
CANADA / JUDGMENT

R. v. Pearson

[1992] 3 SCR 665

COURT

Supreme Court of Canada

DECIDED

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R. v. Pearson

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Supreme Court Judgments

Date

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Report

[1992] 3 SCR 665

Case number

22173

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles
Doherty; McLachlin, Beverley; Iacobucci, Frank

On appeal from

Quebec

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 22173

Decision Content

R. v. Pearson, [1992] 3 S.C.R. 665

The Attorney General of Quebec Appellant

v.

Edwin Pearson Respondent

and

The Attorney General of Canada,

the Attorney General for Ontario,

the Attorney General for Saskatchewan

and the Criminal Lawyers' Association Intervenors

Indexed as: R. v. Pearson

File No.: 22173.

1992: May 28; 1992: November 19.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for quebec

Constitutional law -- Charter of Rights -- Remedy -- Habeas corpus -- Accused charged with trafficking in narcotics and denied bail -- Accused challenging constitutionality of bail provisions -- Whether habeas corpus available remedy -- Canadian Charter of Rights and Freedoms, s. 24(1) -- Constitution Act, 1982, s. 52 -- Criminal Code, R.S.C., 1985, c. C-46, ss. 515(6) (d), 520 .

Constitutional law -- Charter of Rights -- Right to bail -- Reverse onus -- Accused charged with trafficking in narcotics and denied bail -- Criminal Code provision requiring accused to show cause why detention pending trial not justified -- Whether provision infringes s. 11 (e) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, ss. 515(6) (d), 515(10) (b).

Constitutional law -- Charter of Rights -- Fundamental justice -- Presumption of innocence -- Right to bail -- Accused charged with trafficking in narcotics and denied bail -- Criminal Code provision requiring accused to show cause why detention pending trial not justified -- Whether provision infringes s. 7 of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 515(6) (d).

Constitutional law -- Charter of Rights -- Presumption of innocence -- Reverse onus -- Bail -- Accused charged with trafficking in narcotics and denied bail -- Criminal Code provision requiring accused to show cause why detention pending trial not justified -- Whether provision infringes s. 11 (d) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 515(6) (d).

Constitutional law -- Charter of Rights -- Arbitrary detention -- Accused charged with trafficking in narcotics and denied bail -- Criminal Code provision requiring accused to show cause why detention pending trial not justified -- Whether accused arbitrarily detained -- Canadian Charter of Rights and Freedoms, s. 9 -- Criminal Code, R.S.C., 1985, c. C-46, s. 515(6) (d).

Criminal law -- Judicial interim release -- Order of detention -- Accused charged with trafficking in narcotics and denied bail -- Criminal Code provision requiring accused to show cause why detention pending trial not justified -- Whether provision infringes ss. 7 , 9 , 11 (d) or 11 (e) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, ss. 515(6) (d), 515(10) (b).

The accused was charged with five counts of trafficking in narcotics, contrary to s. 4 of the Narcotic Control Act, and was ordered detained until trial. At the preliminary inquiry, the accused was committed to trial and the judge refused his application, under s. 523(2) (b) of the Criminal Code , to review the order denying bail. The accused then brought an application for habeas corpus, arguing that s. 515(6)(d) of the Code is unconstitutional, and that accordingly his detention was illegal. This section provides that an accused charged with having committed a drug offence under s. 4 or 5 of the Narcotic Control Act, or with conspiracy to commit any of these offences, shall be detained in custody until trial unless he shows cause why his detention is not justified. The Superior Court judge dismissed the accused's application on the ground that there was an alternative remedy, namely a review of the bail order under s. 520 of the Code. The Court of Appeal allowed the accused's appeal, holding that habeas corpus was an available remedy in the circumstances and that s. 515(6)(d) of the Code violates ss. 9 , 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms and is not justified under s. 1 . The court found it unnecessary to analyze s. 515(6) (d) under s. 7 of the Charter .

Held (La Forest and McLachlin JJ. dissenting): The appeal should be allowed and the application for habeas corpus dismissed.

(1) Habeas Corpus

In the narrow circumstances of this case, habeas corpus is available as a remedy against a denial of bail. The accused's claim is a special type of constitutional claim. He is seeking (1) a determination that s. 515(6)(d) of the Code violates the Charter and therefore is of no force and effect under s. 52 of the Constitution Act, 1982 ; and (2) a remedy under s. 24(1) of the Charter , namely a new bail hearing in accordance with criteria for determining bail which are constitutionally valid. Where the refusal to grant bail is challenged in a s. 52 claim coupled with an application for a remedy under s. 24(1) , habeas corpus is an adequate remedy. The constitutional claim can be determined without evidence about the applicant's specific

circumstances. If the claim is successful, the court can then order a new bail hearing. In these circumstances, an application for habeas corpus must not fail merely because another remedy is also available. Technical legal distinctions which interfere with the court's ability to adjudicate Charter claims are to be rejected. Outside the narrow circumstances of this case, however, habeas corpus is not an appropriate remedy for a denial of bail. Under s. 24(1) of the Charter, courts should not allow habeas corpus applications to be used to circumvent the appropriate appeal process. In general, a challenge to a denial of bail should be brought by means of a review under s. 520 of the Code.

(2) Validity of s. 515(6) (d) of the Criminal Code

Per Lamer C.J. and Sopinka and Iacobucci JJ.: Section 515(6)(d) of the Code, to the extent that it requires the accused to show cause why detention is not justified, does not violate ss. 7, 9, 11 (d) or 11 (e) of the Charter.

Section 11 (d) of the Charter creates a procedural and evidentiary rule which operates at the trial requiring the prosecution to prove the guilt of the accused beyond a reasonable doubt. This section has no application at the bail stage of the criminal process where guilt or innocence is not determined and where punishment is not imposed. But s. 11(d) does not exhaust the operation of the presumption of innocence as a principle of fundamental justice under s. 7 of the Charter. The presumption of innocence under s. 7 applies at all stages of the criminal process and its particular requirements will vary according to the context in which it comes to be applied. In this case, however, the Charter challenge falls to be determined according to s. 11 (e) of the Charter, rather than under s. 7. Section 11 (e) offers "a highly specific guarantee" which covers precisely the accused's complaint. The substantive right in s. 7 to be presumed innocent at the bail stage does not contain any procedural content beyond that contained in s. 11 (e).

Section 11 (e) creates a broad right guaranteeing both the right to obtain bail and the right to have that bail set on reasonable terms. The meaning of "bail" in s. 11 (e) includes all forms of judicial interim release. While s. 515(6)(d) requires the accused to demonstrate that detention is not justified, thereby denying the basic entitlement under s. 11 (e) to be granted bail unless pre-trial detention is justified by the prosecution, it provides "just cause" to deny bail in certain circumstances and therefore does not violate s. 11 (e). First, the denial of bail occurs only in a narrow set of circumstances. Second, it is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system. Section 515(6) (d) applies only to a very small number of offences, all of which involve the distribution of narcotics, and bail is denied only when the persons who are charged with these offences are unable to demonstrate that detention is not justified having regard to the specified grounds set out in s. 515(10)(a) and (b) of the Code. The special bail rules in s. 515(6)(d) merely establish an effective bail system for specific offences for which the normal bail system would allow continuing criminal behaviour and an intolerable risk of absconding. Because of their unique characteristics, the offences subject to s. 515(6)(d) are generally committed in a very different context than most other crimes. Trafficking in narcotics occurs systematically, usually within a highly sophisticated and lucrative commercial setting, creating huge incentives for an offender to

continue criminal behaviour even after arrest and release on bail. There is also a marked danger that an accused charged with these offences will abscond rather than appear for trial. Drug importers and traffickers have access both to a large amount of funds and to organizations which can assist in a flight from justice. The special bail rules in s. 515(6)(d) combat the pre-trial recidivism and absconding problems by requiring the accused to demonstrate that they will not arise. The scope of these special rules is thus carefully tailored to achieve a properly functioning bail system. Section 515(6)(d) also applies to small or casual drug dealers, but they will normally have no difficulty justifying their release and obtaining bail. Section 515(6)(d) allows differential treatment based on the seriousness of the offence. Moreover, the onus which it imposes is reasonable in the sense that it requires the accused to provide information which he is most capable of providing.

While s. 515(6)(d) provides for persons to be "detained" within the meaning of s. 9 of the Charter, those persons are not detained "arbitrarily". Detention under s. 515(6) (d) is not governed by unstructured discretion. The section fixes specific conditions for bail. Furthermore, the bail process is subject to very exacting procedural guarantees and subject to review by a superior court.

