Indexed as:

R. v. Demers

Réjean Demers, appellant;
v.
Her Majesty The Queen, respondent, and
Attorney General of Canada and Attorney General of Ontario, interveners, and
Tribunal administratif du Québec, section des affaires sociales, and Centre hospitalier Robert-Giffard, mis en cause.

[2004] 2 S.C.R. 489
[2004] S.C.J. No. 43
2004 SCC 46
File No.: 29234.

Supreme Court of Canada

Heard: January 21, 2004;
Judgment: June 30, 2004.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

(108 paras.)

Appeal From:

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC

Catchwords:

Constitutional law — Division of powers — Criminal law — Permanently unfit accused who do not pose a significant threat to public safety — Accused unfit to stand trial on account of permanent mental disability — Whether ss. 672.33, 672.54 and 672.81(1) of Criminal Code ultra vires Parliament — Constitution Act, 1867, s. 91(27) — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.33, 672.54, 672.81(1).

Constitutional law — Charter of Rights — Liberty — Fundamental justice — Presumption of

innocence — Overbroad legislation — Accused unfit to stand trial on account of permanent mental disability — Absolute discharge not available to permanently unfit accused who do not pose a significant threat to public safety — Courts and Review Boards having no power to order psychiatric assessment of unfit accused after initial evaluation in order to adapt disposition to his current circumstances — Whether ss. 672.33, 672.54 and 672.81(1) of Criminal [page490] Code infringe s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.33, 672.54, 672.81(1).

Summary:

The accused, who is moderately intellectually handicapped, was declared unfit to stand trial on charges of sexual assault. He remained in hospital until he was discharged, subject to conditions, three months later by a Review Board acting under ss. 672.47 and 672.54 of the *Criminal Code*. The result of the combined operation of ss. 672.33, 672.54 and 672.81(1) is that an accused found unfit to stand trial remains in the "system" established under Part XX.1 of the *Code* until either he becomes fit to stand trial or the Crown fails to establish a *prima facie* case against him. An absolute discharge is not available. People like the accused who are permanently unfit and could never stand trial are subject to indefinite appearances before the Review Board and to the exercise of its powers. The Quebec Superior Court refused to grant the accused a stay of proceedings and upheld the constitutionality of s. 672.54. In this Court, the accused challenged the constitutional validity of ss. 672.33, 672.54 and 672.81(1) of the *Code* under the *Constitution Act, 1867*'s division of powers and the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be allowed. The impugned provisions are unconstitutional.

Per McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, Deschamps and Fish JJ.: The impugned provisions are *intra vires* Parliament. The pith and substance of Part XX.1 of the *Criminal Code* is revealed by its twin goals of protecting the public and treating the mentally ill accused fairly and appropriately. While the exercise of criminal power over accused found "not criminally responsible on account of mental disorder" can only be justified under the protective branch of criminal law, the situation is different in respect of accused found unfit to stand trial. Unless he is found to be dangerous, the criminal law's jurisdiction over the unfit accused does not stem from that branch of the criminal law. Rather, the criminal justice system maintains jurisdictional control over the accused found unfit to stand trial because that person is subject to a criminal accusation and pending proceedings. As long as this accusation is maintained, it is not necessary to consider the dangerousness of the accused or the protection of the public because other [page491] considerations justify Parliament's jurisdiction in regard to accused found unfit to stand trial, namely its jurisdiction over criminal procedure. The pith and substance of the impugned provisions thus falls within both the preventive and criminal procedure branches of the criminal law. It should also be noted that laws dealing with the unfit accused have long been accepted as valid criminal law. Lastly, where, as here, one level of government supports the constitutionality of another level's legislation, a court should be cautious before finding the impugned provision *ultra vires*.

With respect to s. 7 of the *Charter*, the deprivation of the unfit accused's liberty accords with the presumption of innocence as a principle of fundamental justice. The Review Board proceedings under ss. 672.54 and 672.81(1) do not involve a determination of guilt or innocence. Nor do they presume that the unfit accused is dangerous. They simply require the Review Board to perform an assessment of the accused and impose the least onerous condition on his liberty. The unavailability of an absolute discharge relates to the fact that the accused has not been tried, rather than the presumption that the accused is guilty or dangerous. Section 672.33 does not presume guilt, but rather aims at preventing abuses of the regime under Part XX.1 by providing that the accused is acquitted when the evidence presented to the court is insufficient to put him on trial.

However, it is a well-established principle of fundamental justice that criminal legislation must not be overbroad. The least onerous disposition under s. 672.54(*a*), absolute discharge, is not available to the accused found unfit to stand trial. This is justified in the case of an unfit accused who does not suffer from a permanent mental disorder, because the means chosen by Parliament significantly advance the goals of assessment and treatment, which can result in rendering the accused fit for trial, and the goal of protecting the public. In the case of a permanently unfit accused, a trial is not a possibility and the objective of rendering the accused fit for trial does not apply. Consequently, the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered and there is no evidence of a significant threat to public safety, makes the law overbroad because the means chosen are not the least restrictive of the unfit person's liberty and are not necessary to achieve the state's objective. The impugned legislation thus infringes the s. 7 liberty of permanently [page492] unfit accused who do not pose a significant threat to society.

The overbroad legislation cannot be upheld under s. 1 of the *Charter*, because its overbreadth causes it to fail the minimal impairment branch of the s. 1 analysis. Part XX.1 deals unfairly with the permanently unfit accused who are not a significant threat to public safety. The regime does not provide for an end to the prosecution. Permanently unfit accused are subject to indefinite conditions on their liberty, of varying degrees of restrictiveness, resulting from the disposition orders of the Review Board or the court. Psychiatric evaluations are necessary to assess the mental condition of the permanently unfit accused in order to impose the least restrictive conditions, if any, on his liberty. The inability of courts and Review Boards to order such an assessment after the initial evaluation of the accused makes it impossible to ensure that the disposition under s. 672.54 or any review pursuant to s. 672.81(1) is tailored to the unfit accused's current circumstances.

The appropriate remedy in this case is a declaration of invalidity of the impugned provisions, suspended for a 12-month period to give Parliament time to amend the legislation. Such amendments should allow courts, under s. 672.54, to absolutely discharge a permanently unfit accused, and should also allow courts or Review Boards to order psychiatric evaluations if no current evaluations are available to them. Although the rule in *Schachter* precludes courts from granting an individual remedy under s. 24(1) of the *Charter* during the period of suspended invalidity, it does not stop them from awarding prospective remedies under s. 24(1) in conjunction with remedies under s. 52 of the *Constitution Act, 1982*. Therefore, if Parliament does not amend the invalid legislation within one year, those permanently unfit accused who do not pose a significant threat to the safety of the public can ask

for a stay of proceedings.

Per LeBel J.: The impugned provisions are *ultra vires* Parliament. The criminal procedure power under s. 91(27) of the *Constitution Act, 1867* does not grant Parliament the authority to supervise and detain accused [page493] who are permanently unfit to stand trial. The division of powers should be read in light of the principles that animate the whole of our Constitution, including the principle of respect for human rights and freedoms. The human rights and freedoms expressed in the *Charter*, while they do not formally modify the scope of the powers in ss. 91 and 92 of the *Constitution Act, 1867*, provide a new lens through which those powers should be viewed. In choosing one among several possible interpretations of powers that implicate human rights, the interpretation that best accords with the imperatives of the *Charter* should be adopted. In this case, the pith and substance of Part XX.1 in relation to accused found unfit to stand trial is the treatment and supervision of these accused as well as the protection of the public while they remain unfit and subject to an outstanding criminal charge. Insofar as the aim of Part XX.1 is concerned with the treatment and supervision of a temporarily unfit accused and the protection of the public during the accused's limited period of unfitness, its ultimate aim is to try the accused once he becomes fit. This falls squarely within the ambit of the criminal procedure power. However, where the accused is permanently unfit to stand trial, the overriding goal of Part XX.1 is absent and Parliament loses jurisdiction. A person cannot be subject to state control and have limits imposed on his liberty based on the criminal procedure power absent progress towards the adjudication of his legal culpability. This is a fundamental human right affirmed in ss. 7 and 11(*b*) of the *Charter*. The continued supervision, detention or conditional liberty of a permanently unfit accused can relate only to the mental health of the individual, and this is considered to be within the provincial jurisdiction under ss. 92(7), 92(13) and 92(16) of the *Constitution Act, 1867*. Further, this approach has the salutary effect of respecting and enhancing the permanently unfit accused's human dignity.

There is agreement with the majority's conclusion regarding the violation of s. 7 of the *Charter*.

An application for a stay resulting from a violation of an accused's right under s. 11(*b*) to a trial within a reasonable time would be available to both dangerous and non-dangerous permanently unfit accused, as our jurisprudence has made no distinction between an accused's character or alleged propensity for violence in determining whether s. 11(*b*) has been violated and whether a stay should issue under s. 24(1) of the *Charter*.

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With respect to a remedy, ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* should be declared invalid pursuant to s. 52 of the *Constitution Act, 1982* and the declaration should be suspended for 12 months. Further, the accused and all permanently unfit accused who do not pose a significant threat to public safety should be granted a stay of proceedings within 30 days under s. 24(1) of the *Charter* for the breach of their s. 7 rights. This is an appropriate case to combine remedies under ss. 24(1) and 52, because slavish adherence to the rule in *Schachter* would result in an injustice. This is not a situation in which a s. 24 remedy would only duplicate the relief flowing from the s. 52 remedy. From the

perspective of the public role of the *Charter*, a suspended declaration of invalidity under s. 52 ensures future compliance with the *Constitution Act, 1867* by Parliament and also protects the public from the immediate release of potentially dangerous persons, while giving time to both Parliament and the provincial legislatures to amend their respective legislation. From the perspective of the accused, however, a suspended declaration of invalidity gives him no immediate redress and the violation of his liberty interest under s. 7 continues. In light of the seriousness of the violation and the Review Board's recent finding that the accused was not dangerous enough to warrant hospitalization, a stay to be granted within 30 days would effectively redress the wrong he has suffered. The 30-day period is sufficient to allow the provincial health authorities to seek a protective order under their mental health regime, if necessary. There is no question in this case that the Court can effectively implement the suspended declaration of invalidity or the stay.

Cases Cited

By Iacobucci and Bastarache JJ.

