WEK'ÈEZHÌI LAND AND WATER BOARD

INTERIM CLOSURE AND RECLAMATION PLAN FOR BHP BILLITON DIAMONDS INC.'S EKATI MINE

MOTION RESPECTING THE BOARD'S JURISDICTION OVER FISH HABITAT

SUBMISSIONS OF THE INDEPENDENT ENVIRONMENTAL MONITORING AGENCY

INTRODUCTION

1. The Independent Environmental Monitoring Agency ("the Agency") was established by the Government of Canada, the Government of the Northwest Territories and BHP Diamonds Inc. (now BHP Billiton Diamonds Inc. or "BHP") pursuant to an Environmental Agreement made January 6, 1997 (the "Agreement"). The mandate of the Agency is, among other things, to serve as a public watchdog of the regulatory process and the implementation of the Agreement and to participate as an Intervener in regulatory and other legal processes respecting environmental matters related to the Ekati Mine. Under the Agreement, the Agency shall exist until full and final reclamation of the mine is completed in accordance with requirements of all regulatory instruments.

2. As part of its environmental monitoring mandate, the Agency has one representative and an alternate on the Interim Closure and Reclamation Plan ("ICRP") working group. The Agency has thus been closely involved with the development of the ICRP.

3. The Agency believes that the standards to which the Ekati mine is reclaimed are of the utmost importance to the lasting environmental legacy of the mine. The Agency supports BHP's goal for the ICRP of restoring the site to a functioning ecosystem. A functioning ecosystem is one where, among other things, fish can live and move between the surrounding watershed and reclaimed pit lakes and containment facility. By contrast, BHP's proposal, which envisions pit lakes that

cannot support fish and which are therefore blocked off from the surrounding watershed by fish barriers, is contrary to that goal.

4. These are the written submissions of the Agency with respect to BHP's motion for a determination by the Wek'èezhìi Land and Water Board ("WLWB" or "Board") of whether the Board has jurisdiction to require that BHP establish and maintain fish or fish habitat in the closed pit lakes or the Long Lake Containment Facility ("Cell E") at the Ekati diamond mine.

STATUTORY FRAMEWORK

5. BHP's fundamental position is that the matter of fish habitat is the exclusive jurisdiction of the Department of Fisheries and Oceans ("DFO") under the *Fisheries Act*, R.S.C. 1985, c. F-14. BHP further asserts that the *Mackenzie Valley Resource Management Act* S.C. 1998, c. 25 as amended ("*MVRM Act*") and the *Northwest Territories Waters Act* S.C. 1992, c. 39 do not confer jurisdiction on the WLWB with respect to fish habitat. Therefore, BHP concludes, interpreting the *MVRM Act* to give jurisdiction to the Board to order BHP to restore fish habitat would conflict with the *Fisheries Act*. In other words, the issue is one of legislative conflict.

6. The *Fisheries Act* and the *MVRM Act* are of course both federal statutes. The leading authority on a potential conflict between two statutes passed by the same legislature is *Lévis (City) v. Fraternité des policiers de Lévis Inc.,* 2007 SCC 14. At para. 47 of the *Levi* case Bastarache J. writes:

> The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of

> the other. … Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other. … Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. [emphasis added]
>
> [APPENDIX "A"]

7. The key points from *Lévis* are:

   - Legislative coherence between statutes is presumed;
   - An interpretation which results in legislative conflict should be eschewed unless it is unavoidable; and
   - An unavoidable conflict occurs when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results.

8. As noted above, BHP suggests that the *Fisheries Act* confers exclusive jurisdiction on DFO in respect of fish habitat. For the reasons that follow, the Agency submits this is not correct. Before discussing the *Fisheries Act*, however, the Agency would draw the Board's attention to the *Department of Fisheries and Oceans Act*, R.S.C., 1985, c. F-15 ("*DFO Act*").

