

## MEDICAL AID IN DYING AND THE RIGHT TO LIFE, LIBERTY AND SECURITY

### Carter v. Canada - Supreme Court of Canada (2015)

**IMPORTANT!** This case study has been changed significantly to simplify the exercises and improve the learning experience for students. The facts and legal concepts discussed might therefore be different from the real-life case. You can read a summary of the real reasons of the Supreme Court on pages 5-7 of this document.

#### FACTS

In 2009, Gloria Taylor learns that she was suffering from a neurodegenerative disease that will gradually weaken her until death. In 2010, her condition worsens; her muscles cause her constant pain and she is only able to move using a wheelchair. Ms. Taylor tells her family and friends that she wants **medical aid in dying**. She does not want to suffer until she dies of natural causes and does not want to be forced to kill herself.

The problem for Ms. Taylor is that medical aid in dying is **prohibited in Canada**. At that time, the Criminal Code prohibited doctors and any other person from helping someone to commit suicide. The main objective of this ban is to **protect vulnerable people**: they should not be incited to commit suicide in a moment of weakness.

Ms. Taylor decides to go to court to strike down the sections of the Criminal Code that prevent her from receiving medical aid in dying. Several other people decide to join her fight. This is the case of Lee Carter, the daughter of a woman who was also in an end-of-life situation and who decided to go to Switzerland to die with dignity. In Switzerland, aid in dying is legal and is offered to foreigners.

According to Ms. Taylor and the other appellants, prohibiting medical aid in dying infringes the rights protected by section 7 of the Canadian Charter, namely the **right to life, liberty and security**.

## QUESTIONS

1. Do sections of the Criminal Code that prohibit assisting someone to commit suicide infringe the rights protected by section 7 of the Charter?
2. If so, is this infringement justified under section 1 of the Charter?

## PREPARATION FOR PLEADINGS

Here are some ways to help you develop your legal arguments.

In your pleadings, you do not have to answer all these questions. You can choose not to answer questions if your answers are not convincing or if they seem to benefit the opposing party.

### Question 1

*Do the Criminal Code sections that prohibit assisting someone to commit suicide infringe rights protected by section 7 of the Charter?*

Sample questions you might ask yourself:

#### **a) Right to life:**

- ◆ What are the risks associated with knowing that a person will not be able to receive medical aid in dying on the day it is desired and that on that day, they will no longer be in a position to end their own life?
- ◆ Is the right to die part of the right to life?

#### **b) Right to liberty:**

- ◆ Should a person in an end of life situation have the freedom to choose between life and death?
- ◆ Should a person be able to choose how they will die?
- ◆ Should a person be able to choose the medical care they receive?

#### **c) Right to security:**

- ◆ Is the right not to suffer part of the right to security?



- ◆ Should a person in an end-of-life situation be forced to suffer until they die from natural causes?

## Question 2

*If so, is this infringement justified under section 1 of the Charter?*

Apply the section 1 test (found on page X of your Student Guide). Do not consider the 4th step of the test ("proportionality").

- a) What is the **objective** of the prohibition on medical aid in dying? Is this objective important enough to justify an infringement of the right to life, liberty and security of sick people?
- ◆ What might a person do knowing that they will not be able to receive medical aid in dying on the day they desire and that on that day, they will no longer be in a position to end their own life?
  - ◆ Are all people at the end of life in an identical psychological state?
  - ◆ How important is the right to life in our society?
- b) Is the prohibition of medical aid in dying a **logical way to achieve the above objective**?
- ◆ Is prohibiting an act a good way to dissuade people from asking for it?
  - ◆ Is it logical to forbid medical aid in dying for everyone when the objective is to protect a particular group of people?
- c) Is it **reasonable and necessary** to prohibit medical aid in dying for **everyone**?
- ◆ What **other means** could be put in place to avoid undermining fundamental rights?
  - ◆ Do medical personnel have the **necessary competence** to determine the psychological state of an end-of-life person?
  - ◆ Are there **risks of abuse** or **medical errors**?

Do not forget to anticipate the arguments of the adverse party!

## ARGUMENT EXAMPLES

### Gloria Taylor and Lee Carter (Appellants)

#### Section 7:

- Prohibiting medical aid in dying can cause seriously ill people to end their lives prematurely. Indeed, a person who knows in advance that they will not be able to get help to die on the day when their suffering will be intolerable risks ending their life while they are still able to do so. This prohibition may therefore infringe their **right to life**.
- A person who faces serious and irremediable health problems must have the **freedom to make choices** about his or her autonomy, dignity, physical integrity and quality of life. They therefore have the right to choose the medical care they receive.
- This prohibition forces some people to suffer enormously while awaiting their natural death. It therefore infringes their **right to security**.

#### Section 1:

- The complete prohibition of medical aid in dying is not a **reasonable and necessary** impairment of the rights of Section 7 of the Charter.
  - ◇ This prohibition applies equally to vulnerable persons and to those who are not vulnerable and who are capable of making free and informed decisions.
  - ◇ Physicians can reliably assess whether a patient has the ability to make decisions about his or her life and death.

## The Government (Respondent)

### Section 7:

- The individual freedoms provided for in the Charter **are not absolute** and may be limited to protect vulnerable persons.
- In the case of seriously ill people, it is necessary to protect those who are vulnerable and who may decide to commit suicide in a **moment of weakness**.
- The government has a responsibility to put in place rules to protect the **sanctity of human life**, which is one of the most fundamental values of our society. It must therefore take the necessary measures to prevent the devaluation of human life.

### Section 1:

- The objective of the ban is significant enough to undermine fundamental rights. The aim is to **protect vulnerable people** and not to incite them, directly or indirectly, to commit suicide in a moment of weakness.
- There is a **logical link** between the complete ban on medical aid in dying and its objective. Indeed, banning an activity that poses certain risks is a rational way to **reduce these risks**.
- The complete prohibition, which applies to everyone and in all circumstances, is a **reasonable infringement** because of the importance of human life and the risk of error in the assessment of cases.

## THE JUDGMENT:

The Supreme Court of Canada has ruled that the complete prohibition of medical aid in dying is invalid. This prohibition may indeed deprive an adult of medical aid in dying when:

- 1) He or she **clearly consents** to the termination of his or her life; and
- 2) He or she is suffering from **serious and irremediable health problems** which cause him or her persistent and intolerable suffering in his or her situation.

## Explanation of Judgment

### Section 7:

- The prohibition of medical aid in dying can deprive a person of his or her right to life, liberty and security.
- The right to life comes into play **when a measure or law taken by the State directly or indirectly imposes death on a person or exposes him or her to an increased risk of death.** In the present case, the prohibition might force a person to kill him or herself earlier than he or she would if he or she could get medical aid to die.
- The prohibition of medical aid in dying has a direct **impact on the autonomy, quality of life and dignity of the person.** Preventing this person from making decisions about his or her bodily integrity and the medical care he or she receives is therefore part of his or her right to freedom.
- The prohibition undermines the right to security of the person by allowing a person to **suffer intolerably.**

**Careful!** Section 7 of the Canadian Charter provides that the right to life, liberty and security of the person may be infringed where the offense is "consistent with the principles of fundamental justice." This aspect was extensively analyzed in the Supreme Court's judgment, but it would be too complex to discuss in this workshop. To summarize, the Court ruled that the complete prohibition was inconsistent with the principles of fundamental justice and therefore infringed section 7.