Applied: Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625; R. v. Heywood, [1994] 3 S.C.R 761; Schachter v. Canada, [1992] 2 S.C.R. 679; discussed: R. v. Swain, [1991] 1 S.C.R. 933; *referred to*: R. v. Malmo-Levine, [2003] 3 S.C.R. 571, 2003 SCC 74; Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1; Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31; RJR-MacDonald Inc. v. Canada (Attorney [page495] General), [1995] 3 S.C.R. 199; Ward v. Canada (Attorney General), [2002] 1 S.C.R. 569, 2002 SCC 17; R. v. Morgentaler, [1993] 3 S.C.R. 463; Attorney General of Quebec v. Lechasseur, [1981] 2 S.C.R. 253; R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12; MacDonald v. Vapor Canada Ltd., [1977] 2 S.C.R. 134; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; Siemens v. Manitoba (Attorney General), [2003] 1 S.C.R. 6, 2003 SCC 3; Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), [2002] 2 S.C.R. 146, 2002 SCC 31; R. v. Pearson, [1992] 3 S.C.R. 665; R. v. Charemski, [1998] 1 S.C.R. 679; United States of America v. Shephard, [1977] 2 S.C.R. 1067; Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; Cunningham v. Canada, [1993] 2 S.C.R. 143; R. v. Power, [1994] 1 S.C.R. 601; Krieger v. Law Society of Alberta, [2002] 3 S.C.R. 372, 2002 SCC 65; Vriend v. Alberta, [1998] 1 S.C.R. 493; M. v. H., [1999] 2 S.C.R. 3; Guimond v. Quebec (Attorney General), [1996] 3 S.C.R. 347; Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R. 519, 2000 SCC 48; Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, 2002 SCC 13; Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391; R. v. Conway, [1989] 1 S.C.R. 1659.

By LeBel J.

Not followed: Schachter v. Canada, [1992] 2 S.C.R. 679; *distinguished*: R. v. Swain, [1991] 1 S.C.R.

933; Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625; *referred to*: Reference re Validity of Section 5(a) of the Dairy Industry Act, [1949] S.C.R. 1, aff'd [1951] A.C. 179 (sub nom. Canadian Federation of Agriculture v. Attorney-General for Quebec); Morgentaler v. The Queen, [1976] 1 S.C.R. 616; R. v. Morgentaler, [1993] 3 S.C.R. 463; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; R. v. Hydro-Québec, [1997] 3 S.C.R. 213; Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31; Di Iorio v. Warden of the Common Jail of the City of Montreal, [1978] 1 S.C.R. 152; Ritcey v. The Queen, [1980] 1 S.C.R. 1077; Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen, [1956] S.C.R. 303; R. v. Lyons, [1987] 2 S.C.R. 309; United States of America v. Shephard, [1977] 2 S.C.R. 1067; R. v. Monteleone, [1987] 2 S.C.R. 154; Edwards v. Attorney-General for Canada, [1930] A.C. 124; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Adler v. Ontario, [1996] 3 S.C.R. 609; [page496] Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3; Reference re Secession of Quebec, [1998] 2 S.C.R. 217; Reference re Alberta Statutes, [1938] S.C.R. 100; Switzman v. Elbling, [1957] S.C.R. 285; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; Reference re Resolution to amend the Constitution, [1981] 1 S.C.R. 753; Schneider v. The Queen, [1982] 2 S.C.R. 112; R. v. Askov, [1990] 2 S.C.R. 1199; R. v. Morin, [1992] 1 S.C.R. 771; Guimond v. Quebec (Attorney General), [1996] 3 S.C.R. 347; Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R. 519, 2000 SCC 48; Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, 2002 SCC 13; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1998] 1 S.C.R. 3; R. v. Brydges, [1990] 1 S.C. R. 190; R. v. Bain, [1992] 1 S.C.R. 91.

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Canadian Bill of Rights, S.C. 1960, c. 44.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(b), (d), 15(1), 24(1).

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Constitution Act, 1982, s. 52.

Criminal Code, R.S.C. 1985, c. C-46 [am. 1991, c. 43], ss. 271(1)(a), 614(2), Part XX.1, 672.11, 672.22, 672.23, 672.24(1) [am. 1997, c. 18, s. 82], 672.26, 672.33, 672.34, 672.45, 672.47, 672.48, 672.54, 672.55 [idem, s. 86], 672.58 to 672.62, 672.81.

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History and Disposition:

APPEAL from a judgment of the Quebec Superior Court, [2002] Q.J. No. 590 (QL), J.E. 2002-976, dismissing the accused's motion for a stay of proceedings and for a declaration that s. 672.54 of the Criminal Code is unconstitutional. Appeal allowed.

Counsel:

Suzanne Gagné and Stéphane Lepage, for the appellant.

Joanne Marceau, for the respondent.

Michel F. Denis and Yvan Poulin, for the intervener the Attorney General of Canada.

Lucy Cecchetto and Shaun Nakatsuru, for the intervener the Attorney General of Ontario.

The judgment of McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, Deschamps and Fish JJ. was delivered by

IACOBUCCI and BASTARACHE JJ.:—

I. Introduction

¶ 1 This appeal raises the issue of the constitutional validity of ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("Cr. C."), [page498] with respect to accused persons who are unfit to stand trial. More specifically, the questions raised are whether the regime set out by Parliament in Part XX.1 Cr. C. is unconstitutional under the division of powers analysis or under ss. 7, 11(*b*), 11(*d*) or 15(1) of the *Canadian Charter of Rights and Freedoms* when applied to persons who have been found permanently unfit to stand trial.

¶ 2 We have found that the application of the impugned provisions to persons found unfit to stand trial, on account of permanent or temporary mental disorder, falls within the legislative jurisdiction of the Parliament of Canada. However, we have also found that persons who are permanently unfit to stand trial and do not pose a significant threat to public safety suffer a breach of their liberty interest under s. 7 of the *Charter* because they are subject to indefinite appearances before the Review Board and to the exercise of its powers over them. The limitation of their liberty interest does not accord with the principles of fundamental justice and cannot be saved under s. 1 of the *Charter*. Accordingly, we would allow the appeal.

II. Background

¶ 3 The appellant suffers from Trisomy 21, more commonly known as Down Syndrome, which causes him to be moderately intellectually handicapped. On January 23, 1997, he appeared before the Court of Quebec in relation to charges of sexual assault under s. 271(1)(*a*) Cr. C. On that date, the judge before whom the appellant appeared ordered an inquiry to determine whether he was fit to stand trial.

On February 28, 1997, the appellant was declared unfit to stand trial, following which he remained in hospital until he was discharged three months later, on May 5, 1997, by a Review Board acting under ss. 672.47 and 672.54 Cr. C. His discharge was subject to the condition that he live with his family, keep the peace and establish a consensual treatment regime together with his parents and medical professionals.

¶ 4 The appellant presented a motion to obtain a stay of proceedings under s. 24(1) of the *Charter*, [page499] or alternatively, to have s. 672.54 Cr. C. declared of no force and effect under s. 52(1) of the *Constitution Act, 1982*, on the basis that it violated his rights under ss. 7, 11(*b*) and 15(1). The Quebec Superior Court refused to grant a stay and upheld the impugned provision: [2002] Q.J. No. 590 (QL). Since the matters at issue are not appealable to the Quebec Court of Appeal, leave to appeal was sought. Leave to appeal was granted by this Court on December 12, 2002.

III. Constitutional and Statutory Provisions

¶ 5 The following provisions of the *Constitution Act, 1867* and the *Criminal Code* are at issue:

Constitution Act, 1867

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --
> ...
> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Criminal Code, R.S.C. 1985, c. C-46

> **672.33** (1) The court that has jurisdiction in respect of the offence charged against an accused who is found unfit to stand trial shall hold an inquiry, not later than two years after the verdict is rendered and every two years thereafter until the accused is acquitted pursuant to subsection (6) or tried, to decide whether sufficient evidence can be adduced at that time to put the accused on trial.

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672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
(*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
(*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

672.81 (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(*a*).

¶ 6 The appellant submits that ss. 672.33, 672.54 and 672.81(1) Cr. C. infringe his right to liberty and security of the person guaranteed by s. 7, his right to be tried within a reasonable time guaranteed by s. 11(*b*), the presumption of innocence guaranteed by s. 11(*d*), and his equality rights guaranteed by s. 15 (1) of the *Charter*. The relevant provisions of the *Charter* are 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.
11. Any person charged with an offence has the right

...

(*b*) to be tried within a reasonable time;

...

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

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

IV. Issues

¶ 7 The following constitutional questions were stated by the Chief Justice on February 13, 2003:

1. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that they deprive persons who have been found unfit to stand trial of their right to liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice?
2. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
3. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* infringe the rights and freedoms guaranteed by s. 11(*d*) of the *Charter* on the ground that they deprive persons who have been found unfit to stand trial of the right to be presumed innocent?
4. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
5. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* infringe the rights and freedoms guaranteed by s. 15(1) of the *Charter* on the ground that they create discrimination against persons with a mental disability who have been found unfit to stand trial?
6. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

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An additional question was stated on November 4, 2003:

7. Does the application of ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to persons found unfit to stand trial on account of permanent mental disorder overstep the legislative jurisdiction of the Parliament of Canada under the *Constitution Act, 1867*?

V. Discussion

A. *The Impugned Scheme*

¶ 8 In the wake of this Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, Parliament introduced Part XX.1 Cr. C. The provisions in Part XX.1 establish a regime for dealing with accused persons who suffer from mental disorders. The first group covered by the regime is made up of accused that are found "not criminally responsible on account of mental disorder" ("NCR") under s. 672.34 Cr. C. The second group constitutes individuals declared unfit to stand trial. In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, a majority of this Court held that Part XX.1 was constitutional insofar as it applied to NCR offenders. The constitutionality of Part XX.1 in its application to accused who are unfit to stand trial was not addressed in *Winko* and is the focus of this appeal.

¶ 9 Under s. 672.23(1) Cr. C., where a court has reasonable grounds to believe that the accused is unfit to stand trial, it may direct, on its own motion or on the application of one of the parties, that the issue of fitness of the accused be tried. The court has the power under s. 672.11 to order an assessment of the accused, which constitutes an examination by a medical practitioner on the mental condition of the accused, and any incidental observation or examination of the accused. During a trial on the fitness of the accused, an unrepresented accused is provided with legal representation under s. 672.24(1). He or she is presumed fit to stand trial (s. 672.22). The party requesting that the issue of fitness be tried bears the burden of proving on a balance of probabilities that the accused is unfit to stand trial (ss. 672.22 and 672.23(2)). Although expert [page503] evidence is relied on heavily, the ultimate issue of fitness is decided by the trier of fact (s. 672.26).

