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Garbeau v. Montreal (City of)

2015 QCCS 5246

JC00B1

SUPERIOR COURT CANADA

PROVINCE OF QUEBEC

DISTRICT OF MONTREAL

No.: 500-36-007212-148

DATE : NOVEMBER 12, 2015

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UNDER THE PRESIDENCY OF: THE HONORABLE GUY COURNOYER, JCS

_____

GABRIELLA GARBEAU Appellant

vs.

CITY OF MONTREAL Respondent

And ATTORNEY GENERAL OF QUEBEC

Questioned and LEAGUE OF RIGHTS AND FREEDOMS

Speaker

_____

JUDGEMENT

_____

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I - Overview

[1] Freedom of expression and freedom of peaceful assembly are fundamental freedoms and essential to the functioning of a free and democratic society.

[2] The right to demonstrate, including the right to do so on a public road, is protected by the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms .

[3] This case provides an opportunity to clarify the framework for the exercise of the constitutional right to demonstrate.

[4] The resolution of this question is at the heart of the life of a constitutional democracy such as ours.

[5] There is no general and absolute constitutional right to demonstrate on a public road without any legislative or regulatory framework. Indeed, access to the public highway to exercise the constitutional right to demonstrate must harmonize as much as possible with the usual functions of this place.

[6] In this case, the debate concerns the question of the constitutionality of section 500.1 of the Highway Safety Code (“ HSC ”) [1] . The question arose following the filing of charges against several people present at a demonstration denouncing police brutality on March 15, 2011. They are accused of contravening section 500.1.

[7] Section 500.1 prohibits any concerted action intended to impede in any way the circulation of road vehicles on a public road, to occupy the roadway, the shoulder, another part of the right-of-way or the surroundings or to place a vehicle or an obstacle in such a way as to impede the movement of road vehicles on this road or access to such a road.

[8] However, the person responsible for the maintenance of the public road may authorize parades or other demonstrations, provided that the road used is closed to traffic or under the control of a police force.

[9] For the reasons that follow, s. 500.1 infringes the freedoms of expression and peaceful assembly protected by the Quebec and Canadian charters.

[10] This section is not a reasonable limit that is justified in the context of a free and democratic society, because the power to authorize a demonstration or a parade which is provided for in this section is not framed by a a precise and comprehensible standard for the public and for those who apply it.

[11] The governmental authority that chooses to put in place a prior authorization mechanism before the holding of a demonstration must define the factors that the authorities must apply in making their decision. Section 500.1 does not.

[12] Section 500.1 should be struck down. However, the Tribunal suspends the effect of the declaration of invalidity for a period of 6 months.

[13] The appellant is acquitted of the offense charged against her.

II - Framework of the Tribunal's analysis

[14] The Tribunal will address its analysis in the following order. It will summarize the events surrounding the appellant's commission of the offense and the nature of the evidence presented before the trial judge.

[15] The Tribunal will then present the issues in dispute, the position of the parties and the relevant legislative provisions.

[16] The Court will describe the framework of the constitutional debate raised in this case in order to properly understand its scope.

[17] To this end, the Court will then make certain general observations about the constitutional right to demonstrate, the establishment of the criminal liability of demonstrators, the legal rules that govern police intervention during a demonstration and the primacy law.

[18] It is essential to understand that this constitutional challenge is not about the conduct of many of the protesters on March 15, 2011, or whether the police action was justified that day.

[19] The Tribunal will finally address the issues in dispute by emphasizing first and foremost the importance of freedom of expression and freedom of peaceful assembly as well as the protection of dissenting voices within a constitutional democracy.

[20] He will first determine whether the Quebec and Canadian charters protect the right to demonstrate on the public highway and whether section 500.1 infringes this right. Secondly, he will decide whether this article is a reasonable limit that can be demonstrated to be justified in the context of a free and democratic society.

2.1 – The facts [2]

[21] The Collective Opposed to Police Brutality ("COBP") called on the public to participate in a demonstration on March 15, 2011, as part of the International Day Against Police Brutality.

[22] This appeal was launched, in particular, by leaflets, cards or posters which were distributed, as well as by an appeal published by the COBP on the internet, via the site www.cobp.resist.ca. We can read, in particular, the following:

For a fifteenth year, the Collective Opposed to Police Brutality invites the entire population to take part in a demonstration as part of the International Day Against Police Brutality. This year, we are occupying public space in downtown Montreal! We've had enough of tickets, enough of being pushed back ever further. This time we stay!

[23] More specifically, the COBP organizer(s) asked the public to come to Montreal, near Place des arts at the corner of Maisonneuve and Jeanne-Mance streets, at 5 p.m.

[24] This call from the COBP was also transmitted by word of mouth and via social networks, between acquaintances and friends. The location and time of the gathering had been known for more than a month before March 15, 2011.

[25] The organizers of the demonstration did not request authorization from the Service de police de la Ville de Montréal, nor from any other municipal authority to hold this demonstration. Although steps were taken by the community relations section of the police department to contact the organizers of the COBP, they offered no cooperation and never divulged the route of the demonstration.

[26] A few minutes after 5 p.m., the protesters began their march. As can be seen in the images filmed on March 15, 2011 aboard the Sûreté du Québec helicopter, they occupy the roadway over its entire width, and do so throughout their journey, thus hindering the movement of road vehicles.

[27] At 5:09 p.m., a first notice was given by the police [3] .

1 ST NOTICE

Hi there,

I am the commander _____ responsible for order service and responsible for the security of the event.

I ask you for a few moments. For your safety and that of motorists, we ask that you drive in the same direction as traffic.

You have the right to demonstrate on the condition that you do not commit an offense and none will be tolerated.

If you commit any offences, you are liable to prosecution in court and we will end the protest.

Good morning (afternoon, evening) everyone,

I am commander _____ and I am in charge of the police officers here and responsible for your safety.

May I have your attention for a few moments? For your own safety, as well as the safety of other users of the road, we ask that you walk in the same direction as the traffic.

You have the right to demonstrate as long as you don't commit any offenses as no offense will be tolerated.

[Underline and bold added]

[28] The filmed images make it possible to observe several vehicles parked in the streets used by the demonstrators who cannot leave, including an ambulance. On more than one occasion, we see vehicles immobilized at intersections crossed by the route taken by the demonstrators, as well as vehicles immobilized because these demonstrators were walking in the opposite direction of traffic. Among these vehicles, there are buses from the Société de transport de Montréal.

[29] The demonstrators often walk between the vehicles which circulate on the roadway and which have stopped for the most part, while others carry out maneuvers, sometimes dangerous, among the demonstrators, in an attempt to extricate themselves from the demonstration.

[30] These images also show the game of "cat and mouse" in which the demonstrators engage in order to complicate the work of the police who, not knowing the route, try to control the road traffic in front of them as best they can. the demonstration. On at least three occasions, while some demonstrators passed an intersection, letting the police believe that the march would continue in that direction, those following them suddenly decided to turn into the cross street, later joined by the other demonstrators. These maneuvers, in addition to ensuring that the demonstrators circulate among the vehicles present on the road, often in the opposite direction,

[31] Before making any arrests, the Service de police de la Ville de Montréal, around 6:28 p.m., ordered the demonstrators to disperse and return to their homes, telling them that if they did not obey not to this order, they may be charged under municipal regulations, the Highway Safety Code or the Criminal Code .

2nd OPINION _

This demonstration has become an illegal gathering.

We order you to disperse and return home.

If you do not obey this order, you may be charged under the municipal regulations of the Highway Safety Code or the Criminal Code .

This demonstration has become an unlawful assembly.

We order you to disperse and return to your homes.

If you do not obey, you may be charged with criminal or municipal offences.

[32] As can be seen in the images filmed aboard the Sûreté du Québec helicopter, several demonstrators left the roadway, headed for the sidewalks and then left the scene. Some of the demonstrators choose to stay on the road and others, who had first headed for the sidewalks, return there. The police arrested the demonstrators who occupied the road.

[33] The course of the demonstration is carried out under great tension with, in particular, the presence of hooded people dressed in black, rocks thrown at the police, demonstrators who recover pieces of cobblestones, a woman who receives a bottle in the face , a damaged vehicle, demonstrators charging at the police and throwing paint, the window of a shop smashed and paint thrown into that of a bookstore. This tension is characteristic of the demonstrations organized by the COBP on March 15 each year.

[34] The appellant received a statement of offense accusing her of having, on March 15, 2011, violated section 500.1 by having occupied the roadway, the shoulder, part of the right-of-way or the surroundings of a public road during a concerted action intended to impede the circulation of road vehicles.

[35] As part of the criminal proceedings brought against her before the Municipal Court of Montreal, the appellant raised the invalidity of section 500.1, on the grounds that this provision would infringe the freedom of expression protected by paragraph 2(b) of the Canadian Charter of Rights and Freedoms (" Canadian Charter ") and section 3 of the Charter of Human Rights and Freedoms (" Quebec Charter "), and the freedom of peaceful assembly protected by paragraph 2(c) of the Canadian Charter and section 3 of the Quebec Charter. She also argued that the infringement could not be justified under section 1 of the Canadian Charter or 9.1 of the Quebec Charter .

2.2 – The evidence presented in the context of the constitutional debate

[36] The parties called several witnesses for the purposes of the constitutional argument.

[37] The trial judge heard testimony from people present at the March 15, 2011 demonstration; community organizers, a union representative; an expert professor of sociology, representatives of the

main police forces in the province on the subject of the management of demonstrations, a representative of the fire department of the City of Montreal; a manager from the Ministère des transports du Québec and the regional emergency measures and civil security coordinator from the Health and Social Services Agency.

2.3 - The issues in dispute

[38] The issues in dispute can be summarized as follows:

37.1 Do the Quebec and Canadian charters protect the right to demonstrate on a public road?

37.2 Does obtaining prior authorization to hold a parade or demonstration infringe the constitutional right to demonstrate on a public road?

37.3 Is Section 500.1 a reasonable limit that is justifiable in a free and democratic society?

[39] Let us now consider the position of the parties.

2.4 - The position of the parties

2.4.1. The appellant and the intervener

[40] Ms. Garbeau was charged with having obstructed the movement of road vehicles during a demonstration held on March 15, 2011 denouncing police brutality, thereby committing an offense under section 500.1.

[41] In her defence, she invokes the fact that section 500.1 is unconstitutional, because it violates the freedom of expression and the freedom of peaceful assembly guaranteed by the Quebec and Canadian charters. Moreover, this article is not a reasonable limit that is justified in the context of a free and democratic society due to the fact that the mechanism for authorizing parades or other demonstrations is not framed by any criteria.

[42] The intervener, the Ligue des droits et libertés supports the appellant's position.

2.4.2. The Attorney General

[43] The Attorney General challenges the trial judge's finding that the appellant has demonstrated that section 500.1 infringes freedom of expression or freedom of peaceful assembly.

[44] It adds that the activity of obstructing the movement of road vehicles on a road, during a concerted action intended for this purpose, is a behavior which does not constitute an expressive activity in itself. However, she recognizes that in certain circumstances, such as the present case, this conduct may be aimed at conveying a message.

[45] She also argues that the location or mode of expression used negates constitutional protection. Thus, obstructing the movement of road vehicles on a public road is a mode of expression incompatible with the real and historical function of a public road.

[46] In addition, the other characteristics of the location of the activity and the mode of expression tend to indicate that obstructing the movement of road vehicles on a public road would undermine the underlying values of freedom of expression. .

[47] The Attorney General also asserts that section 500.1 does not have the purpose or effect of restricting freedom of expression and that the appellant cannot claim a right to a gallery.

[48] Finally, the prior authorization mechanism established by section 500.1 is simple and flexible, which makes it a reasonable limit that is justified in a free and democratic society.

2.5 – Relevant provisions

[49] The following statutory provisions are relevant:

- Highway Safety Code :

500.1. No one may, during a concerted action intended to impede in any way the circulation of road vehicles on a public road, occupy the roadway, the shoulder, another part of the right-of-way or the surroundings or place a vehicle or an obstacle, so as to impede the movement of road vehicles on this road or access to such a road.

A peace officer may remove or cause to be removed at the owner's expense any thing used in contravention of this section. He can also grab such a thing; the provisions of the Code of Penal Procedure (chapter C-25.1) relating to things seized apply, with the necessary modifications, to things thus seized.

This article does not apply during parades or other demonstrations previously authorized by the person responsible for the maintenance of the public road on the condition that the road used is closed to traffic or under the control of a police force. .

For the purposes of this article, a public road includes a road serving as a detour from a public road, even if this road is located on private property, as well as a road subject to the administration of the Ministère des Ressources naturelles et de la Faune. or maintained by it.

- Canadian Charter of Rights and Freedoms :

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out therein. They can only be restricted by a rule of law, within limits that are reasonable and demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;

- c) freedom of peaceful assembly;

- Charter of Human Rights and Freedoms:

3. Everyone is entitled to fundamental freedoms such as freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

9.1. Fundamental rights and freedoms are exercised with respect for democratic values, public order and the general well-being of the citizens of Québec.

Role of the law.

The law may, in this regard, determine the scope and arrange the exercise thereof.

- Universal Declaration of Human Rights :

Section 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be forced to belong to an association.

- Covenant on Civil and Political Rights:

Section 21

The right to peaceful assembly is recognized. The exercise of this right may only be subject to such restrictions as are imposed in accordance with law and which are necessary in a democratic society, in the interests of national security, public safety, public order or to protect public health or morals, or the rights and freedoms of others.

- European convention of human rights

SECTION 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and freedom of association, including the right to form trade unions with others and to join trade unions for the defense of their interests.

2. The exercise of these rights may not be subject to restrictions other than those which, provided for by law, constitute measures necessary, in a democratic society, for national security, public safety, defense order and the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others. This article does not prohibit the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police or the administration of the State.

[50] Before addressing the more specific questions posed in this case, it is essential to situate the context of the debate more generally.

III – Analysis

3.1 - Preliminary observations on the constitutional right to demonstrate

[51] The parties take diametrically opposed positions in this case.

[52] On the one hand, Ms. Garbeau and the intervenor, the Ligue des droits et libertés, seek what appears to be a statement that there is a general right to demonstrate in all circumstances and in all places without any form of regulatory constraint or legislative.

[53] Conversely, the Attorney General claims that the right to demonstrate on a public road is not protected.

[54] The parties' submissions thus give rise to certain categorical assertions that do not demonstrate all the nuances required by an analysis of the constitutional right to demonstrate.

[55] These arguments are no doubt the inevitable consequence of any adversarial legal debate, but they are also the echo of public debate [4] .

[56] The Court is aware of the existence of major debates within Quebec society regarding several demonstrations that have taken place in recent years and the excesses that some of them have caused. These debates concern both the extent of the right to demonstrate and that of its framework.

[57] The evidence and arguments presented by the parties before the trial judge reflect these debates within Quebec society.

[58] Depending on the point of view, it is the behavior of the demonstrators that is called into question or that of the police authorities. The regulatory or criminal offenses committed by certain demonstrators during a demonstration are often contrasted with the use of disproportionate force by the police. We are also contesting the application and constitutionality of legislative or regulatory provisions that govern the right to demonstrate.

[59] It must first be said that the “constitutional right to demonstrate must be exercised while respecting the Criminal Code . This right may not be exercised by disturbing the peace, by committing assault, intimidation, by uttering death threats, by means of an unlawful assembly or participation in a riot” [5] .

[60] The exercise of freedom of expression and freedom of peaceful assembly must respect the rule of law [6] . If a rule of law infringes the exercise of these freedoms, a constitutional review of the justification for that rule must be conducted under the supporting provisions.

[61] A protest may be peaceful even if a small number of protesters observe behavior that results in the commission of regulatory or criminal offences. In certain circumstances, a demonstration may itself sometimes become an unlawful assembly if the requirements of section 63 of the Criminal Code are met [7] .

[62] Moreover, the mere presence of a person at the scene of a demonstration during which illegal acts are committed does not necessarily lead to the conclusion that this person, by remaining on the scene, encourages the perpetrators of offenses or helps to conceal the perpetrators of these misdeeds [8] .

[63] A constitutional democracy based on the rule of law requires that the determination of each person's guilt or responsibility be determined on an individual basis according to the requirements of the judicial or quasi-judicial process applicable to the circumstances in question.

[64] This applies to both the conduct of the demonstrators and that of the police who intervene. Obeying the law applies to everyone [9] . The rule of law is not a variable geometry principle.

[65] Thus, the constitutional right to demonstrate requires an assessment of all the circumstances facing the police, which requires nuance and consideration.

[66] The challenge that police authorities face when intervening in a mass public demonstration should not obscure the fact that their own conduct may also be subject to accountability in various contexts. and multiple: a civil suit or a class action, criminal charges, the internal discipline of the police force, police ethics, an independent investigation or a public inquiry commission.

[67] It is however essential to understand that the offenses committed by some or several demonstrators can justify the intervention of the police authorities who must themselves respect the legal and constitutional limits which frame their power of intervention.

[68] The use of force by law enforcement authorities may be justified if it is reasonable and proportionate to the justification for the intervention.

[69] The fault of some can thus coexist at the legal level with the acknowledgment of the fault of others.

[70] The dynamic reality of a mass protest is complex and the challenges it poses are many .

[71] Chief Justice Laskin describes this in his dissent in Dupond c. City of Montreal [11] .

[72] This case involved, before the adoption of the Canadian Charter , the constitutionality of a municipal by-law of the City of Montreal which prohibited demonstrations.

[73] Chief Justice Laskin writes:

It is certain that the application of the criminal law is often difficult and that the difficulties increase with the number of people involved. However, one of the fundamental principles of our criminal law is that

the police must use against the offenders and not against the innocent the powers conferred upon them and exercise their judgment honestly and reasonably with respect to either category [12] .

[74] The distinction between demonstrators who behave peacefully and those who do not is crucial.

[75] The Guidelines on Freedom of Peaceful Assembly, published jointly by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe ("OSCE") and the Vienna: Guidelines on Freedom of Peaceful Assembly , highlights this nuance as follows:

However, the use of violence by a small number of participants in an assembly (including the use of inciteful language) does not automatically turn an otherwise peaceful assembly into a non-peaceful assembly, and any intervention should aim to deal with the particular individuals involved rather than dispersing the entire event [13] .

[76] In his report Independent Civilian Review Into Matters Relating To The G20 Summit , former Associate Chief Justice of the Ontario Court of Appeal John Morden sets out the challenges of managing mass public protests thus:

In a democracy where protest is a common form of expression, crowd control at mass demonstrations is a policing function of increasing importance [14] .

[77] The difficulties faced by police forces in such circumstances underscore the importance of police discretion. In R. v. Beaudry , Justice Charron underlines the importance of police discretion as follows:

No one disputes that police discretion is an essential part of both our criminal justice system and the function of police officers. It allows for a fairer application of the law to concrete situations with which police officers are confronted [15] .

[78] That said, police discretion "is not absolute. The police officer is far from having carte blanche and [he] must rationally justify his decision" [16] .

[79] Thus, “the exercise of the discretionary power must be justified subjectively, that is to say, it must necessarily be honest and transparent and be based on valid and reasonable grounds” [17] . It must “then be justified with regard to objective elements” [18] . Moreover, “a decision based on favoritism or on cultural, social or racial stereotypes cannot constitute a legitimate exercise of police discretion” [19] .

[80] During demonstrations, as in any other situation, the discretionary power of the police allows them to choose to intervene if necessary, and to apply, if necessary, the relevant provisions of a municipal by-law, a law Quebec or federal, such as the Criminal Code [20] .

[81] In summary, police officers must be “abled to respond quickly, effectively and flexibly to the variety of situations they encounter daily on the front lines of policing” [21] .

[82] However, their intervention must be carried out “in accordance with the rules of law, which are numerous and include in particular the restrictions prescribed by the Charter and the Criminal Code ” [22] .

[83] This case also reveals the exercise of discretionary power by the police. Indeed, the evidence presented and accepted by the trial judge refers to situations where the police forces tolerated the holding of several demonstrations when the route had not been provided and in the absence of formal prior authorization. .

[84] For example, during the March 15, 2011 demonstration that gave rise to the charge against the appellant, the police informed those present of their right to demonstrate.

[85] The sensitivity of the exercise of police discretion in such circumstances is well described by Justice Laskin of the Court of Appeal for Ontario in Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council [23] .

[86] This case, which is quite different from that of the present appeal, involved the application of an injunction prohibiting certain demonstrations blocking the public thoroughfare. Justice Laskin sets out the relevant considerations that frame a police intervention and the elements that must be weighed in this determination:

[118] The immediate enforcement and prosecution of violations of the law may not always be the wise course of action or the course of action that best serves the public interest. The House of Lords explained this balancing exercise in R.v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd. , [1999] 1 All ER 129 (HL) , at p. 137 :

In a situation where there are conflicting rights and the police have a duty to uphold the law the police may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion.

[87] It is essential to properly situate the scope of the debate in this case.

[88] Debate centers solely on whether section 500.1 infringes freedom of expression and freedom of peaceful assembly and whether the prior authorization mechanism provided for in this section can be justified in the context of of a free and democratic society.

[89] The Court is not being asked to determine whether the actions of certain protesters during the demonstration against police brutality on March 15, 2011 deserve a penal sanction or whether the police intervention was reasonable in the circumstances.

[90] The Tribunal must engage in constitutional review of the law. As the Supreme Court explained: “constitutional review aims precisely to determine whether a legislative provision respects the Charter or not” [24] .

