S.C.C. File No. 39749

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

**CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI, REDA YASSIN AL NAHASS AND NEDIRA JEMAL MUSTEFA**

Appellants
(Respondents)

- and -

**MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondents
(Appellants)

[*Style of cause continued on next page*]

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# FACTUM OF THE INTERVENER, ADVOCATES FOR THE RULE OF LAW

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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Interveners

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## PART I — OVERVIEW

1. The role of international law in interpreting the *Canadian Charter of Rights and Freedoms* (the "***Charter***") is often misunderstood. Some believe that international law is always relevant when interpreting the *Charter*. Others believe that Canadian courts must interpret the *Charter* to conform with international law, irrespective of the text and purpose of the right in question. Still others believe that international law can supplement — or even supplant — the text of the *Charter*. But none of these beliefs is accurate. Advocates for the Rule of Law ("**ARL**") intervenes in this appeal to help the Court provide clarity on the role of international law in *Charter* interpretation.

2. In particular, ARL intervenes on two issues: (1) when and how courts should consider international law when interpreting the *Charter*; and (2) whether — and if so, how — courts should consider international law when interpreting s. 7 of the *Charter* specifically.

3. First, drawing on the Court's jurisprudence, ARL proposes a three-part framework governing when and how courts should consider international law when interpreting the *Charter*:

(a) First, a court should consider international law only if it sheds light on the *purpose* of the *Charter* right in question — *i.e.*, "the interests it was meant to protect".[1] The only way in which international law may shed light on this purpose is to elucidate the "historical origins of the concepts enshrined".[2] If the framers of the *Charter* did not draw inspiration from the international law in question, it has no place in the interpretive analysis.

(b) Second, if international law sheds light on the purpose of the *Charter* right in question, the court should determine the *weight* to be assigned to the particular source of international law. This weight will depend on two main factors: (1) whether the international law is binding (non-binding international laws attract little or no weight); and (2) whether there are any contextual differences that distinguish the international law from the *Charter* right in question (international laws created in a substantially different historical, social, political, or legal context attract little or no weight).

(c) Third, the court should rely on international law only to *support* or *confirm* the result

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[1] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [***Big M***], at 344.

[2] *Big M* (S.C.C., 1985), *supra* note 1, at 344; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 [***Quebec inc.***], ¶21.

reached through a purposive interpretation.[3] International law plays only a "limited role" in *Charter* interpretation; it cannot be used to "define the scope of *Charter* rights", as this would compromise the integrity of the Canadian Constitution and Canadian sovereignty.[4]

4. Second, the interpretation of s. 7 of the *Charter* must be rooted primarily — if not exclusively — in Canadian legal principles. The *Charter* is a "uniquely Canadian" legal instrument,[5] and the principles of fundamental justice are found in "the basic tenets of *our* legal system".[6] Even international instruments that are binding in Canada will not automatically give rise to a corresponding principle of fundamental justice under Canadian law. International law may play a role in the interpretation of s. 7 of the *Charter* only if it can be shown that the framers drew inspiration from that law. Otherwise, international law has no role to play in the s. 7 analysis.

## PART II — ISSUES

5. ARL intervenes on two issues: (1) when and how courts should consider international law when interpreting the *Charter*; and (2) whether — and if so, how — courts should consider international law when interpreting s. 7 of the *Charter* specifically.

## PART III — ARGUMENT

### A. THREE-PART FRAMEWORK GOVERNING WHEN AND HOW COURTS SHOULD CONSIDER INTERNATIONAL LAW WHEN INTERPRETING THE *CHARTER*

6. The appellants' submissions on the role of international law in *Charter* interpretation elide important nuances. The appellants assert — without further elaboration — that "[i]t is well-established that Canada's international obligations must inform the content of fundamental justice under s.7".[7] Likewise, several interveners overstate the role of international law in *Charter* interpretation. For example, the B.C. Civil Liberties Association states that s. 7 of the *Charter* "must" be interpreted to conform with the *Refugee Convention* and "Canada's international

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[3] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶22.
[4] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶23, 28.
[5] *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 702 [***Keegstra***].
[6] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, ¶31 [emphasis added].
[7] Appellants' Factum, ¶54.

obligations" more broadly.[8] But these arguments misunderstand the role of international law in *Charter* interpretation.