¶ 10 If the accused is found unfit to stand trial, the court may order the forcible treatment of the accused for up to 60 days if (i) the Crown requests forcible treatment and (ii) according to a medical practitioner, specific treatment should be administered for the purpose of making the accused fit to stand trial (ss. 672.58 and 672.59). Immediately following such treatment or a finding that the accused is unfit to stand trial (in the event that no treatment of the accused is ordered), a disposition hearing is held, either by the court (s. 672.45) or alternatively by a Review Board (s. 672.47) to determine whether, and subject to what conditions, if any, the accused should be released or detained. The body conducting the disposition hearing must take into consideration the factors set out in s. 672.54: the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused. It must be pointed out that under s. 672.54, the Review Board is not authorized to grant an absolute or unconditional discharge to persons who are unfit to stand trial (although it does allow for the absolute discharge of individuals declared NCR).

¶ 11 Following its initial disposition in respect of an accused, the Review Board must conduct a hearing every year to determine whether the circumstances warrant a modification of its disposition (s. 672.81(1)). If the accused is fit to stand trial, he is sent to trial under s. 672.48, and the jurisdiction of the Review Board ceases to operate. Otherwise, and subject to what will be said immediately below, another review hearing is held the following year.

¶ 12 In addition to the proceedings conducted by the Review Board, under s. 672.33, every two years, the Crown must appear before a court to show that there still exists a *prima facie* case against the accused. This is the only way the Crown can justify maintaining the outstanding criminal charge against

the [page504] accused. In the event that the Crown cannot make out a *prima facie* case against the accused, the court is required to acquit the accused.

¶ 13 The result of the combined operation of ss. 672.33, 672.54 and 672.81(1) is that an accused found unfit to stand trial remains in the "system" established under Part XX.1 until either (a) he or she becomes fit to stand trial or (b) the Crown fails to establish a *prima facie* case against him or her.

B. *Division of Powers*

¶ 14 We will first examine the issue as to whether the impugned provisions fall within Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867*, or whether, as the appellant contends, it is *ultra vires*.

¶ 15 Whenever an issue of division of powers arises, the first step in the analysis is to characterize the "pith and substance" of the impugned legislation. In order to determine the pith and substance of any particular legislative provision, it is necessary to examine that provision in its overall legislative context: *Swain, supra*, at p. 998.

(1) The Criminal Law Power

¶ 16 Parliament's jurisdiction over criminal law was recently examined by this Court in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at paras. 73-74:

> The federal criminal law power is "plenary in nature" and has been broadly construed:
>
> > A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> [page505]
>
> (*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the "*Margarine Reference*"), at p. 49)
>
> ...

> For a law to be classified as a criminal law, it must possess three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty (*Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 27). The criminal power extends to those laws that are designed to promote public peace, safety, order, health or other legitimate public purpose. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, it was held that some legitimate public purpose must underlie the prohibition. In *Labatt Breweries* [*of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914], in holding that a health hazard may ground a criminal prohibition, Estey J. stated the potential purposes of the criminal law rather broadly as including "public peace, order, security, health and morality" (p. 933). Of course Parliament cannot use its authority improperly, e.g. colourably, to invade areas of provincial competence: *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 237.

¶ 17 In determining whether the purpose of a law constitutes a valid criminal law purpose, courts also look at whether laws of this type have traditionally been held to be criminal law: *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, 2002 SCC 17, at para. 51; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 32; *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 204; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 491.

¶ 18 The pith and substance of Part XX.1 Cr. C. is revealed by its twin goals of protecting the public and treating the mentally ill accused fairly and appropriately: *Winko, supra*, at para. 20.

(2) Pith and Substance of the Impugned Provisions and Their Classification as Criminal Law Under Section 91(27)

¶ 19 The appellant contends that once it has been established that a person will not be tried because of permanent unfitness to stand trial, the circumstances [page506] no longer constitute a matter within Parliament's criminal law power. Instead, he claims that persons who represent a danger to themselves or others fall under the exclusive provincial jurisdiction of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*. The appellant also argues that the impugned provisions are not within Parliament's criminal law powers because their pith and substance is the protection of society from persons with dangerous mental states, not persons who have engaged in conduct proscribed by the *Criminal Code*. He relies on passages from this Court's decisions in *Swain* and *Winko* to suggest that once an unfit accused ceases to pose a significant threat to public safety, the criminal justice system has no further application.

¶ 20 Such a statement is true of the NCR accused. This Court has stated that the only constitutional basis for the criminal law restricting the liberty of an NCR accused is the protection of the public from significant threats to its safety. For example, in *Winko*, at para. 33, McLachlin J. (as she then was) held:

> The preventative or protective jurisdiction exercised by the criminal law over NCR offenders extends only to those who present a significant threat to society... . Once an NCR accused is no longer a significant threat to public safety, the criminal justice system has no further application.

¶ 21 However, to say that the same considerations apply to the accused person found unfit to stand trial is to ignore fundamental differences between persons who are found to be NCR and persons who are found unfit to stand trial. The difference in legal status between the NCR and the unfit accused has been discussed by R. D. Schneider in "Mental Disorder in the Courts: Absolute Discharge for Unfits?" (2000), 21 *For the Defence* 36, at p. 38:

> The NCR accused has not been convicted of a crime, but the criminal proceedings have been fully concluded [page507] and a final verdict obtained. Therefore, society's residual hold on the accused can only be justified if the accused is shown to be a significant threat to the safety of the public. On the other hand, the unfit accused has yet to be tried. So long as the information or indictment is outstanding the court and/or the Review Board maintain jurisdiction over the accused. Jurisdiction over the unfit has nothing to do with dangerousness. The fitness rules were established to ensure that a prosecution not proceed where an accused is not able to adequately respond to the state. The rules are in place to protect the accused. While it is true that an accused may be "permanently unfit", surely that status accompanied by the presumption of innocence [*Charter*, s. 11(*d*)] is preferable to either proceeding against the unfit accused or terminating the outstanding charges. [Emphasis added.]

¶ 22 Thus, when a verdict of NCR has been rendered, the criminal process has ended and the exercise of criminal state power over NCR offenders can only be justified under the protective branch of the criminal law, when it is proven that the NCR offender presents a significant threat to the public. However, the situation is different with respect to accused found unfit to stand trial: the criminal law's jurisdiction over the unfit accused does not stem from the protective branch of the criminal law, unless he or she is found to be dangerous. Rather, the criminal justice system maintains jurisdictional control over the accused found unfit to stand trial because that person is subject to a criminal accusation and pending proceedings. As long as this accusation is maintained, it is not necessary to consider the dangerousness of the accused or the protection of the public because other considerations justify Parliament's jurisdiction in regards to accused found unfit to stand trial, namely its jurisdiction over criminal procedure.

¶ 23 Parliament's power in matters of criminal law, under s. 91(27) of the *Constitution Act, 1867*, expressly includes "the [p]rocedure in [c]riminal [m]atters". Its jurisdiction over criminal procedure was discussed by this Court in *Attorney General of Quebec v. Lechasseur*, [1981] 2 S.C.R. 253, at p. 262:

[page508]

That the present s. 455, no less than its forerunners, is within federal competence as an exercise of power in relation to the criminal law, including procedure in a criminal matter, appears to me to be incontestable. The section makes it possible for a charge of an indictable offence to be brought before a justice of the peace or a magistrate to consider the issue of a summons or a warrant in respect of the charge. The criminal process is thus initiated and this initiation is integral to the process. [Emphasis added.]

From the time a person is accused of a crime under the *Criminal Code*, the criminal process is validly engaged and its hold on the accused found unfit to stand trial is established. Therefore, the authority to establish a scheme to administer the rights of the accused found unfit to stand trial flows from Parliament's jurisdiction on criminal law, including criminal procedure.

¶ 24 The system of Crown pre-charge screening in Quebec was described by this Court in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at para. 76 (citing the Attorney General of Quebec's factum):

> [TRANSLATION] The prosecutor's decision to authorize the laying of criminal charges presupposes that the conduct complained of constitutes an offence in law, that there are reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it, and that it is appropriate to prosecute. In exercising prosecutorial discretion, the prosecutor must take into account various policy and social considerations.

Consequently, when the Crown has reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it and that it is appropriate to prosecute, it will lay criminal charges and the person falls within Parliament's criminal law jurisdiction. Such a finding reinforces the government's fundamental interest in bringing to trial an individual accused of a serious crime.

¶ 25 As mentioned above, Part XX.1 Cr. C. was enacted as a balanced response to this Court's decision in *Swain*. This new scheme reflects both the public's needs (protection from dangerous [page509] individuals and bringing to trial an individual accused of a serious crime) and the needs of the accused (right to a fair trial, assessment and treatment of persons with mental disorders). The pith and substance of the impugned provisions falls within both the preventive and criminal procedure branches of the criminal law, all within well-accepted criminal law purposes (*Margarine Reference, supra*).

¶ 26 In *Swain, supra*, this Court found that the predecessor legislation to Part XX.1 was a valid exercise of Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867*. After citing *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, at p. 146, as an authority for the proposition that "legislation under the preventative branch of the criminal law power must relate in some way to criminal proceedings" but does not require an actual conviction, Lamer C.J. explained, at p. 1001:

> Since the insanity provisions only relate to persons whose actions are proscribed by the *Criminal Code,* the required connection with criminal law is present. The system of Lieutenant Governor warrants, through the supervision of persons acquitted by reason of insanity, serves to prevent further dangerous conduct proscribed by the *Criminal Code* and thereby protects society. The protection of society is clearly one of the aims of the criminal law.
>
> While I am aware of the potential danger of eroding provincial power if "protection of society" is characterized too broadly, I would emphasize that in this case Parliament is protecting society from individuals whose behaviour is proscribed by the *Criminal Code*. The provisions do not relate to all insane persons, but only those who, through their actions, have brought themselves within the criminal law sphere.

¶ 27 It is also important to note that laws dealing with the unfit accused have long been accepted as valid criminal law. Until 1990, where an accused was "acquitted on the basis of mental illness, he or she was not released, but was automatically detained at the pleasure of the Lieutenant Governor in Council: [page510] *Criminal Code*, s. 614(2) (formerly s. 542(2)) (repealed S.C. 1991, c. 43, s. 3)": *Winko*, *supra*, at para. 18.