3.2 - The right to publicly express dissent: freedom of expression and freedom of peaceful assembly in a constitutional democracy

[91] It is easy to forget the importance of freedom of expression and freedom of peaceful assembly, particularly when the opinion expressed shocks us or if the mode of expression used is a source of inconvenience, disorder, even violence.

[92] However, when the rule of law is respected, the exercise of these freedoms is not incompatible with the requirements of a free and democratic society.

[93] As previously indicated, the Attorney General considers that the right to demonstrate on a public road is not protected by the Quebec and Canadian charters. Given this position, a brief reminder of the fundamental principles involved is in order.

[94] Freedom of expression is “[o]ne of the pillars of modern democracies” [25] .

[95] As Justice McIntyre explained in SDGMR c. Dolphin Delivery Ltd. [26] , “[i]t constitutes one of the fundamental concepts on which rests the historical development of the political, social and educational institutions of Western society. Representative democracy in its present form, which is largely the fruit of the freedom to express and discuss divergent ideas, depends for its existence on the preservation and protection of this freedom .

[96] In R. c. Sharpe , [28] Chief Justice McLachlin summarized the main attributes of freedom of expression:

21 Among the most fundamental rights of Canadians is freedom of expression. It makes possible our freedom, our creativity and our democracy, by protecting not only the expression that is “good” and popular, but also that which is unpopular, even offensive. The right to freedom of expression is based on the belief that the free flow of ideas and images is the best path to truth, personal fulfillment and peaceful coexistence in a heterogeneous society made up of people whose beliefs diverge and differ. oppose. If we don't like an idea or an image, we are free to oppose it or simply turn away from it. In the absence of sufficient constitutional justification, however,

22 Freedom of expression is not absolute, however. Our Constitution recognizes that Parliament or a provincial legislature can sometimes limit certain forms of expression. General considerations, such as the prevention of hatred which divides society, as in Keegstra , supra, or the prevention of harm which threatens vulnerable members of our society, as in Butler , supra, may justify the prohibition of certain forms of expression in certain circumstances. Because of the importance of the guarantee of freedom of expression, however, any attempt to restrict this right must be subject to very careful scrutiny.

23 Values that underlie the right to freedom of expression include self-fulfillment, the pursuit of truth through the open exchange of ideas, and political speech which is fundamental to democracy: Irwin Toy Ltd. vs. Quebec (Attorney General) , 1989 CanLII 87 (SCC) , [1989] 1 SCR 927 , p. 976 ; Ford v. Quebec (Attorney General) , 1988 CanLII 19 (SCC) , [1988] 2 SCR 712 , p. 765. While some forms of expression, such as political expression, are more central to the guarantee than others, all forms of expression are essential to maintaining a free and democratic society. As the Court explained in Irwin Toy , supra, at p.

968, the guarantee “ensure[s] that everyone may manifest their thoughts, opinions, beliefs, in fact, all expressions of the heart or mind, however unpopular, distasteful or dissenting. This protection", the Court continued, "is [...] 'fundamental' because in a free, pluralistic and democratic society, we attach great value to the diversity of ideas and opinions which is intrinsically beneficial both for the community than for the individual. According to Judge Cardozo, inPalko v. Connecticut , 302 US 319 (1937), freedom of expression is “ the matrix, the essential element of almost every form of freedom” (p. 327).

[97] The life of a constitutional democracy is not linear. It accommodates the tensions within it and is fortified by several checks and balances that ensure respect for the rule of law.

[98] Here is Professor Paul Woodruff's description of democracy in his book, First Democracy: The Challenge of An Ancient Idea :

Democracy faces human limitations more honestly than any other ideal of government. It balances distrust against distrust, through complex machinery. And the distrust in democracy is massive, disturbing and well deserved. The glory of democracy is that it brings distrust into the open and uses it to keep the state from veering too far one way or another [29] .

[99] In his book, The Judge in a Democracy , the former Chief Justice of Israel, Aharon Barak, describes the multidimensional nature of democracy and the importance of human rights in the following way:

Democracy's world is rich and multifaceted. Democracy should not be viewed from a one-dimensional vantage point. Democracy is multidimensional. It is based both on the centrality of laws and on democratic values, and, at their center, human rights [30] .

[100] He also emphasizes the importance of tolerance in a democracy:

Democracy is based on tolerance. This means tolerance for the acts and beliefs of others. It also means tolerance for intolerance. In a pluralistic society, tolerance is the unifying force that allows people to live together. Indeed, tolerance constitutes both an end and a means. It constitutes a social goal in itself, which every democratic society should aspire to realize. It serves as a means and a tool for balancing between other social goals and reconciling them, in cases where they conflict with one another [31] .

[101] In R. c. Oakes , [32] Chief Justice Dickson described the characteristics of a free and democratic society in these terms:

A second contextual element in the interpretation of s. 1 is provided by the expression “free and democratic society”. The inclusion of these words as the final standard of justification for limiting rights and freedoms reminds the courts of the very purpose of enshrining the Charter in theConstitution: Canadian society must be free and democratic. The courts must be guided by values and principles essential to a free and democratic society, which include, in my view, respect for the inherent dignity of the human being, the promotion of social justice and equality, the acceptance of a wide diversity of beliefs, respect for each culture and each group, and faith in social and political institutions that promote the participation of individuals and groups in society [33] .

[102] A democratic society recognizes pluralism, diversity of opinion, tolerance and openness [34] . The pursuit of the ideal of a free and democratic society encourages the free participation of all in public life [35] , which necessarily includes the right of citizens to express their dissent.

[103] In the Reference re Secession of Quebec [36] , the Supreme Court made the following observations about the proper functioning of a democracy and the consideration of dissenting voices within it:

[…] [T]he good functioning of a democracy requires an ongoing process of discussion. The Constitution establishes a government by democratically elected legislatures and an executive responsible to them, "a government [WHICH] rests ultimately on the expression of public opinion achieved through discussion and the play of ideas (Saumur v. City of Quebec, supra, at p. 330). The need to build majorities, both federally and provincially, by its very nature entails compromise, negotiation and deliberation. No one has a monopoly on the truth and our system is based on the belief that, in the marketplace of ideas, the best solutions to public problems will prevail. There will inevitably be dissenting voices. A democratic system of government is bound to consider these dissenting voices, and to seek to accommodate and respond to them in the laws that all members of the community must abide by .

[Emphasis added]

[104] In MacMillan Bloedel v. Simpson [37] , the Supreme Court recognized the right to publicly express dissent even if, in this case, the Court upheld the validity of an injunction prohibiting demonstrators from blocking public roads.

[105] Justice McLachlin put it this way:

13 As with most cases, this appeal involves a fundamental conflict. This is the conflict between the right to publicly express one's dissent , on the one hand, and the exercise of property rights and contractual rights, on the other. Accordingly, the appellants are incorrect in asserting that the ordinances in question are nothing more than a form of “government by INJUNCTION ” aimed at suppressing the public expression of dissent. The respondent is also wrong in asserting that this appeal has nothing to do with the public expression of a difference of opinion and concerns only private property. This appeal must be considered under these two aspects.In a society that prizes both the right to manifest dissent and the preservation of private rights, a way must be found to reconcile the two interests . Court orders such as the one at issue are such a means. The task of the courts is to find a way to protect the legitimate exercise of private rights while allowing as much freedom as possible for the lawful exercise of the right to express one's opinion and demonstrate .

[Emphasis added]

[106] Even if stated in a private law context, this recognition of the right to publicly express one's dissent can be transposed without difficulty in a public law or criminal law context.

[107] Moreover, it should not be overlooked that the right to publicly express one's dissent is protected both in the interest of those who exercise it and in that of society in general.

[108] In his book Why Societies Need Dissent , American professor Cass Sunstein explains it this way:

It is usual to think that those who conform are serving the general interest and that dissenters are antisocial, even selfish. In a way this is true. Sometimes conformists strengthen social bonds, whereas dissenters endanger those bonds or at least introduce a degree of tension. But in an important respect, the usual thought has things backwards. Much of the time, it is in the individual's interest to follow the crowd, but in the social interest for the individual to say and do what he thinks best. Well-functioning societies take steps to discourage conformity and to promote dissent. They do this partly to protect the rights of dissenters, but mostly to protect interests of their own [38] .

[109] As for the freedom of peaceful assembly and the right to demonstrate, Professor Cutler wrote this as early as the year of the proclamation of the Canadian Charter :

Groups that don't have enough money to pay for publicity often feel compelled to resort to protests. If we deny them the right to demonstrate, we deprive them of the means to communicate. Demonstrations guarantee access to the media, and in Western society such access is essential to communicating a point of view and achieving group goals .

[110] Thus, “the importance of the demonstration derives from the absence of an effective means of making oneself heard” [40] .

[111] The Supreme Court has recognized the collective dimension of freedom of peaceful assembly.

[112] In Mounted Police Association of Ontario v. Canada (Attorney General) [41] Chief Justice McLachlin and Justice LeBel write:

[64] […] [T]he Charter does not exclude collective rights. Although the rights holders to whom it refers are generally individuals, the guarantees provided by art. 2 also apply to groups. The freedom of peaceful assembly covers, by definition, a collective activity that is not likely to be carried out by a single person. […]

[113] It is with these fundamental principles in mind that we must now address the question of whether the right to demonstrate on a public road is protected by the freedom of expression and the freedom of peaceful assembly guaranteed by the Quebec and Canadian charters.

3.3 - Do the Quebec and Canadian charters protect the right to demonstrate on a public road?

[114] The Attorney General erroneously characterizes the right claimed by the appellant as being the right to obstruct traffic when it is the right to demonstrate on a public road.

[115] The position that the right to demonstrate on a public road is not protected by the Quebec and Canadian charters is unfounded.

[116] First, it ignores the protection given to this right in Canadian law, international law and American law.

[117] Second, it is contrary to the factual findings of the trial judge.

[118] Third, the protection of the right to demonstrate on the public highway emerges explicitly from the very wording of section 500.1.

[119] Let us examine these grounds, one by one.

3.3.1. The protection of freedom of expression and freedom of peaceful assembly in Canadian law, international law and American law

3.3.1.1. Canadian law

[120] In her brief and during the hearing, the Attorney General engaged in a laborious development aimed at demonstrating that the right to demonstrate on the public highway is not protected by the Quebec and Canadian charters, because its exercise is fundamentally incompatible with the function of a public road.

[121] However, this question was definitively resolved by the Supreme Court in Société Radio-Canada c. Canada (Attorney General) [42] , if there was even any doubt whatsoever before this one.

[122] Here is how Judge Deschamps expressed herself on behalf of the Court:

[37] For the mode or place of communication of a message to be excluded from the protection of the Charter , the court must come to the conclusion that one or the other is in dissonance with the values protected by s . . 2 (b) , that is, personal development, democratic debate and the search for the truth (Ville de Montréal , at para. 72). In deciding this question, the following factors are suggested: a) the historical or actual function of the location of the activity or mode of expression; (b) other characteristics of the location of the activity or the mode of expression that tend to indicate that speaking there or using that mode of expression would undermine the underlying freedom of speech values. 'expression (City of Montreal , para. 74). However, the analysis should not only focus on the primary function of the mode of expression or the place of activity . For example, in Committee for the Commonwealth of Canada v. Canada , 1991 CanLII 119 (SCC) , [1991] 1 SCR 139 , Ramsden v. Peterborough (City) , 1993 CanLII 60 (SCC) , [1993] 2 SCR 1084 , City of Montreal and Greater Vancouver , this Court held that an airport, a power pole, a public roadand a bus are places where the exercise of

certain expressive activities is not inconsistent with values other than s . 2 (b) is meant to promote, despite the fact that their primary function is not expression. Indeed, the primary purpose of these places was certainly not the communication of messages, but their historical use for expressive purposes demonstrated that their characteristics or functions would not render them unsuitable for the exercise of freedom of expression. .

[Emphasis added]

[123] Two years earlier, in Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Chapter (" Greater Vancouver ") , [43] Deschamps J. expressed the same opinion regarding the protection granted to the right to express oneself in the public domain:

[27] This Court has long interpreted Charter rights and freedoms generously and purposively (Hunter v. Southam Inc. , 1984 CanLII 33 (SCC) , [1984] 2 SCR 145 ; R. v. Big M Drug Mart Ltd. , 1985 CanLII 69 (SCC) , [1985] 1 SCR 295). His interpretation of s . 2 (b) is no exception: SDGMR c. Dolphin Delivery Ltd. , 1986 CanLII 5 (SCC) , [1986] 2 SCR 573 , p. 588 ; Ford v. Quebec (Attorney General) , 1988 CanLII 19 (SCC) ,[1988] 2 SCR 712 , p. 748-749 and 766-767; Irwin Toys Ltd. vs. Quebec (Attorney General) , 1989 CanLII 87 (SCC) , [1989] 1 SCR 927 ; R.v. Keegstra , 1990 CanLII 24 (SCC) , [1990] 3 SCR 697 . The activity of conveying or attempting to convey a message prima facie enjoys the protection of s . 2 (b) (Irwin Toy , pp. 968-969). Moreover, the Court recognized that s . 2 (b) protects the individual right to self-expression in certain public places or spaces (Committee for the Commonwealth of Canada c. Canada ,1991 CanLII 119 (SCC),[1991] 1 SCR 139(airport); Ramsden v. Peterborough (City) ,1993 CanLII 60 (SCC),[1993] 2 SCR 1084(power pole); City of Montreal, para. 61 (public road)). TheCharter therefore protects prima facie not only expressive activity, but also the right to exercise it in certain public places (Ville de Montréal, at para. 61).

[Underline and bold added]

[124] The Ontario Court of Appeal recently held to this effect. In the case of Figueiras v. Toronto Police Services Board [44] , the Court had to consider the conduct of the police authorities on the sidelines of the demonstrations held during the G-20 summit in June 2010. Justice Rouleau wrote:

[71] The second step of the test is satisfied because nothing about Mr. Figueiras' conduct would remove his intended expressive activity from the scope of s. 2(b) protection: see 2952-1366 Quebec Inc. , at paras. 62-81 . Neither the method nor the location of Mr. Figueiras' intended activity conflicts with the values protected by s. 2(b) (ie , self-fulfillment, democratic discourse and truth finding): Canadian Broadcasting Corp. v. Canada (Attorney General) , [2011] 1 SCR 19 , [2011] SCJ No. 2 , 2011 SCC 2 , at para. 37 . In particular,public streets are "clearly areas of public, as opposed to private, concourse,

where expression of many varieties has long been accepted ": 2952-1366 Québec Inc. , at para. 81 . Demonstrating around the G20 site, including the area adjacent to the security fence, was a perfectly lawful — and indeed reasonably expected — activity.

[125] As Professors Roach and Schneiderman state:

Streets and parks seem to be paradigmatic of the sorts of public places available for the conduct of expressive activity [45] .

[126] This is also the opinion of author Gabriel Babineau who, after considering the Greater Vancouver decision , writes the following:

Following this analytical framework, it seems obvious that a demonstration that takes place on a public road, or in a public place, such as a park, will normally fall under the protection of section 2 (b) of the Charter . This would be particularly the case, since, as the author Patrick Forget remarks, "[t]he numerous demonstrations which take place peacefully year after year testify that the protesting event is not incompatible with the main functions assumed by the and public parks" [46] .

[127] In the opinion of the Tribunal, there is no doubt that freedom of expression and the freedom of peaceful assembly protect the right to express oneself in public places even "if the primary purpose of these places does not [is] certainly not the communication of messages, but their historical use for expressive purposes demonstrates that their characteristics or functions do not make them […] unsuitable for the exercise of freedom of expression" [47] .

[128] This recognition is consistent with some court decisions in other contexts .

[129] On the subject more specifically of the freedom of peaceful assembly, it is useful to specify that the Canadian courts have often interpreted the protection granted to it in parallel with the analysis granted to the freedom of expression [49] .

[130] On the other hand, the comments of former Associate Chief Justice Morden regarding the training received by the police prior to the G-20 meeting in Toronto in June 2010 testify to the existence of a consensus on the the protection afforded to freedom of peaceful assembly by the Canadian Charter :

The substance of the training administered to officers covered a broad range of topics related to policing the G20 Summit, with a particular focus on crowd dynamics and management. Crowd management skills are a critical component of safety planning for any major event and were essential in the case of the G20 Summit given its unprecedented size, the thousands of police and security personnel involved, and the security requirements for the event. While the training materials developed were clearly presented and highly relevant to maximizing safety in mass protest situations, the training was lacking in several respects.

First, the training would have benefitted from a more detailed discussion of the relationship between the exercise of police powers, such as arrest, and the relevant Charter rights and freedoms engaged in policing mass public demonstrations, such as the freedom of peaceful assembly . There should have been a greater emphasis in training on the police officers' responsibility to protect and facilitate the public's exercise of their fundamental rights and freedoms under the Charter .

Second, many of the images and much of the language used in the training materials to depict protestors was unbalanced. Representations of rioting crowds, violent protestors, and anarchists left the impression that all protestors at the G20 Summit would engage in destructive protest activity and that police officers would be required to respond with aggressive crowd control measures.

Third, given the increased potential for violence and civil disorder in a mass protest situation, all officers deployed to the G20 Summit should have received more practical skills' training than was offered. This should have included simulated scenario training with groups of non-violent and violent protestors that focus on the powers of police to detain or arrest, as well as the legal rights an individual has when the police engage in such conduct [50] .

[Emphasis added]

[131] The author Babineau highlights the collective dimension of the freedom of peaceful assembly in these terms:

The freedom of peaceful assembly would therefore be distinguished from the freedom of expression since its object is the protection of a collective activity rather than an individual one. However, this does not mean that the freedom of peaceful assembly is, strictly speaking, a collective freedom. Rather, as author Yannick Lécuyer points out, it is an “individual right with a collective dimension” because it is an individual freedom that can only be exercised collectively [51] .

[132] As noted earlier, the collective dimension of freedom of peaceful assembly was recently recognized by the Supreme Court in Mounted Police Association of Ontario v. Canada (Attorney General) [52] .

[133] A few words now about Dupond c. City of Montreal [53] that the Attorney General of Quebec relies on.

[134] In this case, the Supreme Court had to decide on the constitutionality of a by-law of the City of Montreal which prohibited demonstrations. Judge Beetz writes the following:

3. The freedoms of expression, assembly and association, as well as freedom of the press and freedom of religion, are distinct and independent from the right to hold assemblies, parades, gatherings, demonstrations, processions in the public domain of a city. This is particularly true of freedom of expression and freedom of the press dealt with in Reference re Alberta Statutes (supra). A demonstration is not a form of speech but a collective action. It's more a show of force than an appeal to reason; the confusion proper to a manifestation prevents it from becoming a form of language and from reaching the level of discourse.

4. The right to hold public meetings on a public road or in a park is unknown in English law. Far from being the object of a right, the holding of a public meeting in a street or in a park may constitute an infringement of the rights of the municipal authorities which own the street, even if no third party is disturbed. and that no prejudice results therefrom; it can also constitute a nuisance […] [54] .

[135] Based on the Dupond decision , the Attorney General argues that the courts have never recognized that there is a right to obstruct the movement of road vehicles on public roads. It asserts that the appellant cannot claim that this right has been historically granted to it and that it does not interfere with the activity for which these roads are intended.

[136] On the one hand, the characterization of the right invoked by the appellant in this case is incorrect. This is the right to demonstrate on a public road and not the right to impede traffic. On the other hand, the Dupond decision was rendered before the adoption of the Charter .

[137] In the Comité pour la République [55] judgment , Judge L'Heureux-Dubé noted the fact that the Dupond judgment was rendered before the proclamation of the Charter :

In Dupond v. Ville de Montréal , 1978 CanLII 201 (SCC) , [1978] 2 SCR 770 , Beetz J. expressed the opinion, at p. 797, on behalf of the majority, that "[f]ar from being the object of a right, the holding of a public meeting in a street or in a park may constitute an infringement of the rights of municipal powers which are owners of the street" and that free expression cannot be used as the basis for the annulment of a municipal by-law prohibiting all demonstrations for a month. However, this decision was rendered before the proclamation of the Charter and at the very least offers evidence that trespass laws can be understood to constitute a legal restriction on freedom of expression.

But the distinct character of government property restricts the application of the rules of law relating to trespass. As the United States Supreme Court stated in Hague v. Committee for Industrial Organization , 307 US 496 (1939), at pp. 515 and 516:

[TRANSLATION] Regardless of who holds title to the streets and parks, these places have from time immemorial been held in trust for the use of the public and have always been used for the purpose of to hold assemblies and to allow the exchange of ideas between citizens and the discussion of matters of public interest. Since ancient times, this use of streets and public places has been part of the privileges, immunities, rights and freedoms of citizens. The right of a citizen of the United States to use the streets and parks for the purpose of communicating his views on national matters may be regulated in the collective interest; it is not an absolute but a relative right whose exercise must be subject to general convenience and convenience and be in harmony with peace and order. However, it must not be restricted or suppressed under cover of regulations.

And according to Harry Kalven, Jr. in "The Concept of the Public Forum: Cox v. Louisiana", [1965] Sup. Ct. Rev. 1, at pp. 11 and 12:

[TRANSLATION]. . . in an open and democratic society the streets, parks and other public places are important places for public discussion and for the political process. In short, they constitute a public forum that the citizen can requisition; the generosity and understanding with which these places are made available to citizens are an indication of freedom.

