

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

APPELLANT
(Appellant)

- and -

GILLES CARON

RESPONDENT
(Respondent)

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION, COUNCIL OF CANADIANS WITH
DISABILITIES, CHARTER COMMITTEE ON POVERTY ISSUES, POVERTY AND
HUMAN RIGHTS CENTRE, WOMEN'S LEGAL EDUCATION AND ACTION FUND,
COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA, ASSOCIATION
CANADIEN-FRANÇAISE DE L'ALBERTA and DAVID ASPER CENTRE FOR
CONSTITUTIONAL RIGHTS

INTERVENERS

FACTUM OF THE INTERVENER
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW OF POSITION AND STATEMENT OF THE FACTS RELEVANT TO THE INTERVENTION

1. The questions in this appeal are crucial to the issue of access to constitutional justice in the modern legal system. Answering these questions requires this Court to consider the pervasiveness and role of regulatory offences in the modern Canadian state. The regulatory sphere has become a key point of contact between the individual and the state and, as such, a location at which superior courts must retain the power and discretion to facilitate the adjudication of substantial questions of constitutional importance.

2. In particular, and with due regard to this context, the position of the Canadian Civil Liberties Association (the “CCLA”) is that:

- a. the inherent jurisdiction of the superior courts to act in aid of inferior tribunals must be interpreted generously;
- b. the particular discretionary power to award interim costs as established in *Okanagan*¹ and *Little Sisters*², ought to apply equally to public law cases arising from regulatory proceedings as it does to those arising from civil proceedings; and
- c. the core test arising from *Okanagan* and *Little Sisters* is “whether a court would be participating in an injustice” if it failed to order advanced costs³. As such, the impecuniosity requirement in *Okanagan* must be applied flexibly when assessing an application for interim costs, focussing on whether the ordinary citizen has the means to access the justice system to address questions of exceptional public importance and *prima facie* merit.

3. The CCLA makes no submissions regarding the adjudicative facts of the appeal or the application of the legal principles to the facts in the instant case.

¹ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 [*Okanagan*]

² *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38, 2007 SCC 2 [*Little Sisters*]

³ *Little Sisters*, at para. 5

PART II: STATEMENT OF POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

4. The CCLA accepts the questions as framed by the Appellant, but focuses its submissions on the second and third questions.

PART III: STATEMENT OF ARGUMENT

5. The issue of access to justice has been at the forefront of public discussions about the contemporary state of the judicial system in Canada. Whether in media coverage, scholarly writing, or public lectures by those involved in the administration of justice, the imperative of ensuring meaningful access to the Canadian legal system has been much commented upon. This Court has itself consistently affirmed the centrality of this principle, emphasising in particular the importance of access to justice to protecting the constitutional rule of law. Chief Justice Dickson stirringly stated in *B.C.G.E.U.* that “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.”⁴

6. Indeed, in *Okanagan*, Justice LeBel identified access to justice as a distinct rationale for preserving for superior courts a meaningful discretionary power to award advanced costs. Noting that concern about access to justice had increased in recent years, LeBel J. explained that “where individual litigants of limited means seek to enforce their constitutional rights,” the exercise of discretion to depart from traditional principles governing costs “helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.”⁵

7. Affirming the inherent jurisdiction of superior courts to award advanced costs in quasi-criminal proceedings and clarifying the criteria that ought to guide this exercise of a judge’s discretion represent a concrete and meaningful expression of these noble statements of principle.

⁴ *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at 230; See also *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21 at para. 23; and *R. v. Prosper*, [1994] 3 S.C.R. 236, at para. 102 [*Prosper*]. In *Prosper*, a case that addressed legal assistance to those charged with criminal offences, Justice McLachlin (as she then was) stated simply that “[t]he poor are not constitutional castaways.”

⁵ *Okanagan*, at para. 27

A. The Pervasiveness and Role of Regulatory Offences in the Canadian State

8. This appeal raises related issues of judicature and access to constitutional justice in the particular context of those charged with regulatory offences. To answer these questions, this Court must consider the nature and pervasiveness of this exercise of state power in the contemporary Canadian state.