7. To promote clarity and consistency in the law, ARL proposes a three-part framework governing when and how courts should consider international law when interpreting the *Charter*. This three-part framework is designed to ensure Canadian courts' use of international law in interpreting the *Charter* does not compromise the integrity of the Canadian Constitution — which sits at the apex of the hierarchy of laws in Canada[9] — or Canadian sovereignty.

**(1) <u>Connection to Purpose</u>**

8. First, a court must determine whether the international law sheds light on the *purpose* of the *Charter* right in question. In *Teksavvy Solutions Inc. v. Bell Media Inc.*, Stratas J.A. cautioned against attempts to import international law automatically into the *Charter*:

> All too often interveners assert or imply, without demonstration, analysis or particulars, that *Charter* protections are automatically coextensive with whatever is found in some international instrument and that a relevant provision of domestic law, regardless of its authentic meaning, must automatically conform with that instrument. Both propositions are wrong. The *Charter* is not "an empty vessel to be filled with whatever meaning we might wish from time to time", including whatever meanings can be plucked from international law in support of a cause …[10]

9. Although international law can serve as an "interpretive tool in … delineating the breadth and scope of *Charter* rights",[11] this tool must not be misused. In the *Charter* context, a court should consider international law only if it sheds light on the *purpose* of the *Charter* right in question.

10. The *Charter* "is a purposive document" whose interpretation requires a "purposive analysis".[12] The central precept of this purposive approach is that a particular *Charter* right must be interpreted in light of "the interests it was meant to protect".[13] In determining the purpose of a particular *Charter* right, the Court may consider "the character and the larger objects of

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[8] BCCLA's Motion for Leave to Intervene, ¶24-26.

[9] *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132, ¶12, *per* Stratas J.A.

[10] *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108, ¶20, leave to appeal dismissed 2022 CanLII 21665 (S.C.C.).

[11] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 [***Kazemi***], ¶150.

[12] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 156.

[13] *Big M* (S.C.C., 1985), *supra* note 1, at 344.

the *Charter* itself", "the language chosen to articulate the specific right or freedom", "the historical origins of the concepts enshrined", and "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*".[14]

11. The only way in which international law may shed light on the purpose of a *Charter* right is to elucidate the "historical origins of the concepts enshrined".[15] For example, in ascertaining the purpose of the mobility rights protected by s. 6 of the *Charter*, the Court has considered the "international law inspiration for s. 6(1) of the *Charter*": art. 12 of the *International Covenant on Civil and Political Rights*, which binds Canada.[16] If the drafting history shows that the framers of the *Charter* drew inspiration from international law, Canadian courts can and should consider that inspiration.[17] But the framers could have drawn inspiration from international law only if it existed at the time of the framing — international laws that post-date the *Charter* therefore have no place in the interpretive analysis. Nor do international laws that pre-date the *Charter* but did not inspire its content.

12. Although many ordinary domestic laws are enacted to implement international laws binding on Canada, the same cannot be said of *Charter* rights. To illustrate, in *National Corn Growers Association v. Canada (Import Tribunal)*, the Court held that because Canada's *Special Import Measures Act* was "enacted with a view towards implementing international obligations", it should, insofar as its text permitted, be interpreted in a manner "consonant with the relevant international obligations".[18] By contrast, the *Charter* "has to be understood and respected as a uniquely Canadian constitutional document".[19] Although *Charter* rights may "draw[] on a political and social philosophy shared with other democratic societies", international law does not "determin[e] or limit[] the scope of [*Charter*] guarantees", which are "uniquely Canadian".[20] Thus, "[a]s a constitutional document that was 'made in Canada' … , the *Charter* and its provisions are

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[14] *Big M* (S.C.C., 1985), *supra* note 1, at 344.
[15] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶21.
[16] *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, ¶19-29.
[17] B. Oliphant, "Interpreting the *Charter* with International Law: Pitfalls and Principles" (2014), 19 *Appeal* 105, at 105.
[18] [1990] 2 S.C.R. 1324, at 1371.
[19] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at 344, *per* Wilson J. (dissenting).
[20] *Keegstra*, supra note 5, at 838.

primarily interpreted with regards to Canadian law and history".[21]

13. Even if the framers of the *Charter* drew inspiration from international law, Canadian courts should not assume that *Charter* rights and international laws necessarily share the same meaning. A *Charter* right may well have a different meaning from a similarly worded — even identically worded — international law provision. For example, although art. 22(1) of the *International Covenant on Civil and Political Rights* protects "freedom of association", this freedom does not protect the right to strike.[22] By contrast, s. 2(d) of the *Charter*, which uses the same "freedom of association" language as the Covenant, has been interpreted to protect the right to strike.[23] Thus, Canadian courts must perform a careful analysis to ensure the meaning of a particular *Charter* right is not distorted by similarly or even identically worded international laws.