However, even the right to express one's political opinions is not absolute as explained by the United States Supreme Court in Cox v. Louisiana , 379 US 536 (1965), at p. 554:

Even THOUGH the rights of speech and assembly are fundamental in our democratic society, it should still not be concluded that anyone wishing to express opinions or beliefs can speak in public anywhere and anytime. whenever. The freedom guaranteed by the constitution presupposes the existence of an organized society, capable of maintaining public order, without which this same freedom would be lost in the excesses of anarchy . [Emphasis added.] [56]

[138] In Ontario (AG) v. Dieleman [57] , Justice Adams of the Ontario Superior Court issued an injunction prohibiting certain people from displaying protest signs near certain abortion clinics .

[139] In his judgment, Justice Adams explored several issues relating to the scope of the protection afforded by the Canadian Charter to freedom of expression and freedom of peaceful assembly. It draws a historical portrait of the constitutional protection granted to the right to demonstrate before the adoption of the Canadian Charter and, of course, it discusses the Supreme Court 's decision in the Dupond decision .

[140] He writes the following about this decision:

The passage of the Charter of Rights and Freedoms has radically altered this perspective, bringing Canadian law and practice more into tune with the fundamental nature of public speech in its various democratic manifestations. It is now recognized that speaking out on public property is an important aspect of political participation, particularly for individuals and groups who lack access to the official press or media or even to mainstream political life: see Stoykewych, "Street Legal", supra , at p. 45, Committee for the Commonwealth of Canada v. Canada , supra ; and Ramsden v. Peterborough (City) , supra [59] .

[141] The Court adopts the analysis of Adams J. and considers that it is not bound by the Dupond decision , particularly if one considers the recent jurisprudence of the Supreme Court which recognizes the exercise of freedom of expression on the public road.

[142] This recognition is also consistent with international law.

3.3.1.2. International law

[143] In Saskatchewan Federation of Labor v. Saskatchewan [60] , Justice Abella reiterated the importance of Canada's international obligations when interpreting the Canadian Charter :

[64] In R. v. Hape , 2007 SCC 26 (CanLII) , [2007] 2 SCR 292 , LeBel J. confirms that, in interpreting the Charter , the Court "attempted to ensure consistency between its interpretation of the Charter , on the one hand, and Canada's international obligations and applicable principles of international law, on the other" (para. 55). Then, in Divito v. Canada (Public Safety and Emergency Preparedness) , 2013 SCC 47

(CanLII) , [2013] 3 SCR 157 , para. 23 , the Court confirmed that "it must be assumed that the Charter affords protection at least as great as the international human rights instruments ratified by Canada".

[144] Canada has ratified the International Covenant on Civil and Political Rights [61] which protects, in its article 21, the right to peaceful assembly. The fundamental freedoms protected by the Quebec and Canadian charters are inspired by instruments for the protection of international rights [62] .

[145] In this regard, it is interesting to consult the analysis contained in the second edition of the guidelines on freedom of peaceful assembly published in 2010 jointly by the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe ("OSCE") and Vienna Commission: Guidelines on Freedom of Peaceful Assembly [63] .

[146] These guidelines are issued for OSCE member states to help them ensure that their national legislation complies with their international, European and OSCE member state obligations. .

[147] They are based in particular on the analysis of the relevant international and European instruments which grant protection to the freedom of peaceful assembly.

[148] The analysis contained in these guidelines and the accompanying explanatory notes is a useful summary of the basic principles of the scope of protection given to freedom of peaceful assembly in international and European law. [64] .

[149] The guidelines address all issues relevant to the respect of freedom of peaceful assembly and its implementation: 1) the notion of peaceful assembly; 2) guiding principles; 3) restrictions on this freedom; 4) procedural issues and 5) the implementation of the right to freedom of peaceful assembly.

[150] Freedom of peaceful assembly is broadly defined:

1.1 Freedom of peaceful assembly is a fundamental human right that can be enjoyed and exercised by individuals and groups, unregistered associations, legal entities and corporate bodies. Assemblies may serve many purposes, including the expression of diverse, unpopular or minority opinions. The right can be an important strand in the maintenance and development of culture, such as in the preservation of minority identities. The protection of the freedom to peacefully assemble is crucial to creating a tolerant and pluralistic society in which groups with different beliefs, practices or policies can exist peacefully together.

1.2 Definition of assembly. For the purposes of the Guidelines, an assembly means the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose. This definition recognizes that, although particular forms of assembly may raise specific regulatory issues, all types of peaceful assembly – both static and moving assemblies, as well as those that take place on publicly or privately owned premises or in enclosed structures – deserve protection.

1.3 Only peaceful assemblies are protected. An assembly should be deemed peaceful if its organizers have professed peaceful intentions and the conduct of the assembly is non-violent. The term “peaceful” should be interpreted to include conduct that may annoy or give offense, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties [65] .

[151] The legitimacy of the use of public roads for the exercise of the freedom of peaceful assembly is thus described:

3.2 Public space. Assemblies are as legitimate uses of public space as commercial activity or the movement of vehicular and pedestrian traffic. This must be acknowledged when considering the necessity of any restrictions [66] .

[152] Regarding the temporary use of public roads for the exercise of the freedom of peaceful assembly, the explanatory notes provide the following clarifications:

19. These Guidelines apply to assemblies held in public places that everyone has an equal right to use (including, but not limited to, public parks, squares, streets, roads, avenues, sidewalks, pavements and footpaths). In particular, the state should always seek to facilitate public assemblies at the organizers' preferred location, where this is a public place that is ordinarily accessible to the public (see paras. 39-45, in relation to proportionality).

20. Participants in public assemblies have as much a claim to use such sites for a reasonable period as anyone else. Indeed, public protest, and freedom of assembly in general, should be regarded as equally legitimate uses of public space as the more routine purposes for which public space is used (such as commercial activity or for pedestrian and vehicular traffic) .

[153] As can be seen, temporary access to the public highway for the exercise of freedom of peaceful assembly is enshrined in international law.

3.3.1.3. American law

[154] American law is to the same effect.

[155] In his book Why Societies Need Dissent , Professor Sunstein succinctly summarizes American law regarding the exercise of the right to demonstrate on a public road. It confirms that access to streets and parks is protected in order to exercise the right to freedom of expression and peaceful assembly:

In short, governments are obliged to allow speech to occur freely on public streets and in public parks. This is so even if many citizens would prefer to have peace and quiet, and even if people find it annoying, or worse, to come across protesters and dissidents when simply walking home or driving to a local grocery or restaurant [68] .

[156] Access to public roads in order to exercise freedom of expression and freedom of peaceful assembly is therefore protected in Canadian law, in international law and in American law.

3.3.2. The Text of Section 500.1 and Legislative Intent

[157] The position taken by the Attorney General regarding the protection of freedom of expression and the freedom of peaceful assembly is contradicted by the very text of section 500.1 which authorizes temporary access to public roads when that certain conditions are met.

[158] The purpose and legislative intent that led to the adoption of this section is to authorize access to public roads for the purposes of holding demonstrations and parades subject to compliance with certain conditions.

[159] Section 500.1 only confirms that the freedoms of expression and peaceful assembly protect the right to demonstrate, at least temporarily, on a public road.

3.3.3. The trial judge's conclusions

[160] In a careful and clear judgment, the trial judge made certain conclusions of a factual nature regarding the historical use of public roads to exercise the right to demonstrate.

[161] For example, the judge summarizes and evaluates the testimony given by the professor of sociology at McGill University, Marcos Ancelovici. It is expressed thus:

[22] Marcos Ancelovici, a sociologist who teaches at McGill University , is interested in social movements . He was qualified as an expert capable of informing the Tribunal on the notion of manifestation, its development and its use , and in particular the use of manifestation as a means of expression.

[23] In light of Marcos Ancelovici 's testimony and expert report , the Tribunal holds that a demonstration is an expressive activity and a collective phenomenon . Those who participate , often marginalized , convey a message .

[24] Moreover, one objective of the demonstration is to attract media attention in order to communicate this message and influence public policies . Disrupting public order is one way to get this media attention . In addition, the demonstration is often held in the street or on public roads . and its path can be invested with a particular meaning . Manifestation can be an end in itself . _ Among other things , it allows a social movement to “take shape ”. Finally, the manifestation can take several forms : for example, it can be spontaneous and not have of organizer.

[25] Mr. Ancelovici testified that several groups, often marginalized, depend on the disruption of public order to be heard . Moreover , even if the Court accepted the hypothesis that there is a “ routinization ” of the demonstrations in the West, it does not however accept the conclusions of the witness as to this “routinization” in Canada. According Canadians (including Quebecers) are more and more favorable to the idea of demonstrating . However, the way in which he interprets the studies he presents is unreliable and the application of the conclusions of these studies to the Canadian context , speculative.

[26] The Tribunal also does not accept its conclusions to the effect that Canadians (including Quebeckers) are increasingly taking part in demonstrations . Many of the data it presents are partial and the methodology it uses to do so unreliable . Moreover , it does not attach whether the manifestations to which it refers or to which the studies it mentions refer are authorized or not . _ _ Finally, the Tribunal does not accept its conclusions to the effect that relations between the demonstrators and the police have "normalized" because it does not present no data to support this claim.

[Emphasis added]

[162] In addition, the trial judge was "convinced on the basis of the evidence heard that the public roads of Montreal are public and not private meeting places, where street demonstration has been an accepted form of expression since a long time” [69] .

[163] He also points out that he "is pleased that the Supreme Court and appellate courts have recognized that the streets are clearly places where various forms of expression, including demonstrations, have long been accepted . "

[164] In a constitutional debate, the standard of review for facts in dispute, social facts and legislative facts is that of palpable and overriding error .

[165] The Attorney General does not show any such error with respect to the findings of the trial judge in her judgment.

[166] In doing so, it finds it difficult to argue that the historic function of public streets and highways is incompatible with the exercise of freedom of expression and freedom of peaceful assembly when the evidence presented establishes this and that the trial judge accept this evidence.

3.4 - Does section 500.1 infringe the freedoms of expression and peaceful assembly?

[167] Having concluded that the Quebec and Canadian charters protect the right to demonstrate on a public road, it must be decided whether section 500.1 infringes the freedoms of expression and peaceful assembly.

[168] Section 500.1 prohibits unauthorized demonstrations and marches.

[169] The exercise of the right to demonstrate on a public road is subject to prior authorization.

[170] As the Supreme Court explained in Montréal (Ville) c. 2952-1366 Québec Inc. [72] “[W]here the effect of a provision is to limit expression, the violation of s . 2(b) will be made out, provided the

plaintiff demonstrates that the expression in question promotes one of the values underlying freedom of expression" [73] .

[171] A demonstration or parade promotes the values underlying freedom of expression and freedom of peaceful assembly: democratic debate, the search for truth and personal growth .

[172] Section 500.1 is a prior restraint regime for the exercise of the right to demonstrate on a public road .

[173] Such a regime infringes the exercise of the freedoms of expression and peaceful assembly and its justification must be demonstrated according to the requirements of section 1 of the Canadian Charter and section 9.1 of the Quebec Charter .

3.5 - Is section 500.1 a limit that is justified in a free and democratic society?

[174] The opinion expressed by La Forest J. in Committee for the Commonwealth of Canada v. Canada [76] simply poses the issue that must be resolved in this case. He writes:

I agree with the Chief Justice and Justice McLachlin that this freedom does not include the right to use all government property for the purpose of imparting one's opinions on matters of a public nature, but I have no doubt that 'it includes the right to use for these purposes the streets and parks which are intended for the use of the public, subject no doubt to reasonable regulation designed to ensure their continued use for the purposes for which they are intended [77] .

[175] Essentially, it is important to decide, in this case, whether the prior authorization mechanism provided for in section 500.1 and its broad discretionary power is reasonable regulation according to the requirements of the supporting provisions of the Quebec and Canadian charters.

[176] The question can be framed as follows: is the discretion conferred by section 500.1 so broad that it cannot be considered a reasonable limit justified in a free and democratic society?

[177] The general analytical framework for answering this question was first articulated in R. v. Oakes [78] .

[178] This test is summarized in Carter v. Canada (Attorney General) [79] :

[94] To justify, under s. 1 of the Charter , the infringement of the rights recognized by s. 7 to the appellants, Canada must demonstrate that the object of the law is pressing and substantial and that the means chosen are proportionate to that object. A law is proportionate to its purpose if (1) the means adopted are rationally connected to that purpose, (2) it minimally impairs the right in question, and (3) there is proportionality between the harmful effects and the adverse effects. benefits of the law: R. c. Oakes , 1986 CanLII 46 (SCC) , [1986] 1 SCR 103 [80] .

3.5.1. Is section 500.1 a rule of law?

[179] While conferring broad discretion, section 500.1 is a rule of law within the meaning of the supporting provisions .

[180] It is true, as the majority opinion in Irwin Toy Ltd. vs. Quebec (Attorney General) , that "while the legislator has conferred absolute discretion to do what appears to be best in a wide variety of cases, there is no restriction prescribed 'by a rule of law' [82] .

[181] However, as Sopinka J. explained in Osborne v. Canada (Treasury Board) : "[a]s it may well be reasonable in the circumstances to confer broad discretion, it is in the vast majority of cases best to address the issue of vagueness in the context of a analysis based on s. 1 rather than invalidating the law outright" [83] .

[182] Where the general minimum standard of precision is met, "one should consider all other arguments relating to legislative precision at the 'minimal impairment' stage of the analysis based on article 1" [84] .

[183] This is what the Tribunal will do.

3.5.2. The Urgent and Substantial Objective [85]

[184] The CSR governs the use of vehicles on public roads and the circulation of pedestrians on them. It establishes the rules relating to road safety, road transport of people and goods.

[185] The CSR aims more specifically to govern the use of vehicles on public roads and the circulation of pedestrians on these roads. Its article 1 is explicit on this subject:

1. This code governs the use of vehicles on public roads and, in the cases mentioned, on certain private roads and lands as well as the circulation of pedestrians on public roads .

It establishes the rules relating to road safety, road vehicle registration and permits and licenses administered by the Société de l'assurance automobile du Québec, as well as the control of road transport of persons and goods. . [...]

[186] Section 4 defines what a public road is:

“public road” : the area of land or a work of art the maintenance of which is the responsibility of a municipality, a government or one of its bodies, and on a part of which are developed one or more roadways open to public traffic of road vehicles and, where applicable, one or more cycle lanes, with the exception of:

[...]

[187] The term "carriageway" is also defined in Article 4:

“roadway” : the part of a public road normally used for the circulation of road vehicles;

[188] As the title of the CSR indicates and as the second paragraph of section 1 confirms, the legislator is primarily concerned with road safety. In this regard, various rules are established by the CSR to ensure that the circulation of road vehicles on public roads is done in a safe manner, both for drivers and passengers of vehicles and for pedestrians.

[189] For example, the CSR lays down rules concerning vehicles and their equipment (Title VI, art. 210 to 287.2), road signs (Title VIII, art. 288 to 318) and road traffic (Title VIII, art. 319 to 519). It also governs permits relating to the driving of road vehicles so as to ensure that authorization to drive is granted only to persons who have the skills and attitudes of caution necessary for public safety (Title II , ss. 60.1 to 146.1 and Title V, ss. 180 to 209.26).

[190] The possible presence of pedestrians on a public road open to road vehicle traffic presents a major road safety issue. This is why the CSR enacts, in Chapter III of Title III, relating to road traffic, specific provisions applicable to pedestrians:

CHAPTER III

SPECIFIC PROVISIONS APPLICABLE TO PEDESTRIANS

444. When pedestrian lights are installed at an intersection, a pedestrian must obey them.

In front of a white silhouette of a stationary pedestrian, a pedestrian can cross the roadway.

In front of a fixed orange hand, a pedestrian cannot enter the roadway.

In front of a flashing light, a pedestrian who has already started to cross the road must hurry to the sidewalk or the safety zone.

In front of a flashing light accompanied by a numerical countdown, a pedestrian can enter the roadway only if he is able to reach the other sidewalk or the safety zone before the light passes to the steady orange hand.

445. When there are no pedestrian lights, a pedestrian must obey the traffic lights.

446. At a pedestrian crossing that is not located at an intersection regulated by traffic lights, a pedestrian must, before entering it, ensure that he can do so without risk.

447. When there are no intersections or pedestrian crossings clearly identified and located nearby, a pedestrian crossing a public road must yield the right of way to road vehicles and cyclists traveling on it.

448. A pedestrian may not stand on the roadway to solicit transportation or to deal with the occupant of a vehicle.

449. A pedestrian may not request transportation at places where passing is prohibited.

450. When there is an intersection or a pedestrian crossing nearby, a pedestrian may cross a public road only at one of these places.

451. A pedestrian is required to cross the roadway perpendicular to its axis. He can only cross it diagonally if he is authorized to do so by a peace officer, a school crossing guard or a sign.

452. When a sidewalk borders the roadway, a pedestrian is required to use it. If it is impossible to use the sidewalk, the pedestrian can walk along it on the edge of the roadway, making sure that he can do so without danger.

453. When no sidewalk borders a roadway, a pedestrian must walk on the edge of the roadway and in the opposite direction to vehicle traffic, making sure that he can do so without danger.

453.1. A pedestrian may not travel on a limited-access road or on an entry or exit lane of such a road, except in case of necessity. However, he can cross this road at an intersection when traffic lights are installed there.

[191] It can be seen from reading these provisions that the roadway of a public road is not a place where a pedestrian can walk or stand as he pleases.

[192] A pedestrian may not travel on a road with limited access, such as a highway for example, nor on an entry or exit lane of such a road, except in case of necessity (s. 453.1).

[193] As for the other public roads, a pedestrian can certainly cross the roadway, but must do so perpendicular to its axis (art. 451), at intersections or at pedestrian crossings when there are nearby (art. 450), respecting pedestrian lights if there are any (s. 444) or traffic lights (s. 445) and, in the absence of these, making sure that he can do so without risk (art. 446). When there is no intersection or pedestrian crossings located nearby, pedestrians crossing a public road must yield the right of way to road vehicles and cyclists traveling on it.

[194] On these same roads, pedestrians wishing to walk along the axis of the public road must use the sidewalk bordering the roadway (art. 452). If there is no sidewalk bordering this roadway, he must

drive on the edge of it and in the opposite direction to the traffic of vehicles, making sure that he can do so without danger (art. 453). He is therefore prohibited from driving, as he pleases, against the direction of the traffic lanes or in the middle of the road.

[195] Section 500, although not applying only to pedestrians, reinforces the restrictions and prohibitions discussed above with respect to their use of the roadway. This article provides:

500. No one may, without being legally authorized to do so, occupy the roadway, the shoulder, another part of the right-of-way or the surroundings of a public road or place a vehicle or an obstacle there, in such a way as to obstruct traffic. road vehicles on this road or access to such a road.

A peace officer may remove or cause to be removed at the owner's expense any thing used in contravention of this section. He can also grab such a thing; the provisions of the Code of Penal Procedure (chapter C-25.1) relating to things seized apply, with the necessary modifications, to things thus seized.

For the purposes of this article, a public road includes a road serving as a detour to a public road, even if this road is located on private property, as well as a road subject to the administration of the Ministère des Ressources naturelles et de la Faune. or maintained by it.

[196] Section 500.1 pursues the same road safety objectives as those pursued by Section 500.

[197] Moreover, several provisions of the CSR indicate that the legislator, in addition to pursuing road safety objectives, also has that of ensuring the free movement of people and goods on public roads as well as access to buildings. which border them.

[198] Let us mention, by way of example, the following provisions:

331. Except in cases of necessity, no one may drive a road vehicle at a slowness likely to impede or impede normal traffic.

In such a case, the driver must use the hazard warning lights of his vehicle.

382. Except in case of necessity, no one may stop a road vehicle in such a way as to render a sign ineffective, to hinder traffic, the execution of work or the maintenance of the road or to hinder access to a property.

384. NuI may not stop a road vehicle on the roadway of a public road where the maximum permitted speed is 70 km/h or more, except in case of necessity or unless there are signs authorizing it.

447. When there are no intersections or pedestrian crossings clearly identified and located nearby, a pedestrian crossing a public road must yield the right of way to road vehicles and cyclists traveling on it.

[199] Add to these provisions section 500, quoted above, and section 500.1, which also aim to prevent obstructions to the movement of road vehicles on public roads or access to such roads.

[200] A sub-objective to that of ensuring the free movement of people and goods on public roads as well as access to the buildings bordering them concerns the protection of Quebec citizens and their property. This protection requires, in particular, that public roads can be used for the rapid passage of emergency vehicles such as, for example, police vehicles, ambulances and fire safety service vehicles. The CSR , and more specifically section 406, indicates that this is a real concern of the legislator:

406. The driver of a road vehicle or a bicycle must yield the right of way to any emergency vehicle whose light or sound signals are on by reducing the speed of his vehicle, pulling to the right as much as possible and, if necessary, by immobilizing his vehicle.

[201] Article 500.1 is therefore a continuation of the other provisions of the CSR and pursues the same objectives.

[202] Like article 500, it covers the fact of occupying "the roadway, the shoulder, another part of the right-of-way or the surroundings or placing a vehicle or an obstacle there, so as to obstruct traffic road vehicles on this road or access to such a road”. It targets conduct that is already prohibited by the CSR in section 500. The only difference is that section 500.1 targets interference that occurs "in the course of a concerted action intended to interfere in any manner with the circulation road vehicles on a public road”. In this case, the legislator imposes more severe penalties:

511.1. Anyone who contravenes the first paragraph of section 500 commits an offense and is liable to a fine of $300 to $600 and, in the event of a repeat offence, of $3,000 to $6,000.