Normally an order for a new bail hearing would have been issued under s. 686(8) of the Code and a reasonable opportunity given to the accused to show cause why his detention is not justified having regard to the grounds set out in s. 515(10), including s. 515(10) (b) as altered by this Court in *Morales*. There will be no such order in this case, however, since the accused has already been tried, convicted and sentenced. That order would be of no force or effect as the issue of the accused's liberty is moot.

Per L'Heureux-Dubé and Gonthier JJ.: The reasons of Lamer C.J. were agreed with, subject to the reasons of Gonthier J. in *Morales* in which he concludes that the criterion of public interest in s. 515(10)(b) of the Code is not unconstitutional, and subject to some concerns about the manner in which the presumption of innocence, as an integral value protected by s. 7 of the Charter, is dealt with by the Chief Justice in relation to the bail provisions of the Code. The analysis leading to the decision as to bail entails a consideration and weighing of the accused's entitlement to bail or liberty interest on the one hand, and the circumstances provided for in s. 515(10) which may justify a denial of bail on the other. The liberty interest is only one albeit an important factor to be considered and may be outweighed by others.

Per McLachlin J. (dissenting): The reasons of Lamer C.J. were agreed with except for his conclusion that s. 515(6)(d) of the Code does not violate s. 11 (e) of the Charter. Section 515(6) (d) denies bail to all persons charged with having committed an offence under s. 4 or 5 of the Narcotic Control Act who cannot show cause why their detention in custody is not justified. This section fails to distinguish between the large-scale commercial drug trafficker and small or casual traffickers and its wide scope can be used to deny bail to people when there is no reason or "just cause" for doing so. The risk that the accused will continue his criminal activity while awaiting trial or will abscond and not appear for trial may be "just cause" for denying bail to persons charged with serious, large-scale or commercial trafficking, but these reasons do not

apply to other traffickers. Where bail is denied without just cause, s. 11 (e) of the Charter is infringed. The mere possibility of denial of bail without "just cause" is enough to overturn s. 515(6) (d).

Section 515(6)(d) of the Code is not justifiable under s. 1 of the Charter . While the legislative objectives of avoiding repeat offences and absconding are of sufficient importance to warrant overriding a constitutional right, s. 515(6) (d) goes further than is necessary to achieve those objectives. There is no reason to conclude that small and casual traffickers pose any particular threat of repeating the offence or fleeing from their trial. Section 515(6) (d) is thus of no force and effect pursuant to s. 52 of the Constitution Act, 1982 .

Per La Forest J. (dissenting): For the reasons given by McLachlin J., s. 515(6)(d) of the Code violates s. 11 (e) of the Charter and is not justifiable under s. 1 . It is unnecessary to deal with the other provisions of the Charter .

Cases Cited

By Lamer C.J.

Applied: *R. v. Morales*, [1992] 3 S.C.R. 000; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Hufsky*, [1988] 1 S.C.R. 621; referred to: *R. v. Oakes*, [1986] 1 S.C.R. 103; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *Imperial Oil Ltd. v. Tanguay*, [1971] C.A. 109; *Dean v. Dean*, [1987] 1 F.L.R. 517; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. G  n  reux*, [1992] 1 S.C.R. 259; *Stack v. Boyle*, 342 U.S. 1 (1951); *Carlson v. Landon*, 342 U.S. 524 (1952); *United States v. Edwards*, 430 A.2d 1321 (1981), certiorari denied 455 U.S. 1022 (1982); *United States v. Salerno*, 481 U.S. 739 (1987); *R. v. Bray* (1983), 2 C.C.C. (3d) 325; *R. v. Lauze* (1980), 17 C.R. (3d) 90; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Wilson*, [1990] 1 S.C.R. 1291.

By Gonthier J.

Referred to: *R. v. Morales*, [1992] 3 S.C.R. 000.

By McLachlin J. (dissenting)

R. v. Drysdelle (1978), 41 C.C.C. (2d) 238; *R. v. Larson* (1972), 6 C.C.C. (2d) 145.

Statutes and Regulations Cited

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Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

Bail Reform Act, S.C. 1970-71-72, c. 37.

Canadian Charter of Rights and Freedoms, ss. 1 , 7 , 8 , 9 , 11 (d), (e), 24(1) .

Constitution Act, 1982, s. 52 .

Constitution of the United States, Eighth Amendment.

Criminal Code, R.S.C., 1985, c. C-46, ss. 254(3) [rep. & sub. c. 27 (1st Supp.), s. 36], 487(1) [am. idem, s. 68], 504, 507(1) [idem, s. 78], 515(1) [rep. & sub. idem, s. 83], 515(2) [am. idem, s. 186 (Sch. IV, item 7)], 515(5), 515(6)(d), 515(7), 515(8), 515(10)(a), 515(10)(b), 516, 518(1)(b), 520(1) [rep. & sub. idem, s. 86], 520(8), 521, 523(2)(b) [idem, s. 89], 525(1) [am. idem, s. 90], 525(3), 686(8), 784(3).

Narcotic Control Act, R.S.C., 1985, c. N-1, ss. 2 "traffic", 4, 5.

Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, SI/74-53, s. 15 [am. SI/89-52].

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United States. Senate. Judiciary Committee. Report No. 98-225, Comprehensive Crime Control Act, 1983, 98th Cong., 1st Sess. Report of the Committee on the Judiciary on S. 1762. Washington: U.S.G.P.O., 1983.

Verrilli Jr., Donald B. "The Eighth Amendment and the Right to Bail: Historical Perspectives" (1982), 82 Colum. L. Rev. 328.

APPEAL from a judgment of the Quebec Court of Appeal, [1990] R.J.Q. 2438, 79 C.R. (3d) 90, 5 C.R.R. (2d) 164, 59 C.C.C. (3d) 406, setting aside a judgment of the Superior Court, dismissing an application for a writ of habeas corpus. Appeal allowed, La Forest and McLachlin JJ. dissenting.

Robert Marchi, for the appellant.

Christian Desrosiers, for the respondent.

Jacques Malb{oe}uf, Q.C., for the intervener the Attorney General of Canada.

J. A. Ramsay, for the intervener the Attorney General for Ontario.

John Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Bruce Duncan and Aimée Gauthier, for the intervener the Criminal Lawyers' Association.

//Lamer C.J.//

The judgment of Lamer C.J. and Sopinka and Iacobucci JJ. was delivered by

Lamer C.J. -- This appeal was argued along with *R. v. Morales*, [1992] 3 S.C.R. 000. Both cases involve the constitutionality of the bail provisions of the Criminal Code, R.S.C., 1985, c. C-46 , and for the first time require this Court to examine the scope of the right to bail under s. 11 (e) of the Canadian Charter of Rights and Freedoms .

I - Facts

The respondent Edwin Pearson was arrested in September 1989 and charged with five counts of trafficking in narcotics, contrary to s. 4 of the Narcotic Control Act, R.S.C., 1985, c. N-1. A bail hearing was held shortly after his arrest. Pearson was denied bail and ordered detained in custody until trial.

Shortly thereafter, a preliminary inquiry was held and Pearson was committed to trial. At the end of the preliminary inquiry, Pearson brought an application to the preliminary inquiry judge under s. 523(2) (b) of the Criminal Code to review the order that he remain in custody until trial. The preliminary inquiry judge refused to review this order.

Pearson then brought an application for habeas corpus. He argued that s. 515(6) (d) of the Criminal Code is unconstitutional, and that accordingly his detention was illegal. The habeas corpus application was heard by Biron J. of the Quebec Superior Court on November 17, 1989. At the outset of the hearing, the Attorney General of Canada obtained leave to intervene in the application and moved to dismiss the application on the ground that there was an alternative remedy, namely a review of the bail order under s. 520 of the Criminal Code . Biron J. granted this motion and dismissed Pearson's application.

Pearson appealed. On September 10, 1990, the Quebec Court of Appeal allowed the appeal, holding that habeas corpus was an available remedy in the circumstances and that s. 515(6) (d) of the Criminal Code violates ss. 9 , 11 (d) and 11 (e) of the Charter : [1990] R.J.Q. 2438, 59 C.C.C. (3d) 406, 5 C.R.R. (2d) 164, 79 C.R. (3d) 90.

The Attorney General of Quebec now appeals to this Court. The Attorney General of Canada, the Attorney General for Ontario and the Attorney General for Saskatchewan have intervened in support of the position taken by the Attorney General of Quebec. The Criminal Lawyers' Association has intervened in support of the position taken by the respondent.

II - Relevant Statutory and Constitutional Provisions

At issue in this appeal is the validity of s. 515(6) (d) of the Criminal Code , which reads as follows:

515. . . .