14. The role of international law in *Charter* interpretation is not the same as the role of international law in ordinary statutory interpretation. When a Canadian legislature adopts international law into domestic law by ordinary enactment, that law has the same force as any other ordinary domestic law.[24] Consequently, consistent with the modern principle of statutory interpretation,[25] it can be used in interpreting other laws that sit at the same rung, or a lower rung, of the hierarchy of laws.[26] By contrast, because *Charter* interpretation is purposive, focused exclusively on "the interests [the right] was meant to protect",[27] international law has no place in *Charter* interpretation unless it sheds light on the *purpose* of the *Charter* right in question. Any other approach would turn the hierarchy of laws upside down.

15. The consequences of an interpretation that uses international law to distort the meaning of a *Charter* right are severe and long-lasting. While an erroneous interpretation of an ordinary statute can be remedied through ordinary legislative amendment, no such remedy exists for *Charter* rights

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[21] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶20.

[22] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 [***SFL***], ¶154, *per* Rothstein and Wagner JJ. (dissenting).

[23] *SFL* (S.C.C., 2015), *supra* note 22, ¶75.

[24] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, ¶85.

[25] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, ¶21, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at 87.

[26] *Canada (Attorney General) v. Utah*, 2020 FCA 224, ¶28, *per* Stratas J.A.

[27] *Big M* (S.C.C., 1985), *supra* note 1, at 344.

— which, along with the Constitution as a whole, are designed to "endure over time" and have a "lasting and durable quality".[28] To avoid such distortions, Canadian courts interpreting a *Charter* right should consider international law only if it sheds light on the right's purpose.

**(2) Assignment of Weight**

16. If international law sheds light on the purpose of the *Charter* right in question, the court should determine the *weight* to be assigned to the particular source of international law. This weight will depend on two main factors: (1) whether the international law is binding; and (2) whether there are any contextual differences that distinguish the international law from the *Charter* right in question.

17. First, international law binding on Canada, including international instruments to which Canada is a party, may inform the interpretation of *Charter* rights.[29] Indeed, Canadian courts presume that a *Charter* right affords protection that is "at least as great as that afforded by similar provisions in international human rights documents to which Canada is a party".[30] However, this presumption is rebuttable, and cannot displace the authentic meaning of Canadian law.[31] Moreover, the presumption of conformity does not apply to non-binding international law.[32] Even if the framers drew inspiration from non-binding international law, that law has "only persuasive value in *Charter* interpretation",[33] and is entitled to "much less weight" than binding international law.[34] Ultimately, it is the role of the legislature, not courts interpreting the *Charter*, to decide whether to adopt international obligations. Any other approach would violate the separation of powers and upset Canada's constitutional order.

18. Second, courts should account for any contextual differences — historical, social, political, or legal — that may shape the meaning of international law. For example, labour relations laws in different countries have developed in different historical contexts and, as a result, have different

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[28] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶32; *Bhindi v. B.C. Projectionists' Loc. 348*, 1986 CanLII 1100 (B.C.C.A.), ¶72.

[29] **See, e.g.:** *Suresh v. Canada*, 2002 SCC 1 [***Suresh***], ¶46, 59-75.

[30] *Kazemi* (S.C.C., 2014), *supra* note 11, ¶150.

[31] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶34; *Kazemi* (S.C.C., 2014), *supra* note 11, ¶150.

[32] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶35.

[33] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶35.

[34] *SFL* (S.C.C., 2015), *supra* note 22, ¶157, *per* Rothstein and Wagner JJ. (dissenting).

content and different meanings.[35] Likewise, differences in how different legal systems or constitutions are structured may bear on the interpretation of the different laws in question. These differences should not be overlooked.