In addition, upon conviction for an offense under this article, a judge may order the confiscation of a thing seized under the second paragraph of article 500. Prior notice of the application for confiscation must be given by the prosecutor to the person seized and to the offender, except if they are in the presence of the judge.

512.0.1. Anyone who contravenes the first paragraph of section 500.1 is guilty of an offense and is liable to a fine of $350 to $1,050 and, in the event of a repeat offence, of $3,500 to $10,500.

However, if it is shown that the person convicted participated in the planning, organization or direction of the concerted action referred to in this article, the fine is then $3,000 to $9,000 and , in the event of a repeat offence, from $9,000 to $27,000.

In addition, upon conviction for an offense under this section, a judge may order the confiscation of a thing seized under the second paragraph of section 500.1. Prior notice of the application for confiscation must be given by the prosecutor to the seized person and to the offender, unless they are in the presence of the judge.

[203] These more severe penalties were inserted in the CSR in the context where, despite the prohibitions that already existed, there was an upsurge in occupations of the roadway resulting in obstructions to traffic. The legislator, in order to achieve his objectives of ensuring road safety, the free movement of people and goods and access to buildings along the roads, deemed it necessary to be more dissuasive.

[204] The following excerpts taken from the debates held in the National Assembly on May 23, 2000, during the adoption in principle of the Act to amend the Highway Safety Code [86] reveal the context that existed at that time :

- The Minister of Transport Mr. Guy Chevrette, p, 6071:

Similarly, new articles introduce provisions to discourage any concerted action intended to hinder the free movement of road vehicles. I would like to point out that the amendments to the Highway Safety Code are not intended to prevent previously authorized demonstrations and parades. It is essentially a question of preventing the population from being taken hostage by interest groups. However, the best way to ensure the free movement of people and goods is to prohibit any unauthorized occupation of the roadway and shoulders of a public road.

To achieve this, we believe it is justified to use a strong deterrent. Thus, we are proposing to increase the amount of the fines imposed on offenders and to allow peace officers to proceed with the seizure and confiscation of property used in the occupation. [...] [87]

[205] The third paragraph of section 500.1 allows, under certain conditions, the holding of parades or other forms of demonstrations that impede this circulation:

This article does not apply during parades or other demonstrations previously authorized by the person responsible for the maintenance of the public road on the condition that the road used is closed to traffic or under the control of a police force. .

[206] Among the conditions imposed by the legislator, there is the one providing that the road used must be closed to traffic or under the control of a police force. This condition makes it possible to eliminate the simultaneous presence of pedestrians and vehicles on the public road – by closing it, or on part of it – by the control of a police force.

[207] This condition is thus intended to eliminate the dangers posed by the presence of pedestrians on the roadway of a road open to vehicle traffic, both for these pedestrians and for other road users.

[208] The preceding analysis of the provisions of the CSR in general and of Article 500.1 in particular allows us to summarize the objectives pursued by the legislator as follows:

- Make the circulation of road vehicles on public roads safe, both for drivers and passengers of vehicles and for pedestrians;

- Ensure the free movement of people and goods on public roads and access to the buildings bordering them;

- Protect the citizens of Quebec and their property by ensuring that public roads can be used for the passage of emergency vehicles.

[209] The trial judge formulates the objectives in a somewhat different way, but he essentially accepts these objectives .

[210] In the Court's opinion, the Attorney General rightly argues that security, the free movement of people and goods on public roads and access to the buildings bordering them is an urgent and real objective.

[211] The increase in the number of driver's license holders and the number of vehicles in circulation, as well as the increase in the daily flow of vehicles on bridges and highways, amply justify this conclusion.

[212] Public roads are an important part of the economic and social life of modern cities, regardless of their size. These paths ensure the transport of goods essential to individuals and to economic life. They allow citizens to go to work, to school, to the hospital, to the doctor, to political, cultural or religious activities, to visit their family members, or to go to a courthouse such as party, witness, or as a member of a jury.

[213] Public roads also ensure the protection of citizens and property by allowing the passage of police officers, firefighters, first responders and paramedics.

[214] Public roads also allow access to places where a demonstration will be held, which concerted action is likely to prevent.

[215] Contrary to the appellant's assertion, section 500.1 does not really pursue a separate objective from that of section 500. Rather, it increases the severity of the penalty when the obstruction of road vehicle traffic is the result of concerted action.

[216] The trial judge rightly rejected the excessively narrow characterization of the objective suggested by the appellant [89] .

[217] Section 500.1 does not only apply to road blockades having a major impact on traffic and on the supply of a region. The interpretation proposed by the appellant departs from the very wording of s. 500.1 which targets any form of obstruction, including “parades and other demonstrations”. Moreover, this narrow characterization of the objective ignores the overall legislative context in which s. 500.1 fits.

[218] Although the Supreme Court specifies that it is the objective of the infringing measure that must be identified, it does not exclude that the assessment must take into account the global context

[90] . Thus, the main objective of the CSR is not incompatible with the establishment of a measure to find a solution to concerted actions intended to impede in any way the circulation of road vehicles on a public road [91] .

[219] Finally, the objective is pressing and substantial, even if the evidence shows that the police forces are often able to control demonstrations that they were not informed of.

[220] The fact that it is often possible for police forces to ensure the proper management of mass demonstrations does not diminish the importance of the objective pursued by section 500.1.

3.5.3. Is 500.1 CSR rationally connected to its purpose?

[221] The trial judge's conclusions regarding the rational connection between section 500.1 and the pressing and substantial objective are as follows:

[144] Section 500.1 prohibits anyone from occupying a public road during a concerted action intended to impede the movement of vehicles in any way. However, this prohibition does not apply to people who are part of a previously authorized demonstration that takes place on a closed public road or under police control.

[145] For the Court, when the prohibition and the exception are read together, it is apparent that the government wanted to limit the possibility of pedestrians being on the public road at the same time as road vehicles and that the government wanted thereby reducing the risk of accidents between pedestrians and vehicles and ensuring the free movement of vehicles.

[146] It is obvious that people walking on a public road in a group intended to impede vehicular traffic will necessarily affect road traffic and increase the risk of accidents between pedestrians and vehicles.

[147] In order to maintain road safety and ensure the free movement of vehicles, the government prohibited unauthorized demonstrations on a public road, but explicitly allowed those for which permission had been obtained beforehand and for which police control of the public road was obtained.

[222] The test applicable to this stage of the analysis is formulated in Alberta v. Hutterian Brethren of Wilson Colony : "[t]he government must demonstrate that it is reasonable to assume that the

restriction may contribute to the achievement of the objective, and not that it will in fact contribute to it" [92] .

[223] As the Supreme Court stated in Mounted Police Association of Ontario v. Canada (Attorney General) [93] : “[it is not necessary to establish that the measure will inevitably achieve the government's objective. A reasonable inference that the means adopted by the latter will help to achieve the objective in question is sufficient” [94] .

[224] This is the case here.

[225] Section 500.1 can help achieve the objectives of security and the free movement of people and goods.

3.5.4 Does article 500.1 CSR minimally impair the right to demonstrate on a public road?

3.5.4.1 Court judgment

[226] In his judgment, the trial judge is of the opinion that section 500.1 minimally impairs the right to demonstrate on a public road.

[227] He first argues that the government has a certain latitude when it tackles a social problem .

[228] He points out that section 500.1 is not an absolute restriction on the right to demonstrate on a public road . The absolute ban only applies to people who want to demonstrate without permission .

[229] Although the trial judge noted that the appellant claimed that the person who could grant such authorization was unknown and that his discretion was unlimited , [98] he rejected this argument, since the appellant did not did not apply for authorization [99] . Relying on the Ontario Superior Court's decision in Batty v. The City of Toronto [100] , he concludes that the constitutional question posed by the appellant is hypothetical .

[230] Regarding the identity of the holder of the power conferred by section 500.1 to grant authorization to demonstrate or march, that is to say "the person responsible for the maintenance of

the public road", the magistrate concludes on the one hand, that it is about "the city or municipality or a representative of the city where the demonstration is supposed to take place" [102] , and on the other hand, that it is “satisfied that de facto it is a member of the police force of the city or municipality who grants the said permission” [103] .

[231] The trial judge expressed the opinion, as did the Attorney General, that the authorization process is flexible [104] and that there is no proof of refusal [105] .

[232] In his opinion, the prior authorization aims “to increase the level of safety of all people who use public roads” [106] , without worrying about the content of the message conveyed by the demonstration. It “dwells rather on the need to supervise such events in order to ensure the safety of all road users and the free movement of vehicles” [107] .

[233] The trial judgment, it should be noted, is meticulous and addresses the main issues in dispute.

[234] Only the question of discretionary power is not decided by the trial judge. This is explained by his conclusions regarding the fact that a request for authorization to demonstrate was not presented and the absence of proof of refusal to demonstrate. This issue is addressed further below.

[235] As Justice Binnie pointed out in Little Sisters Book and Art Emporium v. Canada (Minister of Justice) , it is important to determine whether violations of constitutional rights find their source in the law itself or solely in its application .

[236] The conclusions of the trial judge first require a discussion of the following elements relating to the application of section 500.1 and the framework of the constitutional challenge: 1) the appellant's standing; 2) the identity of the person responsible for the maintenance of the public road; 3) was an authorization to demonstrate granted on March 15, 2011?

[237] Although these elements relate in part to the application of section 500.1 and not to the section itself, it is essential to summarize the evidence presented in this regard and to draw the necessary conclusions, because it this is the factual context of the constitutional debate.

[238] Subsequently, the Tribunal will determine whether the discretion conferred by section 500.1 is minimally impaired.

3.5.4.2. Absence of an application for authorization to demonstrate: the appellant's standing to act

[239] Ms. Garbeau's standing to challenge the constitutionality of section 500.1 was not discussed in this case.

[240] However, the trial judge's comments suggest that he was of the view that the appellant had to apply for a license or authorization to establish the violation of her constitutional rights, and that in the absence of such a refusal, this demonstration was futile.

[241] However, the appellant did not have to apply for a permit to support its constitutional challenge. With respect for the contrary opinion, this is not a hypothetical challenge.

[242] The trial judge did not have the benefit of two recent Supreme Court judgments where similar arguments were made, but rejected by the Court.

[243] In the case of R. c. Nur , [109] the Supreme Court held that an accused could challenge the constitutionality of a sentence based on reasonably foreseeable applications of a provision creating a mandatory minimum sentence.

[244] Chief Justice McLachlin writes:

[50] Focusing the inquiry solely on the situation of the offender in question runs counter to the Court's long-established jurisprudence regarding constitutional review under the Charter generally and under s. . 12 in particular.

[51] Consider first the case law on constitutional review under the Charter generally. The Court has always held that a person could challenge a legislative provision on the basis of art. 52 of the Constitution Act, 1982 even where his own rights were not infringed by the provision (R. v. Big M Drug Mart Ltd. , 1985 CanLII 69 (SCC) , [1985] 1 SCR 295 , at p. 314 ; R. v. Morgentaler , 1988 CanLII 90 (SCC) , [1988] 1 SCR 30 ; R. v. Wholesale Travel Group Inc. ,1991 CanLII 39 (SCC) , [1991] 3 SCR 154 ; R.v. Heywood , 1994 CanLII 34 (SCC) , [1994] 3 SCR 761 ; R.v. Mills , 1999 CanLII 637 (SCC) , [1999] 3 SCR 668 ; R.v. Ferguson , 2008 SCC 6 , [2008] 1 SCR 96 , para. 58-66). As I noted in Ferguson , “[a] plaintiff who otherwise has standing can generally seek a declaration of invalidity under s . 52 on the ground that a provision has unconstitutional effects for itself or for third parties” (para. 59). This is so because “[it] is the nature of the law, not the status of the accused, which is in issue” (Big M , at p. 314, per Dickson J.).

Not only art. 52 of the Constitution Act, 1982 enshrines the primacy of the Constitution, but provides that it "renders inoperative the inconsistent provisions of any other rule of law". If an unconstitutional law could only be challenged on the specific facts of a given jurisdiction, invalid laws could remain in force indefinitely, which would violate the rule of law. No one shall be subject to an unconstitutional law (Big M, p. 313). This enshrines the principle that the Constitution belongs to all citizens, who have in common the right to the constitutional application of Canadian laws.

[Emphasis added]

[245] In R. c. Smith [110] , a similar question arises in a different context.

[246] Here again, the Supreme Court upheld the principle that an accused may challenge the constitutionality of a law, whether or not it applies to him.

[247] The Court writes:

[11] The first issue is whether Mr. Smith has standing to challenge the constitutionality of the ban. We conclude that he does indeed have this quality. The Crown did not oppose Mr. Smith's standing trial. On appeal, although the issue was raised in oral argument, the Crown acknowledged that the principle that "no one shall be convicted of an offense against an unconstitutional law" applies to Mr. Smith (R. v. Big M Drug Mart Ltd. , 1985 CanLII 69 (SCC) , [1985] 1 SCR 295 , at 313; CA reasons, para. 147). In court, the Crown echoed Chiasson J.'s dissenting position in arguing that Mr. Smith lacked standing because he himself does not use medical marijuana and its activities outside the framework of the regulatory regime. The fact that the exemption is limited to dried marijuana therefore has " nothing to do with it" (CA reasons, at para. 151).

[12] This thesis ignores the role that the RAMFM plays in the legislative scheme. The RAMFM constitutes an exception to the penal provisions under which Mr. Smith was charged, in this case ss. 4 and 5 of the CDSA . As explained by the majority of the Court of Appeal, the issue is whether these provisions of the CDSA , "as amended by the RAMFM , deprive persons authorized to possess marijuana of a right guaranteed to them by the Constitution by limiting their protection against criminal prosecution only to cases where they possess dried marijuana" (para. 85).Nor does the fact that Mr. Smith is a user of medical marijuana and licensed to produce under the scheme mean that he lacks standing . Every accused has standing to challenge the constitutionality of the law under which he is charged, even if the alleged unconstitutional effects do not affect him personally (see R. v. Morgentaler , 1988 CanLII 90 (SCC) , [1988] 1 SCR 30 ; Big M Drug Mart Ltd.). Nor is it necessary for the accused to showthat any possible remedy for a constitutional defect will automatically end the charges against him. Where a plaintiff challenges a law on the basis that its impact on others is inconsistent with the Charter , it is

always possible that a remedy granted under s . 52 of the Constitution Act, 1982 does not address the particular circumstances of the plaintiff (see R. v. Latchmana , 2008 ONCJ 187 , 170 CRR (2d) 128 , at para. 16 ; R. v. Clay (2000), 2000 CanLII 5760 (ON CA) , 49 OR (3d) 577 (CA).

[13] In this case, the constitutionality of the statutory provision under which Mr. Smith is charged depends directly on the constitutionality of the medical exemption provided by the RAMFM (see Parker). He is therefore entitled to challenge it.

[Emphasis added]

[248] The fact that the accused did not use marihuana for medical purposes and did not hold a production license did not deprive him of standing to challenge the constitutionality of the law. .

[249] Of course, the trial judge here did not prevent the appellant's constitutional challenge on the ground that she lacked standing.

[250] However, by asserting as he does, that the appellant did not attempt to obtain authorization, he suggests that section 500.1 could only be challenged if it was established that authorization to demonstrate had been requested and that it had been refused.

[251] On the principles articulated in Nur and Smith , the trial judge's conclusion in this regard is erroneous.

[252] In the present case, as the trial judge rightly noted [111] , the appellant's main argument is that section 500.1 confers a discretion that is not governed by any criterion . It also maintains that the authorization scheme envisaged by this article has not been put in place and that the person responsible for it is unknown.

[253] Failure to file an application for authorization does not deprive the appellant of standing and raise the constitutionality of section 500.1 to challenge her guilt.

[254] Even in the absence of a request for authorization to demonstrate, it can attempt to demonstrate that this regime is not a reasonable limit because the discretionary power provided for therein is not framed by any criteria. .

[255] In summary, no one can be convicted of an offense against an unconstitutional law.

[256] Section 500.1 must be declared invalid if it infringes the right to demonstrate on a public road and if, where applicable, the Attorney General of Quebec does not demonstrate that the prior authorization regime implemented place and the discretion it entails is a reasonable limit that is justified in the context of a free and democratic society.

3.5.4.3. The person responsible for the maintenance of the public road

[257] As we have seen, the trial judge concluded “that de facto it is a member of the police force of the city or municipality who grants said permission” [112] .

[258] This conclusion raises three separate but interrelated issues:

1) Do the police in fact exercise the powers conferred by section 500.1;

2) Does Section 500.1 contain an implied delegation of authority?

3) Can the power conferred by article 500.1 be delegated to the police?

3.5.4.3.1. Do the police actually exercise the powers conferred by the third paragraph of article 500.1 CSR ?

[259] The question of the identity of the holder of the power conferred by the third paragraph of section 500.1 was at the heart of the arguments before the trial judge. It was one of the main arguments presented by the appellant, who asserted that, in her opinion, this person was unknown.

[260] The importance of this issue did not escape the attention of the trial judge, who pointed out to the prosecutor and the Attorney General a gap in the evidence [113] . After being invited to present evidence on this subject, they choose to rely on the evidence presented and the presentation of submissions.

[261] Regarding the interpretation of section 500.1, the parliamentary proceedings confirm the conclusion of the trial judge that the person responsible for the maintenance of the public road is either the city or the municipality or the Ministère des Transports [114] .

[262] However, with respect for the trial judge, the evidence does not establish that the police forces exercise the powers conferred by the third paragraph of section 500.1, but rather that they exercise their discretionary power to tolerate a violation of the first paragraph of this article. The exercise of this discretionary power does not demonstrate that they actually exercised the power conferred by the third paragraph of section 500.1 or that, in law , they could do so.

[263] It is true that the implementation of the exercise of the powers of a modern state must be flexible . It is certainly necessary to avoid imposing “too great a rigidity on a parliamentary and legislative system which relies considerably on framework laws and the delegation of broad discretionary powers” [116] . Moreover, there are "various methods of ensuring respect by the public service for the rights guaranteed by the Charter " [117] . The legislator can choose “more flexible methods, namely the delegation of a power of regulation and the ministerial directive” [118] .

[264] However, a prior authorization regime normally involves the granting of an authorization granted before the activity subject to prior authorization or a permit takes place [119] . It sets out the conditions relating to the exercise of the activity subject to the authorization [120] and, where applicable, the procedures governing the possible revocation of the authorization.

[265] The authors of the book Elements of Legistics describe the main characteristics of such a system of prior authorization as follows:

[T]he legislator has the option of subjecting the citizen to an a priori control , which obliges him to obtain authorization from the Administration before exercising the regulated activity [121] .

[…]

The word "authorization", in the sense of administrative authorization, is a generic grouping together what is designated by different terms: permit, license, certificate, patent, visa, registration , competency card, etc. From a material point of view, these terms designate the right granted to someone by the Administration to accomplish something (building permit) or to exercise an activity (driving permit) . From a formal point of view, they refer to the official document certifying the authorization [122] .

[…]

The conditions that the applicant for an authorization is required to fulfill are provided for by law or regulation and concern both substance and form. The regulatory conditions, if any, must be empowered by law and must be in line with the pursuit of the public interest objective targeted by the authorization mechanism [123] .

[Underline and bold added]

[266] The appellant maintains that the judge's conclusion that the police are in fact exercising the powers conferred by the third paragraph of section 500.1 is not supported by the evidence presented before the trial judge.

[267] In his opinion, the judge ignored the following passage from the testimony of Inspector Sylvain Champagne of the operational planning division at SPVM headquarters:

Q: Who can authorize a demonstration at the City of Montreal if it is not the CCTI?

A: Currently, to my knowledge, there is no organization in the City of Montreal that authorizes or not a demonstration. When we talk about authorization, we are talking about planned events, such as a parade, and so on.

[268] However, in his judgment, the trial judge referred to this testimony.

[269] This is what he writes:

[92] The witness explained how SPVM police personnel were coordinated to oversee demonstrations. He adds that there is, moreover, a specific organization which authorizes them. When he talks about authorization, he is talking about events planned with the Public Events and Festivals Division of the City of Montreal. Thus, if a person goes to the Montréal Access Office about a demonstration, Mr. Champagne believes that he will be directed to the local police station concerned. Moreover, to his knowledge, going to the police station concerned before making a demonstration is not an obligation.

[270] This passage describes Mr. Champagne's testimony quite accurately, although it is possible to argue that reading it gives the impression that there is in fact an organization that authorizes demonstrations, which is not the case.

[271] But that is not the most important question.

[272] The evidence is completely silent as to the formal implementation of the administrative process established and contemplated by section 500.1.

[273] Indeed, according to the evidence presented, no prior authorization process was implemented or even put in place.

[274] In the City of Quebec, the evidence does not mention any formal authorization process, but only the existence of a form relating to the holding of a demonstration, which facilitates the preparation of the police intervention. . Although the form used also includes the mention of Request for occupation of the roadway and that of Applicant , it does not provide any space reserved for the recording in writing of a formal decision authorizing the holding of a demonstration, march or rally.

[275] It should also be noted that there is an incongruity between the rules that are likely to apply if a request for authorization to demonstrate concerns a public road under the jurisdiction of the Ministère des Transports.

[276] In such a situation, section 5 of the Act respecting administrative justice [124] applies. This article provides:

5. The administrative authority cannot make an order to do or not to do or an unfavorable decision relating to a permit or other authorization of the same nature , without first:

1° to have informed the citizen of his intention as well as of the reasons on which it is based;

2° having informed the latter, where applicable, of the content of the complaints and objections concerning him;

(3) having given him the opportunity to present his observations and, where applicable, to produce documents to complete his file.