(6) Notwithstanding any provision of this section, where an accused is charged

...

(d) with having committed an offence under section 4 or 5 of the Narcotic Control Act or the offence of conspiring to commit an offence under section 4 or 5 of that Act,

the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified, but where the justice orders that the accused be released, he shall include in the record a statement of his reasons for making the order.

Section 515(6) (d) is challenged under ss. 7 , 9 , 11 (d) and 11 (e) of the Charter , which read as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

III -- Lower Court Judgments

Quebec Superior Court

Biron J. held that the application for habeas corpus was a disguised review of the order that Pearson be detained in custody until trial. Biron J. held that such a review should have been brought under s. 520 of the Criminal Code , and that it would be incongruous to release Pearson solely on the basis of the unconstitutionality of s. 515(6) (d). A review under s. 520 could determine the constitutional issue and could also determine whether, without application of s. 515(6) (d), the accused should be granted bail.

As a result, Biron J. dismissed the application, but expressly reserved the right to bring an application for review in the appropriate form.

Quebec Court of Appeal (Rothman, Baudouin and Proulx JJ.A.)

The reasons of the court were delivered by Proulx J.A. Considering the availability of habeas corpus as a means to attack the constitutionality of s. 515(6) (d), Proulx J.A. held that Pearson's application was effectively an application for a remedy under s. 24(1) of the Charter , and accordingly no recourse to habeas corpus was needed at all. Furthermore, according to R. v.

Gamble, [1988] 2 S.C.R. 595, in the constitutional context a valid application for habeas corpus could not fail merely because another remedy was also available. Proulx J.A. disagreed with Biron J.'s conclusion that the application was a disguised review of the order that Pearson be detained in custody until trial. A review has a different scope than an application for habeas corpus. In a review, an applicant can adduce fresh evidence and argue that the justice made a manifest error in assessing the evidence. An application for habeas corpus would be restricted to the constitutional issue. Proulx J.A. held that Pearson could not be deprived of his right to this remedy.

On the merits of the application, Proulx J.A. held that the right to bail under s. 11 (e) is not absolute but rather is limited by the concept of "just cause". He considered several definitions of "just cause" and noted that pre-trial detention entails serious repercussions. Proulx J.A. held that bail constitutes an essential element of procedural equity and is a right closely related to the rights under ss. 9 and 11 (d). In this context, Proulx J.A. held that "just cause" must consist of a restriction which is rational, necessary, equitable and consistent with other procedural guarantees. Proulx J.A. held that the primary and secondary grounds for detention of an accused which are set out in s. 515(10) constitute just cause justifying the deprivation of liberty.

Proulx J.A. held that it is completely arbitrary and unjust to create an exception to the bail regime without considering the nature of the narcotic, the seriousness of the offence, the likelihood of conviction, the degree of participation and the individual's specific circumstances. There is no rational basis for treating someone charged with possession of a small quantity of hashish for the purpose of trafficking in the same manner as a repeat offender charged with trafficking cocaine. The situation is worsened by the lack of analogous treatment of more dangerous offences, such as sexual assault, domestic assault and extortion. Furthermore, the onus on the accused is not even necessary because the Crown has the opportunity to oppose bail and to show that the public interest requires the detention of the accused.

Proulx J.A. held that s. 515(6) (d) is inconsistent with the concept of just cause because it requires persons accused of certain offences to be detained unless there is just cause to release them. Proulx J.A. also found the manner of applying this regime on the basis of the charge laid against the accused to be arbitrary and discriminatory.

Turning to s. 11 (d), Proulx J.A. held that the presumption of innocence applies at all stages of criminal proceedings, and not just at the stage of ultimate disposition. Proulx J.A. held that a general rule of mandatory detention based solely on the charge prevents the treatment of the accused as a person who is presumed innocent. Detention increases the likelihood that the accused will be found guilty. In addition, Proulx J.A. noted that s. 11 (d) protects the right to a fair trial, and held that the rights to a fair trial and to make full answer and defence cannot be preserved without the right to bail.

Turning to ss. 7 and 9 , Proulx J.A. held that his analysis of s. 11 (e) indicated the arbitrary character of s. 515(6) (d). This approach led him to conclude that s. 515(6) (d) violates s. 9 . Given that he had found violations of ss. 9 , 11 (d) and 11 (e), Proulx J.A. found it unnecessary to analyze s. 515(6) (d) under s. 7 .

Finally, Proulx J.A. turned to s. 1 . He found that s. 515(6) (d) passed the first branch of the test in *R. v. Oakes*, [1986] 1 S.C.R. 103, but failed the second branch. Proulx J.A. found no rational connection between the objective and the means chosen. The provision was discriminatory and arbitrary, and it had not been demonstrated that interim detention could reduce the incidence of crime. Proulx J.A. also found that the restriction did not constitute a minimal infringement of Charter rights. The goal of protecting the public could be achieved by using the general regime set out in s. 515 . Experience in the United States and England also served to demonstrate that such an arbitrary measure is unnecessary to achieve the objective which is shared in all free and democratic societies. As a result, Proulx J.A. held that s. 515(6) (d) was not justified under s. 1 .

As a result, the appeal was allowed and s. 515(6) (d) was held to violate ss. 9 , 11 (d) and 11 (e) of the Charter .

IV - Issues

The following constitutional questions were stated on April 9, 1991:

- 1.Does s. 515(6)(d) of the Criminal Code of Canada limit the rights guaranteed in ss. 7 , 9 , 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms ?
- 2.If so, is s. 515(6) (d) of the Criminal Code of Canada a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, as required by s. 1 of the Canadian Charter of Rights and Freedoms ?

V - Analysis

A. Habeas Corpus

Before considering the constitutional issues in this case, it is necessary to consider a preliminary issue involving the scope of habeas corpus. The appellant submits that habeas corpus is not available in this case because an alternative remedy exists, namely a bail review under s. 520 of the Criminal Code . While in general habeas corpus is not available as a remedy against a denial of bail, in my opinion habeas corpus is available as a remedy in the narrow circumstances of this case.

The availability of habeas corpus in this case is closely tied to the nature of the claim. The claim in this case is a constitutional claim. Moreover, it is a special type of constitutional claim. The respondent is seeking two constitutional remedies. First, he is seeking a determination that s. 515(6) (d) of the Criminal Code violates the Charter and therefore is of no force and effect under s. 52 of the Constitution Act, 1982 . Second, he is seeking a remedy under s. 24(1) , namely a new bail hearing in accordance with criteria for determining bail which are constitutionally valid.

Thus the respondent is making a s. 52 challenge coupled with an application for a s. 24(1) remedy.

In *R. v. Gamble*, supra, Wilson J. reviewed the scope of habeas corpus as a Charter remedy. She held that habeas corpus is a flexible Charter remedy which should be applied purposively in order to permit proper adjudication of Charter claims. She stated at p. 638:

In general, applicants for Charter relief should, I believe, be allowed a reasonable measure of flexibility in framing their claims for relief in light of the interests the Charter rights on which they rely were designed to protect.

Further, at p. 640 she stated:

. . . it is understandable that courts have, in general, not bound themselves to limited categories or definitions of jurisdictional review when the liberty of the subject was at stake. I think that this trend should be affirmed where habeas corpus is sought as a Charter remedy and that distinctions which have become uncertain, technical, artificial and, most importantly, non-purposive should be rejected.

Thus the emphasis in *Gamble* is to ensure that Charter claims are adjudicated. Technical legal distinctions which interfere with the court's ability to adjudicate Charter claims are to be rejected.

Most challenges to a refusal to grant bail cannot be properly addressed by means of habeas corpus. In a bail review under s. 520, all the circumstances which are relevant to a determination of bail are before the court: see, for example, s. 15 of the Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, which requires an affidavit setting out precisely the information needed by a court making a s. 520 review. Such evidence will not normally be before the court in an application for habeas corpus, making a proper reassessment of a bail order impossible.

However, where the refusal to grant bail is challenged in a s. 52 claim coupled with an application for a remedy under s. 24(1), habeas corpus is an adequate remedy. The constitutional claim can be determined without evidence about the applicant's specific circumstances. If the claim is successful, the court can order a new bail hearing to be held in accordance with constitutionally valid criteria. In these circumstances, I am of the opinion that to refuse to address the respondent's claim simply because another remedy exists would be to adopt the very type of uncertain, artificial, technical and non-purposive distinction which Wilson J. rejected in *Gamble*. The respondent's Charter claim must be adjudicated. The rubric under which the claim is advanced should not interfere with the Court's duty to adjudicate the claim. It would be overly technical and would place form over substance to dismiss the respondent's application on the sole ground that he framed it as an application for habeas corpus.