**(3) Limits on Use**

19. When interpreting the *Charter*, Canadian courts should rely on international law only to *support* or *confirm* the result reached through a purposive interpretation.[36] International law plays only a "limited role" in *Charter* interpretation; it cannot be used to "define the scope of *Charter* rights", as this would compromise "the integrity of the Canadian constitutional structure, and Canadian sovereignty" and turn the hierarchy of laws upside down.[37] When interpreting the *Charter*, the Court has typically relied on international law only *after* considering Canadian law, and only to illustrate that domestic law is consistent with international law.[38] This approach properly recognizes the primacy of Canadian sources in interpreting the *Charter*.

## B. THE INTERPRETATION OF SECTION 7 OF THE *CHARTER* MUST BE ROOTED IN CANADIAN PRINCIPLES

20. Applying the framework set out above, the interpretation of s. 7 of the *Charter* must be rooted primarily — if not exclusively — in Canadian legal principles.

21. Section 7 provides that "[e]veryone 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". Under Canadian law, a "principle of fundamental justice" has three features: (1) it is a legal principle; (2) that is "vital or fundamental to *our* societ[y's]" — i.e., "*Canadian* society['s]" — notion of justice; and (3) is capable of being identified with precision and applied in a way that yields predictable results.[39] These principles are "the shared assumptions upon which *our* system of justice" — the *Canadian* system of justice — is grounded.[40]

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[35] *SFL* (S.C.C., 2015), *supra* note 22, ¶159, *per* Rothstein and Wagner JJ. (dissenting).
[36] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶22; *R. v. Bissonnette*, 2022 SCC 23, ¶98.
[37] *Québec inc.* (S.C.C., 2020), *supra* note 2, ¶23, 28.
[38] **See, *e.g.*:** *Ktunaxa Nation v. B.C.*, 2017 SCC 54, ¶66; *SFL* (S.C.C., 2015), *supra* note 22, ¶62-70.
[39] *R. v. White*, [1999] 2 SCR 417, ¶47 [emphasis added]; *Canadian Foundation for Children, Youth and the Law v. Canada*, 2004 SCC 4 [***Canadian Foundation for Children***], ¶8 [emphasis added].
[40] *Canadian Foundation for Children* (S.C.C., 2004), *supra* note 39, ¶8 [emphasis added].

22. As noted, international law may play a role in *Charter* interpretation only if it can be shown that the framers drew inspiration from that law. There is no evidence in the drafting history that the framers of the *Charter* drew inspiration from international law when they created the concept of "principles of fundamental justice" under s. 7. To the contrary, when the *Charter* was enacted in 1982, this concept "did not have a firmly established meaning" — it was a blank canvass.[41] It was a uniquely Canadian concept, distinct from analogous concepts in other countries such as substantive or procedural due process.[42]

23. Like *Charter* rights more generally, the principles of fundamental justice "do not have to be in conformity with … international standards: they can be uniquely Canadian".[43] For example, Canadian law — unlike international law — recognizes a "duty of commitment to the client's cause" as a principle of fundamental justice.[44] Although certain international instruments provide some protection against state interference with legal representation,[45] none creates an equivalent "duty of commitment to the client's cause". The concept is uniquely Canadian. Likewise, the test for whether a particular extradition or deportation would violate s. 7 is whether it would "shock the *Canadian* conscience" — by definition a uniquely Canadian concept.[46]

24. International laws — no matter how widespread their acceptance may be — do not necessarily qualify as principles of fundamental justice under s. 7. In interpreting s. 7, the Court cautioned in *Kazemi Estate v. Islamic Republic of Iran* that the mere existence of an international law binding on Canada is insufficient to establish a principle of fundamental justice:

> [N]ot all commitments in international agreements amount to principles of fundamental justice. Their nature is very diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with

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[41] P.W. Hogg & W.K. Wright, *Constitutional Law of Canada*, 5th ed. (Supp.) (Toronto: Thomson Reuters) (electronic loose-leaf, 2021), § 47:14.

[42] *Re B.C. Motor Vehicle Act* (S.C.C., 1985), *supra* note 6, ¶17-18.

[43] A.N. Young, "Fundamental Justice and Political Power" (2002), 16 *S.C.L.R.* 121, at 139.