An exception is made to these prior obligations when the order or decision is taken in an emergency context or with a view to preventing irreparable harm from being caused to persons, their property or the environment and , moreover, the law authorizes the authority to reconsider the situation or revise the decision.

[Emphasis added]

[277] However, in the absence of any formal process of authorization or permit to demonstrate, the guarantees of procedural fairness provided for in section 5 cannot be implemented [125] .

[278] Contrary to the assertion of the Attorney General, the evidence does not establish that the mechanism for prior authorization of a demonstration has been put in place and that it is flexible.

[279] This process is not illusory [126] , it is non-existent.

[280] The evidence demonstrates, at most, tacit or explicit tolerance on the part of police forces during demonstrations [127] .

[281] That said, such a tolerance is not an authorization within the meaning of the third paragraph of article 500.1.

[282] It should be noted that the tolerance of a public authority with regard to a regulated activity does not make it possible to assert against an offense of strict liability, as in the present case, the following means: the promissory estoppel, acquired rights or an error caused by a person in authority [128] .

[283] With respect for the trial judge, the Court is of the opinion that it made a manifest and overriding error when it concluded that the powers conferred by the third paragraph of section 500.1 are exercised within the made by the police forces of the cities or municipalities in question, because no formal process for authorizing demonstrations has been put in place.

[284] It is not possible to exercise a power of authorization that has not been established.

[285] This error is not only to have failed to analyze “in depth a given point or a particular piece of evidence” [129] , which “does not constitute a sufficient reason to justify the intervention of the courts of appeal” [130] .

[286] The failure to consider Inspector Champagne's testimony in light of all of the evidence reveals a material error that gives rise to the rational conviction that the trial judge must have overlooked, neglected to consider or misinterpreted the evidence in a way that affects his conclusion that the powers conferred by the third paragraph of section 500.1 were exercised by the police forces .

[287] In conclusion, the trial judge had correctly identified a gap in the evidence presented.

[288] While it is fair to say that the evidence shows no denial, it does not show any authorization granted under the formal prior authorization scheme contemplated by section 500.1. This element distinguishes the present case from the situation in Montréal (Ville) c. 2952-1366 Québec Inc. [132] , decision referred to by the trial judge in his judgment [133] , where authorizations were granted hundreds of times.

[289] In the absence of a formal process for authorization or permission to demonstrate, it is hardly surprising that the evidence reveals neither refusal nor authorization.

[290] There is, at best, an informal process of tolerance on the part of police forces who, in the exercise of their discretion, do their best to ensure the management and control of demonstrations, whether they whether they were informed in advance or not.

3.5.4.3.2. Does CSR 500.1 have implicit delegation?

[291] The Attorney General relies on the concept of implicit delegation described by Professor Garant in his classic work, Administrative Law [134] .

[292] Professor Garant explains that "the attribution of a competence to an administrative authority is generally specified by the designation of the holder" [135] , but the question is often to know "to what extent this holder can empower another authority, which is subordinate to him, to exercise it in his place” [136] .

[293] According to Professor Garant, “[t]he implicit delegation is that which arises from the context and which may exist under certain conditions” [137] .

[294] The position articulated by the Attorney General requires a review of the Supreme Court's decision in Vic Restaurant v. City of Montreal [138] on which the Tribunal requested submissions from the parties during the hearing of the appeal.

[295] Indeed, in this case, the Supreme Court examined the question of the delegation of a discretionary power in the context where a regulation relating to the issuance of permits to operate a restaurant did not formulate the criteria governing the exercise of the chief of police's discretion to make a recommendation for or against the granting of the permit.

[296] The Attorney General argued that this is a novel issue.

[297] In R. c. Mian [139] , the Supreme Court describes what a new question raised by an appellate court is:

[35] In summary, we will conclude that a question raised by a court of appeal is new when it was not posed by the parties and when it cannot reasonably be said that it arises from the questions formulated by these parties. latest, so that the latter must be informed so that they can present informed observations. Issues that form the backdrop of the appellate body will generally not be “new issues” under this definition. The Court of Appeal which exercises its jurisdiction to ask questions at the hearing does not find itself raising a new question, unless, in doing so, it gives a new basis for the review of the decision appealed from on the ground of 'mistake.

[298] With respect, the question of the identity of the holder of the power conferred by section 500.1 is at the heart of the argument presented by the appellant.

[299] The Vic Restaurant decision concerns the conditions surrounding the delegation of discretionary powers by a city or municipality and the requirements regarding the framework of such a

power. To pretend that this is a new question ignores the substance of the constitutional debate in this case.

[300] The fact that Vic Restaurant was not formally raised before the hearing of the appeal does not make it a new issue. In addition, the Court requested the observations of the parties who had the opportunity to present them.

[301] In the Vic Restaurant case , obtaining a permit to operate a restaurant is subject to obtaining a recommendation from the chief of police, but the criteria governing this are not not specified.

[302] Justice Locke wrote:

It will be seen from an examination of the by-law that the Director of Finance, by whom both permits would be issued, is forbidden to do so without the written approval of the directors mentioned. It should be said that no question arises as to the requirement that approval of the City Planning and the Health Department was not obtained. The whole controversy relates to the failure to obtain the approval of the Director of Police. As to that official, while the council was authorized to fix the "terms and manner of issuing licences", the by-law contains no directions whatever to the Director of Police as to the manner in which the discretion given to him to approve or refuse to approve applications for licenses was to be exercised. Thus,.

In Meredith and Wilkinson's Canadian Municipal Manual, at p. 265, it is said:

The exercise of a discretionary power vested in a council cannot, in the absence of statutory authority, be delegated.

A council may, however, delegate to an officer or functionary merely ministerial matters.

In Robson and Hugg's Municipal Manual, at p. 347, the following appears:

Discretion confided to council or to the Board of Commissioners of Police cannot be delegated to others, as for example, requiring an applicant for a license to get the consent of certain persons. Re Kiely (1887) 13 OR 451 ; Rexv. Webster (1888) 16 OR 187 .

In my opinion, these are accurate statements of the law [140] .

[Emphasis added]

[303] Cartwright J. offers the following observations:

The impugned provisions of by-law no 1862 appear to me to be fatally defective in that no standard rule or condition is prescribed for the guidance of the Director of the Police Department in deciding whether to give or to withhold his approval .

[…]

I am unable to accept the suggestion that because the Director of Police is charged with the duty of maintaining the public peace and enforcing the penal laws of Canada of the Province and of the municipality he is thereby instructed as to the standard to be applied and the conditions to be looked for in deciding whether to grant his approval of an application.

In my respectful opinion neither of these passages states rule sufficiently definite to be of value but my purpose in quoting them is to indicate the impossibility of formulating from the available sources any clear or certain rule. I agree with my brother Locke that the effect of the by law is to leave it to the Director of the Police Department without direction to decide whether an applicant should or should not be permitted to carry on any of the lawful callings set out in the 41 sections referred to above.

[Emphasis added]

[304] In McCleery v. Nap. Malenfant Ltée [141] , Fish J. summarized the law relating to the delegation of regulatory power and discretionary power. He writes :

[R]egulatory power cannot be transferred otherwise than in accordance with the enabling legislation. Regulations must provide a framework within which any discretion delegated to a subordinate authority must operate; if they fail to do so, the subordinate authority will have essentially untrammelled discretion to make decisions on the basis of arbitrary considerations. At a minimum, any delegation of authority must be administrative rather than regulatory in nature, unless the latter is explicitly authorized by the enabling legislation [142] .

[305] In this case, it is true that it is not a question of the delegation of a regulatory power, but of the delegation of a discretionary power which was to be exercised by the city or the municipality. However, the exercise of this power has not been the subject of a legislative or regulatory delegation accompanied by criteria governing the exercise of this discretionary power.

[306] Author Philip Cantwell summarizes the applicable rules in such circumstances:

3 Delegation — Obviously, the municipal council cannot, on its own, make all the decisions necessary to ensure the proper administration of the municipality. Certain tasks will necessarily have to be delegated to civil servants. Professor Garant provides an in-depth analysis of the administrative delegation of powers and summarizes the Quebec legal regime in eight rules. Essentially, in the absence of express legislative authority, a municipality cannot sub-delegate the regulatory powers given to it by statute. Powers of a discretionary nature, on the other hand, can be sub-delegated to the extent that the board sets sufficiently precise standards as to the way in which these powers can be exercised by the official.. Finally, the sub-delegation of non-discretionary acts generally does not pose any problem [143] .

[Emphasis added]

[307] In addition, in municipal law, it should be noted that it “is up to the council to determine, by regulation, what are the functions of the officers and employees of the municipality which are not fixed by law (Act respecting cities and cities or Municipal Code of Quebec) or by the specific charter applicable to the municipality” [144] .

[308] In Roberge v. Ville de Québec [145] , the Quebec Court of Appeal interpreted the Vic Restaurant judgment in the same way.

[309] Dubé J. summarizes the applicable rule as follows:

From the study of this case of Vic Restaurant , we must necessarily draw the following general rule which is very well explained in the appellant's factum, on page 12:

The general rule is therefore now very clear: It is illegal for a municipal council which wishes to subject any activity to the prior formality of a permit, to declare that a permit must be obtained from a

municipal officer without specifying the rules which will have to guide this municipal officer to grant or refuse the permit [146] .

[310] Professor Garant summarizes the main findings in Vic Restaurant and Roberge as follows:

In the Vic Restaurant decision , the Supreme Court did not affirm that the by-law of the City of Montreal, which makes the issuance of restaurant permits subject to the recommendation of the chief of police, is ultra vires because it contains a delegation but because it does not lay down sufficiently precise standards to which the chief of police could refer . According to the Supreme Court, the failure of the council to define these norms or guidelines or standards is tantamount to "letting the civil servant establish them in the place of the council by delegating to it the power to grant or refuse the permits at its discretion " . . When sufficiently precise standards are provided for in law or regulation, sub-delegation is perfectly legal.

In 1975, in Roberge , the Court of Appeal applied these principles directly and found implied sub-delegation to be illegal because the chief of police had no standard on which to base whether or not to grant permission. distribute flyers in the streets.

However, this case law leaves a thorny question unanswered: when is a norm sufficiently precise not to amount to an illegal delegation? The answer could be the following: on the one hand, the delegation of pure administrative discretion is prohibited, while the delegation of pure bound power is always permitted. Between the two, if the civil servant must not only note the objective existence of certain facts but also assess them with regard to the public interest, the regulations should be sufficiently precise for the average citizen to know how to comply with the regulations. .

The regulations contain implicit delegations whenever the holder of a power relies on a subordinate to perform administrative acts without the law expressly authorizing it. However, this delegation is illegal if it amounts to a pure transfer of discretionary power, that is to say without sufficiently precise regulatory standards being set . If the delegation is explicit, that is, expressly authorized by law, it is not necessary that “the standards for the exercise of this delegated authority” be stated.

[Emphasis added]

[311] In his work, Professor Garant formulates eight rules relating to implicit delegation. Here is the fourth:

At the sub-government level, an implicit delegation of discretionary power will only be legal when the body to which the discretionary power is entrusted exercises this power through its agents by setting standards and maintaining a power of oversight and control over these agents.

When the body to which the discretionary power is entrusted lays down standards that are not precise enough, this amounts to conferring too broad a "discretion" on the agent who takes the decision, and thus prevents the citizens from knowing how they will be affected. their rights. […]

[312] The Tribunal is of the view that the principle of implied delegation could not apply as suggested by the Attorney General, because "a power of a discretionary nature cannot be sub-delegated unless there is express legislative authorization » [147] .

[313] Even if we conclude, as the trial judge did, that the evidence presented establishes that the discretionary power was exercised, in fact, by the police, such a conclusion is contrary to the rules of Canadian and Quebec administrative law. . Any delegation of the exercise of a discretionary power must be authorized by law or by a regulation which sets the criteria governing its exercise.

[314] The Court also notes that the CSR provides in its article 633 an example of an explicit delegation of a power from the Minister of Transport.

[315] Here is what this article provides:

633. The Minister of Transport may, when he considers that exceptional circumstances justify it and after consultation with the Société, issue a special permit authorizing the operation of a road vehicle or a combination of road vehicles, where the applicant does not may meet the requirements of a regulation made under paragraph 20 of section 621.

When the Minister grants this permit, he sets the related conditions, the fees payable, the amount and the form of security guaranteeing the payment of any damage that the use of this vehicle or combination of vehicles is likely to cause. to a public road.

The Minister of Transport may delegate to an officer or employee of the Ministère des Transports or to any other person or body he designates the exercise of a power conferred on him by this section.

[316] The power conferred by section 500.1 cannot be exercised by police forces in the absence of an express delegation governing the exercise of the discretionary power conferred by this section.

3.5.4.3.3. Can a police force be a mandatary of a city or municipality?

[317] The conclusion of the trial judge that the powers conferred by section 500.1 on cities or municipalities were exercised, in fact, by the police raises another equally fundamental question, namely the question of the nature of the relationship between, on the one hand, a police force and its peace officers and, on the other hand, a city or a municipality.

[318] In R. c. Campbell [148] , Justice Binnie addresses the question of the status of the police. This question arose in this case where the Supreme Court had to determine the nature of the immunity that protected the police during an undercover operation, otherwise illegal.

[319] Justice Binnie wrote:

27 The Crown's attempt to equate the RCMP with the state for purposes of immunity reflects a misconception of the relationship between the police and the executive branch of government when the police engage in law enforcement activities. law. A police officer investigating a crime does not act as a public servant or as an agent of anyone . He holds a public office which was originally defined by the common law and subsequently established in various statutes. In the case of the RCMP, one such relevant statute is now the Royal Canadian Mounted Police Act , RSC (1985), c. R-10 .

28 It is true that under the powers conferred by this Act, RCMP officers perform a multitude of tasks in addition to criminal investigations. These duties include purely ceremonial duties, the protection of Canadian dignitaries and foreign diplomats, and activities related to crime prevention. Some of these tasks create closer ties with the state than others. The Ministry of the Solicitor General Act , RSC (1985), c. S-13 , provides that the powers and duties of the Solicitor General extend to matters relating to the RCMP over which Parliament has jurisdiction and which have not been assigned to another department. Article 5 of the Royal Canadian Mounted Police Act provides this for the leadership of the RCMP:

5. (1) The Governor in Council may appoint an officer, called Commissioner of the Royal Canadian Mounted Police, who, under the direction of the [Solicitor General], has full authority over the Mounted Police and all matters pertaining thereto.

29 It is therefore possible that, in carrying out one or other of its roles, the RCMP is acting as an agent of the state . This appeal, however, only raises the question of the status of an RCMP officer acting in the course of a criminal investigation, and in this respect the police are not under the control of the executive branch of government. The importance of this principle, which is itself the basis of the rule of law, was recognized by this Court in relation to municipal police forces in a decision as old as McCleave v. City of Moncton (1902), 1902 CanLII 73 (SCC) , 32 SCR 106 . This was a civil case dealing with potential municipal liability for police negligence, but as part of his reasons Chief Justice Strong endorsed the following proposition, at pp. 108 and 109:

The police can in no way be considered agents or servants of the city. Their functions are public in nature . The power to appoint them is transferred by the legislature to cities and towns as it is a convenient means of exercising a governmental function, but it does not make them liable for any illegal or negligent acts they commit. The detection and apprehension of offenders, the maintenance of public peace, the enforcement of laws and other similar functions conferred on the police derive from the law, and do not come from the city or town which named them.

[Emphasis added]

[320] Although the scope of the principle of the independence of the police from the executive power is not clearly delineated [149] , this independence certainly exists with regard to the conduct of investigations [150] and in respect of law enforcement, i.e., under the terms of section 48 of the Police Act [151] , the mission of maintaining peace, order and security public, to prevent and repress crime and violations of laws or regulations made by municipal authorities, and to seek out the perpetrators.

[321] Thus, regardless of the extent of the non-law enforcement administrative powers that the executive may entrust or delegate to a police force, the trial judge erred in law. by concluding that a police force may act as mandatary of a city or municipality for the purposes of section 500.1.

3.5.4.4. Was an authorization according to the third paragraph of article 500.1 CSR granted on March 15, 2011?

[322] At and after the hearing of the appeal, the Court asked the parties whether the notice given to the demonstrators at 5:09 p.m., which included the following statement: "You have the right to demonstrate at the condition of committing no offense and none will be tolerated", was an authorization within the meaning of Article 500.1.

[323] Obviously, this question arises because of the conclusion of the trial judge, who is of the opinion that the police forces have in fact exercised the powers conferred by the third paragraph of section 500.1.

[324] Moreover, because of their relevance, it is useful to reproduce the following notices which were given during demonstrations by the police department of the City of Quebec and which were presented in evidence by the Attorney General:

1 st record :

Notice to the crowd

A moment of attention please, I am ..... from the police department of Quebec City, I inform you that if there is no route provided, the walk will be declared illegal under section 500.1 of the Highway Safety Code concerning the obstruction of traffic on a road audience.

Please note, that no escort will be provided. You must use the sidewalks and no action endangering the safety of citizens will be tolerated.

I repeat, if there is no route provided, the march will be declared illegal, there will be no police escort and your actions will be videotaped. You are liable to receive a statement of offense under section 500.1 of the CSR.

Thank you for your collaboration.

2nd record : _

Authorized route:

A moment of attention please; A route has been provided and is authorized by the Quebec City Police Department. You must respect it in order to keep the legality of your event.

I repeat, a path is authorized and you must respect it to keep the legality of your demonstration.

Thank you for your cooperation [152] .

[325] According to the first message, a demonstration is declared illegal if a route is not provided. The second message requires compliance with the route provided to ensure the legality of the demonstration [153] .

[326] The question of the notice given on March 15, 2011 was not the subject of a debate, nor of observations by the parties before the trial judge. In the context of a complex constitutional debate with many facets, it is not surprising that this question escaped the attention of the parties and the trial judge. However, this is an important question.

[327] The parties communicated their position after receiving a request from the Tribunal to do so.

[328] The appellant and the intervener write:

As mentioned at the hearing by our colleague Me Ataogul, the first notice given at 5:09 p.m. by the police clearly does not, in our view, constitute authorization within the meaning of section 500.1 of the Highway Safety Code since the evidence has shown that the police services do not give this authorization. The police services rather manage the vagaries of the demonstration on the circulation, if necessary.

We submit to you that the first notice demonstrates that article 500.1 was not applied at that time to street demonstrations. This seems to be confirmed by the second notice given at 6:28 p.m. when the police services declared the demonstration illegal. It therefore appears from the statement of offense that it was only after several hours of detention that the police services decided to issue tickets under section 500.1 to the demonstrators accusing them of having occupied the street.

Moreover, it is not provided in section 500.1 that a prior authorization given may be withdrawn by the police. Consequently, we submit to you that these elements militate in favor of the appellant's and the intervener's thesis that the police do not issue an authorization within the meaning of section 500.1. We therefore reiterate that the trial judge made a manifest error in concluding that the police authorized the demonstrations.

Alternatively, as previously submitted in the context of our argument, we submit to you that the police are not empowered under the Highway Safety Code to give the authorization provided for in section 500.1. Consequently, if you come to the conclusion that the first notice given was indeed an authorization within the meaning of section 500.1, we submit to you that this is in fact the exercise by the police of a delegation of power illegal and that the trial judge made a manifest error in not concluding that he was faced with an illegal delegation of power [154] .

[329] For her part, the Attorney General writes:

The question of whether, in this case, the demonstration in question was authorized is only relevant with respect to the determination of guilt and Gabriella Garbeau. However, insofar as she pleaded guilty to this offence, it must be taken as proven, before this Court, that the demonstration in which she participated was not authorized under the third paragraph of section 500.1. of the Highway Safety Code . No such authorization was given .

[330] The appellant and the intervener respond to the position taken by the Attorney General as follows:

With respect, we submit that the facts underlying the demonstration of March 15, 2011 are obviously relevant. We understand from the position of the Attorney General that he agrees that the notice given on March 15, 2011 does not constitute authorization within the meaning of 500.1 of the Highway Safety Code. However, it should be noted that the evidence has shown that the police forces give no indication, other than this type of notice, in the case of dozens of other demonstrations (e.g. the testimony of Mr. Champagne, the excerpts of the various "twitter" accounts of the police services). There is simply no authorization given within the meaning of 500.1 CSR. Finally, we submit that the confusion that reigns around the question of this authorization stems directly from the article itself. The context of application of 500.1 CSR is certainly relevant to judge its validity and especially as regards the claim that such an authorization would be easy to obtain according to the Attorney General [156] .

[331] The position of the Attorney General is astonishing, because, as we know, “one must be careful not to rule on constitutional disputes in the absence of an adequate factual record” [157] . This evidence is therefore relevant to the constitutional debate.

[332] Moreover, from a purely procedural point of view, in the absence of a more specific investigation on this subject [158] , the plea entered by the appellant does not necessarily lead to the conclusion that she admitted that an authorization had not been given under section 500.1 [159] .

[333] In any event, even if it is considered that the appellant admitted the absence of an authorization under the third paragraph of article 500.1 by her guilty plea, this plea was presented subject to the constitutional challenge. This was not a waiver to comment on the facts presented in the constitutional debate.

[334] The notice given by the police at 5:09 p.m. highlights the problem posed by the absence of any criteria governing the decision to grant or not the right to demonstrate and of any power to revoke this authorization.