Outside the narrow circumstances of this case, habeas corpus is not a remedy for a denial of bail. As Wilson J. noted in *Gamble* at p. 642, "[u]nder section 24(1) of the Charter courts should not allow habeas corpus applications to be used to circumvent the appropriate appeal process". In the context of bail, a s. 520 review is the "appropriate appeal process" which should not be

circumvented by habeas corpus. This approach is consistent with McIntyre J.'s holding in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 959, that Charter remedies are subject to normal and established procedures and do not create the right to bring an interlocutory appeal. The undesirability of interlocutory Charter appeals was also noted in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 638-39. Allowing the use of habeas corpus as a general remedy for a bail review would create precisely this type of interlocutory appeal (see s. 784(3) of the Criminal Code, which provides for an appeal against a refusal of habeas corpus).

In *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, Cory J. warned at p. 1418 against allowing habeas corpus to develop as a costly and unwieldy system parallel to an existing system of judicial review:

It is necessary to make a further comment. As I have made clear above, the continuing detention of a dangerous offender sentenced pursuant to the constitutionally valid provisions of the Criminal Code will only violate s. 12 of the Charter when the National Parole Board errs in the execution of its vital duties of tailoring the indeterminate sentence to the circumstances of the offender. This tailoring is performed by applying the criteria set out in s. 16(1) of the Parole Act. Since any error that may be committed occurs in the parole review process itself, an application challenging the decision should be made by means of judicial review from the National Parole Board decision, not by means of an application for habeas corpus. It would be wrong to sanction the establishment of a costly and unwieldy parallel system for challenging a Parole Board decision.

Similarly, since any error in the denial of bail occurs within the normal bail review process, a challenge to a denial of bail should be brought by means of a review under s. 520 rather than an application for habeas corpus. Just as habeas corpus should not become a costly and unwieldy parallel system of parole review, it should not become a costly and unwieldy parallel system of bail review.

In most cases, habeas corpus is not a remedy against a refusal to grant bail. However, in the narrow circumstances of this case, it was open to the respondent to frame his Charter claim as an application for habeas corpus. This Charter claim must be adjudicated.

B. Validity of Section 515(6) (d)

(1) Sections 7 and 11 (d): Fundamental Justice and the Presumption of Innocence

The presumption of innocence has been described as the "golden thread" woven throughout the web of the criminal law (see *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (H.L.), at p. 481). It is also the common thread linking the various issues in this appeal. This appeal examines the validity of s. 515(6) (d) of the Criminal Code under ss. 7, 9, 11 (d) and 11 (e) of the Charter. Each of these Charter issues is linked by a single concept, namely the presumption of innocence.

As I noted in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 512, "[s]ections 8 to 14 [of the Charter] address specific deprivations of the 'right' to life, liberty and security of the person in breach of principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of 'principles of fundamental justice'". Consistent with this view, this Court has held that the presumption of innocence, "[a]lthough protected expressly in s. 11 (d) of the Charter . . . is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter": *R. v. Oakes*, supra, per Dickson C.J., at p. 119.

Section 11 (d) of the Charter sets out the presumption of innocence in the context of its operation at the trial of an accused person. As I stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 357:

Section 11 (d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or by calling other evidence.

This operation of the presumption of innocence at trial, where the accused's guilt of an offence is in issue, does not, in my opinion, exhaust the operation in the criminal process of the presumption of innocence as a principle of fundamental justice. The presumption of innocence, as a substantive principle of fundamental justice "protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct": *Oakes*, supra, at p. 119. In my view, the presumption of innocence is an animating principle throughout the criminal justice process. The fact that it comes to be applied in its strict evidentiary sense at trial pursuant to s. 11 (d) of the Charter, in no way diminishes the broader principle of fundamental justice that the starting point for any proposed deprivation of life, liberty or security of the person of anyone charged with or suspected of an offence must be that the person is innocent.

This, of course, does not mean that there can be no deprivation of life, liberty or security of the person until guilt is established beyond reasonable doubt by the prosecution at trial. As I noted in *Re B.C. Motor Vehicle Act*, supra, at p. 512, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right." The illustrations of deprivations of life, liberty and security of the person otherwise than in accordance with the principles of fundamental justice set out in ss. 8 to 14 of the Charter are suggestive of this conclusion. Section 8 speaks in terms of unreasonable search and seizure, s. 9 of arbitrary detention and s. 11(e) of the right not to be denied reasonable bail "without just cause". Each of these specific examples is consistent with the view that certain deprivations of liberty and security of the person may be in accordance with the principles of fundamental justice where there are reasonable grounds for doing so, rather than only after guilt has been established beyond a reasonable doubt. As the majority of this Court (per La Forest J.) noted in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361:

It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

This is true with respect to the presumption of innocence as a substantive principle of fundamental justice within s. 7 of the Charter . While the presumption is pervasive in the criminal process, its particular requirements will vary according to the context in which it comes to be applied.

In determining the precise content of the substantive principle in a specific context, the examples given in the Charter itself, ss. 8 to 14 , will be instructive, as will "the basic principles of penal policy that have animated legislative and judicial practice in Canada and other common law jurisdictions" (R. v. Lyons, *supra*, at p. 327).

Examples are legion of how the various stages of the criminal process have accommodated themselves to the fundamental principle that the assumed innocence of an accused or a suspect is the starting point for any proposed interference with that person's life, liberty or security of the person. In general, one who proposes to lay an information must believe, on reasonable grounds, that an offence has been committed: see, e.g., Criminal Code, s. 504 . The justice receiving the information must consider, before issuing process, that a case for doing so has been made out: see, e.g., Criminal Code, s. 507(1) . Much the same may be said with respect to the power to arrest. In general, a peace officer must have reasonable grounds to effect the arrest. There must be reasonable and probable grounds to demand a breath sample under s. 254(3) of the Code, and reasonable grounds must be shown before a search warrant may be issued: s. 487(1). Each of these cases may be seen as an example of the broad but flexible scope of the presumption of innocence as a principle of fundamental justice under s. 7 of the Charter . The principle does not necessarily require anything in the nature of proof beyond reasonable doubt, because the particular step in the process does not involve a determination of guilt. Precisely what is required depends upon the basic tenets of our legal system as exemplified by specific Charter rights, basic principles of penal policy as viewed in the light of "an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves": *Re B.C. Motor Vehicle Act*, *supra*, at p. 513.

The interaction of s. 7 and s. 11 (d) is also nicely illustrated at the sentencing stage of the criminal process. The presumption of innocence as set out in s. 11 (d) arguably has no application at the sentencing stage of the trial. However, it is clear law that where the Crown advances aggravating facts in sentencing which are contested, the Crown must establish those facts beyond reasonable doubt: *R. v. Gardiner*, [1982] 2 S.C.R. 368. The Court in *Gardiner* cited with approval at p. 415 the following passage from J. A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97, at p. 121:

... because the sentencing process poses the ultimate jeopardy to an individual ... in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.

Although, of course, Gardiner was not a Charter case, the problem it confronted can readily be restated in terms of ss. 7 and 11 (d) of the Charter . While the presumption of innocence as specifically articulated in s. 11 (d) may not cover the question of the standard of proof of contested aggravating facts at sentencing, the broader substantive principle in s. 7 almost certainly would. The specific application of the right would take account of the serious consequences adverted to in the passage from Olah, cited by the Court in Gardiner.

A further possible example of the presumption of innocence operating as a principle of fundamental justice may be found in the area of civil contempt. It may well be, of course, that a person facing civil contempt proceedings is "charged with an offence" within the meaning of s. 11 of the Charter . But even if not, I would be attracted to the argument that the presumption of innocence, requiring proof beyond reasonable doubt, would apply as a principle of fundamental justice under s. 7 of the Charter . This would be consistent with the practice in both the civil law (see, e.g., *Imperial Oil Ltd. v. Tanguay*, [1971] C.A. 109) and common law (see, e.g., *Dean v. Dean*, [1987] 1 F.L.R. 517 (Eng. C.A.)).

I should add that in advancing the numerous examples from statute law and elsewhere, I am not deciding whether any one of them exactly or fully reflects the dictates of the presumption of innocence as a principle of fundamental justice under s. 7 of the Charter . I note these examples by way of illustration only to show the pervasive presence of the broad substantive principle throughout the criminal process and to underline the point that s. 11 (d), while having its specific operation at trial, does not exhaust the broader principle of fundamental justice which is enshrined in s. 7 .