### Section 1:

- The purpose of the prohibition, which is to protect vulnerable people and prevent them from taking their lives in a moment of weakness, is **important enough** to justify an infringement.
- There is a **logical connection** between the complete ban on medical aid in dying and its objective. Indeed, banning an activity that poses certain risks is a rational way to reduce these risks.
- On the other hand, the complete prohibition of medical aid in dying **does not constitute minimal impairment.** This absolute prohibition is not proportionate to its objective and is not necessary to achieve this objective.

The test is therefore unsuccessful.

## POINTS FOR REFLECTION

- Do you agree with the two criteria developed by the Supreme Court to determine whether a person can receive medical aid in dying?
  - 1) The person concerned clearly consents to the termination of his or her life;
  - 2) The person is suffering from serious and irremediable health problems which cause him or her persistent and intolerable suffering in his or her situation.
- Parliament has adopted other criteria that limit access to medical aid in dying. What do you think of these criteria (extracts are taken from the Criminal Code)?

*241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria:*

- a) they are eligible [...] for health services funded by a government in Canada;*
  - b) they are at least 18 years of age and capable of making decisions with respect to their health;*
  - c) [...]*
  - d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and*
  - e) [...]*
- Different forms of assisted dying are permitted in other countries and the rules for using them are sometimes less severe. What do you think about the possibility of going to another country to receive medical aid in dying?



## WEARING OF THE NIQAB AND FAIRNESS OF THE TRIAL

### R. v. N.S. - Supreme Court of Canada (2012)

**IMPORTANT!** This case study has been changed significantly to simplify the exercises and improve the learning experience for students. The facts and legal concepts discussed might therefore be different from the real-life case. You can read a summary of the real reasons of the Supreme Court on pages 5-6 of this document.

#### FACTS

N.S., an Ontario woman of Muslim faith, says she has been the victim of several sexual assaults. The two men accused of these attacks are part of her family.

N.S. is called to testify during the trial of the two men. She asks the judge for the **right to testify with her niqab**, a veil that conceals the entirety of her face with the exception of the eyes. The accused oppose it and ask the judge to compel N.S. to testify without her niqab. They invoke their **right to a fair trial** and full defense.

According to the accused, wearing the veil prevents them from **assessing the credibility** of N.S.'s testimony: it is not possible to see her facial expressions and the emotions that emanate from her body language.

N.S. explains that she cannot remove her niqab in public where men who are not close family members can see her. She admits, however, that she has already removed her niqab for a woman to take her driver's license picture. She also admits that she would remove her veil if it were necessary for a security check at a border crossing.

In the circumstances, the judge decided that N.S. should take off her niqab to testify. N.S. objected and the case went to the Supreme Court of Canada.

N.S. argues that her **freedom of religion** allows her to testify while wearing her niqab and that forcing her to remove it violates her freedom of religion.



## QUESTIONS

1. Does the prohibition of the niqab infringe the witness' freedom of religion?
2. If so, is this infringement justified under section 1 of the Charter?

## PREPARATION FOR PLEADINGS

Here are some ways to help you develop your legal arguments.

In your pleadings, you do not have to answer all of these questions. You can choose not to answer questions if your answers are not convincing or if they seem to benefit the opposing party.

### Question 1

*Does the prohibition of the niqab infringe the witness' freedom of religion?*

The **scope** of freedom of religion can be summarized as follows:

- ◆ It protects the right to practice religious beliefs **openly and without fear**;
- ◆ It provides that no person may be compelled to act contrary to their **sincere beliefs** unless a restriction is necessary to preserve the safety, order, health, public uses or the rights and freedoms of others.

### Question 2

*If so, is this infringement justified under section 1 of the Charter?*

Apply the section 1 test (found on page X of your student guide). Do not consider the 4th step of the test ("proportionality").

- a) What is the **objective** of banning the niqab before the courts? Is this **objective important enough** to justify a breach of a witness' freedom of religion?



- ◆ It protects the right to practice religious beliefs **openly and without fear**;
  - ◆ It provides that no person shall be compelled to act contrary to their sincere beliefs unless a restriction is necessary to preserve the safety, order, health, public uses or the rights and freedoms of others.
- a) What is the **objective** of banning the niqab before the courts? Is this objective **important enough** to justify a breach of a witness' freedom of religion?
- ◆ The **scope** of the **right to a fair trial and full answer and defense** can be summarized as follows:
    - ◇ The court must remain neutral and cannot favor one party over another;
    - ◇ An accused has the right to know all the evidence against him;
    - ◇ An accused has the right to defend himself, to present his own evidence and to explain his arguments.
- b) Is the banning of the niqab a logical way to achieve the above objective?
- ◆ How important is the testimony of the victim in a criminal trial?
  - ◆ Why is it important to see a person's face when testifying?
- c) Is it **reasonable and necessary** to prohibit the wearing of the niqab in **all circumstances** before the courts?
- ◆ Are there other alternatives that would not undermine freedom of religion to the same extent?
  - ◆ What might a niqab wearing woman do if she is forced to make a choice between her religion and her participation in the justice system?
  - ◆ What is the impact of the trial on the lives of the accused if they are convicted?
  - ◆ Can the wearing of the niqab in the courts diminish citizens' confidence in the justice system?

Do not forget to anticipate the arguments of the adverse party!

## EXAMPLES OF ARGUMENTS

### N.S. (Appellant)

- Freedom of religion must be based on a **"sincere" religious belief**. In this case, N.S.'s conviction that she must wear the niqab before the court and in the presence of men who are not members of her family is based on a sincere religious belief.
- Women who wear the niqab will be **reluctant to report an offense and prosecute** if they are forced to remove their veil during testimony. They may even be reluctant to participate more generally in the Canadian justice system. This obligation **forces these women to make a choice** between their religious beliefs and their participation in the justice system.

### The Government (Respondent)

- Allowing N.S. to wear the niqab during her testimony **violates the accused's right to a fair trial** and their **right to make full answer and defense**.
- The adversarial process rests on the interaction between the parties' lawyers, the plaintiffs, the accused, the witnesses and the judge. In this case, testimony is a necessary tool for this communication exercise.
- Seeing the face of a witness has traditionally been part of the process of **determining whether a witness is telling the truth**. It also allows for effective interrogation and enables the judge to assess the credibility of the witness.
- Individual freedom is not absolute when it must be **reconciled with another right which is more important**, namely the right to a fair trial.