[335] The sequence of events on the evening of March 15, 2011 revealed this acutely.

[336] In fact, the police concluded, based on the circumstances presented to them, that the demonstration had become an unlawful assembly within the meaning of the Criminal Code, according to what is indicated in the second notice given at 6:28 p.m. and which includes a order to disperse the demonstrators.

[337] It is reasonable to assume that they concluded that the legitimate demonstration had become an unlawful assembly, because the assembly disturbed the peace in an uproarious manner or incited others to act in this manner.

[338] The opinion of the police and the order to disperse given to the demonstrators offers the possibility of leaving the illegal assembly to those who want it.

[339] Under US law, such notice is a constitutional requirement before police can lawfully make an arrest.

[340] Posner J. of the Seventh Circuit Court of Appeals described this rule in these terms in Vodak v. City of Chicago :

No precedent should be necessary, moreover, to establish that the Fourth Amendment does not permit the police to say to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, arrest the person for having marched without police permission. This would be “an indefensible sort of entrapment by the State-convicting a citizen for exercising a privilege which the State had clearly told him was available to him.” Coxv. Louisiana , supra , 379 US at 571, quoting Raley v. Ohio , 360 US 423, 426, (1959) [160] .

[341] In this case, the police first informed those present of their right to demonstrate. He later ordered the dispersal of an unlawful assembly, but filed a statement of offense against the appellant under section 500.1. Is the dispersal order a revocation of the notice given to protesters earlier?

[342] Furthermore, if a demonstration is tolerated by a person in authority, as the notice given at 5:09 p.m. suggests, what are the legal consequences of the police's decision to disperse the unlawful assembly at 6:00 p.m. h 28?

[343] Is it possible to charge a protester with an offense under section 500.1 when the dispersal order is clearly based on the Criminal Code ?

[344] Even if it is considered that "the power to revoke a license is inseparable from the power to issue it" [161] , an authorization to exercise a regulated activity is normally accompanied by conditions relating to the exercise of this activity and regulates, where applicable, the power to revoke the authorization, which is totally absent in this case.

[345] The Supreme Court has certainly recently confirmed the power of police officers to exercise their discretionary power to intervene by virtue of the various legal powers they possess [162] , but this discretionary power cannot implicitly include the ability to revoke a administrative authorization.

[346] In addition, according to the evidence presented before the trial judge in the context of the constitutional debate, the requirements imposed by the police forces of Montreal and Quebec appear to be different.

[347] In Quebec, the police force demanded a route and that it be respected by the demonstrators.

[348] The point here is not to criticize the wisdom or appropriateness of such a requirement. That is not the question in the context of the constitutional debate. But it must be noted that the same legislative provision gives rise to different requirements, depending on the police force involved, requirements that are absent from the actual text of section 500.1.

[349] In this case, on the evening of March 15, 2011, the police authorities did not have the route that the demonstrators were going to follow, but that did not prevent them from telling those present that they had the right to demonstrate. .

[350] The Court does not question the fact that the exercise of the discretionary power of the police officers could lead them to choose not to intervene in order to prevent the meeting from taking place.

[351] In fact, just as the prosecution is not obliged to lay a charge even if it has proof of an offence, the police have the discretionary power to determine the nature of their intervention and, if necessary , they can decide not to go to court .

[352] This discretion is recognized both in the Supreme Court's decision in Beaudry and in the decision of the Ontario Court of Appeal in Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council [164] and the Court must be extremely careful before questioning it.

[353] The evidence of the circumstances surrounding the demonstration of March 15, 2011 reveals, however, that the exercise of the right to demonstrate is subject to the exercise of the absolute discretionary power of the police officers who tolerate or suspend the exercise of it according to unknown criteria. . They also decide, if necessary, to file a statement of offense under the first paragraph of section 500.1, even if the police officers had initially informed those present of their right to demonstrate.

[354] Regarding the specific question put to the parties regarding the notice given by the police on March 15, 2011 at 5:09 p.m., the Court considers that no authorization was granted under the third paragraph of section 500.1.

[355] Such authorization can only be granted by the person responsible for the maintenance of the public road and not by the police who cannot act as an agent or representative of a city or municipality without legislative delegation. or clear regulations.

[356] In the absence of an authorization granted in accordance with the third paragraph of section 500.1, the notice given by the police to the persons present at the demonstration is only the exercise, by them ci, of their discretionary power not to intervene to prevent the holding of the demonstration, and this, despite clear proof of the commission of the offense provided for in the first paragraph of article 500.1.

[357] However, this opinion is likely either to justify the application of the defense of error caused by a person in authority [165] , or to cast doubt on the appellant's guilt. The Tribunal will discuss this issue at the end of its judgment.

3.5.4.5. Conclusions relating to the application of section 500.1 of the CSR

[358] Before addressing the question of the constitutionality of the discretion conferred by section 500.1, it is useful to summarize the main conclusions of the Tribunal regarding the evidence presented before the trial judge regarding the application of section 500.1:

- The prior authorization mechanism provided for in the third paragraph of section 500.1 has not been put in place by the competent public authorities. It is non-existent;

- No authorization has been granted under this power and no refusal has been notified;

- The police forces did not exercise the discretionary power conferred by the third paragraph of section 500.1, because this power can only be exercised by a city, a municipality or the Ministère des Transports. The police forces are not their representatives or agents;

- The police forces tolerate or choose to exercise their discretionary power to prevent or not the holding of a demonstration, despite the commission of the offense provided for in the first paragraph of section 500.1 according to different considerations or requirements (for example: the communication of a journey);

- The discretionary power exercised by the police during the holding of demonstrations is not based on the prior authorization mechanism provided for in the third paragraph of section 500.1, but rather on the offense provided for in the first paragraph of this section;

- The exercise of the right to demonstrate on a public road is subject to the exercise of the absolute discretionary power of the police, that is to say the fact that its exercise is tolerated, the conditions relating to its exercise, his revocation as well as the laying of a charge under the first paragraph of section 500.1.

[359] The Court is of the opinion that the problems posed by the application of the third paragraph of section 500.1 are related to the absence of criteria surrounding the power to authorize the holding of a demonstration on a public road.

[360] The question that must now be addressed is whether this broad discretionary power is a minimal interference with the right to demonstrate on a public road.

3.5.4.6. Discretionary powers and discretion conferred by section 500.1 of the CSR

[361] Any discussion of the discretion conferred by the third paragraph of section 500.1 must take into account the fact that Canadian administrative law has recognized since Roncarelli c. Duplessis [166] that absolute and unimpeded discretion does not exist.

[362] In this case, Justice Rand wrote:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the color of his hair? the legislature cannot be so distorted[167] .

[363] In Slaight Communications Inc. v. Davidson , Lamer J. makes similar observations:

A discretion, regardless of the terms by which it is conferred, is never absolute. This is a long recognized principle. HWR Wade, in his treatise Administrative Law (4th ed. 1977), puts it this way at pp. 336 and 337:

It has been recognized for more than three centuries that the discretion conferred on public authorities is not absolute, even within its well-defined limits, but is subject to general legal limits. These limits are expressed in several different ways: for example, it is said that discretion must be exercised reasonably and in good faith, that only relevant considerations must be taken into account, that there must be absolutely no wrongdoing , or that the decision should not be the result of arbitrariness or caprice. [Emphasis added.] [168]

[364] Thus, any discretionary power, however great, has its limits, [169] and a law is always supposed to apply in a certain perspective desired by the legislator .

[365] Further , any discretion must be exercised according to the scheme and purpose of the legislation as a whole .

[366] The question that arises in this case is to know in what circumstances can one consider that a broad discretionary power is or is not a reasonable limit according to the supporting provisions of the Quebec and Canadian charters.

[367] Indeed, if a discretionary power must always be applied according to the economy and the object of the law as a whole and if an imprecise discretion must be interpreted as not allowing the violation of the rights guaranteed by the Quebec and Canadian charters, one might strictly ask whether it is even possible, in light of these principles, to challenge the constitutionality of a discretionary power.

[368] This is the question that the Tribunal must resolve.

[369] To date, the Tribunal has only considered the trial judge's findings of fact regarding the minimal impairment component .

[370] He did not analyze the question of whether the discretion conferred by the third paragraph of section 500.1 is a minimal impairment within the meaning of the supporting provisions.

[371] As mentioned previously, the trial judge did not specifically examine this question because of his conclusions regarding the absence of an application for authorization to demonstrate and the absence of evidence of a denial of permission.

[372] However, the analysis of the constitutionality of a law and that of its application are two distinct questions .

[373] In the present case, the appellant considers that the discretionary power conferred by the third paragraph of section 500.1 is absolute and must therefore be invalidated.

[374] The Attorney General claims that the discretion conferred by the third paragraph of section 500.1 respects the Quebec and Canadian charters. Moreover, it asserts that this discretion must be exercised according to the objectives pursued by the CSR and section 500.1 in particular. She believes that if the section is so interpreted, the validity of section 500.1 must be upheld.

[375] In order to fully understand the position of the Attorney General, it is useful to reproduce the description of the operation of section 500.1 that she proposes in her factum.

[376] This is what she writes:

[43] Another condition imposed by the legislator is that requiring that the holding of parades or other forms of demonstration be previously authorized by the person responsible for the maintenance of the public road. Before a use incompatible with the function of the public road and the roadway is authorized, the legislator entrusts the person responsible for the maintenance of the road with the task of ensuring that this authorization will not go against its objectives to ensure road safety, free movement on public roads and the protection of people and their property. Depending on the specific circumstances of each case, the impacts in relation to these objectives may vary depending, in particular, on the characteristics of the premises, the route if applicable, nearby buildings, the time of day,

[44] The presence of an authorization system allows the person responsible for maintaining the road to make a specific analysis of the situation based on the objectives pursued by the CSR. Thus, this authorization aims to ensure that the parade or any other form of demonstration will not create road safety problems on the one hand and that, on the other hand, the temporary withdrawal of the function of the public road, to make it and its roadway available for another purpose (parades or other forms of demonstrations), will not significantly undermine the objectives pursued.

[377] It thus describes the factors that must be assessed by the person responsible for the maintenance of the public road:

[131] Section 500.1 aims to control the material consequences of an activity, the obstruction to the circulation of road vehicles on a public road, regardless of the content of the message that this activity could attempt to convey.

[132] This section does not prevent the appellant or anyone else from conveying their message in multiple ways. Section 500.1 does not cover forms of expression that take place elsewhere than on the "roadway, shoulder, other part of the right-of-way or the approaches to a public road", nor those that

take place there and do not impede the movement of road vehicles on public roads or access to these roads.

[133] Moreover, section 500.1 allows the holding of parades or other demonstrations, even if they impede traffic, on the condition that they are authorized by the person responsible for the maintenance of the public road and the condition that the road is closed to traffic or under the control of a police force.

[134] The authorization process provided for in the third paragraph of section 500.1 is flexible, does not require significant logistical means for the person requesting the authorization and allows it to be made and answered in a short time and no matter the time of day. The evidence indicates that this authorization process allows multiple marches and demonstrations to take place and there are no examples of denials or the imposition of conditions that would have prevented anyone from speaking out.

[135] On the other hand, a process of prior authorization is essential to the achievement of the legislative objectives. A simple notice of a demonstration that would impede traffic, for example, on a highway, a bridge giving access to an island, access to a hospital, a courthouse or block the only access road to an area would not allow the legislative objectives to be achieved. There are obviously situations which would require either a refusal or a modification of the proposed route. It is certain that the legislator cannot, without renouncing its objectives, confer on the plaintiffs the right to occupy the roadway of a public road at the place they choose, without any control.

[136] Insofar as the evidence establishes that the request for authorization can be made and answered within a short period of time and regardless of the time of day, rare, if not non-existent, are the situations of so-called “spontaneous” demonstrations that do not do not allow an application for authorization to be made. Be that as it may, the problems linked to road safety, the free movement of people and goods and the protection of people and their property are also present in these situations and the legislator cannot allow these obstacles, without again here, give up on its objectives.

[137] The discretion that section 500.1 grants to the person responsible for the maintenance of the road is not without limits and is framed by the object and the context of the CSR in which it is inserted. The presence of this discretion makes it possible to carry out a specific analysis of each situation, which can vary enormously from one case to another and makes it possible to establish a fair balance between the desire of people to express themselves and the objectives pursued by the CSR. […]

[…]

[139] Meetings on a public road that obstruct automobile traffic are prohibited in two provinces. Six provinces delegate to municipalities the power to manage the use of public roads under their jurisdiction, the majority of them expressly mentioning activities such as parades or rallies. In addition, two provinces provide for the possibility of granting a permit for these otherwise prohibited activities.

[140] A total ban was not the measure adopted by the Quebec legislator, which instead adopted the mechanism of prior authorization for the entire province. Such a measure is reasonable and adapted to the reality of the multitude of scenarios likely to impede traffic and to the objectives that the legislator wishes to achieve.

[378] The trial judge generally adopted this description in his judgment .

[379] As can be easily seen, however, the Attorney General formulates a series of factors or criteria that are absent from the text of section 500.1 itself.

[380] The position of the Attorney General seems to be an invitation to rewrite the text of the section by adding words that are missing in order to avoid a finding of constitutional invalidity.

[381] However, as we know, such an approach is generally proscribed both by the presumption against the addition of terms to a law [175] and by the narrow corridor authorizing the use of a broad or extensive interpretation (“ reading in ”) as a constitutional remedy under section 52 .

[382] As Chief Justice Dickson pointed out in Hunter v. Southam : " [i]t is not for the courts to add the details which make legislative gaps constitutional . "

[383] In addition, reading in is a constitutional remedy that risks encroaching on the legislative domain .

[384] It is true, however, that the jurisprudence of the Supreme Court shows certain decisions where the Supreme Court proceeds to a certain rewriting of a law, which gives rise to quite significant debates within the Court [179] .

[385] However, the Tribunal should only engage in such an approach with caution.

[386] In this case, the parties made their main submissions with respect to two decisions that interpret the discretion granted by section 56 of the Drugs and Substances Act (“ DDA ”): either the decision of the Ontario Court of Appeal in R. c. Parker and that of the Supreme Court in Canada (Attorney General) v. PHS Community Services Society .

[387] The position of the parties reveals a fundamental difference regarding the approach applicable when the constitutionality of a discretionary power is challenged. The resolution of this discrepancy is crucial to the fate of this appeal.

[388] Before examining these two decisions, it is worth reviewing the Supreme Court's consideration of the question of discretionary powers.

3.5.4.7. Discretionary powers in the context of the supporting provisions: an overview

[389] When it comes to determining whether a law is justified in the context of a free and democratic society, the analysis of a discretionary power that is not circumscribed by any criterion arises in two ways.

[390] On the one hand, the analysis is considered from the angle of whether such discretion is a limit established by “a rule of law”. On the other hand, it can be considered that this type of discretion is not a minimal interference with the constitutional right in question [180] .

[391] The Tribunal approaches the issue here from the perspective of minimal impairment. However, the analysis of the main decisions of the Supreme Court is useful, whatever the angle from which the question was approached by the Court.

[392] This overview provides an essential general context that will put this issue in proper perspective before examining the Parker and PHS judgments .

[393] Let us see how the question arises.

[394] Professor Hogg explains that the requirement that a limit on a constitutional right be established by a rule of law is based, on the one hand, on the desire to avoid that government action be

arbitrary and, on the other hand, on the other hand, on the need for the law to be both accessible to the public and formulated with sufficient precision both for the citizens concerned and those who must apply the rule of law in question.

[395] He writes:

The requirement that any limit on rights be prescribed by law reflects two values that are basic to constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of frights must be authorized by law. Secondly, citizens must have a reasonable opportunity to know what is prohibited so that they can act accordingly. Both these values are satisfied by a law that fulfills two requirements: (1) the law must be adequately accessible to the public; and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law .

[396] He specifically emphasizes the need for discretion to be framed by legal criteria:

A law that confers a discretion on a board or official to act in derogation of a Charter right will satisfy the prescribed-by-law requirement if the discretion is constrained by legal standards .

[Emphasis added]

[397] The Supreme Court addressed the question of the criteria that should govern the exercise of a discretionary power for the first time in 1988.

[398] In R. c. Hufsky [183] , the Supreme Court established the constitutional requirement that the exercise of a discretionary power must be framed by explicit or implicit criteria. Justice Le Dain wrote:

The next question that arises with respect to the appellant's s . 9 of the Charter is whether the detention that ensues when vehicles are stopped at random for a spot check is arbitrary within the meaning of s . 9 . Section 189a(1) of the Highway Traffic Act empowers a police officer, in the lawful exercise of his or her duties, to require the driver of a motor vehicle to stop. It does not specify that there must be any reason or cause for asking a particular motorist to stop but, as its plain reading suggests, it leaves the officer with the discretion to choose which motorist he will ask to stop. In carrying out the purposes of the spot check procedure, including verifying the condition or "sobriety" of the driver, the officer was clearly in the legitimate exercise of his duties. Although authorized by law and carried out for legitimate

purposes, the random stop, made for the purpose of carrying out a spot check, nevertheless resulted, there were no criteria for selecting drivers who would be asked to stop and submit to the spot check. The selection was left to the sole discretion of the police officer. A discretionary power is arbitrary if there is no criterion, express or implied, which governs its exercise . In this case there were none. The appellant was therefore arbitrarily detained within the meaning of s . 9 of the Charter , as a result of the random stop for the purpose of carrying out a spot check, and the second constitutional question must therefore be answered in the affirmative .

[Emphasis added]

[399] The following year, in R. c. Irwin Toy , [185] a free speech case, the majority say that "if there is no intelligible standard and the legislature has conferred unfettered discretion to do what appears to be the better in a wide variety of cases, there is no restriction prescribed 'by rule of law'" [186] .

[400] A week after Irwin Toy , in Slaight Communications Inc. v. Davidson , Justice Lamer writes:

Since the Constitution is the supreme law of the land and renders inoperative the incompatible provisions of any other rule of law, it is impossible to interpret a statutory provision conferring discretion as conferring the power to violate the Charter unless, of course, that power either expressly granted or necessarily implied. Such an interpretation would indeed oblige us, in the absence of being able to justify this legislative provision under the terms of section 1, to declare it inoperative. However, although this Court should not add or remove an element from a legislative provision in order to make it conform to the Charter, it must not, moreover, interpret a legislative provision, open to more than one interpretation, in such a way as to render it incompatible with the Charter and, therefore, inoperative. A statutory provision conferring an imprecise discretion must therefore be interpreted as not allowing the rights guaranteed by the Charter to be violated .

[Emphasis added]

[401] In 1991, in Committee for the Commonwealth of Canada v. Canada [188] , the Supreme Court must determine the scope of freedom of expression on government property, in this case, an airport. The decision gives rise to a plurality of opinions.

[402] One of the aspects of this decision which is relevant to the present case is that of the application of a regulation relating to the operation of concessions at an airport and the discretionary power which it entails.

[403] L'Heureux-Dubé J. makes the following observations about the regulation she considers applicable and the discretion it confers. She writes:

In addition, the regulations provide that "unless authorized in writing by the Minister, no person may . . . ". It is clear that the Minister has "full discretionary powers to do what seems best to him". This in itself can create a standard that is imprecise to the point of being incomprehensible. In any event, the vagueness attributable to the absence of an understandable standard is not in accordance with the principles that the restriction of a right or freedom must be "prescribed by a rule of law" .

It could be argued that in a prior authorization regime, as here, the standard is not imprecise. It could be argued that such provisions allow citizens to regulate their conduct because they clearly establish that anyone wishing to solicit or advertise must first obtain the authorization of the Minister. However, this merely shifts the problem of arbitrariness from the "prescribed by law" element to the "means" element of the s. 1 test.

Although in my opinion s. 7 of the Regulations, which clearly restricts freedom of expression, is too vague to constitute a reasonable limit prescribed by law for the purposes of the s. 1 analysis, I prefer to base my opinion on the analysis of the reasonable as enacted in Oakes . For this purpose and for the specific purposes of the analysis that follows, I will assume, without deciding, that the government's objectives are sufficiently pressing and that the provision is rationally connected to those objectives, since I believe that the scope of art. 7 of the Rules is excessive and that, consequently, this article does not withstand the analysis of the means proposed in the

[Emphasis added]

[404] McLachlin J. points out the following:

[T]he restriction on the right should not go beyond what is necessary to achieve this objective - it should not be overly broad and should include sufficient safeguards to ensure that the application of the rule of right will not impair the right in question more than necessary . This latter risk may exist, for example, if the administrators responsible for applying the restriction or rule of law in question enjoy too much discretionary power .

[Emphasis added]

[405] The opinion of L'Heureux-Dubé and McLachlin JJ. will be adopted by the Ontario Court of Appeal in R. c. Parker [191] where the Court had to determine the scope of the discretionary power to exempt granted to the Minister of Health by section 56 of the Drugs and Substances Act [192] .

[406] We will come back to this, because the appellant relies on the Parker decision and argues that the principles formulated in this decision support the conclusion that the discretion conferred by the third paragraph of section 500.1 is unlimited, whereas the Prosecutor General relies instead on the Supreme Court's decision in Canada (Attorney General) v. PHS Community Services Society [193] to support the contrary position.

[407] In 1992, the Supreme Court addressed the question of discretionary powers in its study of the doctrine of vagueness in R. v. Nova Scotia Pharmaceutical Society [194] . The discussion focuses on the vagueness of an incriminating text, but some observations are relevant to the question raised in this case, as it concerns the limit of discretion in the application of the law.