9. Canadians live in a legal environment thick with regulations and quasi-criminal offences. As Archibald, Jull and Roach observe, “[r]egulations cover every aspect of modern society from health and safety to equality and social policy.”⁶ In the 1980s, the Law Reform Commission of Canada estimated that any individual was subject to over 40,000 provincial regulatory offences⁷ and the Department of Justice counted over 97,000 federal regulatory offences.⁸ Despite changing trends over time, complex and pervasive regulation remains a fact of the everyday lives of ordinary Canadians.⁹ In *Wholesale Travel*, Justice Cory summarized the centrality and prevalence of regulation as a method of governance:

It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted....¹⁰

10. Beneficial though government regulation may often be, the regulatory or quasi-criminal sphere poses particular stresses and challenges for the administration of justice in Canada; as R.C.B. Risk observed, regulation presents “distinctive problems, especially with the individual and the state.”¹¹ To cite but one example, this Court has had to grapple with and adjust doctrines of fault in the criminal law to appropriately balance the public interest in enforcing regulatory regimes and cherished principles – both constitutional and common-law – of due process and

⁶ T.L. Archibald, Kenneth E. Jull, and Kent W. Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management*, looseleaf (Aurora, Ont.: Canada Law Book, 2010) (“*Regulatory and Corporate Liability*”) at 1-3

⁷ Law Reform Commission of Canada, *Studies in Strict Liability* (Ottawa: Law Reform Commission of Canada, 1974) at 2, 10

⁸ Law Reform Commission of Canada, *Policy Implementation, Compliance and Administrative law - Working Paper 51 -* (Ottawa: Law Reform Commission of Canada, 1986) at 38

⁹ *Regulatory and Corporate Liability*, note 6

¹⁰ *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at 221 [*Wholesale Travel*]

¹¹ R.C.B. Risk, “Lawyers, Courts, and the Rise of the Regulatory State” (1984) 9 *Dalhousie L.J.* 31 at 54

fundamental justice.¹² The availability of advance costs orders in cases of public importance is another such “distinctive problem” raised by the pervasiveness and complexity of government regulation.

11. The prosecution of regulatory or quasi-criminal offences is one of the most common points of interaction between individuals and the legal system and it may be only once charged with a regulatory offence that an individual becomes alive to an issue of broad public importance that involves constitutional rights and principles. Regulatory offences are, therefore, important sites for addressing issues such as the courts’ ability to ensure access to constitutional justice. Given the vastness of the regulatory sphere and the state’s ubiquitous use of regulatory offences to accomplish government objectives, it is entirely predictable that, from time to time, quasi-criminal proceedings will give rise to substantial legal questions of patent public and constitutional importance. This is what has occurred in the present appeal.

12. Constitutions and constitutional rights serve to constrain and discipline the exercise of state power. As this Court has recently stated, it is a fundamental postulate that “in a constitutional democracy, all government power must be exercised in accordance with the Constitution.”¹³ Given that regulatory offences are now one of the chief means of exercising state power, the judiciary must be equipped with adequate and effective means to ensure that genuine matters concerning the constitutional propriety of this form of government action can be fully tested. As the Respondent explains in this case, the statutory availability of costs in regulatory proceedings is narrowly limited and will frequently be inadequate to fund constitutional litigation.¹⁴ In some instances, other sources of funding to pursue such arguments may be available.¹⁵ When, however, no such alternative recourse is available, and the ordinary

¹² *The Queen v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 [*Sault Ste. Marie*]; *Re Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Wholesale Travel*. Consider also the fraught question of the protection afforded by s. 8 of the *Charter* in the regulatory context: see, e.g. *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, *Baron v. Canada*, [1993] 1 S.C.R. 416 and *R. v. Jarvis*, [2002] 3 S.C.R. 757, 2002 SCC 73 (concerning income tax regulation); *Comité paritaire de l’industrie de la chemise v. Potash*; *Comité paritaire de l’industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406 (concerning regulation of industrial working conditions); *R. v. Gomboc*, 2009 ABCA 276, on appeal before this Court (concerning police monitoring of regulated power lines).

¹³ *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, at para. 37

¹⁴ Factum of the Respondent, at paras. 29, 45, 46

¹⁵ In a highly complex and serious regulatory charge engaging the liberty of the subject, *Rowbotham* funding might be available (*R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)). In some cases, government funding through a program like the Court Challenges Program might suffice. The airing and adjudication of *prima facie* meritorious constitutional issues cannot, however, ultimately depend on a case falling into a pre-defined category (as in

citizen would not have the reasonable means to fairly litigate an issue of broad public or constitutional significance, superior courts must have both the jurisdiction and the discretionary tools to facilitate access to constitutional justice. To hold otherwise would effectively immunize the state's robust regulatory power from constitutional scrutiny.