The effect of the presumption of innocence at trial is entrenched in s. 11 (d). There has developed a long line of authority establishing a very specific understanding of s. 11 (d) as a right which is violated if conviction is possible despite the existence of a reasonable doubt about guilt. In *Oakes*, supra, at p. 132, Dickson C.J. described s. 11 (d) as follows:

In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11 (d). If an accused bears the burden of disproving on a balance of probabilities an essential element of the offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. [Emphasis added.]

After *Oakes*, this understanding of s. 11 (d) was reiterated in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 655; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1330-31, and *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 196-97. Thus the effect of s. 11 (d) is to create a procedural and evidentiary rule at trial that the prosecution must prove guilt beyond a reasonable doubt. This procedural and evidentiary rule has no application at the bail stage of the criminal process, where the guilt or innocence of the accused is not determined and where punishment is not imposed. Accordingly, s. 515(6)(d) does not violate s. 11 (d).

I am of the view that s. 11 (d) does not exhaust the operation of the presumption of innocence as a principle of fundamental justice under s. 7 .

However, in this case, I am also of the view that the Charter challenge falls to be determined according to s. 11 (e) of the Charter , rather than under s. 7 . Section 11 (e) offers "a highly specific guarantee" which covers precisely the respondent's complaint. As I said in *R. v. G  n  reux*, [1992] 1 S.C.R. 259, at p. 310:

The appellant places reliance upon both s. 11 (d) and s. 7 of the Charter . However, the s. 7 submission can be dealt with very briefly. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, this Court decided that ss. 8 to 14 of the Charter , the "legal rights", are specific instances of the basic tenets of fairness upon which our legal system is based, and which are now entrenched as a constitutional minimum standard by s. 7 . Consequently, in the context of the appellant's challenge to the independence of the General Court Martial before which he was tried, s. 7 does not offer greater protection than the highly specific guarantee under s. 11 (d). I do not wish to be understood to suggest by this that the rights guaranteed by ss. 8 to 14 of the Charter are exhaustive of the content of s. 7 , or that there will not be circumstances where s. 7 provides a more compendious protection than these sections combined. However, in this case, the appellant has complained of a specific infringement which falls squarely within s. 11 (d), and consequently his argument is not strengthened by pleading the more open language of s. 7 .

Viewed in this light, ss. 11 (d) and 11 (e) are parallel rights. Section 11 (e) entrenches the effect of the presumption of innocence at the bail stage of the criminal process. Section 11 (d) does the same at the trial stage. Sections 11 (d) and 11 (e) define the procedural content of the presumption of innocence at the bail and trial stages of the criminal process, and constitute both the extent and the limit of that presumption at those stages. The substantive right in s. 7 to be presumed innocent is operative at both the bail and trial stages, in the sense that it creates a legal rule that the accused is presumed legally innocent until proven guilty, but it does not contain any procedural content beyond that contained in ss. 11 (d) and 11 (e). Thus s. 515(6)(d) does not violate s. 7 unless it fails to meet the procedural requirements of s. 11 (e).

(2) Section 11 (e)

(i) The Scope of the Right

This Court has never before been called upon to define the scope of the right contained in s. 11 (e). As a result, some preliminary remarks about s. 11 (e) are in order.

Section 11 (e) guarantees the right of any person charged with an offence "not to be denied reasonable bail without just cause". In my opinion, s. 11 (e) contains two distinct elements, namely the right to "reasonable bail" and the right not to be denied bail without "just cause". The French version of s. 11 (e) makes this distinction clearer than does the English version. The French version guarantees the right "de ne pas   tre priv   sans juste cause d'une mise en libert   assortie d'un cautionnement raisonnable". This wording demonstrates that two separate rights are operative, namely the right "de ne pas   tre priv   sans juste cause d'une mise en libert  " ("not

to be denied release without just cause") and the right to have that release "assortie d'un cautionnement raisonnable" ("subject to reasonable bail").

"Reasonable bail" refers to the terms of bail. Thus the quantum of bail and the restrictions imposed on the accused's liberty while on bail must be "reasonable". "Just cause" refers to the right to obtain bail. Thus bail must not be denied unless there is "just cause" to do so. The "just cause" aspect of s. 11 (e) imposes constitutional standards on the grounds under which bail is granted or denied.

The dual aspect of s. 11 (e) can be contrasted with the comparable provision in the United States. In the United States, the excessive bail clause of the Eighth Amendment provides only that "[e]xcessive bail shall not be required". While this wording clearly refers to the terms of bail, there has been considerable debate about whether it also creates a right to obtain bail: see *Stack v. Boyle*, 342 U.S. 1 (1951), at p. 4; *Carlson v. Landon*, 342 U.S. 524 (1952), at p. 545; *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), at pp. 1325-26 and 1329-30, certiorari denied 455 U.S. 1022 (1982); *United States v. Salerno*, 481 U.S. 739 (1987), at pp. 752-55, and D. B. Verrilli Jr., "The Eighth Amendment and the Right to Bail: Historical Perspectives" (1982), 82 Colum. L. Rev. 328. In Canada, there can no such doubt about the scope of s. 11 (e). Section 11 (e) creates a broad right guaranteeing both the right to obtain bail and the right to have that bail set on reasonable terms.

The dual aspect of s. 11(e) mandates a broad interpretation of the word "bail" in s. 11(e). If s. 11(e) guarantees the right to obtain "bail" on terms which are reasonable, then "bail" must refer to all forms of what is formally known under the Criminal Code as "judicial interim release". In common parlance, "bail" sometimes refers to the money or other valuable security which the accused is required to deposit with the court as a condition of release. Restricting "bail" to this meaning would render s. 11 (e) nugatory because most accused are released on less onerous terms. In order to be an effective guarantee, the meaning of "bail" in s. 11 (e) must include all forms of judicial interim release.

My conclusion about the meaning of "bail" in s. 11(e) leads me to a comment about terminology. Throughout these reasons, use of the word "bail" reflects the meaning of the word as it is used in s. 11(e). Thus a reference in these reasons to "bail" should be read as a reference to judicial interim release in general and not as a reference to any particular form of interim release.

Most of the current bail provisions in the Criminal Code were enacted in the Bail Reform Act, S.C. 1970-71-72, c. 37. The Bail Reform Act established a basic entitlement to bail. Bail must be granted unless pre-trial detention is justified by the prosecution. In *R. v. Bray* (1983), 2 C.C.C. (3d) 325 (Ont. C.A.), at p. 328, Martin J.A. described the Bail Reform Act as "a liberal and enlightened system of pre-trial release". In my view, s. 11 (e) transforms the basic entitlement of this liberal and enlightened system into a constitutional right. Section 11 (e) creates a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise.

Section 515(6)(d) must be placed in context. In general, a person charged with an offence and produced before a justice, unless he or she pleads guilty, is to be released on an undertaking without conditions. However, the Crown is to be given a reasonable opportunity to show cause

why either detention or some other order should be made: s. 515(1). Detention may be justified on the primary ground that "his detention is necessary to ensure his attendance in court" or, on the secondary ground that "detention is necessary in the public interest or for the protection or safety of the public . . .": s. 515(10) (a) and (b).

Under s. 515(6)(d), where the accused is charged with an offence under the Narcotics Control Act, s. 4 (trafficking or possession for the purpose of trafficking) or s. 5 (importing or exporting), or with conspiracy to commit any of these offences, the justice is to order the accused's detention. The accused, however, is to be afforded a reasonable opportunity to show cause why detention is not justified having regard to the primary and secondary grounds noted above.

As with other orders made under s. 515(2), (5), (7) or (8), an order under subs. (6) is subject to review by a judge at any time before trial and, in fact, successive reviews, provided they are at least 30 days apart, are permitted: see ss. 520(1) and 520(8). There is a further review mechanism where the trial has not occurred within 90 days of the accused's detention: see s. 525(1). The judge conducting the review is to take into consideration whether there has been unreasonable delay: see s. 525(3). With respect to offences under ss. 4 and 5 of the Narcotic Control Act, the accused has the right to elect to have a preliminary inquiry at which the justice is to determine whether there is some evidence relating to each element of the charge. If the accused is discharged, the detention order also comes to an end. Even if committed to stand trial, the justice may vacate a detention order previously made: see s. 523(2) .

It is within the framework of these general remarks about the nature of s. 11(e) and the context of the bail process that I will now consider the validity of s. 515(6)(d).

(ii) Whether Section 515(6)(d) Denies Bail

In order to determine whether s. 515(6)(d) infringes s. 11(e), it is first necessary to determine whether s. 515(6)(d) even has the effect of denying bail. The appellant and the intervening Attorneys General submit that s. 515(6)(d) does not deny bail because it merely requires the accused to show that detention is not justified in the circumstances of the case. With respect, I cannot agree.