## THE JUDGMENT:

A person who must testify in a criminal trial and who wishes to wear the niqab for sincere religious reasons will be **obliged to remove it if the following two conditions are met:**

- a) the obligation to remove the niqab is necessary to avoid a **serious risk that the trial is unfair**, when there is no reasonable alternative (accommodation) to avert the risk;
- b) the beneficial effects of the obligation to remove the niqab (e.g. effects on the fairness of the trial) are **more important than its negative effects** (e.g. effects on freedom of religion).

### Explication du jugement

In arriving at this conclusion, the Supreme Court answered **four questions:**

1. Does forcing a witness to remove their niqab during their testimony **infringe their freedom of religion?**
  - Here, the **sincerity** of belief must be evaluated.
2. Does allowing the witness to wear the niqab during their testimony pose a **serious risk to the fairness of the trial?**
  - According to a principle deeply rooted in our legal system, to see the face of the witness promotes an effective **cross-examination** and an accurate appreciation of their **credibility**, which promotes a fair trial.
3. If freedom of religion and the fairness of the trial come into play, is there a way to respect both rights and **avoid the conflict between them?**
  - Each situation will be different,. Accommodation must be attempted.
4. If no accommodation is possible, are the beneficial effects of the obligation to remove the niqab more **important than the adverse effects?**
  - It will depend on the situation.

The Supreme Court did not decide whether or not N.S. should remove her niqab. Rather, the Court **referred the case** back to the lower court, which was initially tasked with deciding the charges of sexual assault. The Supreme Court outlined the guidelines that the court must uphold.

In 2013, the lower court ordered N.S. to remove her niqab to testify. However, she avoided any visual contact with the members of the audience, with the exception of the accused, lawyers, judge and employees of the Court.

N.S. complied with this decision and a special viewing room was set up with a camera positioned so that the public saw only the back of her head.

## POINTS FOR REFLECTION

- Is the removal of N.S.'s veil during testimony the best approach for minimizing the violation of her freedom of religion? See the 2013 decision above.
- Under what circumstances do you think the wearing of the niqab should be allowed during testimony? For example, should it be permitted if the testimony of the veiled person is of little importance to the trial? What if the accused does not risk being imprisoned?

## PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

### R. v. Cole - Supreme Court of Canada (2012)

#### FACTS

Richard Cole was a high school teacher in Ontario. He also supervised a laptop computer program for students at his school. As a supervisor, he could access student computers connected to the school network.

Mr. Cole's school board gave him a laptop to help him do his work. Only he could use it, and he protected it with a password.

Both his school and the school board had rules about these computers:

1. Employees could occasionally use board-issued computers for personal use.
2. The board was the owner of both the computers and messages and other data on the computers.
3. People with these computers should not expect privacy in their files.

A technician doing maintenance on the board's computers discovered a hidden folder on Mr. Cole's laptop. The folder had nude photos of a 16-year-old female student. In the court case, her name stayed confidential, but we will call her Sarah.

Mr. Cole had accessed a student's school email account. This student had saved nude photos of Sarah in this account. Mr. Cole had copied them to his laptop.

The technician reported the discovery to Mr. David, the school principal. Mr. David confiscated Mr. Cole's laptop and asked the technician to put copies of the photos on a compact disk (CD). Later, school board technicians made a second CD of temporary Internet files from Mr. Cole's computer. These files recorded his Internet surfing history and contained a lot of pornographic images.

The school board contacted the police and handed over the CDs and laptop. The board told the police that the board owned the computer and the data on it.

Without getting a search warrant, an experienced police officer, Officer Burt, immediately examined the laptop and two CDs. Two months later, he sent a copy of the computer's hard drive to forensic experts for examination.

Mr. Cole was charged with the crime of possessing child pornography. He asked the court to throw out the evidence collected from the computer. He said that the evidence had been gathered during an “unreasonable” search and seizure in violation of his rights under Section 8 of the Canadian Charter. Section 8 says that everyone has the right to be protected against unreasonable searches and seizures. Mr. Cole argued that the search was unreasonable because the police did not get a search warrant.

## QUESTIONS

### Unreasonable Search and Seizure — Section 8

1. Was it reasonable for Mr. Cole to expect that personal data in the work computer would remain private?
2. Were the search and seizure of the computer and its data “unreasonable” because the police did not get a search warrant?

### Accepting the Evidence — Section 24

3. If the search and seizure were unreasonable and violated Mr. Cole’s rights, should the computer evidence be thrown out under Section 24 of the Canadian Charter? Section 24 says that courts cannot accept evidence gathered in violation of someone’s rights when accepting the evidence would “bring the administration of justice into disrepute”.

## EXPLANATIONS

**Section 8** – The general rule is that the police need a search warrant to search and seize. A warrant is permission from a judge. A search without a warrant is presumed to be unreasonable, and the police must then show that another legal rule gave them permission to search and seize.

**Section 24** – Bringing the administration of justice into disrepute means, in general terms, damaging society’s confidence in the justice system.

When the violation of rights and negative impact on the person accused of a crime is serious, it is more likely that a court will refuse controversial evidence.

On the other hand, if the violation and negative impact are not so serious, and society has a strong interest in having the case heard with the controversial evidence, it is more likely that a court will accept the evidence.

## PREPARATION FOR PLEADINGS

### Lawyers for the Accused — Mr. Cole (respondent)

The lawyers for Mr. Cole must show the following:

#### **Reasonable Expectation of Privacy – Section 8**

- It was reasonable for Mr. Cole to expect that personal data on the work computer would remain private.

Ask yourself these questions:

- ⇒ Is the line between work and personal information becoming blurred because employees are often allowed to use work computers away from the workplace?
- ⇒ Should employers have a right to see everything an employee is doing with a work-issued computer?
- ⇒ Does having a password make everything on a computer private?
- ⇒ Is there a difference between the two CDs, one with the photos of Sarah and the other with Mr. Cole's browsing history?

#### **Unreasonable Search and Seizure – Section 8**

- Mr. Cole had a reasonable expectation of privacy in the personal data. This means that the police should have gotten a warrant to search and seizure this data.
- Since the police did not get a warrant, the search and seizure were unreasonable and violated Mr. Cole's rights.

*For help with this argument, see the explanation box above about searches and seizures.*

#### **Accepting the Evidence – Section 24**

- The violation of Mr. Cole's rights under Section 8 was serious and had a significant impact on him because he was charged with a crime. If the computer evidence is accepted, this will reflect badly on the justice system: it sends a message that the police don't need to follow the rules about warrants.
- For these reasons, the computer evidence should be thrown out and the case against Mr. Cole rejected.

*For help with this argument, see the explanation box above about Section 24.*

Don't forget to anticipate the arguments of the other side!



## Lawyers for the Government (appellant)

The lawyers for the government must show the following:

### Reasonable Expectation of Privacy – Section 8

- Based on the computer policies of his school and school board, Mr. Cole could not reasonably expect that he had a right to privacy regarding personal data on his laptop.

Ask yourself these questions:

- ⇒ Is ownership of a computer a good way to decide who owns the data on the computer?
- ⇒ Should the school board and school rules determine what privacy rights Mr. Cole had in his personal data?
- ⇒ Is there a difference between the two CDs, one with the photos of Sarah and the other with Mr. Cole's browsing history?