13. For these reasons, appreciation of the reality of the regulatory state has implications for the way in which this Court should construe both the scope of the inherent jurisdiction of superior courts to come in aid of inferior tribunals and the availability of interim costs orders in light of the principles enunciated in *Okanagan* and *Little Sisters*.

B. This Court Should Protect a Generous Interpretation of Superior Courts' Inherent Jurisdiction to Act in Aid of Inferior Tribunals

14. Alberta submits that the courts below erred in giving an unduly expansive interpretation of the inherent jurisdiction of superior courts. In particular, Alberta objects that the jurisdiction to act in aid of an inferior court does not encompass the power to award interim costs.¹⁶ The CCLA submits that this is an inappropriately narrow reading of the jurisdiction of superior courts and that it is essential that the superior courts' inherent jurisdiction, including its power to act in aid of inferior courts, continue to be read in the broad manner that this Court has adopted in the past.

15. In an article referred to by this Court in *MacMillan Bloedel* as the "seminal article on the core or inherent jurisdiction of superior courts," I.H. Jacob identified a power under the superior courts' inherent jurisdiction "to render assistance to inferior courts *to enable them to administer justice fully and effectively.*" Jacob explained that the principled basis for this inherent jurisdiction to see that justice is done is "the authority of the judiciary to uphold, to protect and to fulfil the judicial functioning of administering justice according to law in a regular, orderly and effective manner." The inherent jurisdiction of superior courts lies in "the reserve or fund of powers... which the court may draw upon *as necessary whenever it is just or equitable to do so*, and in particular to ensure the observance of the *due process of law*, to prevent improper vexation or oppression, *to do justice between the parties and to secure a fair trial between*

Rowbotham applications) or the good will and policy choices of the government (as with the Court Challenges Program, which was cancelled in 2006 and reinstated in a modified form in 2008).

¹⁶ Factum of the Appellant, at paras. 2, 55-66

them.”¹⁷ Drawing from these principles, this Court has broadly defined the inherent jurisdiction of the superior courts as comprising “those powers which are essential to the administration of justice and the maintenance of the rule of law.”¹⁸

16. In *Brotherhood of Maintenance of Way Employees*, Justice McLachlin (as she then was) explained the essence and informing logic of the inherent jurisdiction of superior courts:

8 ... No matter how comprehensive a statutory scheme for the regulation of disputes may be, the possibility always remains that events will produce a difficulty which the scheme has not foreseen. It is important in these circumstances that there be a tribunal capable of resolving the matter... It is precisely for this reason that the common law developed the notion of courts of inherent jurisdiction. If the rule of law is not to be reduced to a patchwork, sometime thing, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief.¹⁹

Although this statement was made in the context of a superior court granting injunctive relief in a labour relations matter, it has equal application and force in the circumstances of the present appeal. Provincial courts are statutory decision-makers giving effect to statutory schemes. Superior courts must retain a broad jurisdiction to offer relief where the proper administration of justice so requires.

17. The CCLA submits that the appropriate principle governing the inherent jurisdiction of the superior courts to act in aid of inferior tribunals, including provincial courts trying regulatory offences, is that a superior court may make an order in aid of an inferior tribunal whenever it is convinced that the fair and effective administration of justice and the rule of law so demands. This power includes interim costs orders, based as they are on the principle, clearly enunciated in *Little Sisters*, that, in extraordinary circumstances, such awards are necessary to prevent a court from “participating in an injustice – against the litigant personally and against the public generally – if it did not order advance costs to allow the litigant to proceed.”²⁰

18. When such situations arise – situations that squarely engage the rule of law and the effective administration of justice – superior courts have discretion to exercise their inherent

¹⁷ I.H. Jacob, “The Inherent Jurisdiction of the Court,” (1970) *Current Legal Problems* 23, at 27-28, 48 and 51 [emphasis added]

¹⁸ *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, paras. 29, 38 [emphasis added]

¹⁹ *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495, at para. 8

²⁰ *Little Sisters*, at para. 5

jurisdiction to prevent an injustice. The sheer number and variety of regulatory offences with which Canadians are faced every day make it impossible to anticipate in advance whether and when such circumstances might present before inferior tribunals. Accordingly, this case offers an important occasion for this Court to confirm a necessarily generous interpretation of the inherent jurisdiction of superior courts to act in aid of inferior tribunals.