¶ 28 Finally, as stated by Dickson C.J. in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20, where one level of government supports the constitutionality of another level's legislation, the Court should be cautious before finding the impugned provision *ultra vires*:

> I think it is important to note, and attach some significance to, not only the similar federal legislation but also the fact that the federal government intervened in this appeal to support the Ontario law. The distribution of powers provisions contained in the *Constitution Act, 1867* do not have as their exclusive addressees the federal and provincial governments. They set boundaries that are of interest to, and can be relied upon by, all Canadians. Accordingly, the fact of federal-provincial agreement on a particular boundary between their jurisdictions is not conclusive of the demarcation of that boundary. Nevertheless, in my opinion the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity or, as in this case, actually intervenes to support it and has enacted legislation based on the same constitutional approach adopted by Ontario. [Emphasis added.]

See also *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, 2003 SCC 3, at para. 34, and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 31. In the case at bar, the Attorney General of Canada, as well as the Attorney General of Ontario, have intervened to support the constitutionality of the impugned provisions of the *Criminal Code*.

¶ 29 Thus, for all the aforementioned reasons, we are of the view that the application of ss. 672.33, 672.54 and 672.81(1) Cr. C. to persons found unfit to stand trial, on account of permanent or temporary

mental disorder, falls within the legislative [page511] jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*.

C. *Do Sections 672.33, 672.54 and 672.81(1) of the Criminal Code Infringe Section 7 of the Charter?*

(1) The Liberty Interest

¶ 30 As stated in *Winko*, *supra*, at para. 64, the provisions of Part XX.1 Cr. C. permit the state, through a court or Review Board, to deprive the NCR accused of his or her liberty. It is conceded by the respondent in the case at bar that an unfit accused is also deprived of his or her right to liberty under Part XX.1, because he or she is subject to a disposition order by the Review Board that imposes certain conditions on his or her liberty. It is therefore necessary to move to the next stage of the s. 7 analysis to determine whether the deprivation of liberty accords with the principles of fundamental justice.

(2) Principles of Fundamental Justice

¶ 31 The appellant argues that two principles of fundamental justice have been breached: (1) the presumption of innocence and (2) the principle that criminal legislation must not be overbroad.

(a) *Presumption of Innocence*

¶ 32 The appellant contends that Part XX.1 requires the state to treat unfit accused as offenders who have a mental illness, without taking into account that it has not been proved beyond a reasonable doubt that they have committed a criminal offence. The appellant also argues that the presumption of innocence is infringed when permanently unfit accused are subjected to the criminal justice system during an indeterminable period for the sole reason that a *prima facie* case against them exists, one that they will never be able to contest because they are permanently unfit. In sum, the appellant argues that the state cannot subject a permanently unfit accused to the criminal charges for an indeterminate period with only the goal of ensuring public safety, based solely on a *prima [page512] facie* case that he or she committed the offence charged.

¶ 33 In our view, the deprivation of the unfit accused's liberty accords with the presumption of innocence as a principle of fundamental justice.

¶ 34 As discussed by this Court in *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 685, the presumption of innocence as a principle of fundamental justice under s. 7 of the *Charter* "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". The Review Board proceedings under ss. 672.54 and 672.81(1) do not involve a determination of guilt or innocence. Nor do they presume that the unfit accused is dangerous. They simply require the Review Board to perform an assessment of the accused and impose the least onerous condition on his or her liberty. The unavailability of an absolute discharge relates to the

fact that the accused has not been tried, rather than the presumption that the accused is guilty or dangerous.

¶ 35 Section 672.33 requires the court only to examine whether or not the Crown is able to put forward sufficient evidence to put the accused on trial. In other words, the Crown must adduce some "evidence upon which a reasonable jury properly instructed could return a verdict of guilty": *R. v. Charemski*, [1998] 1 S.C.R. 679, at para. 2; *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080. Section 672.33 does not presume guilt, but rather aims at preventing abuses of the regime under Part XX.1 Cr. C. by providing that the accused is acquitted when the evidence presented to the court is insufficient to put him or her on trial.

¶ 36 Even though the disposition orders do restrict the unfit person's liberty, they do not aim to punish the [page513] accused. Nor are they based on a presumption of guilt or innocence. The *prima facie* case against the unfit accused is sufficient to keep him or her under Part XX.1 Cr. C. and is consistent with *Pearson, supra*.

(b) *Overbreadth*

¶ 37 It is a well-established principle of fundamental justice that criminal legislation must not be overbroad: *R. v. Heywood*, [1994] 3 S.C.R. 761; *Winko, supra*; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

¶ 38 The appellant argues that Part XX.1 Cr. C. assumes that persons who are found unfit to stand trial will become fit. He submits that in the event that this Court concludes that the state can restrain the liberty of accused persons unfit to stand trial on account of permanent mental disorders, with the sole goal of protecting the public, these provisions are overbroad. He also argues that the provisions are overbroad because they require the court or the Review Board to restrain the liberty of an unfit accused even in the absence of a conclusion that he or she represents a significant threat to the safety of the public.

¶ 39 Overbreadth in criminal legislation was examined by our Court in *Heywood, supra*, at pp. 792-93:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

¶ 40 In *Winko, supra*, at para. 71, this Court stated that the scheme under s. 672.54 is not overbroad in regards to NCR accused because Parliament has stipulated that unless it is established that the NCR [page514] accused is a significant threat to public safety, he must be discharged absolutely. In cases where a significant threat is established, Parliament has further stipulated that the least onerous and least restrictive disposition of the accused must be selected. This ensures that the NCR accused's liberty is impaired no more than is necessary to protect public safety.

¶ 41 The least onerous disposition under s. 672.54(*a*), absolute discharge, is not available to the accused found unfit to stand trial. This is justified in the case of an unfit accused who does not suffer from a permanent mental disorder, and does not overshoot the goals of Part XX.1, particularly the goal of providing individual assessment and opportunities for appropriate treatment: *Winko, supra*, at para. 43. The purpose of Part XX.1, as a unique scheme that exists within the criminal process, is to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial while preserving his or her maximum liberty and dignity. Part XX.1 is not overbroad in the case of temporarily unfit accused, because the means chosen by Parliament significantly advance the goals of assessment and treatment, which can result in rendering the accused fit for trial and the goal of protecting the public.

¶ 42 However, in the case of a permanently unfit accused, a trial is not a possibility; therefore, the objective of rendering the accused fit for trial does not apply. The criminal process will never come to an end because the accused will not become fit for trial. In enacting Part XX.1, Parliament has set up an assessment and treatment system so that the accused can become fit, thus creating a presumption of possibility of recovered capacity to stand trial.

¶ 43 Consequently, the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered and there is no evidence of a significant threat [page515] to public safety, makes the law overbroad because the means chosen are not the least restrictive of the unfit person's liberty and are not necessary to achieve the state's objective. Accordingly, these sections of the law restrict the liberty of permanently unfit accused "for no reason", to use Cory J.'s words in *Heywood*, *supra*, at p. 793.

(3) The Proper Approach to Section 7

¶ 44 The respondent argues that the impugned provisions do not violate the principles of fundamental justice because they strike an appropriate balance between the interests of society and the accused. It relies on *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at p. 152, where McLachlin J. wrote that "[f]undamental justice requires that a fair balance be struck between these interests, both substantively and procedurally."

¶ 45 In making this argument, the respondent misconceives the role played by "balancing" in the structure of s. 7 of the *Charter*. It effectively argues that it is a principle of fundamental justice that the correct balance be struck between individual and societal interests. However, as a majority of this Court

made clear in the case of *Malmo-Levine, supra*, at para. 97, the "balancing of interests" referred to by McLachlin J. in *Cunningham* is to be taken into consideration by courts only when they are deriving or construing the content and scope of the principles of fundamental justice themselves. It is not in and of itself a freestanding principle of fundamental justice which must be respected if a deprivation of life, liberty and security of the person is to be upheld. This was explained by Gonthier and Binnie JJ. in *Malmo-Levine*, at paras. 96 and 98:

> We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure "strikes the right balance" between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual [page516] and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7.
> ...
> The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez*, ... "in arriving at these principles (of fundamental justice), a balancing of the interest of the state and the individual is required" (pp. 592-93 ...). [Italics and underlining in original.]

¶ 46 With respect to a justification analysis under s. 1 of the *Charter*, it was mentioned in *Heywood, supra*, at pp. 802-3 that "[o]verbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis." To the extent that the impugned provisions at issue are overbroad, it impairs individuals' interests unnecessarily, and therefore has not employed the least restrictive means of achieving Parliament's objective under the circumstances.

D. *Analysis of the Process and its Shortcomings*

¶ 47 Although the court and Review Board have a wide latitude in determining the appropriate conditions to be imposed under s. 672.54 Cr. C., the scope of their authority does not encompass the power to make an order for psychiatric or other treatment of the accused or an order requiring the accused to submit to such treatment, unless the accused consents to the condition and the Review Board or court considers it reasonable and necessary in the interests of the accused: s. 672.55 Cr. C. However, a determination of the least restrictive and onerous disposition compatible with the unfit accused's current situation under s. 672.54 Cr. C. requires an evaluation of the individual's dangerousness, among other factors. It is therefore necessary to examine the powers of the court and Review Board under Part XX.1, particularly their ability to order psychiatric evaluations, [page517] to ensure that the scheme provides for the ongoing assessment of the unfit accused.

(1) Powers and Role of the Review Board

¶ 48 The regime under Part XX.1 is inquisitorial rather than adversarial: *Winko, supra,* at para. 54. The court or Review Board gathers and reviews all available evidence pertaining to the four factors set out in s. 672.54: public protection, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused (*Winko, supra*, at para. 55).

¶ 49 While a court, under Part XX.1 Cr. C., orders a first psychiatric evaluation and makes an initial determination, the Review Board is in charge of evaluating all the relevant factors on an ongoing basis and making, as best as it can, an assessment of whether the unfit accused poses a significant threat to the safety of the public. However, the Review Board itself lacks the power to order psychiatric evaluations. Such a power, which is necessary to make an accurate assessment of the accused, is especially important as time passes (after the initial evaluation) and the accused is neither undergoing treatment nor detained in a hospital. For the Review Board to properly assess the individual, and to make or recommend an appropriate disposition to fit the given situation of an accused, it must have the authority to order a psychiatric evaluation. As discussed below, its inability to order such evaluations fails to provide for the proper assessment of the permanently unfit accused, which, in our view, results in unfair treatment under Part XX.1.

(2) Powers and Role of the Courts

¶ 50 Unlike the Review Board, the court has the power, under s. 672.11 Cr. C., to order psychiatric evaluations:

> **672.11** A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable [page518] grounds to believe that such evidence is necessary to determine
>
> (*a*) whether the accused is unfit to stand trial;
> ...
> (*d*) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused.