### Unreasonable Search and Seizure – Section 8

- The search was reasonable because the police were told that the computer and the data belonged to the school board and not to Mr. Cole.
- The police did not need a search warrant since the school board freely gave them the computer and CDs of data.

Ask yourself this question:

- ⇒ Should different rules apply to searches by schools and by the police?

*For help with this argument, see the explanation box above about searches and seizures.*

### Accepting the Evidence – Section 24

- Even if the search was unreasonable under Section 8 and Mr. Cole's rights were violated, the court should accept the computer evidence.
- The violation of rights was not very serious. Given the school board and school rules, Mr. Cole must have had a reduced expectation of privacy in the personal computer data.
- Even if the police had waited to get a warrant, the result would have been the same for Mr. Cole: the police would have found the same evidence and charged him with a crime.

- It is in society's interest to discover the truth and have Mr. Cole's case decided using all of the computer evidence.

*For help with this argument, see the explanation box above about searches and seizures.*

Don't forget to anticipate the arguments of the lawyers for Mr. Cole and their responses to your arguments. Remember that they have a right to respond to your arguments.



## ARGUMENTS

### The Accused — Mr. Cole (respondent)

#### Reasonable Expectation of Privacy :

- The school board authorized Mr. Cole to store personal data on the computer. He protected his computer with a password. It was therefore reasonable for him to expect personal data and his browsing history to stay private, no matter what the other school board and school rules said.

#### Unreasonable Search and Seizure :

- Even if the school board was allowed to take and inspect Mr. Cole's computer because it owned it, this did not mean the police could put aside the normal rules of a criminal investigation, which require a search warrant.
- There was no urgency that justified the police acting without a search warrant: the evidence was safely in Mr. David's hands. This lack of urgency is shown by the fact that the police waited two months before sending the laptop to forensic experts.

#### Accepting the Evidence :

- Officer Burtt was an experienced police officer. He should have known that he should get a search warrant.
- It would have been easy for Officer Burtt to get a search warrant because he had a good reason to think Mr. Cole had child pornography, which is a crime.
- These facts make the violation of Mr. Cole's rights serious. Because the violation was serious, the court should reject the evidence under Section 24.

## ARGUMENTS

### The Government (appellant)

#### Reasonable Expectation of Privacy :

- The school board rules said that the computer and its data are the property of the board. Also, the school's policy warned people not to expect privacy regarding their files.
- Therefore, Mr. Cole could not reasonably expect that he had a right to privacy over personal data in the computer.

#### Unreasonable Search and Seizure :

- The data in the computer belonged to the school board and not to Mr. Cole.
- The school board was therefore allowed to seize Mr. Cole's computer, examine its contents and give the computer to the police.
- The police did not need a search warrant since the school principal freely gave them the computer and CDs, which belonged to the school board.

#### Accepting the Evidence :

- Accepting the computer evidence would not "bring the administration of justice into disrepute". There are several reasons for this:
  - ◆ First, Officer Burttt did not act in bad faith or carelessly: he genuinely believed he did not need a search warrant because the school board told him it owned the computer and data.
  - ◆ Secondly, even if he had waited to get a search warrant, Officer Burttt would have discovered the same evidence he found without a warrant. The impact on Mr. Cole's rights was therefore not serious.
  - ◆ Thirdly, given the school board and school rules, Mr. Cole must have had a reduced expectation of privacy in the data.
  - ◆ Finally, it is in society's interest to have this case decided and to discover the truth using all of the evidence seized.

## JUDGMENT

The court decided that the police search violated Mr. Cole's rights under Section 8. Despite this, the court concluded that it was in the interests of justice that the computer and its data be accepted as evidence.

### Reasons

#### Reasonable Expectation of Privacy :

The school board owned the computer and data on it. This reduced the privacy Mr. Cole could expect regarding his personal data. But these factors did not completely remove his expectation of privacy, especially since he was allowed some personal use of the computer.

Mr. Cole therefore had some privacy rights protected by Section 8 of the Charter. This was especially true regarding the Internet files with Mr. Cole's browsing history: a browsing history reveals intimate information about a person's interests, lifestyle and preferences.

#### Unreasonable Search and Seizure :

An inspection is a "search" and taking is a "seizure" when a person has a reasonable privacy interest in the object or information searched and seized.

Since Mr. Cole had a reasonable expectation of privacy in his personal computer data, there was a search and seizure. The court therefore had to decide if the search and seizure was "reasonable".

Officer Burt should have kept the computer and CDs in a safe place and waited to get a search warrant before examining the contents.

As Mr. Cole's employer, the school board was allowed to confiscate the computer. But this did not give the police the right to take it for a criminal investigation without a warrant. The school board could not agree to the search and seizure or give up Mr. Cole's rights without his permission.

The police therefore violated Mr. Cole's Section 8 rights.

### Accepting the Evidence :

Officer Burt's behaviour was not done out of bad faith, negligence or disregard for Mr. Cole's rights. Officer Burt's statements in court showed that he truly believed he did not need a warrant to search the computer.

Also, if Officer Burt had gotten a warrant, he would have discovered the same evidence he found without a warrant.

A court should only throw out evidence obtained illegally in the most serious cases. Officer Burt's violation of the Charter was not outrageous.

Throwing out the evidence would have a significant negative impact on the criminal law process in this case. The truth-seeking function of the criminal courts must take priority in these types of cases.

### POINTS FOR REFLECTION

- Do you think a police officer should be allowed to search and seize evidence without getting a search warrant? If so, in what circumstances?
- Do you agree with the court's decision to accept the computer evidence even though it was obtained in violation of Mr. Cole's rights?
- Do you think that personal information on a computer provided by an employer should stay private?



## FREEDOM OF RELIGION

# Multani v. Commission scolaire Marguerite-Bourgeoys Supreme Court of Canada (2006)

## FACTS

Gurbaj Singh Multani, a 12-year-old student in a Montreal school, was a practising member of the Sikh religion. He wore a kirpan (ceremonial knife) under his clothes as part of his religious clothing.

One day, Gurbaj accidentally dropped his kirpan in the schoolyard. After hearing about this, the school principal told Gurbaj not to wear the kirpan to school. The school had rules prohibiting dangerous objects such as knives and weapons on school premises.

The school board supported the principal's decision and suggested Gurbaj instead wear a replica of the kirpan made from another material, such as plastic.

Gurbaj and his father challenged the school board's decision, arguing it violated Gurbaj's freedom of religion under the Canadian and Québec Charters and that he had a right to wear the kirpan to school.

## QUESTIONS

1. Did the school board decision preventing Gurbaj from wearing his kirpan to school violate his freedom of religion?
2. If so, was this limit on his rights reasonable and justified under Section 1 of the Canadian Charter and Section 9.1 of the Québec Charter?