C. *Okanagan* Orders Ought to be Available in the Trial of Regulatory Offences Just as They are in Civil Cases

19. A substantial question in this appeal is whether a bright line ought to be drawn precluding *Okanagan* interim costs awards in regulatory proceedings. The CCLA submits that the principles that lead to the exceptional availability of such orders in civil cases apply with equal force to regulatory cases. Although such awards will remain exceptional in all contexts, it would be contrary to the principles set out in *Okanagan* and *Little Sisters* if such orders were categorically unavailable in cases involving the prosecution of regulatory offences.

20. In *Okanagan*, this Court explained that, in special circumstances, superior courts have the inherent discretionary jurisdiction to depart from the ordinary principles governing costs in the normal course of litigation. Specifically, *Okanagan* established that in such cases, “the more usual purposes of costs are... superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance.”²¹ As this Court made clear in *Little Sisters*, *Okanagan* was not a revolution in the courts’ use of costs orders: “the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a novel one.”²² Rather, when access to justice and the public importance of the issues of the case so demand, superior courts have the discretion to make interim costs orders.

21. These principles apply equally in the context of regulatory proceedings. In both *Okanagan* and *Little Sisters*, this Court described interim costs orders as available in “public law cases.” As Dickson J. (as he then was) stated in *Sault Ste. Marie*, “[a]lthough enforced as penal laws through the utilization of machinery of the criminal law, [regulatory offences] are in

²¹ *Okanagan*, at para. 38

²² *Little Sisters*, at para. 34

substance of a civil nature and might well be regarded as a branch of administrative law...”²³
Regulatory and quasi-criminal law cases are, quintessentially, public law cases.

22. Some of the most significant constitutional cases decided by this Court, and many of the nature contemplated in *Okanagan*, have arisen out of regulatory proceedings.²⁴ *Okanagan* itself might well have been triggered by a regulatory charge. In situations in which it would be “contrary to the interest of justice to deny the advance costs application,”²⁵ there is no principled basis for a categorical rule distinguishing regulatory offence proceedings from other public law cases requiring the exercise of a superior court’s inherent discretion to protect the administration of constitutional justice and due process of law.

23. Indeed, it would be highly incongruous if the government were able to shield itself from exposure to interim costs awards simply by charging an individual with a regulatory offence. If the unique constellation of circumstances meriting an *Okanagan* order would arise if an individual chose to seek a civil declaration of unconstitutionality, *a fortiori*, such an order ought to be available when the state has instigated the legal dispute through the exercise of its power and the individual responds with a defence in which the real issue is a constitutional question of public importance.

D. Given the Ultimate Purpose of Advance Costs, the Impecuniosity Factor Must be Applied Flexibly, Focussing on the Injustice of Excluding a Citizen of Ordinary Means from the Justice System

24. This appeal also presents an opportunity for this Court to provide guidance on the proper assessment of applications for *Okanagan* costs. In *Little Sisters*, this Court stated that interim costs awards should be rare and “used only as a last resort in order to protect the public interest.” These statements, as well as the criteria listed in *Okanagan* and *Little Sisters*, must be interpreted and applied in light of the ultimate test governing orders for interim costs, the test that Bastarache and LeBel JJ. described in *Little Sisters* as the “ratio in *Okanagan*”: whether “a court

²³ *Sault Ste. Marie*, at pp. 3-4 of QL version

²⁴ See for e.g. *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43; *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59; *Jack and Charlie v. The Queen*, [1985] 2 S.C.R. 332

²⁵ *Little Sisters*, at para. 37

would be participating in an injustice – against the litigant personally and against the public generally – if it did not order advance costs to allow the litigant to proceed.”²⁶

25. Properly focussing on this ultimate test has implications for how the criteria set out in *Okanagan* and *Little Sisters* are assessed. Specifically, the *Okanagan* guidelines of “*prima facie* merit” and “public importance” ought to be the primary focus in the exercise of the inherent jurisdiction to grant interim costs. As Justice LeBel made eminently clear in *Little Sisters*, the specific injustice to which advance costs are intended to respond is the prospect of “ordinary citizens” being excluded from the justice system “when they seek to resolve matters of consequence to the community as a whole.” Accordingly, once a superior court judge is satisfied that the public interest and *prima facie* merit criteria as explained in *Little Sisters* are met, whether the impecuniosity factor is satisfied will be a highly fact and context-sensitive inquiry that asks whether this ordinary citizen has the reasonable means to advance this issue before the courts. Given the particular injustice that advance costs orders seek to avoid – the complicity of the judiciary in preventing the ordinary citizen from vindicating constitutional rights and addressing matters of substantial public importance – the rarity or exceptional nature of *Okanagan* costs orders must be found in the public interest criterion and other circumstances distinguishing the case. Such orders must not depend on demonstrating “exceptional” or “rare” degrees of impecuniosity.