¶ 51 Under Part XX.1, courts are afforded a certain discretion to order an assessment of the accused's mental condition where they have jurisdiction over the accused. However, this discretion seems limited (1) to making a first disposition under s. 672.54 after a verdict of unfit to stand trial has initially been rendered, and (2) to ordering a proceeding under s. 672.33 Cr. C., according to which no individual declared unfit to stand trial may continue to be subjected to criminal proceedings where the Crown is unable to establish a *prima facie* case against him or her. Section 672.11 does not explicitly grant the court the power to order a psychiatric evaluation for the mandatory review of a disposition under s. 672.81(1). The process under Part XX.1 therefore makes the court's power to order psychiatric evaluations unproductive after the first disposition, because the court does not deal at the same time with sufficiency of evidence and dangerousness.

(3) Application of the Process to Permanently Unfit Accused Who Do Not Present a Significant Threat to Public Safety

¶ 52 The entire criminal process in relation to permanently unfit accused rests on psychiatric evaluations, namely assessments of fitness to stand trial and assessments of dangerousness. Psychiatric evaluations are necessary to assess the mental condition of the permanently unfit accused in order to impose the least restrictive conditions, if any, on his or her liberty. The inability of courts and Review Boards to order an assessment of the accused after the initial evaluation makes it impossible to ensure that the disposition under s. 672.54 or any review pursuant [page519] to s. 672.81(1) is tailored to the unfit accused's current circumstances.

¶ 53 A permanently unfit accused will never become fit, nor will he or she ever be tried. Such individuals will be subject to anxiety, concern and stigma because of the criminal proceedings that hang over them indefinitely.

¶ 54 The respondent submits that there is a way of putting a stop to the proceedings, namely its discretion to withdraw the charges against the accused notwithstanding the existence of a *prima facie* case, a power within the prerogative of the Crown. Although this Court has recognized the importance of prosecutorial discretion (see *R. v. Power*, [1994] 1 S.C.R. 601; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65), the constitutional validity of the impugned scheme in this case cannot depend on such discretion.

¶ 55 In our view, Part XX.1 Cr. C. fails to deal fairly with the permanently unfit accused who are not a significant threat to public safety. Society's interest in bringing accused persons to trial cannot be accomplished, nor can society's interest in treating the accused fairly. The regime fails to provide for an end to the prosecution. Permanently unfit accused are subject to indefinite conditions on their liberty, of varying degrees of restrictiveness, resulting from the disposition orders of the Review Board or the court, who do not even have the power to order a psychiatric assessment in order to adapt a disposition to meet the permanently unfit accused's current circumstances. Thus, the failure of the regime to provide for the permanently unfit accused, combined with the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered, renders the entire scheme under Part XX.1 overbroad as it relates to permanently unfit accused who do not pose a significant threat to the safety of the public.

[page520]

E. *Remedy*

¶ 56 Because the impugned provisions are unconstitutional as a violation of s. 7 of the *Charter*, a remedy under s. 52(1) of the *Constitution Act, 1982* is in order, particularly because the main problem here is the overbreadth of the legislation. As outlined in *Schachter v. Canada*, [1992] 2 S.C.R. 679, there

is a range of possible remedies available. The remedy of choice under the circumstances is a declaration of invalidity that is to be suspended for a period of twelve months.

¶ 57 It is inappropriate to simply strike down the legislation in this case since doing so would create a lacuna in the regime before Parliament would have a chance to act. In accordance with *Schachter, supra*, a suspended declaration of invalidity is warranted in situations like this one, where striking down the legislation could create a danger to public safety. For similar reasons, Lamer C.J. in *Swain, supra*, at p. 1021, avoided declaring the legislation at issue of no force or effect and suspended the declaration of invalidity:

> If, based on the reasons given above, s. 542(2) is simply declared to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, it will mean that as of the date this judgment is released, judges will be compelled to release into the community all insanity acquittees, including those who may well be a danger to the public. Because of the serious consequences of finding s. 542(2) to be of no force and effect, there will be a period of temporary validity which will extend for a period of six months.

¶ 58 In addition, the "reading in" remedy of *Vriend v. Alberta*, [1998] 1 S.C.R. 493, is also not appropriate here because doing so would necessarily include reading in detailed and complicated consequential amendments to the existing legislation, which, as the Court decided in *M. v. H.*, [1999] 2 S. C.R. 3, is better left to Parliament or the legislatures. Nor is the "reading down" remedy appropriate for similar reasons.

¶ 59 Under the circumstances, and recognizing the federal government's acknowledgement of the [page521] need to address the situation of permanently unfit accused and its intent to propose amendments to the legislation (see *Response to the 14th Report of the Standing Committee on Justice and Human Rights: Review of the Mental Disorder Provisions of the Criminal Code* (November 2002), at p. 11), we order a declaration of invalidity of the impugned provisions of Part XX.1 Cr. C. as a result of their overbreadth in regard to permanently unfit accused who do not pose a significant threat.

¶ 60 This declaration is suspended for a period of 12 months to allow for Parliament to amend the legislation. Such amendments, as already proposed by Government in November 2002, would allow courts, under s. 672.54 Cr. C. to absolutely discharge a permanently unfit accused either on its own motion or following the recommendation of a Review Board. They would also allow for courts or Review Boards to order psychiatric evaluations if no current evaluations are available to them.

¶ 61 In case, however, Parliament does not amend the legislation within a year, there is a need to consider the issue of whether an individual remedy under s. 24(1) is available in conjunction with the suspended declaration of invalidity pursuant to s. 52. In *Schachter, supra*, at p. 720, Lamer C.J. limited the situations in which courts could grant individual remedies under s. 24(1) in conjunction with s. 52 remedies:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief [page522] flowing from the action that court has already taken. [Emphasis added.]

¶ 62 This rule precludes courts from granting a s. 24(1) individual remedy during the period of suspended invalidity. Although this rule has mostly been applied in cases dealing with pecuniary liability (see *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 18; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para. 43), the policy rationale for this rule is not in our view based solely on financial liability. This was discussed by our Court in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 79:

> Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded.

In our view, there is no reason to revisit the wisdom of the *Schachter* rule in the present case. There is no evidence that government acted in bad faith or abused its powers.

¶ 63 Although the rule in *Schachter, supra*, precludes courts from combining retroactive remedies under s. 24(1) with s. 52 remedies, it does not stop courts from awarding prospective remedies under s. 24(1) in conjunction with s. 52 remedies. Therefore, if Parliament does not amend the invalid legislation within one year, those accused who do not pose a significant threat to the safety of the public can ask for a stay of proceedings as an individual remedy under s. 24(1) of the *Charter*. This will quash the criminal charge and liberate them from what will [page523] remain of the impugned regime. As recently stated by LeBel J. in *Regan, supra*, at para. 54, citing *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 75, a stay of proceedings is a "drastic" remedy, and is therefore reserved for the cases where a very high threshold is met:

> ... a stay of proceedings will only be appropriate when two criteria are met:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
(2) no other remedy is reasonably capable of removing that prejudice.

¶ 64 Thus, a stay should be granted to permanently unfit accused who do not pose a significant threat to the safety of the public, in order to prevent their indefinite subjection to criminal proceedings. In deciding whether or not to grant a stay, courts will have to consider such factors as the nature of the accusation, the time since the offence, later conduct, initial and current medical evaluations, whether the accused is taking medication required to eliminate the risk, as well as all other relevant information and circumstances of the accused. Also, as mentioned by this Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 92, it will also be appropriate at this stage "to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits". This balancing recognizes that the administration of justice is best served by staying the proceedings where the affront to fairness and decency is disproportionate to the societal interest in the subjection of the accused to criminal proceedings: *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667.

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F. *Application to Demers*

¶ 65 Aside from requesting to have s. 672.54 Cr. C. declared of no force or effect under s. 52, the appellant also requests an immediate remedy under s. 24(1) of the *Charter*. As noted above, the *Schachter* rule does not preclude our Court from awarding a stay of proceedings under s. 24(1) after the one-year suspension. In order to qualify for the stay of proceedings, Mr. Demers must be found not to present a significant threat to the safety of the public after undergoing a psychiatric evaluation. It must be noted here that the appellant has never been found to pose no threat to public safety on the basis of a psychiatric evaluation; he has not been reevaluated in that respect since the original determination of dangerousness because he has not been institutionalized, nor has he been receiving treatment, two situations which would have provided for new medical evidence of dangerousness that could be considered by the Review Board. Although Mr. Demers has undergone annual hearings pursuant to s. 672.81(1) Cr. C., these proceedings do not provide for psychiatric evaluations of dangerousness.

VI. Disposition

¶ 66 For the above reasons, we would allow the appeal, set aside the judgment of the Superior Court, and declare that ss. 672.33, 672.54 and 672.81(1) Cr. C. are overbroad, thus violating the s. 7 rights of permanently unfit accused who do not pose a significant threat to society. Because we find the impugned provisions unconstitutional as violating s. 7 of the *Charter*, it is unnecessary for us to consider the other *Charter* questions posed. The most appropriate remedy in this case is a suspended declaration of invalidity for a period of twelve months. If after twelve months Parliament does not cure the

unconstitutionality of the regime, accused who qualify can ask for a stay of proceedings.

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¶ 67 We would therefore answer the constitutional questions as follows:

1. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that they deprive persons who have been found unfit to stand trial of their right to liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice?

   Yes.

2. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

   No. The legislation's overbreadth causes it to fail the minimal impairment branch of the s. 1 analysis.

3. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* infringe the rights and freedoms guaranteed by s. 11(*d*) of the *Charter* on the ground that they deprive persons who have been found unfit to stand trial of the right to be presumed innocent?

   It is unnecessary to answer this question.

4. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

   It is unnecessary to answer this question.

5. Do ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* infringe the rights and freedoms guaranteed by s. 15(1) of the *Charter* on the ground that they create discrimination against persons with a mental disability who have been found unfit to stand trial?

   It is unnecessary to answer this question.

6. If so, are the infringements reasonable limits that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

It is unnecessary to answer this question.

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7. Does the application of ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to persons found unfit to stand trial on account of permanent mental disorder overstep the legislative jurisdiction of the Parliament of Canada under the *Constitution Act, 1867*?

No.

The following are the reasons delivered by

LeBEL J.:--

I. Introduction

¶ 68 This appeal raises some important questions regarding our basic constitutional arrangements, including the relationship between the *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms*. I agree with my colleagues' conclusion regarding the breach of s. 7 of the *Charter*, but I disagree with respect to the division of powers issue and wish to leave open the possibility that an individual stay might be available for a violation of s. 11(*b*) of the *Charter*.