Department of Fisheries and Oceans Act

9. This is the Act which provided for the establishment of the Department of Fisheries and Oceans. Section 4 of the *DFO Act* is titled "Powers, Duties and Functions of the Minister" and states:

> 4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

> (a) sea coast and inland fisheries;
>
> (b) fishing and recreational harbours;
>
> (c) hydrography and marine sciences; and
>
> (d) the coordination of the policies and programs of the Government of Canada respecting oceans.
>
> [emphasis added]

10. The Agency submits that under the *DFO Act*, it has always been contemplated that the federal government might assign to some other federal department, board or agency matters which would otherwise fall within DFO's jurisdiction. In addition, the Board should take note of the fact that several provinces have their own Fisheries Acts (e.g., British Columbia, Newfoundland, Saskatchewan, Alberta, etc.). In other words, DFO's jurisdiction over fish and fish habitat is not absolute.

11. The Government of Canada has acknowledged this overlapping jurisdiction in its "Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act*". Under the heading "Jurisdiction and Responsibilities", the policy states:

> Under section 91 of the *Constitution Act*, 1867, the federal government has exclusive jurisdiction over the conservation and protection of Canada's sea coast and inland fisheries. The *Fisheries Act*, first passed by Parliament in 1868, is the federal statute promulgated pursuant to this constitutional authority.
>
> The Department of Fisheries and Oceans has primary, and ultimate, responsibility for administration of the *Fisheries Act*, which includes responsibility for administration and enforcement of the provisions dealing with physical alteration of fish habitat. The Department of the Environment has been assigned responsibility for administration and enforcement of the *Fisheries Act* provisions dealing with the deposit of deleterious substances into water frequented by fish through a 1978 Prime Ministerial decision. A 1985 Memorandum of Understanding between DFO and DOE reiterated the responsibilities of both departments and set out mechanisms for information sharing and co-operation.

> Provincial, territorial and municipal governments also have powers that can have an impact on fishery resources and fish habitat through their authority to deal with water pollution and land and water use activities (e.g., forestry, mining, agriculture, hydro-electric power developments). [emphasis added]

[APPENDIX B]

12. While the above statement is simply an expression of Canada's views, the Agency submits that a review of the statutory framework will disclose that it is correct: jurisdiction over fish, fish habitat and water is shared and overlapping among federal, provincial and territorial governments and agencies.

Fisheries Act

13. Section 35 of the *Fisheries Act* states:

> **Harmful alteration, etc., of fish habitat**
>
> **35.** (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> **Alteration, etc., authorized**
>
> (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

14. It is clear that Section 35 is aimed at the prevention or mitigation of the harmful alteration, disruption or destruction of fish habitat. And clearly, this is DFO's jurisdiction. That is not controversial.

15. However, preventing the destruction of fish habitat is not the same thing as requiring the creation or restoration of fish habitat. They are two different things.

16. If the WLWB was being asked to stipulate that BHP could not harmfully alter, disrupt or destroy fish habitat then clearly the Board would be trenching on

DFO's jurisdiction and there might (but not necessarily) be an issue of legislative conflict. But that is not what the Board is being asked to do. Rather, the Board is being asked to require in the ICRP that BHP reclaim the pit lakes and Cell E of the containment facility to a standard that will allow fish to use the reclaimed sites. A requirement in the ICRP that BHP create fish habitat as part of mine reclamation in no way conflicts with Section 35 of the Fisheries Act.

17. As established by the Supreme Court of Canada in *Lévis*, there must be an "unavoidable conflict" between the relevant provisions of the *Fisheries Act* and the relevant provisions of the *MVMR Act* for true legislative conflict to exist. The Agency submits that in this case there is no conflict at all, let alone an unavoidable conflict.

18. Not only does the *Fisheries Act* prohibit the harmful alteration, disruption or destruction of fish habitat, it also prohibits (in s. 36(3)) the deposit of deleterious substances in water frequented by fish, unless authorized by DFO. Section 34(1) defines "deleterious substance" to mean:

> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water …

19. It is strongly arguable that the prohibition against depositing deleterious substances in water concerns the matter of water quality as much it does fish. That does not mean, however, that it conflicts with territorial or provincial water legislation such as the *Northwest Territories Waters Act*, S.C. 1992, c. 39 (the "*Waters Act*").