## PREPARATION FOR PLEADINGS

### Lawyers for Gurbaj (appellant)

The lawyers representing Gurbaj must show that his freedom of religion was violated. To do this, they must prove the following:

- Gurbaj has a sincere belief in his religious practises.
- The school rule he is challenging substantially interferes with the observance of his religious practises.

#### **What you need to know:**

- ⇒ Freedom of religion includes the right to practise religious beliefs openly and without fear.
- ⇒ No one can be forced to act contrary to his or her beliefs or conscience, except as required by safety, order, health, morals or the rights of others.

Don't forget to anticipate arguments the other side might raise.

### Lawyers for the School Board (respondent)

The lawyers for the school board must show the following:

- Gurbaj's freedom of religion was not violated.
- Even if there was a violation, it was justified under Section 1 of the Canadian Charter and Section 9.1 of the Québec Charter. When applying the Section 1 (and Section 9.1) test, think about whether the school board tried to accommodate Gurbaj.

Don't forget to anticipate the arguments of the lawyers for the other side and their responses to your arguments. Remember that they have a right to respond.

## ARGUMENTS

### Gurbaj and His Father (appellants)

#### Freedom of Religion :

- Wearing a kirpan is mandatory for all Sikhs who have been initiated into the religion, so any restriction on this religious practice violates the guarantee of freedom of religion.
- The school board's suggestion of using a replica made from another material does not respect a Sikh's beliefs.

#### Section 1 :

- There have not been any violent incidents involving kirpans in schools, so banning it is not justified on the grounds of safety.
- The school had a duty to accommodate Gurbaj. A compromise could be reached: Gurbaj could agree to wear the kirpan under his clothes, put it in a wooden sheath (cover) instead of a metal one, sew the sheath into his clothing to make access difficult and allow the school to check from time to time that these conditions were being respected.

### The Government /School Board (respondents)

#### Freedom of Religion :

- Individual rights are not absolute: individual rights might be limited in a school environment for safety reasons.

#### Section 1 :

- The ban on dangerous objects is necessary to provide a safe learning environment.
- The school board's proposal to let Gurbaj wear a replica is reasonable one.
- The compromise proposed by Gurbaj and his father would reduce safety standards and impose "undue hardship" on school authorities.

## JUDGMENT

The Supreme Court decided that the kirpan ban violated the Canadian Charter and was not justified under Section 1. (Given its conclusions on the Canadian Charter, the Supreme Court decided it did not have to make a decision regarding the Québec Charter.)

### Reasons

#### Freedom of Religion :

- Freedom of religion is not absolute, especially when it conflicts with other Charter rights.
- To establish an infringement on freedom of religion, the person making the claim must demonstrate he or she sincerely believes in his or her religious practices.
- That person must also show a substantial interference with the observance of those practices.
- Gurbaj proved that he sincerely believed he must carry a kirpan. His religious practice therefore cannot be challenged on the basis some Sikhs don't carry it.
- The court found that the school board's ban interfered with Gurbaj's ability to act in accordance with sincerely held beliefs and therefore violated his freedom of religion.

#### Section 1 :

- The objective of the school board's rule – ensuring safety – was justifiable.
- However, since the court found no evidence of violence involving kirpans in schools, it was impossible to show a real risk to school safety.
- A total ban on all kirpans was not the smallest possible infringement on freedom of religion.

- A total ban sends a message that some religious practices merit more protection than others.
- The school board had a duty to accommodate Gurbaj, unless doing so would be unreasonable. Accommodating him demonstrates the importance of protecting freedom of religion and respecting minorities.

## POINTS FOR REFLECTION

- Could this decision apply to other religious practices or symbols?
- Should all religious symbols be banned from schools?
- Should freedom of religion be different for adults, children and teenagers? Why?





## PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

### R. v. M. (M.R.) - Supreme Court of Canada (1998)

#### FACTS

Mr. Cadue, a high school vice-principal in Nova Scotia, was told by several students that M.R.M., a 13-year-old student, was selling drugs on school property and would be carrying them at an upcoming school dance. (Due to his age, M.R.M.'s full name could not be made public.)

Mr. Cadue believed the information from the students was reliable because they knew M.R.M. well and one of them had given Mr. Cadue reliable information in the past.

When Mr. Cadue saw M.R.M. at the school dance, he called the RCMP to ask an officer to come to the school. He then called M.R.M. to his office, where he asked him if he had drugs and said he was going to search him.

Soon after, a plain-clothes RCMP officer arrived. He came into Mr. Cadue's office and identified himself but did not say anything while Mr. Cadue talked to M.R.M.

After asking M.R.M. to turn out his pockets and pull up his pant legs, Mr. Cadue noticed a bulge in M.R.M.'s sock and found a cellophane bag. He handed the bag to the officer, who identified the contents as marijuana.

The officer told M.R.M. he was under arrest for drug possession and read him his rights, including the right to consult a lawyer and contact a parent or adult. M.R.M. unsuccessfully tried to reach his mother, then said he didn't want to contact anyone else.

At his trial for drug possession, M.R.M. argued that the evidence (the bag of marijuana) couldn't be used against him because it had been obtained during an unreasonable search and seizure, contrary to Section 8 of the Canadian Charter.

M.R.M. also argued that his right to retain counsel (a lawyer) on arrest or detention under Section 10 (b) of the Canadian Charter had been violated.

## QUESTIONS

1. Was the search by the vice-principal “unreasonable”?
2. Was M.R.M. detained when he was in the principal’s office but before he was arrested?
3. If he was detained, had his right to consult a lawyer upon “detention” been violated?

## EXPLANATIONS

**Searches** – A search done by a person in authority in a school environment usually must be done in a sensitive, minimally intrusive manner. The more serious the suspected rule-breaking, the more intrusive the search can be.

**Detention** – A person is considered to be “detained” when a police officer or other agent of the state deprives that person of his or her liberty by significant physical or psychological restraint. For example, if a police officer speaks to someone in the street and a reasonable person would think he or she is not free to leave, that might be considered to be “detention” due to psychological restraint. It would be important to consider factors such as what the police officer said (e.g., did the officer give orders), the tone of the officer’s words, whether other people were around, the length of the encounter, etc. If there is no detention, the right to consult a lawyer under Section 10 (b) does not apply.

## PREPARATION FOR PLEADINGS

### Lawyers for M.R.M. (appellant)

The lawyers for M.R.M. must show that the search was unreasonable and that his right to a lawyer was violated.

#### The Search

To show that the search was unreasonable, M.R.M.'s lawyers must demonstrate the following:

- M.R.M. had a reasonable expectation of privacy.

This is important. For example, people going through a border crossing normally do not have much of an expectation of privacy because they know they might be searched. On the other hand, a person in a bathroom has a high expectation of privacy.

When thinking about the expectation of privacy, ask yourself whether it can be limited in some circumstances. For example, do students have a reasonable expectation of privacy at school?

- The search of M.R.M. was unreasonable.