¶ 69 In my view, the criminal procedure power under s. 91(27) of the *Constitution Act, 1867* does not grant Parliament the authority to supervise and detain accused who are permanently unfit to stand trial. Although Parliament is competent to legislate procedures for unfit accused at the outset of proceedings, once a court has determined that the accused is in fact permanently unfit to stand trial, the jurisdiction shifts to the provincial governments under their health power.

¶ 70 With respect to the appropriate remedy, I agree that the declaration of invalidity of ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, should be suspended for 12 months in order to give Parliament and the provinces time to amend their respective mental health legislation. However, I would also order a stay of the proceedings against Mr. Demers within 30 days under s. 24(1) of the *Charter* for the breach of his s. 7 rights. Similarly, I would stay proceedings against all permanently unfit accused who do not pose a significant [page527] threat to public safety within 30 days. This period of time should permit the provincial authorities to seek protective orders under their respective mental health regimes, if necessary. I think it is appropriate that we should revisit our position about the combination of remedies: see, e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720.

II. Division of Powers

¶ 71 Justices Iacobucci and Bastarache conclude that, with respect to permanently unfit accused, ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* are a valid exercise of Parliament's criminal procedure power under s. 91(27) of the *Constitution Act, 1867*. I disagree. The supervision and treatment

of permanently unfit accused and the protection of the public from potentially violent permanently unfit accused are matters exclusively within the health jurisdiction of the provinces under ss. 92(7), 92(13), and 92(16).

A. *Historical Scope of the Criminal Law Power*

¶ 72 This appeal raises fundamental questions regarding our constitutional structure, including the proper relationship between the *Constitution Act, 1867* and the *Charter*. Historically, the federal criminal law power and the contingent criminal procedure power have been construed broadly. The classic definition of the scope of the criminal law was provided by Rand J. in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at pp. 49-50, aff'd [1951] A.C. 179 (P.C.) (*sub nom. Canadian Federation of Agriculture v. Attorney-General for Quebec*), as a public purpose that can support the prohibition and penalty as being in relation to criminal law:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious [page528] or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
> ...
> Is the prohibition ... enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law ... .

This wide scope has been consistently affirmed by the Court, as Laskin C.J. remarked in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 625:

> The wide scope of the exclusive federal criminal law power has been consistently asserted in the relevant case law in both the Privy Council, when it was Canada's ultimate appellate court, and in this Court.

This expansive interpretation has continued more recently in cases such as *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; see also Professor A. W. MacKay, "The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?" (2001), 80 *Can. Bar Rev.* 241, at pp. 266-79.

¶ 73 Similarly, as a corollary of this plenary criminal law power, Parliament's jurisdiction over criminal procedure under s. 91(27) has also been construed broadly. A precise definition of "procedure in criminal matters", however, has been difficult to formulate:

> It is not necessary and perhaps impossible, to find a satisfactory definition of "criminal procedure." Although I would reject the view which would confine criminal procedure to that which takes place within the courtroom on a prosecution, I am equally of the opinion that "criminal procedure" is not co-extensive with "criminal justice" or that the phrase "criminal procedure" as used in the *B.N.A. Act* can drain from the words "administration of [page529] justice" in s. 92(14) that which gives those words much of their substance -- the element of "criminal justice."
> (*Di Iorio v. Warden of the Common Jail of the City of Montreal*, [1978] 1 S.C.R. 152, at pp. 209-10, quoted with approval by Ritchie J. in *Ritcey v. The Queen*, [1980] 1 S.C.R. 1077, at p. 1085)

Based on the apparent elasticity of the concept, the Court held that the preventative branch of criminal procedure under s. 91(27) gave Parliament jurisdiction over the detention of accused who have been found not criminally responsible ("NCR"): *Swain, supra*.

¶ 74 In *Swain, supra*, Lamer C.J., for all seven judges on this issue, held that the then insanity provisions of the *Criminal Code* were *intra vires* Parliament. In *Swain*, Lamer C.J. considered s. 542(2) and the surrounding legislative scheme, including ss. 545 and 547. These provisions dealt with persons who had been acquitted by reason of a mental disorder. Lamer C.J. held that the pith and substance of the legislative scheme was not to treat and cure the mentally ill, but the protection of society from dangerous people who have engaged in conduct proscribed by the *Criminal Code* (p. 998). In *Swain*, the Court did not consider the question from the perspective of those who were found unfit to stand trial because of mental disorder. Lamer C.J. held that the provisions dealing with the detention of persons who had been acquitted by reason of mental disorder were founded on the "preventative" branch of the criminal procedure power.

¶ 75 In reviewing the existence of the preventative branch of criminal procedure power, Lamer C.J. considered *Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen*, [1956] S.C.R. 303, and *R. v. Lyons*, [1987] 2 S.C.R. 309. Both cases dealt with the preventative branch in the context of sentencing. While Lamer C.J. held, at p. 1000, that "a conviction is not necessary before Parliament can legislate pursuant to this particular aspect of [page530] s. 91(27)", he qualified the scope of the preventative aspect such that it must relate in some way to criminal proceedings (p. 1001). Lamer C.J. concluded that the provisions only apply to those insane individuals who have committed acts (i.e. the *actus reus*) proscribed by the *Criminal Code* (at p. 1001):

> Since the insanity provisions only relate to persons whose actions are proscribed by the *Criminal Code*, the required connection with criminal law is present. The system of Lieutenant Governor warrants, through the supervision of persons acquitted by reason of insanity, serves to prevent further dangerous conduct proscribed by the *Criminal Code* and thereby protects society.

> ... I would emphasize that in this case Parliament is protecting society from individuals whose behaviour is proscribed by the *Criminal Code*. The provisions do not relate to all insane persons, but only those who, through their actions, have brought themselves within the criminal law sphere. [Emphasis added.]

Similarly, McLachlin J. (as she then was) for the majority in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, only considered the criminal procedure power in relation to those who were found not criminally responsible on account of mental disorder, the same group considered in *Swain, supra*. She held, at para. 32, that the provisions relating to the ongoing supervision and control of NCR accused were *intra vires* the preventative branch of the federal criminal procedure power:

> Nor is the verdict that a person is NCR a verdict of acquittal. Although people may be relieved of criminal responsibility when they commit offences while suffering from mental disorders, it does not follow that they are entitled to be released absolutely. Parliament may properly use its criminal law power to prevent further criminal conduct and protect society: *Swain*, at p. 1001. By committing acts proscribed by the *Criminal Code*, NCR accused bring themselves within the criminal justice system, raising the question of what, if anything, is required to protect society from recurrences. [Emphasis added.]

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¶ 76 The conclusions reached regarding the scope of the criminal procedure power in *Swain* and *Winko* do not apply to accused who are unfit by reason of a mental disorder; they only apply to NCR accused. Unlike NCR accused, the Crown has not proved beyond a reasonable doubt that an accused found unfit to stand trial has committed an offence. Rather, an accused found unfit to stand trial only stands charged with a criminal offence; in order to maintain its hold over the accused under Part XX.1, the Crown need only demonstrate a *prima facie* case. The standard is not an onerous one: the test is whether there is admissible evidence upon which a properly instructed jury, acting reasonably, could convict (in other contexts see *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080; *R. v. Monteleone*, [1987] 2 S.C.R. 154, at p. 161).

¶ 77 Because the conclusions in *Swain* and *Winko* only apply to NCR accused, we must consider the reach of s. 91(27) in respect of temporarily and permanently unfit accused with fresh eyes. In my view, the criminal procedure power applies to temporarily but not permanently unfit accused. I will discuss the reasons for my conclusion below.

B. *Certain Fundamental Limits on the Criminal Procedure Power*

¶ 78 When interpreting the scope of the federal criminal procedure power, arid legal formalism should be rejected in favour of an interpretative stance under which the scope of the power is considered

in light of the principles underlying the whole of our constitutional structure. This approach is more harmonious with our understanding of the Constitution as a living tree "capable of growth and expansion within its natural limits" (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, *per* Lord Sankey). This metaphor, which originated in [page532] the context of interpreting the *Constitution Act, 1867*, was later applied to the *Charter*. Dickson J. (as he then was) explained, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155, the need for a Constitution that was capable of growth in order to meet the changing needs of society:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter* of *Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

In light of this need for development, I find that the catalogue or "shopping list" approach to the division of powers under ss. 91 and 92 is a singularly impoverished notion. The view of some is that the *Constitution Act, 1867* and the *Constitution Act, 1982* -- particularly the *Charter* -- are separate silos, the first logically prior to and distinct from the second. This approach must be rejected. The *Charter* did not repeal or alter the division of powers between Parliament and the provincial legislatures: *Adler v. Ontario*, [1996] 3 S.C.R. 609, at para. 38. On the other hand, the advent of the *Charter* may have impacted on how some of the powers should be interpreted, defined or examined in order to ensure consistency with its values.

¶ 79 It is proper to view the relationship between the elements of our Constitution as organic in nature. [page533] In particular, the division of powers should be read in light of the principles that animate the whole of our Constitution. These principles have been discussed in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*"), and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Quebec Secession Reference*") . To those principles which have been previously expounded, I would add that a further principle underlying our constitutional arrangement is respect for human rights and freedoms. As I will explain below, the promulgation of the *Charter* signalled an evolution in our constitutional and political culture.

(1) The Implied Bill of Rights

¶ 80 Looking to the basic constitutional structure in interpreting the Constitution is not new. It was applied by some judges of this Court to find an implied "bill of rights" in the *Constitution Act, 1867*: see, e.g., *Reference re Alberta Statutes,* [1938] S.C.R. 100, *per* Duff C.J.; *Switzman v. Elbling,* [1957] S.C.R. 285, *per* Abbott J.; *OPSEU v. Ontario (Attorney General),* [1987] 2 S.C.R. 2, *per* Beetz J. and Dickson C.J. In *OPSEU,* at p. 57, Beetz J. for the majority held that "quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them". Professor Bora Laskin (as he then was) was critical of the implied bill of rights notion. He rejected the idea that there were any civil rights limitations on the provincial or federal legislative power; he viewed the idea of an implied bill of rights to be "at variance with the legal doctrine of parliamentary supremacy" ("An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 *Can. Bar Rev.* 77, at p. 102).