Section 515(6)(d) is an exception to the basic entitlement to bail contained in s. 11(e). Instead of requiring the prosecution to show that pre-trial detention is justified, it requires the accused to show that pre-trial detention is not justified. In my view, the mere fact that there is a departure from the basic entitlement to bail is sufficient to conclude that there is a denial of bail for the purposes of s. 11(e) and that this denial of bail must be with "just cause" in order to be constitutionally justified. Furthermore, the very wording of s. 515(6)(d) establishes that it has the effect of denying bail in certain circumstances. Section 515(6)(d) provides that under certain circumstances "the justice shall order that the accused be detained in custody". This wording mandates a denial of bail. Such wording makes it impossible to accept the submission that s. 515(6)(d) does not constitute a denial of bail.

Given that s. 515(6)(d) denies bail in certain circumstances, it becomes necessary to determine whether there is just cause for this denial.

(iii) Whether Section 515(6)(d) Provides Just Cause to Deny Bail

Although s. 515(6)(d) constitutes a denial of bail in certain circumstances, in my opinion there is just cause for this denial of bail. There are two reasons for my conclusion. First, bail is denied only in a narrow set of circumstances. Second, the denial of bail is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system. The effect of s. 515(6)(d) is to establish a set of special bail rules in circumstances where the normal bail process is incapable of functioning properly. In my view, there is just cause for these special rules.

The circumstances in which bail is denied under s. 515(6)(d) are very narrow. Section 515(6)(d) applies only to a very small number of offences, all of which involve the distribution of narcotics. Furthermore, s. 515(6)(d) does not deny bail for all persons who are charged with these offences, but rather denies bail only when these persons are unable to demonstrate that detention is not justified having regard to the specified primary or secondary grounds. The narrow scope of the denial of bail under s. 515(6)(d) is essential to its validity under s. 11(e). The basic entitlement of s. 11(e) cannot be denied in a broad or sweeping exception.

The offences which are included under s. 515(6)(d) have specific characteristics which justify differential treatment in the bail process. These characteristics are noted by the Groupe de travail sur la lutte contre la drogue, Rapport du groupe de travail sur la lutte contre la drogue (1990). It notes at pp. 18-19 that drug trafficking generally constitutes a form of organized crime:

[translation] In Quebec drug trafficking is generally under the control of members of organized crime, who are responsible for distribution in all areas. Using well-organized networks, their capacity to finance major deals allows them to import large quantities of drugs, often even using legitimate businesses as a cover. For some time they have invested and pooled their resources to optimize the financial return on their investments: these cartels go so far as to plan a type of risk insurance which allows them to distribute losses suffered in police raids among themselves. Acting as importers, wholesalers and retailers at the same time, the organizations can sell by the tonne, by the kilo and even by the gram through outlets controlled by them; they are particularly active in cannabis and heroin trafficking. The traffickers in this category are of various origins, but since 1985 arrests of foreign nationals who maintain ties with producing countries have become more frequent. These international ramifications enable organized crime to be active in both the producing and consuming countries and in this regard one cannot ignore the existence of links between the Montreal Mafia and the criminal elements in certain South American countries. [Emphasis in original.]

It also notes at p. 21 that the nature of drug trafficking is sometimes mistakenly viewed as less serious than more openly violent crimes:

[translation] Unlike robbery, sexual assault and murder, drug trafficking is often wrongly regarded as a non-violent crime: there is accordingly a certain tolerance of traffickers who give the illusion of being anonymous businessmen, hidden among those who are engaged in lawful business. Such an impression is far from the reality, however, when one considers the fierce battles for control of territory and violent action to obtain the money needed to purchase drugs; equally, when one thinks of the personal brutality and social dramas that result. [Emphasis in original.]

It notes at p. 24 that narcotics offences increase the general level of criminality:

[translation] Drugs are responsible for 70 to 80% of prison terms: crimes resulting from the application of narcotics legislation (possession and trafficking); crimes committed under the influence of alcohol or other drugs (rape, violence and homicide); crimes committed to obtain drugs (theft and prostitution).

The unique characteristics of the offences subject to s. 515(6)(d) suggest that those offences are committed in a very different context than most other crimes. Most offences are not committed systematically. By contrast, trafficking in narcotics occurs systematically, usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail. In these circumstances, the normal process of arrest and bail will normally not be effective in bringing an end to criminal behaviour. Special bail rules are required in order to establish a bail system which maintains the accused's right to pre-trial release while discouraging continuing criminal activity.

Another specific feature of the offences subject to s. 515(6)(d) is that there is a marked danger that an accused charged with these offences will abscond rather than appear for trial. Ensuring the appearance of the accused at trial is the primary purpose of any system of pre-trial release, and the system must be structured to minimize the risk that an accused will abscond rather than face trial. For most offences, the risk that an accused will abscond rather than face trial is minimal. It is not an easy thing to abscond from justice. The accused must remain a fugitive from justice for the rest of his or her lifetime. The accused must flee to a country which does not have an extradition treaty with Canada (or whose extradition treaty does not cover the specific offence which the accused is alleged to have committed). Alternatively, the accused must remain in hiding. Either prospect is costly. Neither prospect is possible unless the accused is exceedingly wealthy or part of a sophisticated organization which can assist in the difficult task of absconding. Most alleged offenders are neither wealthy nor members of sophisticated organizations. Drug importers and traffickers, however, have access both to a large amount of funds and to sophisticated organizations which can assist in a flight from justice. These offenders accordingly pose a significant risk that they will abscond rather than face trial.

There appears to be no evidence about the risk of absconding by those charged with narcotics offences in Canada. However, there is evidence from both the United States and Australia which demonstrates that those charged with narcotics offences pose a particular danger of absconding while on bail. In the United States, the United States Senate, Report of the Committee on the Judiciary on the Comprehensive Crime Control Act of 1983 (1983), refers at p. 20 to the problem of drug offenders absconding while on bail:

Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses. Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers. [Footnote omitted.]

In Australia, the Hon. Mr. Justice E. S. Williams, Australian Royal Commission of Inquiry into Drugs (1980), refers to this risk at p. B222:

Police witnesses from a number of States indicated that their efforts in drug law enforcement were often frustrated by persons charged with offences absconding while on bail. It was frequently pointed out that experience has shown that there were proportionally more abscondences from bail by persons charged with serious drug offences than with any other type of crime, and that the amounts of bail and/or sureties set by the courts were often grossly inadequate in comparison with the financial rewards available from large-scale drug dealing.

Of course these sources do not provide direct evidence of the situation in Canada, and no Attorney General has tendered any evidence either in this Court or in the courts below. However, in view of the international interconnection of the drug trade and the fact that the United States and Australia are two societies which are very similar to our own, evidence from those societies provides a reasonable basis for concluding that serious narcotics offences create specific difficulties for the bail process.

In the Court of Appeal, Proulx J.A. expressed concern about the scope of s. 515(6)(d). He felt that it is inequitable to treat a person who distributes a few joints of marijuana in the same manner as a person running a sophisticated network to traffic cocaine. Proulx J.A.'s concerns are legitimate. The scope of the Narcotic Control Act is very broad. The schedule to the Narcotic Control Act, which lists the substances defined as "narcotics", includes both hard and soft drugs. Furthermore, "trafficking" is a very broad concept. Under s. 2 of the Narcotic Control Act, "traffic" means "to manufacture, sell, give, administer, transport, send, deliver or distribute" a narcotic, or to offer to do any of those items. The offence of trafficking can even be committed by giving a narcotic to a friend for safekeeping: see *R. v. Lauze* (1980), 17 C.R. (3d) 90 (Que. C.A.). Thus s. 515(6)(d) applies not only to hardened drug traffickers, but also to "small fry" drug dealers and even to the "generous smoker" who shares a single joint of marijuana at a party.

Although I believe that Proulx J.A.'s concerns about the scope of s. 515(6)(d) are legitimate, in my view they do not lead to a conclusion that s. 515(6)(d) violates s. 11(e). The "small fry" and "generous smoker" will normally have no difficulty justifying their release and obtaining bail. This is not a situation like that in *R. v. Smith*, [1987] 1 S.C.R. 1045, where an overbroad provision did not allow differential treatment based on the seriousness of the offence. Indeed all guilty accused had to be sentenced to at least 7 years imprisonment. Section 515(6)(d) does not mandate denial of bail in all cases and therefore does allow differential treatment based on the seriousness of the offence. Moreover, the onus which it imposes is reasonable in the sense that it requires the accused to provide information which he or she is most capable of providing. If a person accused of trafficking or importing is "small fry" or a "generous smoker", then the accused is in the best position to demonstrate at a bail hearing that he or she is not part of a criminal organization engaged in distributing narcotics.