The police must generally get authorization from a judge before carrying out a search. Ask yourself these questions:

- ⇒ Should school principals be required to get this kind of authorization before searching a student? If not, why not?
- ⇒ Should there be limits on searches of students by school principals? Should we require that principals have very good reasons to search?
- ⇒ How should the search be carried out in order to be considered "reasonable"? To answer this question, see the earlier section on searches.

#### Detention and the Right to a Lawyer

To show that M.R.M.'s right to a lawyer was violated, his lawyers must first show that he was "detained". See the earlier explanations about detention.

Don't forget to anticipate the arguments of the other side!

## Lawyers for the Government (respondent)

The lawyers for the government must show the following:

### The Search

- M.R.M could not have had an expectation of privacy at school. Ask yourself this question: why don't students have an expectation of privacy at school?
- The search was reasonable. Refer to the earlier explanation about searches.

### Detention

- M.R.M. was not detained because he was not subject to any physical constraint. Since he was not detained, he did not have a right to consult a lawyer. Ask yourself this question: when a student obeys a school principal, is the student under physical constraint? If not, why not?



## EXAMPLES OF ARGUMENTS

### M.R.M. (appellant)

#### Unreasonable Search :

- Students have a reasonable expectation of privacy in school, so the vice-principal's search was "unreasonable".

#### Detention and Right to Consult a Lawyer :

- M.R.M. was "detained" the moment the vice-principal took him to his office because he was compelled to stay there. The moment he was detained, he should have been informed of his right to consult a lawyer.

### Le gouvernement (intimé)

#### Unreasonable Search :

- M.R.M. could not have a reasonable expectation of privacy at school.
- The search was reasonable since:
  - ⇒ Mr. Cadue did it as part of his duty to maintain order in the school,
  - ⇒ he had credible information that M.R.M. had drugs, and
  - ⇒ the search was done in the privacy of Mr. Cadue's office and carried out in a minimally intrusive way.

#### Detention and Right to Consult a Lawyer :

- At school, students are often expected to obey rules and instructions, but this does not mean they are "detained".
- Section 10 was not meant to apply to interactions between teachers and students, but rather between the individual and the state.
- Applying Section 10 in the school environment would lead to absurd results.
- M.R.M. did not have a right to counsel until he was arrested by the RCMP officer.

## JUDGMENT

The Supreme Court rejected M.R.M.'s Charter arguments. He was later convicted of possession of marijuana.

### Reasons

#### Section 8 :

- Students' reasonable expectation of privacy at school is less than in other circumstances. Just as people crossing borders know they may be questioned or searched, students know that teachers and school authorities have to maintain order and discipline, and that this responsibility sometimes requires searches of students and their belongings and seizure of prohibited items.
- When police conduct searches, they normally need authorization (often a warrant) and strong reasons to believe they will find something. However, a more flexible standard should apply to searches by school authorities.
- To ensure safety and order, principals and teachers must be able to react quickly. They therefore don't need authorization for a search, but they must have reasonable grounds for believing a student they want to search has violated school rules and that searching will provide evidence of this.
- The search by school authorities must be conducted in a sensitive, minimally intrusive manner.
- A more intrusive search will be allowed if the suspected rule-breaking is serious.
- Mr. Cadue had information from credible sources that M.R.M. had violated school rules.
- The search was conducted in the privacy of Mr. Cadue's office in a sensitive way.
- The suspected infraction – carrying drugs – was serious, so the search was reasonable in the circumstances.

### Section 10(b) :

- A person is detained only when he or she is “deprived of liberty by physical constraint” or when a “police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequences”.
- Section 10(b) was not meant to apply to teachers and principals in schools. It would be absurd if students could contact a lawyer every time they were called to the principal’s office.
- In this case, there was no “detention”.

**Note to Teachers** — In another case decided after M.R.M., the Supreme Court of Canada elaborated on the definition of detention. The Court stated that a person can be considered to be “detained” when a police officer or other agent of the state deprives that person of his or her liberty by significant physical or psychological restraint. For example, if a police officer speaks to someone in the street and a reasonable person would think he or she is not free to leave, that might be considered to be detention due to psychological restraint. It would be important to look at factors such as what the police officer said (e.g., did the officer give orders), the tone of the officer’s words, whether other people were present, the length of the encounter, etc. Students have this updated definition in their toolkits.

### POINTS FOR REFLECTION

- Do you think our expectation of privacy is different in different places? What is your expectation of privacy inside school bathrooms? In school hallways? For items in your school locker? Inside your home?
- Do you think it’s fair that there is more flexibility for school searches compared to police searches?
- Do you think the presence of an RCMP officer during the search in this case changes anything?
- Should police officers and vice-principals have to meet the same standards during a search?
- Do you think M.R.M. felt “detained” because of the presence of the RCMP officer? Should this affect the court’s reasoning under Section 10 (b)?



## THE RIGHT TO LIFE, LIBERTY AND SECURITY AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

### Charkaoui v. Canada (Citizenship and Immigration) Supreme Court of Canada (2007)

#### FACTS

In 2001, Parliament adopted a new immigration law giving the federal government the power to issue “security certificates” against non-citizens living legally in Canada.

The certificates allowed authorities to arrest and detain someone without laying charges if the government thought the person was a threat to national security. The certificate was reviewed by a judge, who had to decide if it was “reasonable”. The government could request that this review hearing be held behind closed doors so neither the public nor the prisoner could see any sensitive national security evidence used to issue the security certificate. If the judge found that the certificate was reasonable, the person could be deported to another country, even one where he or she might face torture.

Between 2001 and 2003, security certificates were issued against Adil Charkaoui, Hassan Almrei and Mohamed Harkat, and they were detained. The government claimed they were involved in terrorism and posed threats to Canada’s security. They spent three to five years in prison without being charged or having a public hearing or trial. They were never told the basis of the case against them.

In 2006, they brought a case challenging their detentions under Section 7 of the Canadian Charter.

#### QUESTIONS

1. Does the security certificate procedure violate Section 7 of the Canadian Charter?

Section 7 states that 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.

1. If the procedure does violate Section 7, is this violation justified under Section 1 of the Canadian Charter?



## EXPLANATIONS

### ***The Principles of Fundamental Justice***

The principles of fundamental justice include, among other things, the right to a fair hearing. For a hearing to be considered fair, the following four criteria must be met:

- The hearing must take place before an independent and impartial judge.
- The decision must be based on all the relevant facts and the law.
- The accused must know the evidence used against him or her.
- The accused must have a chance to defend himself or herself against the accusations.

## PREPARATION FOR PLEADINGS

### Lawyers for the Detainees (appellants)

The lawyers for Charkaoui, Almrei and Harkat must show the following:

- The automatic detention under the security certificate process violates their right to liberty and security. Ask yourself these questions:
  - ⇒ How was the right to liberty of the detainees violated?
  - ⇒ How was the security of the detainees jeopardized?
- The principles of fundamental justice were not respected because the detainees were deprived of the right to a fair hearing. For help with this argument, see the explanations above. You can also ask yourself these questions:
  - ⇒ If the detainees aren't allowed to attend the hearing, the judge only hears the government's arguments. Can the judge really be impartial in these circumstances?
  - ⇒ If the detainees are not allowed to see the government's evidence, do they have a genuine chance to defend themselves against the accusations against them?
  - ⇒ Is the judge really making a decision based on all the relevant facts?