20. The *Waters Act* prohibits the deposit of waste in any inland waters in the Northwest Territories and defines "waste" to include:

> … any substance that, if added to water, would degrade or alter or form part of a process of degradation or alteration of the quality of the water to an extent that is detrimental to

> its use by people or by any animal, fish or plant … [emphasis added]

21. It can be seen that both the *Fisheries Act* and the *Waters Act* regulate essentially the same thing: the deposit of waste/deleterious substances in water in amounts that could harm fish. This does not mean the statutes conflict. They do not, because jurisdiction over water and over fish is overlapping and shared.

The Tłı̨chǫ Land Claims and Self Government Agreement

22. BHP begins its discussion of the Board's jurisdiction (as opposed to DFO's jurisdiction) by discussing the *MVRM Act*. The Agency submits that to properly understand the WLWB's jurisdiction one needs to go to the original source of that jurisdiction, namely the *Land Claims and Self-Government Agreement Among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada* (the "Tłı̨chǫ Agreement").

23. Chapter 22 of the Tłı̨chǫ Agreement deals with land and water regulation. Section 22.1.1 establishes the principle that "an integrated system of land and water management should apply to the Mackenzie Valley". Section 22.3.2 provides for the establishment of the Wek'èezhìi Land and Water Board "to regulate the use of land and water and the deposit of waste throughout the Wek'èezhìi".

24. Section 22.3.9 of the Tłı̨chǫ Agreement sets out the objective of the Board:

> The objective of the Wek'èezhìi Land and Water Board is to provide for conservation, development and utilization of the land and water resources of Wek'èezhìi in a manner that will provide the optimum benefit therefrom generally for all Canadians but in particular for present and future residents of Wek'èezhìi. In exercising its powers, the Board shall take into account the importance of conservation to the Tłı̨chǫ First Nation well-being and way of life.

25. Finally, Section 22.3.1.4 of the Tłı̨chǫ Agreement expressly states that the WLWB shall have the power to "issue, amend or renew authorizations and the terms and conditions attaching thereto for all uses of land and water and all

deposits of waste, including those incidental to the exercises of subsurface rights". This power includes the imposition of conditions relating to the closure and abandonment of an undertaking which uses water or involves the deposit of waste into water.

26. The Tłı̨chǫ Agreement thus expressly provides the conferral of jurisdiction on the WLWB to regulate the use of water and the deposit of waste into water, taking into account the importance of conservation to the Tłı̨chǫ First Nation.

Tłı̨chǫ Land Claims and Self-Government Act

27. The Tłı̨chǫ Agreement was ratified by Canada and brought into force through the *Tłı̨chǫ Land Claims and Self-Government Act,* S.C. 2005, c-1 (the "*Tłı̨chǫ Act*"). Section 5 of the *Tłı̨chǫ Act* states:

> **5.** (1) In the event of an inconsistency or conflict between the Agreement or this Act, or any regulations made under this Act, and the provisions of any other Act of Parliament, any ordinance of the Northwest Territories, any regulations made under any of those other Acts or ordinances, or any Tlicho law, then the Agreement or this Act, or regulations made under this Act, as the case may be, prevail to the extent of the inconsistency or conflict.

28. Based on Section 5, the Agency submits that if there is an inconsistency or conflict between the jurisdiction of the Board and DFO as regards fish and fish habitat (to be clear, the Agency submits there is no such conflict), the Board's jurisdiction prevails.

The Mackenzie Valley Resource Management Act

29. As discussed above, the Tłı̨chǫ Agreement provided for the establishment of the WLWB to regulate the use of land and waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water

resources in a manner that will provide the optimum benefit generally for all Canadians and in particularl for residents of the Wek'èezhìi. The agreement also provided for the conferral on the WLWB of the power to issue authorizations for the use of land and water and the deposit of waste.