[408] Gonthier J. wrote that sufficiently precise standards “therefore limit the discretionary power by introducing lines of demarcation and they sufficiently delimit a sphere of risk so that citizens are warned as to the substance of the standard to which they are subject. » [195] . He adds that a vague provision “ does not sufficiently delineate a sphere of risk and therefore cannot provide either reasonable warning to citizens or limitation of discretion in the application of the law” [196] .

[409] In 1996, Justice Lamer addressed the issue of discretionary powers in R. c. Adams [197] . He writes:

53. Normally, in a claim under the Canadian Charter of Rights and Freedoms , where a statute confers a broad administrative discretion that is unstructured and capable of being exercised in a way that infringes on a constitutional right, the court should not conclude that the delegated discretion violates the Charter and then consider possible justifications for that violation under s. On the contrary, the court must instead conclude that the discretionary power must henceforth be exercised in such a way as to respect the guarantees provided for in the Charter . See Slaight Communications Inc. v. Davidson , 1989 CanLII 92 (SCC), [1989] 1 SCR 1038 , at pp. 1078 and 1079 ; R.v. Swain , 1991 CanLII 104 (SCC) , [1991] 1 SCR 933 , at pp. 1010 and 1011 ; and Schachter v. Canada , 1992 CanLII 74 (SCC) , [1992] 2 SCR 679 , at p. 720 .

[410] In Eldridge v. British Columbia (Attorney General) , La Forest J. qualified this approach and pointed out that not all discretionary powers can be interpreted in a manner consistent with the Charter :

[30] I will digress to point out that not all discretionary power provisions can be interpreted in a manner consistent with the Charter . Some provisions of this nature necessarily infringe Charter rights , even if they do not expressly authorize this result; see, for example, Re Ontario Film & Video Appreciation Society and Ontario Board of Censors (1984), 1984 CanLII 1824 (ON CA) , 5 DLR (4th) 766 (Ont. CA) , affirming (1983), 1983 CanLII 1923 (ON SC) , 147 DLR (3d) 58 (Ont. Div. Ct.). In such cases, it is generally the law and not its application that attracts Charter scrutiny ; see June M. Ross, "Applying the Charter to Discretionary Authority" (1991), 29 Alta. L.Rev. 382. In this case, however, the discretion given to the Medical Services Board to decide whether a service constitutes a benefit does not necessarily or generally threaten the equality rights guaranteed by s. 15(1) of the Charter .It is of course possible for the commission to violate these rights in the exercise of its power. However, this possibility is a consequence of the purpose of the discretionary power, which is to ensure that all medically necessary services are paid for by the government .

[Emphasis added]

[411] In 2000, in Little Sisters Book and Art Emporium v. Canada (Minister of Justice) [199] Binnie J. must analyze the question of discretionary powers in considering the powers conferred by the Customs Act with respect to the importation of obscene material. In that case, he specifically concluded that “[b]ecause of the incorporation by reference of s. 163(8) [of the Criminal Code] to the Customs Tariff, customs officials are required to apply the definition” [200] of obscenity in that section. He finds this standard constitutionally valid .

[412] He also recalls that a discretionary power must be exercised in accordance with the Charter and he asserts that a “rule which would require Parliament to enact special procedures in each case to protect Charter rights would be unnecessarily rigid” [202] .

[413] In 2009, the Supreme Court reiterated the importance of an intelligible standard in the Greater Vancouver judgment [203] .

[414] Deschamps J. then drew a general portrait of the Supreme Court's case law on the question of the rule of law within the meaning of section 1 of the Charter .

[415] She writes:

[52] The Court therefore does not require that the right in question be restricted by a law in the strict sense of the term; it may also be by regulation or by common law. Moreover, it is sufficient that the restriction necessarily flow from the wording of the “law” or from the conditions of its application. (See also Irwin Toy ; BCGEU v. British Columbia (Attorney General) , 1988 CanLII 3 (SCC) , [1988] 2 SCR 214 ; R. v. Swain , 1991 CanLII 104 (SCC) , [1991] 1 SCR 933 and R. v. Orbanski , 2005 SCC 37 , [2005] 2 SCR 3.)

[53] The Court also implicitly recognizes other forms of restriction by law that were not initially mentioned in Therens , notably those resulting from a municipal by-law (Ramsden and Ville de Montréal), of a collective agreement binding a government entity (Lavigne) and rules of a regulatory body (Black v. Law Society of Alberta , 1989 CanLII 132 (SCC) , [1989] 1 SCR 591). These texts constitute "rules of law" because, like regulations and other subordinate legislative measures, their adoption is authorized by statute, they are binding and of general application and they are sufficiently accessible and precise for those who are subject to it. In this respect, they respond to the concerns justifying the requirement of the restriction "by a rule of law" insofar as it is a question of hindering the arbitrariness of the State and of offering citizens and entities government authorities enough information on what to do.

[54] In Irwin Toy , the Court interprets the requirement of precision liberally. The majority explained as follows (p. 983):

In law, absolute precision is rare, if not non-existent. The question is whether the legislator has formulated an intelligible standard on which the judiciary must rely to carry out its functions. The interpretation of how to apply a standard in particular cases always involves an element of discretion because the standard can never specify all cases of application. On the other hand, if there is no intelligible standard and if the legislator has conferred absolute discretion to do what seems best in a wide variety of cases, there is no limitation prescribed "by a rule by right ".

In Osborne v. Canada (Treasury Board) , 1991 CanLII 60 (SCC) , [1991] 2 SCR 69 , p. 94-97 , the Court points out that the standard is not strict. Unless it “is . . . so obscure that the ordinary methods do not permit of an accurate interpretation”, the impugned statute is deemed to constitute “a rule of law” (p. 94).

[55] As evidenced by the above-mentioned decisions, the Court opted for a flexible interpretation of the “rule of law” capable of restricting a right guaranteed by the Charter , both in terms of form (statute, regulation, particular municipal, rule of a regulatory body or collective agreement) than on that of formulation (i.e., a standard intelligible to the public and the one who applies it). In the end, the Court insisted, as in Therens , on the need to distinguish between the restriction resulting from the law and

that resulting from an arbitrary measure of the State, the latter still not satisfying the requirement of a restriction "by a rule of law".

[56] This generous approach is favored because a narrow interpretation would impose too much rigidity on a parliamentary and legislative system that relies heavily on framework laws and the delegation of broad discretionary powers. In the Committee for the Commonwealth of Canada judgment , McLachlin J. (now Chief Justice) said on this subject (p. 245):

From a practical point of view, it would be inappropriate to limit the application of s. 1 to statutes and regulations enacted by Parliament. The state would then be required to enact detailed regulations covering all conceivable contingencies before it could justify its conduct under s. In my view, such a technical approach is not in keeping with the spirit of the Charter and would make it unduly difficult to justify limitations on rights and freedoms that may be reasonable and, in fact, necessary.

See also Little Sisters Book and Art Emporium v. Canada (Minister of Justice) , 2000 SCC 69 , [2000] 2 SCR 1120 , para. 137 .

[416] In Greater Vancouver , the issue before the Court was the advertising policies of transit authorities and whether those policies are laws within the meaning of s. 1 of the Charter .

[417] Justice Deschamps made the following clarifications on this subject:

[64] Policy that is non-administrative in nature and meets certain requirements may constitute a “rule of law”. To be legislative in nature, the policy must establish a standard of general application adopted by a government entity under its regulatory authority . Such a power exists when the federal or provincial legislator has delegated a power to the governmental entity for the specific purpose of adopting binding rules of general application establishing the rights and obligations of the persons subject to them (D. C. Holland and JP McGowan , Delegated Legislation in Canada (1989), at 103). There is no need, for the application of section 1 of the Charter, that these rules take the form of regulatory texts. To the extent that their enabling laws allow entities to adopt mandatory rules, that their policies establish rights and obligations of general rather than specific application, and that they are sufficiently accessible and specific, then such policies are deemed to constitute " rules of law” capable of limiting a right guaranteed by the Charter .

[65] Thus, when a government policy is authorized by law, establishes a general standard that is intended to be mandatory and is sufficiently accessible and precise, it is a rule of a legislative nature that constitutes a " rule of law ".

[Emphasis added]

[418] The following year, the Quebec Court of Appeal in Singh c. Montréal (Ville de) [204] applies the framework of analysis set out in the Greater Vancouver judgment in an appeal where the constitutionality of a town planning by-law concerning signage is raised.

[419] After concluding that the by-law in question limits freedom of expression, Forget J. analyzes the issue from the perspective of minimal impairment. He writes:

29 At the outset, the regulation was not “carefully designed” to use the words of LeBel J. in Guignard .

30 The by-law does not set out any parameters of any kind whatsoever, particularly with regard to the number, size and geographical distribution of these bulletin boards to which it now limits posting. In short, the City relies on the entire discretion of the administration .

[Emphasis added]

[420] After referring to the Greater Vancouver case , he adds:

32 Also, far be it from me to impose on the City an obligation to determine in its by-law the type of bulletin boards, their size and the places where they will be installed. However, the by-law in question does not contain any directive to the administration. Thus, we should conclude that the City complied with the by-law as soon as a single bulletin board was installed.

33 Deschamps J. requires, at the very least, “a standard that is intelligible to the public and to those who apply it”. In this case, the standard is not intelligible either to the public or to the person applying it. Upon reading the by-law in question, the citizen cannot know his posting rights without traveling through the territory of the City to locate the bulletin boards.

[421] Forget J. concludes that the by-law does not demonstrate a minimal impairment and that the application of the by-law does not demonstrate that the interference with freedom of expression is minimal.

[422] Finally, in Canada (Attorney General) v. Way [205] , the Quebec Court of Appeal recently upheld the Superior Court's finding that the amendments to section 140(1)(d) of the Corrections and Conditional Release Act , cannot be saved under s. 1 of the Canadian Charter , in part because "[t]he discretion granted to commissioners appears to be unbounded" [206] .

[423] This overview helps to put into context the main elements surrounding the analysis of a discretionary power in the context of a constitutional challenge.

[424] Let us now consider Parker and PHS .

3.5.4.8. The R. v. Parker (CA Ont.) and Canada (Attorney General) v. PHS Community Services Society

[425] In this case, the main submissions of the parties focused on two decisions that interpret the discretion conferred by section 56 of the Drugs and Substances Act (“ DDA ”).

[426] It is therefore impossible to understand the position of the parties without carefully analyzing all of the decisions of the Ontario Court of Appeal and the Supreme Court of Canada regarding section 56 of the CDDA . These decisions are as follows: R. c. Parker [207] , Hitzig v. Canada [208] , Canada (Attorney General) v. PHS Community Services Society [209] (“ PHS ”) and R. v. Smith [210] .

[427] The position of the parties reveals a fundamental difference regarding the approach applicable when the constitutionality of a discretionary power is challenged. The resolution of this discrepancy is crucial to the fate of this appeal.

[428] Section 56 gives the Minister of Health broad discretion to grant exemptions from the application of the LDAS if he believes that there are medical, scientific or public interest reasons to do so.

3.5.4.8.1. R. v . parker

[429] The Ontario Court of Appeal rendered its decision in Parker at the end of July 2000. It concluded that section 4 of the LDAS was unconstitutional in that it restricted access to marijuana for medical purposes contrary to Parker's rights under section 7 of the Charter .

[430] Judge Rosenberg summed up his conclusions at the beginning of his judgment as follows:

[10] I have concluded that the trial judge was right in finding that Parker needs marijuana to control the symptoms of his epilepsy. I have also concluded that the prohibition on the cultivation and possession of marijuana is unconstitutional. Based on principles established by the Supreme Court of Canada, particularly in R. v. Morgentaler , 1988 CanLII 90 (SCC) , [1988] 1 SCR 30 , 31 CRR 1 , where the court struck down the abortion provisions of the Criminal Code, RSC 1985, c. C-46 and Rodriguez v. British Columbia (Attorney General) , 1993 CanLII 75 (SCC) , [1993] 3 SCR 519 , 17 CRR (2d) 193, where the court upheld the assisted suicide offense in the Criminal Code , I have concluded that forcing Parker to choose between his health and imprisonment violates his right to liberty and security of the person. I have also found that these violations of Parker's rights do not accord with the principles of fundamental justice. In particular, I have concluded that the possibility of an exemption under s. 56 dependent upon the unfettered and unstructured discretion of the Minister of Health is not consistent with the principles of fundamental justice . I have not dealt with the equality argument raised by the Epilepsy Association because that argument was not raised at trial.

[11] Accordingly, I would uphold the trial judge's decision to stay the charges against Parker and I would dismiss that part of the Crown's appeal. However, I disagree with Sheppard J.'s remedy of reading in a medical use exemption into the legislation. I agree with the Crown that this is a matter for Parliament. Accordingly, I would declare the prohibition on the possession of marijuana in the Controlled Drugs and Substances Act to be of no force and effect. However, since this would leave a gap in the regulatory scheme until Parliament could amend the legislation to comply with the Charter, I would suspend the declaration of invalidity for a year. During this period, the marijuana law remains in full force and effect. Parker, however, cannot be deprived of his rights during this year and therefore he is entitled to a personal exemption from the possession offense under the Controlled Drugs and Substances Act for possessing marijuana for his medical needs. Since the Narcotic Control Act has already been repealed by Parliament, there is no need to hold it unconstitutional. If necessary, I would have found that Parker was entitled to a personal exemption from the cultivation offense for his medical needs.

[Emphasis added]

[431] In his judgment, Justice Rosenberg explains why the discretion conferred by section 56 does not meet constitutional requirements.

[432] He first considers the following opinion expressed by Chief Justice Dickson in R. c. Morgentaler while writing that “[t]he administrative scheme established by s. 251(4) suffers from another weakness:

the absence of an adequate standard to which therapeutic abortion committees must refer when deciding whether a therapeutic abortion should, in law, be permitted” [211] .

[433] Rosenberg J. draws the following conclusion:

[178] The same must be said about s. 56. It rests in the Minister an absolute discretion based on the Minister's opinion whether an exception is "necessary for a medical . . . purpose", a phrase that is not defined in the Act. The Interim Guidance Document issued by Health Canada to provide guidance for an application for a s. 56 exemption sets out factors that the Minister "may" consider in deciding whether an exemption is necessary for a medical purpose. This document does not have the force of law and, in any event, merely sets out examples of factors the Minister may consider. It does not purport to exhaustively define the circumstances. In fact, the document explicitly states that the Minister may take into account considerations unrelated to medical necessity such as "the potential for diversion".18 at end of document] The document also suggests that the power under s. 56 is only to be exercised in "exceptional circumstances", a qualification not found in the statute itself.

[179] Even if the Minister were of the opinion that the applicant had met the medical necessity requirement, the legislation does not require the Minister to give an exemption. The section only states that the Minister "may" give an exemption. The Crown did not suggest that "may" should be interpreted as "shall".

[434] After considering the opinion of Justices L'Heureux-Dubé and McLachlin in the Committee for the Republic judgment , Justice Rosenberg continued his analysis and added:

[184] In view of the lack of an adequate legislated standard for medical necessity and the vesting of an unfettered discretion in the Minister, the deprivation of Parker's right to security of the person does not accord with the principles of fundamental justice.

[185] In effect, whether or not Parker will be deprived of his security of the person is entirely dependent upon the exercise of ministerial discretion. While this may be a sufficient legislative scheme for regulating access to marijuana for scientific purposes, it does not accord with fundamental justice where security of the person is at stake.

[435] Finally, he asserts, relying on R. c. Smith [212] of the Supreme Court, that the violation of Parker's constitutional rights cannot be avoided by the exercise of the Minister's discretion.

[436] After quoting a passage from Smith , he writes:

[187] In my view, this is a complete answer to the Crown's submission. The court cannot delegate to anyone, including the Minister, the avoidance of a violation of Parker's rights. Section 56 fails to answer Parker's case because it puts an unfettered discretion in the hands of the Minister to determine what is in the best interests of Parker and other persons like him and leaves it to the Minister to avoid a violation of the patient's security of the person .

[188] If I am wrong and, as a result, the deprivation of Parker's right to security of the person is in accord with the principles of fundamental justice because of the availability of the s. 56 processes, in my view, s. 56 is no answer to the deprivation of Parker's right to liberty. The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. It does not comport with the principles of fundamental justice to subject that decision to unfettered ministerial discretion. It might well be consistent with the principles of fundamental justice to require the patient to obtain the approval of a physician, the traditional way in which such decisions are made. It might also be consistent with the principles of fundamental justice to legislate certain safeguards to ensure that the marijuana does not enter the illicit market. However, I need not finally determine those issues, which, as I will explain in considering the appropriate remedy, are a matter for Parliament.

[Emphasis added]

[437] Essentially, the appellant argues that Rosenberg J.'s conclusions regarding the unlimited discretion conferred on the Minister by section 56 of the LDAS apply to the discretion conferred by the third paragraph of section 500.1.

[438] The government does not appeal the decision in Parker [213] , but chooses instead to pass the Medical Marijuana Access Regulations (“ MAPR”) which come into force on June 14 2001.

[439] The RAMFM regulates the exercise of the Minister's discretion conferred by section 56 of the LADS with respect to access to marijuana for medical purposes. In particular, it defines the notion of “medical purposes” [214] .

3.5.4.8.2. The Hitzig v . Canada

[440] In Hitzig v. Canada , the Ontario Court of Appeal must decide whether the medical exemption established by the RAMFM is constitutional. The Court summarizes the situation and its findings as follows:

1 In R.v. Parker (2000), 2000 CanLII 5762 (ON CA) , 146 CCC (3d) 193 , this court held that the criminal prohibition against the possession of marihuana in s. 4 of the Controlled Drugs and Substances Act , SC 1996, c. 19 (“ CDSA ”) was of no force or effect, absent a constitutionally acceptable medical exemption from that prohibition. The court suspended its declaration for a year to allow the Government of Canada (the "Government") to address the constitutional deficiency. The Government responded with the Marihuana Medical Access Regulations , SOR/2001-227 (June 14, 2001) ("MMAR"). Those regulations permitted the possession, and in some cases, the production of marihuana1 by individuals (or in limited circumstances, production, by their designates) who met the medical criteria established in the MMAR . On these appeals, the court must decide whether Lederman J. erred in holding that the scheme set out in the MMAR was not a constitutionally acceptable medical exemption to the criminal prohibition against possession of marihuana.

2 This case is not about the social or recreational use of marihuana, but is about those with the medical need to use marihuana to treat symptoms of serious medical conditions. We have concluded that for those people the MMAR as drafted by the Government do not create a constitutionally acceptable medical exemption. Our reasons for so concluding differ somewhat from those of Lederman J. So does the remedy we would impose, namely to declare invalid only five specific sections of the MMAR. This renders constitutional the medical exemption as described in the remaining provisions of the MMAR, thereby rendering the possession prohibition in s. 4 of the CDSA constitutional: R.v. parker , supra. The of justice are best served by removing any uncertainty as to the constitutionality of the interests of the possession prohibition while at the same time providing for a constitutionally acceptable medical exemption.

[441] Regarding the Minister's discretion, the Court of Appeal wrote:

37 In July 2000, this court held in R.v. Parker , supra , that the medical exemption scheme based on s. 56 of the CDSA was constitutionally inadequate in that it depended on the unfettered exercise of the Minister's discretion. The Government set to work fashioning a legislative response to Parker which would produce a constitutionally acceptable medical exemption within the one year for which the court had suspended its declaration of invalidity.

[…]

55 Pursuant to Ss 11 and 12 of the MMAR, the Minister has very little discretion to refuse an ATP once the necessary personal and medical declarations have been completed. The limited role played by the Minister is no doubt an attempt to cure the major defect in the previous scheme identified in R. v. Parker , supra.

[442] Leave to appeal this decision is denied [215] .

3.5.4.8.3. The PHS stop

[443] It is now appropriate to examine the scope of the PHS decision on which the Attorney General relies.

[444] In PHS , the Supreme Court must decide whether the LDAS applies to the Insite supervised injection site, which provides medical services to intravenous drug users. It concludes in the affirmative and finds that the scheme established by the LDAS is constitutional.

[445] On the other hand, the Court considers that the refusal of the Minister of Health of Canada to renew the exemption provided for in art. 56 of the LDAS violates s . 7 of the Charter and that this refusal cannot be justified under s.

[446] The Supreme Court's conclusion that section 4 of the CDDA , which prohibits possession of drugs, is consistent with the Canadian Charter is based on the existence of the Minister's discretion provided for in section 56 of the LDS .

[447] The Attorney General submits that the description of the minister's discretion supports the conclusion that section 500.1 is also constitutional, because the person responsible for authorizing a demonstration under this section must, like the Minister of Health who exercises the authority conferred by section 56 of the LDAS , exercise that discretion in accordance with the Charter .

[448] The principal passages of Chief Justice McLachlin's opinion on which the Attorney General relies are as follows:

[112] Section 56 gives the Minister of Health broad discretion to grant exemptions from the application of the Act "[i]f he considers that medical, scientific or public interest reasons justify it" .

[113] The possibility of granting exemptions serves as a valve preventing the application of the Act in cases where its application would be arbitrary, its effects grossly disproportionate or its overbreadth.

[114] I conclude that although s. 4(1) of the Act engages the rights guaranteed by s . 7 of the Charter to applicants and others in the same situation, it does not violate s . 7 . This is so because the Act gives the Minister the power to grant exemptions from the application of s. 4(1), including for health reasons. In fact, if we decided to write a law that combated drug addiction while respecting Charter rights , we could very well adopt precisely this type of regime — a prohibition combined with the power to grant exemptions. If there is a Charter issue, it does not lie in the statute, but in the exercise by the Minister of his statutory power to grant the appropriate exemptions.