- These violations were not justified under Section 1 of the Canadian Charter.

The lawyers for the government will use the Section 1 test to defend their position. You have to know how to respond to their arguments. Ask yourself these questions:

- ⇒ Can such serious violations of fundamental rights be justified by national security concerns?
- ⇒ Is the deportation of a person to a country where he or she might face torture justified in a free and democratic society?

Don't forget to anticipate the arguments of the other side!

### Lawyers for the Government (respondent)

The lawyers for the government must show the following:

- The detainees were deprived of the right to liberty and security, but this was done in accordance with the principles of fundamental justice. In other words, the detainees received a fair hearing. Ask yourself these questions:
  - ⇒ Is it acceptable that the detainees were denied the right to attend the hearing?
  - ⇒ Why does the government issue security certificates?
  - ⇒ Is terrorism more of a threat to national security than other types of crimes?
  - ⇒ Isn't the role of a judge to take into account the interests of all the parties, whether or not they are present at the hearing?
- If the detainees' rights were violated, this was justified under Section 1 of the Canadian Charter. Apply the Section 1 test by asking yourself these questions:
  - ⇒ Can such serious violations of fundamental rights be justified by national security concerns?
  - ⇒ Is the deportation of a person to a country where he or she might face torture justified in a free and democratic society?

Don't forget to anticipate the arguments of the lawyers on the other side, as well as their responses to your arguments. Remember that they have a right to respond.



## ARGUMENTS

### Charkaoui, Almrei and Harkat (appellants)

- Section 7 applies in this case: when people are detained, they are clearly deprived of their liberty. They are also deprived of their security because they can be deported to countries where their lives or freedom might be threatened.
- “Fundamental justice” includes the right to a fair hearing and full defence, including the right to argue against any charges.
- The judge at a closed hearing cannot remain independent and impartial because he or she only hears one side of the arguments and has to ask questions on behalf of the people being detained.

### The Government (respondent)

#### Section 7 :

- The government is responsible for the security of the country and must have the freedom to carry out this responsibility.
- A private hearing is necessary to protect national security secrets.
- Security threats from terrorism are different from regular crimes.
- The judges in these cases ask the government questions and investigate the government's claims to make sure the hearing is fair.

#### Section 1 :

- The limits imposed on individual rights are justified to protect national security.

### Civil Liberties Groups (interveners)

- The word “terrorism” is not defined in the law and could allow the government to abuse the rights of individuals or allow it to limit the activities of groups not involved in terrorism.
- The term “national security” is not defined in the law and could cause difficulties in interpretation and lead to abuses.

## JUDGMENT

The court found that the security certificate procedure violated the Canadian Charter and could not be justified under Section 1. However, it gave Parliament one year to change the process to comply with the standards of the Canadian Charter.

### Reasons

#### Section 7 :

- Possible deportation to a country where there is a risk of torture violates a person's right to security under Section 7.
- Before a person can be detained for a significant period, he or she has a right to a fair hearing before an independent and impartial judge, the right to a decision based on the law and all the relevant facts, the right to know the evidence against him or her and the right to argue against that evidence. Automatic detentions without this kind of hearing violate the detainees' liberty under Section 7.
- The court decided that even though the judge reviewing the security certificates only heard the government's arguments, he or she still had to consider the interests of both parties and was therefore impartial.
- However, without the opportunity to attend the hearing, the person detained could not present a proper defence and ensure the judge had all the facts. The hearing therefore did not respect the "principles of fundamental justice" as required by Section 7.

#### Section 1 :

- The security certificate procedure did respond to a pressing and important objective – protecting national security – and therefore passed the first part of the Section 1 test.
- The procedure also passed the second part of the test: there was a logical connection between the procedure and what the government was trying to achieve.
- However, the procedure failed the third part of the test: the least possible restriction of a Canadian Charter right. The court found that sensitive information could be protected without closed hearings that deprived detainees of the right to defend themselves. For example, the government could use special lawyers to represent detainees.



## POINTS FOR REFLECTION

- Do you agree with the court's criteria for a "fair" hearing?
- If you were in the shoes of Parliament, what would you do to make the law consistent with the Canadian Charter?
- Should suspected terrorists have the same rights as other suspected criminals?
- Why should the Supreme Court of Canada be able to tell the government what it can and cannot do?



## PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

### Commission des droits de la personne et des droits de la jeunesse v. Systèmes de drainage Modernes inc Human Rights Tribunal (Québec) (2009)

#### FACTS

Mike Allard was born with a left hand that was missing fingers and a thumb. Despite this, he had always done work requiring manual dexterity.

While studying industrial mechanics, he found a part-time job as a machine operator in a plastics factory owned by Les Systèmes de drainage modernes inc. The job advertisement mentioned that manual dexterity was one of the job requirements. The work involved removing plastic pieces from a mould and trimming off excess bits.

Two days after starting work, Mr. Allard was called into a meeting with the company's director of human resources, Mr. Charlebois. He was told he could no longer work at the company because "he was missing a hand". Mr. Charlebois said that because of this disability, Mr. Allard did not meet workplace health and safety standards and "multi-tasking" requirements.

Mr. Charlebois had never observed Mr. Allard working. He testified in court that he assumed Mr. Allard could not do the work based on his own judgment and the comments of a co-worker, who said Mr. Allard was "missing a hand". However, the factory foreman testified in court that Mr. Allard was doing the work correctly. Also, when asked by the foreman to comment on Mr. Allard's performance, two of his colleagues did not mention any problems related to his disability.

Two experts in ergonomics (people who study the interaction between people and their work tasks and workplaces) also testified in court. They did not agree on whether Mr. Allard's condition prevented him from doing his work safely and correctly: one said he could, the other said he could not. Neither had actually observed Mr. Allard doing his work.

Mr. Allard filed a complaint against the company with the Commission des droits de la personne et des droits de la jeunesse. The Commission agreed to take the complaint on his behalf to the Québec Human Rights Tribunal, a kind of court for human rights cases.

## QUESTIONS

### Discrimination Based on a “Handicap”

1. Did the company illegally discriminate against Mr. Allard when it fired him? (See Sections 10 and 16 of the Québec Charter.)
2. Was the company’s firing of Mr. Allard permitted under Section 20 of the Québec Charter, which states that distinctions based on job requirements are not considered to be discriminatory?

*In other words, if a requirement is really necessary to do a job, it will not be considered to be discriminatory. For example, the courts have decided that a city can refuse to hire a person as a firefighter because of deafness in one ear. Requiring good hearing in both ears was found to be an a legitimate job requirement and therefore not discrimination.*

### Damages

If Mr. Allard was in fact discriminated against, the court must then decide if he is entitled to monetary compensation, also called “damages”.