30. This language is largely replicated in the *MVRM Act*, the relevant provisions of which are as follows:

> 57.1 (1) There is hereby established, in respect of Wekeezhii, a board to be known as the Wekeezhii Land and Water Board.
>
> 58.1 The Wekeezhii Land and Water Board shall regulate the use of land and waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of its management area.
>
> 60. (1) A board has jurisdiction in respect of all uses of waters and deposits of waste in its management area for which a licence is required under the Northwest Territories Waters Act and may
>
> (a) issue, amend, renew and cancel licences and approve the assignment of licences, in accordance with that Act, and
>
> (b) exercise any other power of the Northwest Territories Water Board under that Act,
>
> and, for those purposes, references in that Act to that Board shall be read as references to the board.
>
> 60.1 In exercising its powers, a board shall consider
>
> (a) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the Constitution Act, 1982 applies and who use an area of the Mackenzie Valley; and

> (b) any traditional knowledge and scientific information that is made available to it.

31. Clearly, the language in the *MVRM Act* establishing the WLWB and conferring jurisdiction on the Board in respect of land and water use and the deposit of waste was intended to be, and is in fact, largely identical to the language in the Tłı̨chǫ Agreement. Therefore, the paramountcy clause (Section 5) in the *Tłı̨chǫ Act* applies to the *MVRM Act*, such that in the event of a conflict between that Act and the *Fisheries Act*, the *MVRM Act* prevails.

The Mackenzie Valley Land Use Regulations

32. As noted by BHP in paragraph 19 of its submissions, Section 26 of the *Mackenzie Valley Land Use Regulations*, SOR/98-429 is relevant to this discussion. The Agency acknowledges these regulations relate to the issuance of permits for the use of land, not the use of water. However, the Agency submits that it is significant that in Section 26, the WLWB is expressly authorized to include in a land use permit conditions respecting the protection of fish habitat. It is significant as being another example of how jurisdiction over water and fish, including fish habitat, is overlapping and shared between the DFO and the WLWB.

Northwest Territories Waters Act

33. Generally speaking, the *Waters Act* establishes a regulatory regime whereby any person who wishes to use water or deposit waste in water must obtain approval from the Northwest Territories Water Board (the "NWT Water Board"). As discussed above, under the *MVRM Act*, the WLWB is given the NWT Water Board's jurisdiction over the issuance of licenses: section 60 of the *MVRM Act* specifically states that the WLWB, in exercising this jurisdiction, may "exercise any other power of the Northwest Territories Water Board" under the *Waters Act*.

34. As discussed above, one such power given to the WLWB (section 15(1)(e) of the *Waters Act*) is that the Board may include in a licence any conditions that it

considers appropriate, including conditions "relating to any future closing or abandonment of the appurtenant undertaking". The requirement that BHP prepare and submit to the Board for approval a mine closure and reclamation plan was made a condition of its water licenses (see water licence MV2001L2-008 Part L s. 5 and water licence MV2003L2-0013 Part J s.4).

Mines Site Reclamation Guidelines for the Northwest Territories

35. Indian and Northern Affairs Canada has established *Mine Site Reclamation Guidelines for the Northwest Territories* (the "Reclamation Guidelines"). In the current (January 2007) version of the Reclamation Guidelines, section 2.6 deals with open pit mine workings. According to section 2.6 (page 27), objectives for open pit reclamation include:

- Meet water quality objectives for any discharge from pits; and
- Establish in-pit water habitat where feasible for flooded pits [emphasis added]

36. In the same section on page 28, several "progressive and post-closure reclamation options" are listed. These include establishing "aquatic life in flooded pits".

37. Clearly, the Reclamation Guidelines explicitly contemplate reclamation of pit lakes to include the establishment of aquatic habitat and life.

Statutory Framework: Conclusion

38. The Agency submits that it is clear there is no conflict between the jurisdiction of DFO under the *Fisheries Act* and the jurisdiction of the WLWB under the Tłı̨chǫ Agreement, the *Tłı̨chǫ Act*, the *MVRM Act* and the *Waters Act*, as regards water, fish and fish habitat. Rather, taken together these statutes establish a coherent legislative regime in which jurisdiction over water, fish and fish habitat is shared between DFO and the Board.