[44] *Canada v. Federation of Law Societies of Canada* [***FLSC***], 2015 SCC 7, ¶103.

[45] *FLSC* (S.C.C., 2015), *supra* note 44, ¶103.

[46] *Suresh* (S.C.C. 2002), *supra* note 29, ¶27 [emphasis added].

> principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.[47]

25. To illustrate, in *Canadian Foundation for Children, Youth and the Law v. Canada*, the Court held that although the "best interests of the child" is an established legal principle in international law and "a primary consideration" under the *Convention on the Rights of the Child*, it is not a principle of fundamental justice.[48]

26. Even *jus cogens* norms, which are "customs accepted and recognized by the international community of states from which no derogation is permitted",[49] do not necessarily qualify as principles of fundamental justice under s. 7. In *Kazemi*, the Court stated that the prohibition against torture — "clearly" a *jus cogens* norm — is "very likely" a principle of fundamental justice.[50] But the Court was not prepared to conclude, based on international law alone, that it was. Thus, even the most widely accepted and strictly enforced international laws do not necessarily find expression in s. 7. Although the basic tenets of our legal system will often coincide with widely accepted principles of international law, the two must not be equated automatically.

27. *United States v. Burns* reflects these principles. In considering whether extraditing an individual who may potentially be sentenced to death upon conviction violates s. 7, the Court began with the "principles of criminal justice *as applied in Canada*". The Court observed that "[t]he death penalty has been rejected as an acceptable element of criminal justice by the Canadian people". Only after surveying the domestic situation did the Court consider the "significant movement towards acceptance internationally of a principle of fundamental justice *that Canada has already adopted internally*", and conclude that "the trend to abolition in the democracies, particularly the Western democracies, *mirrors and perhaps corroborates* the principles of fundamental justice that led to the rejection of the death penalty in Canada".[51]

28. *Suresh v. Canada (Minister of Citizenship and Immigration)* also reflects these principles. The Court held that international laws prohibiting deportation to torture could not alone

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[47] *Kazemi* (S.C.C., 2014), *supra* note 11, ¶150.
[48] *Canadian Foundation for Children* (S.C.C., 2004), *supra* note 39, ¶9-10.
[49] *Kazemi* (S.C.C., 2014), *supra* note 11, ¶151.
[50] *Kazemi* (S.C.C., 2014), *supra* note 11, ¶152.
[51] *United States v. Burns,* 2001 SCC 7, ¶76, 89, 92 [emphasis added].

substantiate a principle of fundamental justice under s. 7. International law provided *evidence* of a principle of fundamental justice, but did not *create* one. Viewing the matter from "the Canadian perspective", the Court found that international laws prohibiting deportation to torture reinforced the reality that Canada (like many other countries) has no domestic practice of torture, Canada's laws (including the *Criminal Code*) expressly prohibit it, and s. 12 of the *Charter* prohibits any form of cruel and unusual treatment. These factors led the Court to conclude that the principles of fundamental justice — under *Canadian* law — prohibit deportation to torture.[52]

29. *Gosselin v. Québec (Attorney General)* also reflects these principles. The majority acknowledged several international instruments that establish rights to a basic standard of living, but nevertheless declined, in interpreting the right to "security of the person" under s. 7, to recognize a positive right to social assistance. Indeed, the majority did not even consider international law as a relevant factor in its s. 7 analysis: the majority referred to international law in its analysis of the *Quebec Charter*, not the *Charter*. Had international law been a primary consideration, one would have expected a different conclusion — the one reached by the dissent.[53]

30. In sum, international law's role in the interpretation of s. 7 of the *Charter* is limited by Canada's constitutional structure and Canadian sovereignty. International law can neither supplement nor supplant the text of the s. 7 of the *Charter*, read purposively. Although international law may *confirm* principles of fundamental justice under s. 7 — a uniquely Canadian concept — international law cannot *dictate* them.

## PART IV — SUBMISSIONS ON COSTS

31. As an intervener, ARL asks that no costs be awarded for or against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16th day of June, 2022.

**Connor Bildfell, Adam H. Kanji, and Alexandra Comber**

[52] *Suresh* (S.C.C. 2002), *supra* note 29, ¶48, 50-52, 60, 65, 76.

[53] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, ¶93. **See also:** Oliphant, *supra* note 17, at 113.

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