[115] The allegations of invalidity of the Act based on s . 7 must therefore be rejected.

[116] The main issue raised in the appeal, as argued, is that of the constitutional validity of the Act itself. I have concluded that the Act , properly interpreted, is valid. There remains the question of the Minister's decision to refuse an exemption. The Court must decide, on a preliminary basis, whether it should consider this question. In the particular circumstances of this case, I conclude that it should. The plaintiffs argued, in the alternative, should the Act be valid, that the Minister's decision infringed their Charter rights.. This question was raised during the hearing and the parties had the opportunity to present their point of view in this regard. The Court is therefore duly seized of this question and the Attorney General of Canada cannot claim that it would be unjust for the Court to decide it. But above all, justice demands that the Court examine it. The plaintiffs have established that their s . 7 are at stake. They cannot be deprived of a remedy and forced to hold a new trial on this point, simply because it is the Minister's decision and not the Act itself that has infringed their rights. , when the matter has been argued and fairness is not compromised.

[117] The discretion left to the Minister of Health is not absolute: as is always the case with the exercise of a discretionary power, the Minister's decisions must respect the Charter : Suresh c. Canada (Minister of Citizenship and Immigration) , 2002 SCC 1 , [2002] 1 SCR 3 . If the Minister's decision results in the application of the Act restricting the rights guaranteed by s . 7 in a manner that violates the Charter , the Minister's exercise of discretion is unconstitutional.

[118] I note that this case differs from the Parker case , in which the Ontario Court of Appeal held that the general prohibition against possession of marihuana was not validated by the possibility, provided for in the ' art. 56 , to grant an exemption for possession for medical reasons. In Parker , no decision of the Minister was in issue and the court's conclusion was based on findings by the trial judge that “ the possibility of granting an exemption was illusory” (para. 174).

[…]

[128] Note that, when exercising the discretionary power conferred on him by art. 56 , the Minister must respect Charter rights . This means that when the rights guaranteed by s . 7 are engaged, any limitation resulting from a ministerial decision must be imposed in accordance with the principles of fundamental justice. The Minister cannot simply reject a request for exemption made under s . 56 for simple political reasons; insofar as it affects Charter rights , the Minister's decision must be consistent with the principles of fundamental justice.

[Emphasis added]

[449] In her decision, Chief Justice McLachlin engages in a two-step analysis. It first examines the question of the constitutionality of section 4 of the LDAS (paras. 109-115) and, secondly, the question of the Minister's refusal (paras. 116-118 and 128) .

[450] This approach, which clearly distinguishes between examining the validity of a law and the situation where it is an act of government or an administrative practice that is challenged, was first described by Chief Justice McLachlin in Alberta v. Hutterian Brethren of Wilson Colony [216] .

[451] In Doré v. Barreau du Québec [217] , Abella J. formulated the distinction between the two remedies in these terms:

[36] As Chief Justice McLachlin explained in Alberta v. Hutterian Brethren of Wilson Colony , 2009 SCC 37 , [2009] 2 SCR 567 , reviewing the constitutionality of a law should be different from reviewing an administrative decision that is challenged on the basis that it would infringe the rights of particular individual (see also Bernatchez). When Charter values are applied to a particular administrative decision, they are applied with respect to a specific set of facts. Dunsmuir tells us that restraint is in order in such a case (para. 53; see also Suresh v. Canada (Minister of Citizenship and Immigration) , 2002 SCC 1 , [2002] 1 SCR 3 , para. 39). On the other hand, when determining whether a particular "law" complies with the Charter , we are talking about principles of general application.

[452] Doré " establishes the framework of analysis applicable to decide whether a minister has exercised his discretionary power in accordance with the relevant provisions" [218] of the Charter . It follows a "series of conflicting decisions" [219] by the Supreme Court on this issue. It is now clearly

established that it is the administrative law approach that must be applied in these circumstances and not that of section 1 of the Charter .

[453] However, when the constitutionality of a law is in issue, it is the section 1 test that applies.

[454] In this regard, the Tribunal notes that Chief Justice McLachlin is careful at paragraph 118 of PHS to highlight the difference between the issue at issue in that case, a Minister's decision, and the decision in Parker where the law was disputed. In the recent R. v. Nur , [220] Chief Justice McLachlin again emphasizes this distinction .

[455] Moreover, in PHS , the Minister's discretion was not directly challenged. Its existence was a significant factor in the Court's conclusion regarding the constitutionality of section 4 of the LDAS .

[456] In the view of the Tribunal, Chief Justice McLachlin's comments in PHS about the exercise of ministerial discretion in a manner consistent with the Charter do not operate to undermine the conclusion of Rosenberg J. in Parker who expresses the opinion that a discretionary power which is not framed by any criterion cannot be a reasonable limit.

[457] The recent R. c. Smith of the Supreme Court confirms that the authority of the Ontario Court of Appeal's decision in Parker is not questioned by the Supreme Court .

[458] Furthermore, the assertion that the Minister's discretion must be exercised in a manner consistent with the Charter does not suffice to remedy the obvious deficiencies of section 500.1, since it does not contain any criteria to regulate the exercise of the discretionary power it confers.

[459] The same is true of the argument that discretion must be interpreted according to the purpose and scheme of COSA .

[460] The approach suggested by the Attorney General requires adding language to s. 500.1 that is missing.

[461] In the Tribunal's view, s . 61.5(9)(c) of the Canada Labor Code), Little Sisters (section 163(8) of the Criminal Code), Doré (the interpretation of an ethical standard) and Divito c. Canada (Public Safety and Emergency Preparedness) [223] (section 10 of the International Transfer of Offenders Act).

[462] As La Forest J. pointed out in Eldridge v. British Columbia (Attorney General) : “not all discretionary provisions can be interpreted in a manner consistent with the Charter ” [224] .

[463] In R. c. Nova Scotia Pharmaceutical Society , Gonthier J. eloquently describes the problem with overly broad discretionary statutory provisions such as section 500.1:

What is more of a problem are not so much general terms conferring a broad discretionary power, as terms which do not give, as to the mode of exercise of this power, indications making it possible to control it . Again, an impermissibly vague law does not provide a sufficient basis for legal debate; it does not provide sufficient guidance as to how decisions should be made, such as the factors to be taken into account or the determinants. By giving a discretionary power that allows full latitude, it deprives the judiciary of the means of controlling the exercise of the discretionary power [225] .

[Emphasis added]

[464] The remarks of Justice L'Heureux-Dubé in Committee for the Commonwealth of Canada c. Canada go in the same direction:

In addition, the regulations provide that "unless authorized in writing by the Minister, no person may . . . ". It is clear that the Minister has "full discretionary powers to do what seems best to him". This in itself can create a standard that is imprecise to the point of being incomprehensible. In any event, the vagueness attributable to the absence of an understandable standard is not in accordance with the principles that the restriction of a right or freedom must be "prescribed by a rule of law".

It could be argued that in a prior authorization regime, as here, the standard is not imprecise. It could be argued that such provisions allow citizens to regulate their conduct because they clearly establish that anyone wishing to solicit or advertise must first obtain the Minister's authorization. However, this merely shifts the problem of arbitrariness from the "prescribed by law" element to the "means" element of the s. 1 test .

[…]

The provision at issue in this case does not stand a chance of meeting that standard. As a result of its vagueness and overbreadth, it is impossible to determine which activities are truly prohibited.

Moreover, the absolute discretion available to the Minister himself greatly reduces the reasonableness and predictability of its application . Those affected by the Regulations should not be left guessing at the cases and circumstances in which the Regulations will apply . Such speculation is inconsistent with the spirit, purpose and objectives of our Charterand is completely unacceptable constitutionally: the justification for the restriction has not been demonstrated in the context of a free and democratic society .

[Emphasis added]

[465] In the opinion of the Court, the principles formulated by Justices Gonthier and L'Heureux-Dubé apply perfectly to the analysis of section 500.1 and they can lead to only one conclusion, that of its unconstitutionality.

[466] The constitutional right to demonstrate on a public road is a right whose collective dimension must not be ignored. This right should not depend on the discretionary power of the person responsible for the maintenance of the public road, especially when the legislator has not specified the conditions for its exercise [228] .

[467] Moreover, according to the recent judgment of the Supreme Court in R. c. Nur [229] , the constitutionality of section 500.1 cannot rest on the exercise of the discretion of the person responsible for the maintenance of the public road.

[468] Indeed, here is what Chief Justice McLachlin writes on this subject:

[95] Two other points can be made against the idea that prosecutorial discretion can remedy the fact that a sentencing provision infringes s . 12 of the Charter . First, no one can be assured that this power will always be exercised in such a way as to avoid an unconstitutional result. Nor can the constitutionality of a legislative provision depend on the confidence that one can have that the Crown will act properly (Lavallee, Rackel & Heintz v. Canada (Attorney General) , 2002 SCC 61 , [2002] 3 SCR 209 , para. 45). As Justice Cory said on behalf of the majorityin R. v. Bain , 1992 CanLII 111 (SCC) , [1992] 1 SCR 91 , at p. 103-104 :

Unfortunately, it would seem that whenever the Crown is granted a power by statute that can be abused, it indeed will be on occasion. The protection of fundamental rights should not be based on trust in the permanent exemplary behavior of the public prosecutor, something which cannot be monitored or controlled. It would be preferable for the offending legislative provision to be abolished.

[Emphasis added]

[469] In Vancouver (City) v. Zhang [230] , who challenged the constitutionality of a municipal by-law that restricted the erection of expressive structures on Vancouver City lands, Justice Huddart of the British Columbia Court of Appeal addresses the role discretion of a city council to grant individualized permissions using an approach similar to that in the Nur case :

69 Despite this constitutionally-fundamentally-protected right to expression, the By-law maintains a general prohibition subject to Council's unfettered discretion to mete out individual exemptions . The City says that "[w]ithout this general prohibition the entire regulatory scheme would fail as it is impossible for the City to foresee and legislate in relation to every possible obstruction or encroachment". This may be, but no evidence or argument was put forward as to why the City could not develop a policy allowing for the administrative regulation of political expression comparable to those in place for commercial and artistic expression. Had the Council instituted what might be called a "Political Structure Policy," as it did policies for commercial and artistic expression, as part of its regulatory scheme, my conclusion might well be different.But they chose to maintain a complete ban and, effectively, to rely on prosecutorial discretion and Council's power to direct the use of that discretion, to ensure the right to freedom of political expression was not infringed in an individual case . In so doing, I am persuaded, they rendered s. 71 unconstitutional and of no force or effect. They reached beyond that which is permitted to them when political speech is the right sought to be exercised. It cannot be said that there is not a more reasonably tailored regulatory scheme.

[Emphasis added]

[470] Moreover, in assessing the existence of less intrusive means, the test that must be applied "consists of asking whether there is another less intrusive means of achieving the objective in a real and substantial way » [231] .

[471] In this regard, an examination of the regulatory or legislative framework put in place by other free and democratic societies makes it possible to identify the scope of constitutional rights and the limits recognized under supporting provisions .

[472] The OSCE Guidelines on Freedom of Peaceful Assembly shares the Supreme Court's concern with the criteria for discretion when a state chooses to intervene by way of establishment of a permit system:

In regulating freedom of assembly, well-drafted legislation is vital in framing the discretion afforded to the authorities .

[…]

Any restrictions imposed must have a formal basis in law and be in conformity with the European Convention on Human Rights and other international human rights instruments. To this end, well-drafted legislation is vital in framing the discretion afforded to the authorities. The law itself must be compatible with international human rights standards and be sufficiently precise to enable an individual to assess whether or not his or her conduct would be in breach of the law, as well as the likely consequences of any such breaches .

[…]

Any permit system must clearly prescribe in law the criteria for issuance of a permit. In addition, the criteria should be confined to considerations of time, place and manner, and should not provide a basis for content-based regulation [235] .

[…]

The regulatory authorities should ensure that the decision-making process is accessible and clearly explained. The process should enable the fair and objective assessment of all available information. Any restrictions placed on an assembly should be communicated promptly and in writing to the event organizers, with an explanation of the reason for each restriction. Such decisions should be taken as early as possible so that any appeal to an independent court can be completed before the date for the assembly provided in the notification [236] .

[473] The legitimacy of setting up a permit system before a demonstration is held is accepted in American law, but this recognition is accompanied by a rigorous framework for the discretionary power of the authorities.

[474] American law is summarized in a recent Law Library of Congress document as follows:

The First Amendment to the United States Constitution prohibits the United States Congress from enacting legislation that would abridge the right of the people to assemble peaceably. The Fourteenth Amendment to the United States Constitution makes this prohibition applicable to state governments.

The Supreme Court of the United States has held that the First Amendment protects the right to conduct a peaceful public assembly. The right to assemble is not, however, absolute.

Government officials cannot simply prohibit a public assembly in their own discretion, but the government can impose restrictions on the time, place, and manner of peaceful assembly, provided that constitutional safeguards are met. Time, place, and manner restrictions are permissible so long as they "are justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information."

Such time, place, and manner restrictions can take the form of requirements to obtain a permit for an assembly. The Supreme Court has held that it is constitutionally permissible for the government to require that a permit for an assembly be obtained in advance.

The government can also make special regulations that impose additional requirements for assemblies that take place near major public events.

In the United States, the organizer of a public assembly must typically apply for and obtain a permit in advance from the local police department or other local governmental body. Applications for permits usually require, at a minimum, information about the specific date, time, and location of the proposed assembly, and may require a great deal more information.

Localities can, within the boundaries established by Supreme Court decisions interpreting the First Amendment right to assemble peaceably, impose additional requirements for permit applications, such as information about the organizer of the assembly and specific details about how the assembly is to be conducted.

The First Amendment does not provide the right to conduct an assembly at which there is a clear and present danger of riot, disorder, or interference with traffic on public streets, or other immediate threat to public safety or order. Statutes that prohibit people from assembling and using force or violence to accomplish unlawful purposes are permissible under the First Amendment [237] .

[475] In Thomas v. Chicago Park District , [238] Justice Scalia summarized the requirements of American law as follows:

Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content . See Forsyth County v. Nationalist Movement, 505 US 123 , 131 (1992). We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review . See Niemotko , supra, at 271. Petitioners contend that the Park District's ordinance fails this test.

We think not. As we have described, the Park District may deny a permit only for one or more of the reasons set forth in the ordinance . See n. 1, supra . It may deny, for example, when the application is incomplete or contains a material falsehood or misrepresentation; when the applicant has damaged Park District property on prior occasions and has not paid for the damage; when a permit has been granted to an earlier applicant for the same time and place; when the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant has violated the terms of a prior permit. See Chicago Park Dist. Code, c. VII, §C.5.e. Moreover,the Park District must process applications within 28 days, §C.5.c, and must clearly explain its reasons for any denial, §C.5.e. These grounds are reasonably specific and objective, and do not leave the decision “to the whim of the administrator .” Forsyth County, 505 US, at 133. They provide “'narrowly drawn, reasonable and definite standards' ” to guide the licensor's determination , ibid. (quoting Niemotko , supra, at 271). And they are enforceable on review—first by appeal to the General Superintendent of the Park District, see Chicago Park Dist. Code, c. VII, §C.6.a, and then by writ of common-law certiorari in the Illinois courts, see Norton v.Nicholson, 187 Ill. App. 3d 1046 , 543 NE 2d 1053 (1989), which provides essentially the same type of review as that provided by the Illinois administrative procedure act, see Nowicki v. Evanston Fair Housing Review Bd. , 62 Ill. 2d 11, 14, 338 NE 2d 186 , 188 (1975) [239] .

[Emphasis added]

[476] In his article The Neglected Right of Assembly , author Tabatha Abu El-Haj describes the permit system in place in several American cities thus:

To demonstrate, parade, or make a speech in public in the United States today, a person or organization must generally go (often well in advance) to the local police department, or to some other municipal department, to fill out required paperwork and to obtain a permit from government officials. A survey of twenty American cities reveals that all of them have extensive permit requirements for gatherings on public streets and most have similar requirements for public parks [240] .

[477] American and European law therefore show an approach similar to that of Canadian law in terms of regulating a system of prior authorization.

[478] A public authority is not required to set up a prior permit or authorization system. It is possible to limit the sending of a notice before the holding of a demonstration [241] .

[479] However, when the route of the system of prior authorization is chosen, the discretionary power to grant this authorization must be framed by precise criteria that are understandable to the public and those who apply it.

3.5.5. Is 500.1 CSR proportionate in its effects?

[480] At the final stage of the analysis, the question "is whether the consequences of the infringement of rights are disproportionate to the likely beneficial effects of the impugned legislation" [242] or "whether the beneficial effects of the impugned legislation justify the cost of restricting the right" [243] .

[481] In this case, the Court does not consider it appropriate to conduct a lengthy analysis.

[482] The constitutional right to demonstrate on a public road can be exercised by thousands of citizens.

[483] The prejudice caused to this constitutional right by an entirely discretionary prior authorization system is totally disproportionate to the benefits in terms of the safe circulation of road vehicles on public roads, both for the drivers and passengers of the vehicles and for pedestrians, and the free movement of goods.

3.5.6. Conclusions on justification

[484] Section 500.1 violates the freedoms of expression and peaceful assembly protected by the Quebec and Canadian charters. This limitation is not justified in the context of a free and democratic society, because it is possible to set up a system of prior authorization which limits the discretionary power to authorize a demonstration.

[485] Section 500.1 must be declared invalid. The only question that arises is whether this declaration should refer to the whole of the article or simply to the third paragraph which provides for an unconstitutional prior authorization regime.

[486] According to the Court, the declaration must refer to the entire article, since it is up to the legislator to review the entire system put in place [244] .

IV - Conclusion and redress

4.1. Should the effect of the declaration of invalidity of section 500.1 CSR be suspended?

[487] In Schachter v. Canada [245] , Chief Justice Lamer sets out three situations which justify the temporary suspension of the effect of a declaration of invalidity:

A court may declare a law or legislative provision inoperative, but suspend the effect of this declaration until the federal or provincial legislator has had an opportunity to fill the void. This method is very appropriate when the annulment of a provision presents a danger to the public (R. v. Swain , supra) or undermines the rule of law (Reference re Manitoba Language Rights , 1985 CanLII 33 (SCC) , [1985] 1 SCR 721). This method might also be appropriate in cases where a provision is limiting as opposed to cases where it is too broad [246] .

[488] Professor Roach considers that these are not watertight and rigid categories. Here is his description of this power:

Courts have often been attracted to suspended declarations of invalidity because of their recognition that legislatures have a legitimate role and a broader range of options in devising constitutional responses to court decisions. At the same time, the Supreme Court in Schachter warned that suspended declarations of invalidity should not become routine and that they can force matters back on the legislative agenda. A number of commentators have criticized the Court for routinely suspending declarations of invalidity and not justifying its decisions. These criticisms have some validity, but the answer is not to abandon the useful technique of a suspended declaration of invalidity or to retreat to the three limited categories or pigeonholes outlined in Schachter. Rather, courts should justify the use of suspended declarations in each case on the basis of remedial principles.

Suspended declarations should be used where an immediate declaration could cause a significant social harm including but not limited to threats to the rule of law and public safety . Suspended declarations should also be used in cases of unconstitutionally under-inclusive legislation where legislatures have a range of remedial options such as extending but also reducing benefits that are not open to the court. More generally, they should be used in cases where legislatures can select among a number of options in complying with the court's interpretation of the Charter . This latter principle is in tension with Lamer CJC's statement in Schachter that the use of suspended declarations of invalidity should “turn not on considerations of the role of the courts and legislatures” but rather on the three listed categories. Nevertheless, the need to respect the roles of courts and legislatures has emerged as important principles that govern constitutional remedies in the Court's subsequent remedial jurisprudence and indeed in its own decision in Schachter with respect to when reading in would be an appropriate subsection 52(1) remedies [247] .

[I underline]

[489] The effect of the declaration of invalidity of section 500.1 must be suspended because of the dangers in terms of road safety and the movement of goods which would be likely to arise if its effect were immediate, even if , according to the evidence presented before the trial judge, police forces are often able to adequately manage the holding of demonstrations whose route they do not know.

[490] The challenge posed by the amendments that must be made to the Highway Safety Code is far from insurmountable. A period of six months seems reasonable [248] .

4.2. The Appellant's Conviction

[491] This is a challenge to the constitutionality of the offense under which the statement of offense was issued against the appellant. This article is invalid. The appellant must be acquitted [249] .

[492] Had it not been for the conclusion regarding the invalidity of section 500.1, the Court would have ordered, under the powers conferred by the second paragraph of section 285 of the Code of Penal Procedure , the holding of a new direction to assess the scope of the opinion given by the police on March 15, 2011 at 5:09 p.m. with regard to the appellant's guilt or the assessment of the question of the error caused by a person in a situation of authority.

[493] Although this question was not argued at trial because of the appellant's conditional guilty plea, the hearing of the appeal reveals that the interests of justice would have justified the holding a new instruction to assess these issues. These comments should not be seen as a criticism of the trial

judge or of the parties. The benefit of hindsight is often an indicator that allows the identification of questions relevant to the interests of justice.

[494] FOR THESE REASONS, THE TRIBUNAL:

[495] DECLARES section 500.1 of the Highway Safety Code invalid;

[496] SUSPEND the declaration of invalidity for a period of six months;

[497] ACQUITS the appellant;

[498] ALL free of charge.

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