HISTORICAL RECORD

Introduction

39. BHP submits that the approval and permitting history of the Ekati mine discloses a common understanding that the pit lakes would not be restored to viable fish habitat. The Agency rejects this and submits that the contrary is true. Before the mine was constructed, it was understood that the mine would destroy fish habitat in lakes. However, the destruction of fish habitat, and the payment by BHP of compensation for that destruction, does not logically, and does not in fact preclude restoration of lost fish habitat through mine reclamation. Further, contrary to what is alleged by BHP, the Agency submits that a review of the historical record shows that until very recently BHP acknowledged that reclamation would include restoration of fish habitat.

40. We will now set forth below examples from the written record of the approval and operation of the Ekati mine which show that restoration of fish habitat has been contemplated by all parties, including BHP.

1994 Project Description Report

41. In January 1994, BHP submitted a Project Description Report for the proposed Ekati Diamond Mine. Section 5.7 of that report dealt with the proposed Abandonment Plan for the mine. At page 5-14, BHP stated:

> The key objectives of a closure and abandonment plan are to minimize disturbances to the environment and to attempt to restore the site and water courses to original undisturbed conditions.

42. While this passage contains no explicit mention of fish, restoration of the mine site and water courses to original undisturbed conditions would clearly require restoration of fish habitat destroyed by the mine.

BHP's Environmental Impact Statement ("EIS") for the Proposed Mine

43. BHP's EIS for the Ekati Diamond Mine was submitted in December 1995. In Volume III (Environmental Management), Section 9 "Reclamation,

Decommissioning and Closure Management Plan", BHP stated the following, at page 9.1:

> Currently, wildlife (and fish) use of the mine area and limited Aboriginal use of the area are the predominant land uses. Accordingly, the reclamation design has been developed to re-establish these land uses within the context of an economic mining operation.

44. In addition, in Section 9.1 "Reclamation Goals and Objectives", BHP listed reclamation strategies, one of which was to "re-establish the primary use (wildlife) by creating habitat and/or promoting habitat recovery".

45. Also, Section 3.1.2 of the EIS, "Aquatic Life, Residual Effects", contained the following statement:

> When the dewatered lakes eventually refill, unlimited amount of steep littoral habitat for benthos and fish will be restored. When the drainage system of these lakes is reopened, the pre-existing stream channels are expected to provide functional habitat once again.

46. The Agency submits that BHP acknowledged in its EIS that restoration of fish habitat would be necessary to re-establish one of the primary land uses of the area: use by wildlife, including fish.

EARP Panel Final Report

47. As noted by BHP, Section 3.1.4 of the EARP Report (the "Report") dealt with closure and reclamation. At page 28, the Panel acknowledged that mine-site reclamation is normally addressed through the water licensing process under the *Waters Act*. Further, the Panel acknowledged that development of an abandonment and restoration (i.e. reclamation) plan is an iterative process that would not be finalized until after the mine had been operating for some period of time.

48. As a result, while the Panel concluded that BHP's reclamation plan represented an acceptable "framework" for reclamation, it also concluded that this would be dealt

with through the existing water licensing regulatory regime. In other words, the Panel did not address specifics of reclamation.

49. As also noted by BHP, Section 4.4 of the Report dealt with fish and fish habitat. It is important to understand that this section of the Report dealt not with reclamation but rather with potential environmental effects of the mine and whether those effects could be mitigated. It is within that context that the Panel discussed DFO's requirement for compensation for the destruction of fish habitat.

50. The Panel was required to make recommendations to the Minister regarding the potential environmental impacts of the mine and whether those impacts could be mitigated. In this case, having regard to the destruction of several lakes by the mine, the Panel accepted that the financial compensation would be payable in lieu of mitigation. In the Agency's submission, this had nothing to do with BHP's eventual reclamation obligations.