26. Alberta suggests a checklist approach to assessing impecuniosity, including a categorical rule that a public fundraising campaign must be undertaken before a court can properly order *Okanagan* costs.²⁷ Yet this Court has been cautious to leave this factor flexible, listing a number of possible sources of funding, but ultimately articulating the purpose of the impecuniosity requirement as being to prevent an application from succeeding “where private funding has not been diligently sought.”²⁸

27. This Court has made clear that *Okanagan* orders ought not to be granted so readily as to unduly tax the public or the government. Yet a requirement that an applicant have *exhausted* all

²⁶ *Little Sisters*, at paras. 5 and 73

²⁷ Appellant’s Factum, at para. 86

²⁸ *Little Sisters*, at para. 73

possible alternative sources of funding²⁹ goes too far, taxing communities and individuals who are making *bona fide* and *prima facie* meritorious arguments in the public interest. In some circumstances, extensive fundraising appeals, self-funding, and many other alternative funding options can be extraordinarily onerous for individuals, counsel and communities. An unduly restrictive approach to the impecuniosity requirement presents the risk of precluding ordinary citizens from raising meritorious arguments of exceptional constitutional and public importance.

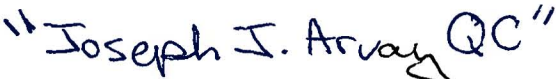
28. The reality is that much constitutional and other public interest litigation is far beyond the means of the ordinary citizen. To remain faithful to the principles giving rise to the discretion to award advance costs, the “impecuniosity” consideration set out in *Okanagan* and *Little Sisters* cannot be a measure of destitution. Neither can it require the ordinary citizen to assume crippling debt or his or her community to collectively empty its pockets. Rather, “impecuniosity” must be understood as an assessment of whether the individual has reasonable means of meeting the expense to, in the words of this Court in *Okanagan*, “determine their constitutional rights and other issues of broad social significance.”³⁰ The CCLA submits that this is the only principled construction that can be given to the term “impecunious” for the purposes of advanced costs in public interest litigation. If, in a given case, a superior court judge is satisfied that an ordinary citizen does not have such means and the issue is one of public importance and *prima facie* merit, that case may be of the extraordinary nature that justifies an order of advance costs.

PARTS IV AND V: COSTS SUBMISSION AND ORDER SOUGHT

29. The CCLA seeks no costs order either for or against it, a right to make oral submission of 10 minutes in length, and otherwise supports the Respondent’s request that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 25, 2010



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²⁹ *Little Sisters*, at paras. 68, 136; Appellant’s Factum, at para. 26

³⁰ *Okanagan*, at paras. 27, 38

PART VI: LIST OF AUTHORITIES

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| <i>R. v. McKinlay Transport Ltd.</i> , [1990] 1 S.C.R. 627 | 10 |
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| | Paragraph(s) |
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| <i>R. v. Rowbotham</i> (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) | 12 |
| <i>R. v. Wholesale Travel Group Inc.</i> , [1991] 3 S.C.R. 154 | 9-11 |
| OTHER | |
| T.L. Archibald, K.E. Jull, and K.W. Roach, <i>Regulatory and Corporate Liability: From Due Diligence to Risk Management</i> , looseleaf (Aurora, Ont.: Canada Law Book, 2010) at 1-1 to 1-7, 1-11 | 9 |
| I.H. Jacob, “The Inherent Jurisdiction of the Court,” (1970) <i>Current Legal Problems</i> 23 at 27-28, 48 and 51 | 15 |
| Law Reform Commission of Canada, <i>Policy Implementation, Compliance and Administrative law - Working Paper 51 -</i> (Ottawa: Law Reform Commission of Canada, 1986) at 38 | 9 |
| Law Reform Commission of Canada, <i>Studies in Strict Liability</i> (Ottawa: Law Reform Commission of Canada, 1974) at 2, 10 | 9 |
| R.C.B. Risk, “Lawyers, Courts, and the Rise of the Regulatory State” (1984) 9 <i>Dalhousie L.J.</i> 31 at 54 | 10 |

PART VII: STATUTORY PROVISIONS

| | Paragraph(s) |
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| <i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11, s. 8 | 10 |



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| http://www.canlii.org/en/ca/const/const1982.html | http://www.canlii.org/fr/ca/const/const1982.html |
| 8. Everyone has the right to be secure against unreasonable search or seizure. | 8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. |