¶ 81 This view was shared by Professor P. C. Weiler, who also rejected that there were any inherent limits on the exercise of legislative power. He wrote, in [page534] "The Supreme Court and the Law of Canadian Federalism" (1973), 23 *U.T.L.J.* 307, that any inferences drawn from the structure of the *British North America Act* (now the *Constitution Act, 1867*) lead to the opposite conclusion based on the principle of parliamentary sovereignty inherited from the United Kingdom (at p. 344):

> Those judges and commentators who have tried to spell out constitutional limitations from the preamble, spirit, institutions (ie, parliament), or structure of the BNA Act, face difficulties which seem insuperable to me. These inferences logically lead to the conclusion that there is no power in either provinces or dominion to pass such restrictive legislation, in the face of the long-held assumption ... that the distribution of legislative authority is exhaustive... . Moreover, the evidence from which the inference is to be made -- the institution of parliament as mentioned and defined in the act, and as understood at the time -- again, if anything, proves the contrary because of the basic principle of parliamentary sovereignty then and still extant in Britain.

¶ 82 Still, the view of Laskin and Weiler was not shared universally. I would rather agree with Professor F. R. Scott, who understood that in importing certain principles found in the United Kingdom, the *Constitution Act, 1867* incorporated principles of civil liberties and human rights embedded in English constitutional history. As he aptly observed, "[t]he theoretical sovereignty of the British Parliament has tended to blind us to the reality of the limitations upon that sovereignty residing in the theory of government these documents proclaim" (*Civil Liberties & Canadian Federalism* (1959), at pp. 14-15). The documents Scott was referring to were the Magna Carta, the Bill of Rights of 1689, the Balfour Declaration of 1926 and the Statute of Westminster of 1931. Of course, today we must also interpret the Constitution in light of its patriation in 1982 and the promulgation of the *Charter*, and it is to this discussion that I now turn.

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(2) Beyond the Implied Bill of Rights

¶ 83 In construing the text of the Constitution it is necessary to refer to the principles underlying our constitutional structure. The Court has on more than one occasion explained that the Canadian Constitution comprises not only a written text but also unwritten elements that make up a "global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state" (*Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at p. 874; aff'd in *Quebec Secession Reference, supra*, at para. 32). This matrix of values infuses the totality of our constitutional documents. No one part of the Constitution can be read in isolation from another, nor does any one principle of our Constitution trump another: *Quebec Secession Reference, supra*, at para. 49. These unwritten elements are aids in the interpretation of the text of our constitutional documents and can fill gaps in the text: *Quebec Secession Reference*, at paras. 53-54. They may also, in certain circumstances, give rise to substantive legal obligations, which themselves are limitations on government and courts: *Quebec Secession Reference*, at para. 54. The Court has identified a number of foundational principles: federalism, democracy, constitutionalism and the rule of law, respect for minority rights (*Quebec Secession Reference*, at para. 49), and judicial independence (*Provincial Court Judges Reference, supra*, at para. 83). I would identify a further principle: respect for human rights and freedoms.

¶ 84 In *Quebec Secession Reference*, the Court held that "[b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles" (para. 49) . But to limit Canada's constitutional story to those elements inherited from Britain would fundamentally misconstrue the nature of our civil society. Our civil society was only in its infancy at Confederation. It has evolved [page536] considerably since then. The period between 1948 and 1982 -- including the enactment of the *Canadian Bill of Rights*, S.C. 1960, c. 44 -- was an interval during which respect for human rights matured. Even leading up the enactment of the *Canadian Bill of Rights*, eminent scholars recognized that upon those British constitutional foundations we built our own distinctive political and constitutional culture:

> The B.N.A. Act provided us with a written constitution of strict law, embedded in a context of constitutional convention and tradition. From that moment the growth of our ideas about civil liberties and human rights took place inside and under that constitution.

(Scott, *supra*, at p. 25)

Professor Scott added that even within the strictures of the *Constitution Act, 1867*, there was considerable discretion to adopt interpretations that protected liberties and human rights. It was not only courts that valued human rights, but also Parliament, the legislatures, and most importantly, Canadian political society. This communal will towards recognizing and entrenching fundamental rights was a gradual evolution, and not a "rights revolution" as some would have it. In my opinion, the promulgation of the *Charter* was marked more by continuity than discontinuity in our political and constitutional culture. The *Charter* is the apotheosis of this evolution. As J. Raz observed, in *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed. 1980), at pp. 188-89, changes in legal systems reflect the interaction between the basic elements of a community:

> Legal systems are always legal systems of complex forms of social life, such as religions, states, regimes, tribes, etc... .
> The identity of legal systems depends on the identity of the social forms to which they belong. The criterion of identity of legal systems is therefore determined not only by jurisprudential or legal considerations but by other [page537] considerations as well considerations belonging to other social sciences.

In 1982 Canada affirmed its own, distinct political culture. That year was marked by the affirmation of independence in its constitutional culture from the United Kingdom as well as an expression of the spirit of human rights in Canada.

¶ 85 Since the promulgation of the *Charter* in 1982, the provisions set out therein have resulted in fructifying contact with the other elements of our Constitution. Thus, the human rights and freedoms expressed in the *Charter*, while they do not formally modify the scope of the powers in ss. 91 and 92 of the *Constitution Act, 1867*, do provide a new lens through which those powers should be viewed. In choosing one among several possible interpretations of powers that implicate human rights, the interpretation that best accords with the imperatives of the *Charter* should be adopted.

¶ 86 This type of analysis, sometimes called structural analysis, is not new and is often implicit in our federalism jurisprudence: for a discussion of structural analysis see R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982), at pp. 74-92; and C. L. Black, Jr., *Structure and Relationship in Constitutional Law* (1983). In order to determine what result in a particular case is dictated by the Constitution, structural analysis looks to the relationships created by the Constitution among various levels and branches of government, and also between the state and the individual: Bobbitt, *supra*, at p. 74. Using structural analysis concurrently with other approaches to constitutional interpretation gives us a truer sense of the Constitution's meaning.

C. *Application to This Case*

¶ 87 Lamer C.J. in *Swain, supra*, held that the preventative aspect of the criminal procedure power [page538] must relate in some way to criminal proceedings. Following intervention by the police, an accused typically has his or her initial brush with criminal proceedings when he or she is charged with an offence, and is thereafter firmly within the grasp of the federal criminal procedure power. At any time once proceedings against an accused have been commenced, but prior to a verdict, the court may of its own motion, or on an application by the accused or the prosecution, direct that the fitness of the accused be tried (s. 672.23(1)). Where the verdict is that the accused is unfit to stand trial, proceedings are suspended pending the accused's return to fitness.

¶ 88 Like my colleagues, I conclude that the pith and substance of Part XX.1 in relation to accused found unfit to stand trial is the treatment and supervision of these accused as well as the protection of the

public while they remain unfit and subject to an outstanding criminal charge . Part XX.1 is predicated on an accused found unfit to stand trial becoming fit for trial. Such accused is subject to the regime only so long as a *prima facie* case exists that he or she committed an offence. Further, the court or Review Board can order treatment of the accused, with the accused's consent (s. 672.55), or the court can order the treatment of the accused without the accused's consent if certain conditions are met (ss. 672.58 to 672.62). The accused found unfit to stand trial is also subject to ongoing supervision by the Review Board (s. 672.81(1)).

¶ 89 Insofar as the aim of Part XX.1 is concerned with the treatment and supervision of a temporarily unfit accused and the protection of the public during the accused's limited period of unfitness, its ultimate aim is to try the accused once he or she becomes fit. In my opinion, this falls squarely within the ambit of the criminal procedure power because it "relate[s] in some way to criminal proceedings" -- i. e., the trial: *Swain, supra*, at p. 1001. The continued subjection of an unfit accused to Part XX.1 is justified under the goal of trying him or her for the offence charged. However, where the accused is permanently unfit to stand trial, the overriding goal of [page539] Part XX.1 is absent and Parliament loses jurisdiction.

¶ 90 As I discussed above, the scope of the criminal procedure power under s. 91(27) needs to be re-evaluated in light of the evolution in our constitutional culture since the entrenchment of the *Charter*. In choosing one of several possible interpretations of the criminal procedure power that implicate human rights, the interpretation that best accords with the imperatives of human rights and freedoms should be adopted. Under the existing scheme, an accused who is permanently unfit will forever be within the grip of the state's machinery for criminal justice. He or she will always have the weight of a criminal accusation hanging overhead, but the day of judgment is permanently postponed. Meanwhile, without the final adjudication of his or her culpability, a permanently unfit accused is subject to the ongoing control of the state through criminal proceedings set out in Part XX.1. His or her continued detention or conditional liberty cannot be justified by progress towards a trial.

¶ 91 In my opinion, a person cannot be subject to state control and have limits imposed on his or her liberty based on the criminal procedure power absent progress towards the adjudication of his or her legal culpability. This is a fundamental human right. The principle is affirmed in ss. 7 and 11(*b*) of the *Charter*. In construing the scope of the criminal procedure power, an interpretation at odds with this principle should be eschewed. The continued control over a permanently unfit accused and the resulting protection of the public based on a *prima facie* case do not "relate in some way to criminal proceedings". The continued supervision, detention or conditional liberty of a permanently unfit accused can only relate to the mental health of the individual, and this is considered to be within the provincial jurisdiction under ss. 92(7), 92(13) and 92(16) of the *Constitution [page540] Act, 1867*: see *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at pp. 135-36.

¶ 92 Further, this approach has the salutary effect of respecting and enhancing the permanently unfit accused's human dignity: rather than being stigmatized by criminal proceedings, his or her needs and those of society can be addressed through mental health legislation. Persons with a mental disorder are a

historically disadvantaged group and have been, and continue to be, subjected to social prejudice. We should adopt an interpretation of s. 91(27) that does not perpetuate that disadvantage and prejudice. The potential danger a permanently unfit accused may present is more properly attributable to his or her mental illness and is a matter of health and not criminal procedure. The need to protect the community from permanently unfit accused who pose a significant threat to public safety can be answered through the exercise of the provincial health power.

¶ 93 Consequently, I find that Parliament is not competent under its criminal procedure jurisdiction to legislate for the supervision, treatment, detention or control of permanently unfit accused. Once a court has found that an accused is permanently unfit to stand trial, the criminal procedure jurisdiction is exhausted. Administrative supervision or control is then a matter falling within the jurisdiction of the provincial health power. The present scheme does not provide for a finding of permanent or temporary fitness; it will have to be amended accordingly. On the facts of this case, it is clear that Mr. Demers will never become fit for trial.