The very specific characteristics of the offences subject to s. 515(6)(d) suggest that the special bail rules created by s. 515(6)(d) are necessary to create a bail system which will not be subverted by continuing criminal activity and by absconding accused. The offences subject to s. 515(6)(d) are undertaken in contexts in which criminal activity will tend to continue after arrest and bail, and they create the circumstances under which offenders are able to abscond rather than face trial. The special bail rules in s. 515(6)(d) combat these problems by requiring the accused to demonstrate that these problems will not arise.

The special bail rules in s. 515(6)(d) do not have any purpose extraneous to the bail system, but rather merely establish an effective bail system for specific offences for which the normal bail system would allow continuing criminal behaviour and an intolerable risk of absconding. The scope of these special rules is narrow and carefully tailored to achieve a properly functioning bail system. I therefore conclude that there is just cause for s. 515(6)(d) to depart from the basic entitlement of s. 11(e) and to deny bail in certain circumstances. Accordingly, I conclude that s. 515(6)(d) does not violate s. 11(e).

(3) Section 9

The respondent's submission that s. 515(6)(d) violates s. 9 of the Charter can be dealt with very briefly. There is no question that s. 515(6) (d) provides for persons to be "detained" within the meaning of s. 9 of the Charter . The sole issue is to determine whether those persons are detained "arbitrarily". Le Dain J. discussed the meaning of "arbitrarily" in *R. v. Hufsky*, [1988] 1 S.C.R. 621. He held at p. 633 that a random police spot check of motor vehicles constituted arbitrary detention under s. 9 because "[t]he selection was in the absolute discretion of the police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise." Thus detention is arbitrary if it is governed by unstructured discretion.

In my view, detention under s. 515(6)(d) is not arbitrary in this sense. Section 515(6)(d) sets out a process with fixed standards. This process is in no way discretionary. Specific conditions for bail are set out. The highly structured nature of the criterion in s. 515(6)(d) is in sharp contrast to the completely random nature of the detention which was held to violate s. 9 in *Hufsky*, *R. v.*

Ladouceur, [1990] 1 S.C.R. 1257, and R. v. Wilson, [1990] 1 S.C.R. 1291. Furthermore, the bail process is subject to very exacting procedural guarantees (see ss. 516, 518(1)(b), 523(2) (b)) and subject to review by a superior court (see ss. 520 and 521).

Accordingly, I conclude that s. 515(6)(d) does not violate s. 9 .

(4) Section 1

The parties and interveners have made extensive submissions about the application of s. 1 . Given that I have found no violation of ss. 7 , 9 , 11 (d) or 11(e), it is not necessary to consider s. 1 , as the second constitutional question does not arise.

I find that s. 515(6)(d) does not offend ss. 7 , 11 (d), 11 (e) or 9 of the Charter in as much as it requires the respondent, in the circumstances specified in s. 515(6) (d), to show cause why his detention is not justified. The appeal is allowed, the order of the Court of Appeal is set aside and the application for the writ of habeas corpus is dismissed.

However, in the case of R. v. Morales, supra, the judgment in which is being released simultaneously with the judgment in this case, the Court has decided that the inclusion in s. 515(10) (b) of the Criminal Code of the words "in the public interest or" infringes s. 11 (e) of the Charter and those words are declared to be of no force or effect. To this extent, there has been a change in the secondary ground for detention and therefore a change with respect to one of the grounds in relation to which the respondent pursuant to s. 515(6) (d) was required to show cause why his detention was not justified. Therefore, although the appellant's appeal succeeds with respect to s. 515(6) (d), normally an order under s. 686(8) of the Criminal Code would have been issued and the respondent, pursuant to the decision in Morales, would have had a new bail hearing at which time he would have been given a reasonable opportunity to show cause why his detention is not justified having regard to the grounds set out in ss. 515(10) (a) and (b) as altered by the Court's decision in Morales. However, as the respondent has since been tried, convicted and sentenced, that order would be of no force or effect as the issue of the respondent's liberty is moot.

VI - Disposition

Habeas corpus is available in the narrow circumstances of this case. The appellant's first ground of appeal accordingly fails. Section 515(6) (d) of the Criminal Code does not violate ss. 7 , 9 , or 11 (d) of the Charter . Placing the onus on the accused to show cause why his detention is not justified in the circumstances set out in s. 515(6) (d) does not violate s. 11 (e) of the Charter . The appellant's second ground of appeal accordingly succeeds. As a result, the appeal should be allowed and the application for habeas corpus dismissed. As decided in Morales, one aspect of the secondary ground for detention with respect to which the accused had the burden is of no force or effect. But, for the reasons given previously, there shall be no order for a new bail hearing. The constitutional questions are answered as follows:

1.Does s. 515(6)(d) of the Criminal Code of Canada limit the rights guaranteed in ss. 7 , 9 , 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms ?

Answer:With respect to ss. 7 , 9 and 11 (d), the answer is no. With respect to s. 11 (e), the answer is yes, but only to the extent that the section has reference to that part of s. 515(10) (b) which has been held by this Court in R. v. Morales (judgment rendered this day) to be of no force or effect.

2.If so, is s. 515(6) (d) of the Criminal Code of Canada a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, as required by s. 1 of the Canadian Charter of Rights and Freedoms ?

Answer:This question does not arise.

//La Forest J.//

The following are the reasons delivered by

La Forest J. (dissenting) -- I agree with Justice McLachlin, for the reasons she gives, that s. 515(6) (d) of the Criminal Code, R.S.C., 1985, c. C-46 , violates s. 11 (e) of the Canadian Charter of Rights and Freedoms and is not saved by s. 1 . For these reasons, I would dispose of the appeal as she proposes, and accordingly find it unnecessary to deal with the other provisions of the Charter .

//Gonthier J.//

The reasons of L'Heureux-Dubé and Gonthier JJ. were delivered by

Gonthier J. -- I am in agreement with the reasons of the Chief Justice, subject however to my reasons in the case of R. v. Morales, [1992] 3 S.C.R. 000, in which I conclude that the criterion of public interest in s. 515(10) (b) of the Criminal Code, R.S.C., 1985, c. C-46 , is not unconstitutional. I also have some concerns about the manner in which the presumption of innocence, as an integral value protected by s. 7 of the Canadian Charter of Rights and Freedoms , is dealt with by the Chief Justice in relation to the bail provisions of the Criminal Code . In my view, the analysis leading to the decision as to bail entails a consideration and weighing of the accused's entitlement to bail or liberty interest on the one hand, and the circumstances provided for in s. 515(10) which may justify a denial of bail on the other. The liberty interest is but one albeit an important factor to be considered but may be outweighed by others.

Consequently, I would allow the appeal on the second ground and dismiss the application for habeas corpus. The constitutional questions are answered as follows:

1.Does s. 515(6)(d) of the Criminal Code of Canada limit the rights guaranteed in ss. 7 , 9 , 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms ?

Answer: No.

2.If so, is s. 515(6) (d) of the Criminal Code of Canada a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, as required by s. 1 of the Canadian Charter of Rights and Freedoms ?

Answer: This question does not arise.

//McLachlin J.//

The following are the reasons delivered by

McLachlin J. (dissenting) -- I have had the advantage of reading the reasons of the Chief Justice. I agree with them, save for his conclusion that s. 515(6) (d) of the Criminal Code, R.S.C., 1985, c. C-46 , does not violate the constitutional right "not to be denied reasonable bail without just cause" guaranteed by s. 11 (e) of the Canadian Charter of Rights and Freedoms . I share the Court of Appeal's concern that s. 515(6) (d) fails to distinguish between the large-scale commercial drug trafficker and the "small-time" drug trafficker. Were s. 515(6)(d) confined to the large-scale organized trafficker, there might be just cause for denying bail to people in this group. As the section stands, however, it can be used to deny bail to people when there is no reason or "just cause" for denying them bail. And where bail is denied without just cause, s. 11 (e) of the Charter is infringed on its plain words.

Section 515(6)(d) denies bail to all persons charged with having committed an offence under s. 4 or 5 of the Narcotic Control Act, R.S.C., 1985, c. N-1, or the offence of conspiring to commit such an offence, who cannot show cause why their detention in custody is not justified. The denial of bail in certain circumstances, as Lamer C.J. points out in his reasons at p. 000, "makes it impossible to accept the submission that s. 515(6)(d) does not constitute a denial of bail." Thus, the fact that the section merely raises the possibility of denial of bail, as opposed to mandating bail denial, does not in itself cure the unconstitutionality of the section. The mere possibility of denial of bail "without just cause" is enough to overturn this section.