3. Does the company have to pay him moral damages under Section 49 (1) of the Québec Charter?

***Moral damages** compensate a person for psychological harm as opposed to physical harm to the person or his or her property. For example, moral damages can be given for mental suffering or damage to a person’s reputation.*

4. Was the discrimination intentional? If so, does the company have to pay him punitive damages under Section 49 (2) of the Québec Charter?

***Punitive damages** are meant to punish a person who intentionally harms someone.*



## EXPLANATIONS

### **Discrimination:**

- Someone who claims to have been a victim of discrimination must prove that he or she was discriminated against based on one of the characteristics listed in Section 10 of the Québec Charter, such as a “handicap”.
- This person must also show that, because of this discrimination, his or her right to be treated equally was denied. (See the second paragraph of Section 10 of the Québec Charter.)

### **Intentional discrimination:**

- A violation of fundamental rights will be considered to be “intentional” if the person who violated someone else’s rights knew that his or her actions would probably cause harm.

### **Section 20 of the Québec Charter:**

- If there was discrimination, the employer must prove the discrimination was justified because it was based on skills or qualifications required for the job.
- To prove this, the employer must demonstrate the following:
  - ⇒ The skills or qualifications required were logically connected to the job.
  - ⇒ The measures taken to implement those job requirements were reasonable.
  - ⇒ It was impossible to accommodate differences between employees without extreme inconvenience. For example, if a company that is not very profitable has to spend \$300,000 to accommodate one employee, the accommodation might be considered too difficult and therefore “impossible”.

*“Accommodating differences” means making changes to the physical workplace or the way work is organized. Examples of accommodation include giving an employee with vision problems a larger computer screen or allowing an employee to work on a different schedule than co-workers.*

## PREPARATION FOR PLEADINGS

### Lawyers for the Commission (plaintiff)

The lawyers for the Commission must show the following:

#### **Discrimination Based on a Handicap**

- Mr. Allard was discriminated against based on a “handicap”.
- Because of this discrimination, he was denied the right to be treated equally.

#### **Damages**

- Mr. Allard suffered psychological harm as a result of the discrimination. He is therefore entitled to receive moral damages.
- The violation of Mr. Allard’s rights was intentional. He is therefore entitled to receive punitive damages.

For help with your arguments, refer to the explanations given above.

### Lawyers for SDM (defendant)

The lawyers for the company must show the following:

#### **Discrimination Based on a Handicap**

- Mr. Allard was not discriminated against based on a handicap.
- Even if Mr. Allard was discriminated against, this discrimination was justified under Section 20 of Québec Charter. Apply the three criteria explained above.
- Ask yourself these questions:
  - ⇒ Did the employer try hard enough to accommodate Mr. Allard before claiming it was impossible to do so?
  - ⇒ Why was it impossible to accommodate Mr. Allard?
- Because of this discrimination, he was denied the right to be treated equally.

#### **Damages**

- Even if Mr. Allard’s rights were violated, he did not suffer any psychological harm and is not entitled to moral damages.
- The violation of his rights was not done intentionally, so he is not entitled to punitive damages.

For help with your arguments, refer to the explanations given above.

## ARGUMENTS

### The Commission, on behalf of Mike Allard (plaintiff)

#### Sections 10 and 16 :

- Dismissing Mr. Allard based on a disability is discriminatory.

#### Section 20 :

- Mr. Allard was dismissed because of his disability, not because he was unable to do the job. This kind of discrimination is not justified under Section 20.

#### Section 49 :

- The violation of Mr. Allard's rights was intentional. The company should therefore pay him not only moral damages but also punitive damages.

### Les Systèmes de drainage modernes inc. (defendant)

#### Sections 10 and 16 :

- Mr. Allard was dismissed because his disability prevented him from doing his job quickly and safely enough.

#### Section 20 :

- Mr. Allard's dismissal was legal because it falls into one of the exceptions based on job requirements. (See the explanation above about the exception for job requirements.)

## JUDGMENT

The Tribunal decided that Mr. Allard had been discriminated against and that this discrimination did not fall under the exception mentioned in Section 20. The Tribunal awarded Mr. Allard \$10,000 in moral damages and \$3,000 in punitive damages.

### Reasons

#### Sections 10, 16 and 20 :

- A person claiming discrimination must show he or she was discriminated against based on one of the characteristics mentioned in Section 10.
- To claim discrimination based on a “handicap” (one of the characteristics mentioned in Section 10), the disability can be real or perceived. In other words, the person claiming discrimination is not obliged to show that the disability actually limited his or her activities.
- The person claiming discrimination must also show that, because of this discrimination, he or she was denied equal exercise of his or her rights. (See the wording of Section 10.)
- Once these elements are shown, the employer must prove that the discrimination was justified because it was based on skills or qualifications required for the job. (See the wording of Section 20.)
- The employer must prove that:
  1. the job requirements were logically connected to the job
  2. the measures taken to implement those job requirements were reasonable
  3. it was impossible to accommodate differences between employees without extreme inconvenience.
- In this case, the employer did not demonstrate that having two hands with all fingers was logically connected to performing the job of machine operator at the company.

**Explanation:** Accommodating differences means making changes to the physical workplace or the way work is organized. Examples of accommodation include giving an employee with vision problems a larger computer screen or allowing an employee to work on a different schedule than co-workers.

- It was therefore not necessary to examine the second criterion listed above. However, the Tribunal stated that, as a general rule, an employer must make significant efforts to accommodate an employee with a disability before it can claim it was impossible to accommodate differences. Minor inconvenience caused by accommodating an employee is not enough to justify firing that employee.

**Explanation:** To decide if it is possible to accommodate, the courts look at factors such as the size of the company, the cost involved, whether accommodation would increase safety risks, whether the workforce and facilities are interchangeable, the morale of other employees and any disruption to a union labour agreement.

### Section 49 (Compensation) :

- By assuming that Mr. Allard's birth defect automatically meant he could not perform the job, the employer implied he was not entitled to the same respect as other employees.
- To compensate for this discrimination, the Tribunal awarded Mr. Allard \$10,000 in moral damages.
- The Tribunal also awarded Mr. Allard \$3,000 in punitive damages because the harm caused to him by the company was caused intentionally. A person's actions will be considered to be intentional if that person knows that his or her actions will probably cause harm. In this case, contrary to his normal practise, Mr. Charlebois met personally with Mr. Allard to tell him he was fired. This indicates Mr. Charlebois knew the firing would be a difficult experience for Mr. Allard. Mr. Charlebois's refusal to even consider whether he could accommodate Mr. Allard was another indication the firing was intentional.

### POINTS FOR REFLECTION

- Do you think that laws such as the Québec Charter have helped combat discrimination?
- Are certain kinds of discrimination still more common than others? (See the list of grounds of discrimination listed in Section 10 of the Québec Charter.)
- Do you agree with the Tribunal that discrimination can result not just from actual physical differences, but also from how those differences are perceived?
- Do you think courts should be able to give moral and punitive damages? Why?