[page541]

III. Section 11(*b*) of the *Charter*

¶ 94 It was argued by counsel for Mr. Demers that the impugned provisions violate the defendant's right to trial within a reasonable time contrary to s. 11(*b*) of the *Charter*. In the case of an accused who is permanently unfit to stand trial by reason of a mental disorder, the accused will never be tried within a reasonable time under s. 11(*b*). The violation results from the intersection of the legislation with an immutable personal characteristic of the accused. Iacobucci and Bastarache JJ. choose not to address this argument. In my view, their reasons should not be understood as foreclosing an application, on an individual basis, by a permanently unfit accused who has been prejudiced by an unreasonable delay. This application would, I believe, be available to both dangerous and non-dangerous permanently unfit accused, as our jurisprudence has made no distinction between an accused's character or alleged propensity for violence in determining whether s. 11(*b*) has been violated and whether a stay should issue under s. 24(1): see *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771. The same principles should guide courts in the future.

IV. Remedy

¶ 95 Iacobucci and Bastarache JJ. order that ss. 672.33, 672.54 and 672.81(1) of the *Criminal Code* should be declared invalid, on the limited basis that they violate the s. 7 *Charter* rights of permanently unfit accused who do not pose a significant threat to public safety. Although I agree with my colleagues that the impugned sections should be declared invalid under s. 52 of the *Constitution Act, 1982*, I do so primarily on the basis that they are *ultra vires* the federal criminal procedure power insofar as they apply to accused who are permanently unfit to stand trial. I would also order that the declaration be suspended for one year to give the provincial legislatures sufficient time to amend their mental health [page542] statutes accordingly. Such amendments, in my view, should reflect the principles articulated

by the Court in *Winko, supra*, so that a permanently unfit accused's liberty is infringed no more than necessary to protect the public.

¶ 96 Further, I would grant Mr. Demers a stay of proceedings within 30 days of this judgment pursuant to s. 24(1) of the *Charter*. This time limit should give the provincial mental health authorities sufficient time to address, under existing mental health legislation, any concerns that Mr. Demers presents a danger to himself or others. I would also order that a stay be granted within 30 days for all permanently unfit accused who do not pose a significant threat to the public. In this respect, this is an appropriate case to combine remedies under ss. 24(1) and 52 . This invites us to revisit certain remarks made in *Schachter, supra*, at p. 720, that ss. 24 and 52 remedies should generally not be combined. In my view, slavish adherence to this rule would result in an injustice in this case.

A. *Combining Sections 52 and 24(1) Remedies*

¶ 97 The source of this rule is found in a brief passage written by Lamer C.J. in *Schachter, supra*, at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or [page543] in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

In *Schachter*, the claimant sought retrospective payment of paternity benefits under s. 24(1) in addition to the declaration of invalidity. This passage in *Schachter* was then applied in subsequent cases: *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 18; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para. 43; and *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at paras. 80-81. Interestingly, those cases all dealt with claims for monetary awards under s. 24(1) of the *Charter*. Despite the concession by Gonthier J. in *Guimond, supra*, at para. 19, and *Mackin, supra*, at para. 81, that damages may be obtained in an exceptional case under s. 24(1) in combination with a declaration of invalidity under s. 52, the merits of the general rule in *Schachter* against combining remedies have not been subjected to sustained or critical examination by the Court.

¶ 98 The policy rationales implicit in the rule articulated by Lamer C.J. in *Schachter* are examined by V. Shandal in "Combining Remedies Under Section 24 of the *Charter* and Section 52 of the *Constitution Act, 1982*: A Discretionary Approach" (2003), 61 *U.T. Fac. L. Rev*. 175 . He observes that they are

essentially about limiting the government's pecuniary liability: "The first justification was the traditional immunity of Parliament and the provincial legislatures from liability for the consequences of legislation they enact. The second was a policy concern of avoiding the imposition of indeterminate liability upon the government" (p. 190). Although these rationales may have some merit where a claimant is bringing an action for damages under s. 24(1), they fail to justify a general prohibition against a retroactive remedy under s. 24(1) in conjunction with s. 52. I do not [page544] foreclose the possibility that damages might be appropriate in some cases; however, I direct the following analysis to the present situation in which the claimant is not seeking a monetary remedy.

¶ 99 Public law litigation is essentially different from private law. In private law actions, remedies are primarily geared towards compensating a plaintiff for the loss suffered at the hands of a defendant. By contrast, public law actions are about ensuring compliance with the Constitution, in this case, vindicating constitutional rights that have been violated by the state. In doing so, it is typically more than an individual claimant's rights that are being affirmed; the benefit of a successful claim enures to society at large. For when an individual or group successfully obtains a remedy for illegal state action, the constitutional rights and freedoms of all citizens are enhanced.

¶ 100 Private law litigation typically has the following characteristics: it is a dispute between two unitary interests; it concerns past events; the remedy is dependent on the right because it effectively seeks to compensate a plaintiff for the loss suffered at the hands of a defendant; the impact of a judgment is confined to the parties, though it may alter or affect the development of the law; and the litigation is initiated and controlled by them: A. Chayes, "The Role of the Judge in Public Law Litigation" (1976), 89 *Harv. L. Rev.* 1281, at pp. 1282-83. Public law litigation differs significantly. As Professor Chayes explains (at p. 1284):

> The characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding [page545] the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders -- masters, experts, and oversight personnel... .

And, most significantly, the effects of a judgment in a public law case reach far beyond the party bringing the claim against the state. The primary focus is often on achieving future compliance with the Constitution, rather than compensating past wrongs.

¶ 101 Nevertheless, public law actions share a necessary commonality with private litigation: an individual or group is seeking to redress a wrong done to them. The larger public dimensions of a constitutional challenge piggyback on the claimant's pursuit of his or her own interests, particularly in criminal law cases. Courts should not lose sight of this symbiosis; they should not forget to provide a remedy to the party who brought the challenge. This is not a reward so much as a vindication of the

particularized claim brought by this person in assertion of his or her rights. Corrective justice suggests that the successful applicant has a right to a remedy. There will be occasions where the failure to grant the claimant immediate and concrete relief will result in an ongoing injustice. That is the case here.

¶ 102 Moreover, Lamer C.J.'s statement in *Schachter* is at odds with the general rule of this Court to provide a successful applicant with immediate relief despite a prospective remedy. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 20, Lamer C.J. held: "In the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of unconstitutionality: see, e.g., *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Feeney*, [1997] 2 S.C.R. 117." In *Brydges, supra*, the Court held that the police were required under s. 10(*b*) of the *Charter* to inform a detainee of the existence of legal aid and duty [page546] counsel. It suspended the operation of this rule for 30 days but upheld the trial judge's exclusion of the evidence, under s. 24(2), obtained from the accused in violation of s. 10(*b*), and restored the acquittal. I recognize that *Brydges, supra*, was not a case where legislation was declared invalid under s. 52, but it demonstrates that the Court will give *Charter* remedies retrospective effect for the applicant.

¶ 103 The applicant is typically exempted from the period of delay by having the ruling applied immediately to him or her, usually by ordering a new trial or entering an acquittal under the *Criminal Code*. For example, in *R. v. Bain*, [1992] 1 S.C.R. 91, the Court suspended a declaration that the then provisions providing the Crown with 48 standbys during jury empanelling were invalid, but ordered that Bain's acquittal be restored immediately. In the case at bar, the appeal comes by way of a final judgment on a *Charter* application from the Superior Court of Quebec; it is not an appeal from the verdict of unfit to stand trial by reason of a mental disorder. To give immediate effect to Mr. Demers' rights, it is necessary to consider combining remedies under ss. 52 and 24(1). Consequently, this is not a situation in which a s. 24 remedy would only duplicate the relief flowing from the s. 52 remedy.

¶ 104 The crafting of a remedy is highly contextual and is intimately linked to the nature of the violation and the facts of the particular case. In determining when to combine remedies under ss. 52 and 24(1), the following questions should be considered. First, from the perspective of the public role of the *Charter*, what remedy or remedies would most effectively foster compliance with the *Charter* and deter future infringements without unduly interfering with the effective operation of government and the implementation [page547] of legitimate public policy? Second, from the perspective of the claimant, what remedy or remedies would most effectively redress the wrong he or she has suffered, putting him or her in the position he or she would have been in had his or her rights not been violated? This will often call for the consideration of the adequacy of a s. 52 remedy standing alone. At this stage, a court may also weigh the deleterious effects of delay to the claimant against the salutary effects of delay to the public. Third, can the courts effectively implement the proposed remedy or remedies? See M. L. Pilkington, "Monetary Redress for Charter Infringement", in R. J. Sharpe, ed., *Charter Litigation* (1987), 307, at pp. 308-9; and Shandal, *supra*, at pp. 196 ff.

B. *Application to the Case at Bar*

¶ 105 Turning to the constitutional violations before us, I will now apply the test for combining remedies. From the perspective of the public role of the *Charter*, a suspended declaration of invalidity under s. 52 would best serve to ensure future compliance with the *Constitution Act, 1867* by Parliament and also protect the public from the immediate release of potentially dangerous persons. A suspended declaration would permit both Parliament and the provincial legislatures to amend their respective legislation according to the imperatives of the constitutional division of powers.

¶ 106 From the perspective of Mr. Demers, however, a suspended declaration of invalidity would give him no immediate redress. The violation of his liberty interest under s. 7 would continue. In light of the seriousness of the violation, and the fact that the Review Board recently found that [TRANSLATION] "Nothing in the evidence in the record or adduced at the hearing leads to the conclusion that Mr. A. is so dangerous a patient that he must be detained in a hospital", I conclude that a stay should be granted within 30 days. The 30-day period is sufficient to allow the provincial health authorities to make an application under mental health legislation if circumstances have changed and Mr. Demers presents [page548] a danger to himself or others owing to his mental state. There is no question in this case that the Court can effectively implement the suspended declaration of invalidity or the stay.

¶ 107 Finally, all permanently unfit accused who do not pose a significant threat to public safety should benefit from a stay for the violation of their s. 7 rights within 30 days under s. 24(1) of the *Charter*. Iacobucci and Bastarache JJ. suspend the availability of a stay for one year on grounds of public safety. There is no sound policy reason, particularly on the basis of safety, to delay a stay for one year for those permanently unfit accused who do not pose a significant danger to society.

¶ 108 Consequently, I would allow the appeal, order that the impugned provisions be declared invalid under s. 52 of the *Constitution Act, 1982* insofar as they violate the division of powers and the *Charter*, and suspend the declaration for one year. I would also order that Mr. Demers be granted a stay within 30 days under s. 24(1) of the *Charter* for the violation of his s. 7 rights. All other permanently unfit accused who do not pose a significant threat to public safety should be given a stay within 30 days.

Solicitors:

Solicitors for the appellant: Létourneau & Gagné, Québec.

Solicitor for the respondent: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Montréal.

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Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

QL Update: 20050120
cp/e/qw/qllls