As the Chief Justice acknowledges, the section is very broad. First, it applies to everyone who commits the specified offences. Second, the offences are very broad. They catch anyone who "traffics" in a drug, however small the quantity or whatever the circumstances. And "trafficking" itself is a very broad concept. As a result, s. 515(6)(d) catches not only large-scale drug dealers, but the friend who shares a joint of marijuana at a party or gives it to a friend for safekeeping. All trafficking is repugnant and hence criminally punishable. But when the issue is denial of bail, the different dangers associated with the different types of trafficking, may require different treatment.

I agree with my colleague that there may be "just cause" for denying bail to persons charged with serious, large-scale or commercial trafficking. With the greatest respect, however, it seems to me that the reasons he gives for this conclusion do not apply to other traffickers. The reasons he gives are two. First, the trafficker is said to be more likely than persons charged with other offences to continue his or her criminal behaviour in the interval before trial if he or she is released. Second, the trafficker is said to be more likely than persons charged with other offences

to abscond and fail to appear at trial.

These distinctions apply only to one category of persons caught by s. 515(6)(d) -- the organized commercial trafficker. Let us look first at the argument that the trafficker is more likely than those charged with other offences to continue criminal activity while awaiting trial. My colleague supports this conclusion with the following observations (at p. 000):

Most offences are not committed systematically. By contrast, trafficking in narcotics occurs systematically, usually within a highly sophisticated commercial setting. . . . It is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail.

These comments are applicable to a person involved in organized commercial drug trafficking. They do not apply to others. Much trafficking has nothing to do with profit or making money. Profit is not a required element of the offence: see *R. v. Drysdelle* (1978), 41 C.C.C. (2d) 238 (N.B.C.A.). Nor is promotion of future distribution required: see *R. v. Larson* (1972), 6 C.C.C. (2d) 145 (B.C.C.A.). The amounts involved may be minuscule; no money need change hands. In short, the "small-time" trafficker may not be motivated by money or profit, nor be a participant in a "highly sophisticated commercial setting". The argument advanced by my colleague does not apply to him or her.

The second argument is that there is a "marked danger" that an accused charged with the offence of trafficking will abscond and not appear for trial. My colleague supports this conclusion as follows (at p. 000):

Drug importers and traffickers . . . have access both to a large amount of funds and to sophisticated organizations which can assist in a flight from justice. These offenders accordingly pose a significant risk that they will abscond rather than face trial.

Again, the same problem arises. Not all accused denied bail under s. 515(6)(d) fall into the category of prosperous drug lords; not all have international organizations willing to help them escape the country. The casual user who gives a joint to a friend provides an obvious example. But even in the commercial drug world, it is far from clear that those charged with trafficking are more able to abscond than people charged with other offences. Those charged with trafficking are often at the bottom of the chain and rarely provide a link to the top. Professor Carrigan in *Crime and Punishment in Canada: A History* (1991), relying on an RCMP report, National Drug Intelligence Estimate 1987/88, states (at p. 196):

Drug trade links are intricate and difficult for the police to penetrate. At the top of the chain are international syndicates that buy the raw product and arrange for processing and transportation. Supplies are delivered to gangs across the country, which in turn have a network of street vendors. The latter sometimes get caught, but it has proven extremely difficult to reach the management level of the chain and to intercept the flow of drugs.

Thus it is far from apparent that the majority of those arrested for organized drug trafficking have large amounts of money or organizations which will assist them in escaping. The lowly street vendor, the person most likely to be arrested, cannot count on the distant drug lord to run the risk of stealing him out of the country.

My colleague cites American and Australian studies, at pp. 000 and 000 of his reasons, to support the conclusion that flight is a major problem among those charged with trafficking in drugs. However, the conclusions relied on in those studies are confined to "major", "serious" and "large-scale" drug dealing.

The United States Senate, Report of the Committee on the Judiciary on the Comprehensive Crime Control Act of 1983 (1983) states that:

. . . flight to avoid prosecution is particularly high among persons charged with major drug offenses. . . . Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers. [Emphasis added.]

An Australian Royal Commission Report contained similar findings:

It was frequently pointed out that experience has shown that there were proportionally more abscondences from bail by persons charged with serious drug offences than with any other type of crime, and that the amounts of bail and/or sureties set by the courts were often grossly inadequate in comparison with the financial rewards available from large-scale drug dealing. [Emphasis added.]

In fact, the law of the United States and Australia, unlike that of Canada, distinguishes between major and more minor trafficking. In the United States, the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), and the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), passed after the Report of the Judiciary Committee, target major drug traffickers by classifying federal drug trafficking crimes on the basis of quantity. The equivalent Australian Commonwealth legislation also classifies crimes on the basis of "trafficable quantity" (e.g., 2 grams of cocaine) versus "commercial quantity" (e.g., 2 kg of cocaine). In Canada, by contrast, all trafficking is lumped together. It is incorrect, with respect, to apply conclusions based on major drug offences in the United States and Australia, to all types of trafficking, major and minor, in Canada.

I conclude that whatever legitimacy the arguments of repeat offences and fleeing bail may have with respect the higher, more organized levels of drug trafficking, they offer no reason for denying bail to the many other traffickers who fall under s. 515(6)(d).

My colleague responds to these concerns, eloquently expressed by Proulx J.A. in the Court of Appeal below, with a final argument: the people for whom there are no special reasons for pre-trial detention will be able to convince the judge that they are not in fact part of an organization and hence bail will not in fact be unjustly denied. Such offenders, he states, at p. 000,

... will normally have no difficulty justifying their release and obtaining bail. ... If a person accused of trafficking or importing is a "small fry" or a "generous smoker", then the accused is in the best position to demonstrate at a bail hearing that he or she is not part of a criminal organization engaged in distributing narcotics.

The first difficulty with this proposition is that it is far from clear that a person charged with a more minor trafficking offence will be able to convince the judge that he or she is not connected to a drug organization. The argument would require the accused, presumed to be innocent, to prove the negative proposition that he or she is not part of a criminal organization. Criminal organizations, unlike unions and service organizations, do not distribute lists of their members. How does one prove that one is not a member?

Second, the argument does not address the difficulty of the lower-level agent of a larger commercial trafficking organization. The street vendor, while criminally responsible, may not pose a special risk of pre-trial recidivism or absconding. Yet he or she may be unable to establish that they are in no way connected to organized crime. There is no just cause for denying bail in such a case, yet bail might well be denied on the criteria proposed by my colleague.

In summary, it seems clear to me, despite the arguments to the contrary, that s. 515(6)(d) may well result in denying people bail in the absence of "just cause". Section 11 (e) of the Charter says everyone has the right not to be denied bail without just cause. It follows of necessity that s. 515(6) (d) violates s. 11 (e) of the Charter .

If s. 515(6)(d) violates s. 11 (e) of the Charter , it must be struck down under s. 1 and s. 52 of the Constitution Act, 1982 unless the Crown establishes that it is "demonstrably justified" in a free and democratic society. To meet this test a law must be directed to an objective of compelling importance and must not exceed what is necessary to achieve that objective. I take as given that s. 515(6) (d) is directed to avoiding repeat offences and absconding. These are important objectives. The problem is that s. 515(6) (d) goes further than is necessary to achieve those objectives. As discussed, there is no reason to conclude that small and casual traffickers pose any particular threat of repeating the offence or fleeing from their trial. Thus violating their constitutional right to bail in the absence of "just cause" does nothing to promote the objectives of the section. Other jurisdictions, like the United States and Australia, distinguish between major and minor trafficking. Canada, for no apparent reason, does not. One may hope that Parliament will revisit the question and consider confining denial of bail to cases where it can be justified. For the present, however, I agree with the Court of Appeal that s. 515(6) (d) cannot be justified and accordingly is of no force and effect under s. 52 of the Constitution Act, 1982 .

Consequently, I would dismiss the appeal. The constitutional questions are answered as follows:

1.Does s. 515(6)(d) of the Criminal Code of Canada limit the rights guaranteed in ss. 7 , 9 11(d) and 11(e) of the Canadian Charter of Rights and Freedoms ?

Answer:With respect to ss. 7 , 9 and 11 (d), the answer is no. With respect to s. 11 (e), the answer is yes.

2.If so, is s. 515(6) (d) of the Criminal Code of Canada a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, as required by s. 1 of the Canadian Charter of Rights and Freedoms ?

Answer:No.

Appeal allowed, La Forest and McLachlin JJ. dissenting.

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