law either do not arise in this case or are not of national importance in light of the existing jurisprudence.

Part IV: Submissions on Costs

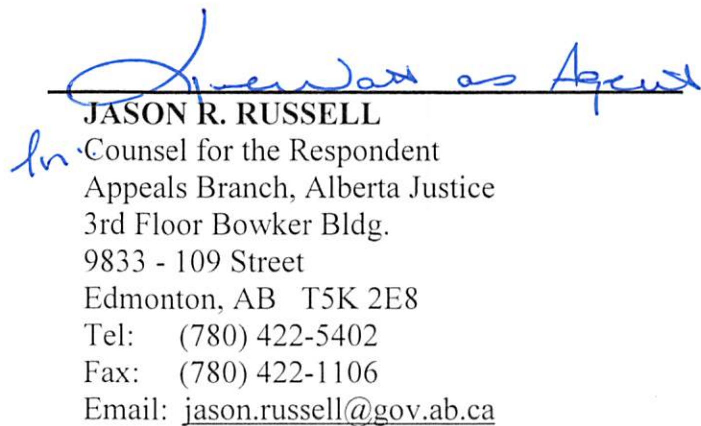
52. The Respondent makes no submissions as to costs.

Part V: Orders / Relief Sought

53. The Respondent asks that the application for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Edmonton, Alberta, October 9, 2019.



JASON R. RUSSELL
Counsel for the Respondent
Appeals Branch, Alberta Justice
3rd Floor Bowker Bldg.
9833 - 109 Street
Edmonton, AB T5K 2E8
Tel: (780) 422-5402
Fax: (780) 422-1106
Email: jason.russell@gov.ab.ca

Part VI: Table of Authorities & Statutes Relied Upon

CASE LAW	**PARAGRAPH REFERENCE**
Doucet-Boudreau v Nova Scotia (Department of Education), [2003] 3 SCR 3	24
R v Babos, [2014] 1 SCR 309	22, 24, 25, 31, 36, 41, 44
R v GTD, 2017 ABCA 274	27
R v Reilly, 2019 ABCA 212	17, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35
R v Reilly, 2018 ABPC 85	18, 20

Statutes Relied Upon

Criminal Code, RSC 1985, c. C-46, ss. 503(1)(a) *Code Criminel*, LRC 1985, c. C-46, ss. 503(1)(a)	1
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 10(b) *Loi constitutionnelle de 1982*, Annexe B de *la Loi de 1982 sur le Canada (R-U)*, 1982, c 11, s. 10(b)	26
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 24(1) *Loi constitutionnelle de 1982,* Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, s. 24(1)	1, 27, 38, 40, 42, 45
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 24(2) *Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, s. 24(2)*	27