Fish Habitat Compensation Agreement

51. The Compensation Agreement entered into in 1996 between Canada and BHP set out the compensation payable by BHP for destruction of fish habitat. Again, it did not deal with reclamation obligations. In fact, Section 8 of the Agreement, titled "Responsibilities Under Other Legislation", states:

> Nothing contained herein shall in any manner relieve BHP of any of its other responsibilities for environmental protection, and it is BHP's responsibility to ensure that the requirements of other interested federal and/or territorial environmental departments or ministries are satisfied.

52. One of BHP's other responsibilities for environmental protection is reclamation. The Compensation Agreement does not and in fact cannot constrain the Board's jurisdiction to establish the nature and extent of BHP's reclamation obligations.

***Fisheries Act* Authorizations**

53. The *Fisheries Act* Authorizations authorize the destruction of fish habitat by BHP. A requirement in the ICRP to restore fish habitat is in no way inconsistent with the Authorizations. Further, similar to the Compensation Agreement, the *Fisheries Act* authorizations issued to BHP were clear that they were "valid only with respect to fish habitat and for no other purposes" and did not "release the applicant from any obligation to obtain permission from or to comply with the requirements of any other regulatory agencies".

Water Licenses

54. Water License MV 2003 L2 – 0013 (which was a renewal of License N7L2-1616) issued to BHP in respect of the Ekati mine contains several requirements relating to fish and fish habitat.

55. First, in Part C "Conditions Applying to Water Use", Section 3 requires BHP "to construct and/or maintain water intakes with a mesh size sufficient to ensure no entrainment of fish in accordance with the *Fisheries Act* and in accordance with the *Fisheries Act* and any other applicable legislation".

56. Further, Part I "Conditions Applying to Aquatic Effects Monitoring", Section 3 (a) states that BHP's Aquatic Effects Monitoring program shall include a process for measuring project-related effects in fish migration routes and in the structure, abundance and productivity of fish communities. BHP is also required to measure contaminant levels in fish tissues and indicators of fish health, as well as the taste of fish in water bodies downstream of the long lake contaminant facility. Finally, BHP is required to describe procedures that will be used to minimize the impacts of the Aquatic Effects Monitoring program on fish populations.

57. The Agency submits that these conditions contained in BHP's water license are another indication that jurisdiction over water, fish and fish habitat is shared between DFO and the Board.

Interim Abandonment and Restoration Plan

58. On September 30, 1997, BHP submitted its first Interim Abandonment and Restoration Plan to the NWT Water Board in fulfillment of a requirement contained in BHP's water license. In Section 4.2.1 of the plan, "Reclamation [Open Pits]", BHP states at page 16:

> Lake productivities after the pits fill with water are expected to be low because only some littoral development will be possible on the steep pits slopes. However, pit slopes that extend above the eventual high water level may provide perches for birds. Opportunities for habitat enhancement within the pit also will be explored as the mine develops. [emphasis added]

59. Section 4.2.1 of the Interim Abandonment and Restoration Plan remained unchanged in the December 1998 version. On June 29, 1999, the NWT Water Board approved this version. The Board's approval letter attached comments from the Technical Advisory Committee intended to be addressed by BHP in the next revised version of the plan. Those comments included:

> Although the plan states that opportunities for habitat enhancement within the pit will be explored as the mine develops the objectives for pit reclamation or desired endpoints should be stated in the plan.
>
> The goal of reclamation to return the area, as closely as possible, to the state in which it was found should include reclaiming the lost lakes upon closure. BHP has stated that lake productivity in the refilled pits will be lost because of the limited littoral development on the steep pit slopes. Reclamation should therefore include plans to enhance the upper benches of the pit to develop a littoral zone similar to other lakes in the area. It is not acceptable that the steep pit wall remain if they will limit littoral development, hence lake productivity. [emphasis added]

Project Description for Proposed Sable, Pigeon and Beartooth Kimberlite Pipes

60. In February 1999, BHP submitted a Project Description document for the expansion of the mine to include the Sable, Pigeon and Beartooth pits. In Section 2.1.7 of the document, at pages 11-12, BHP stated:

> Reclamation of the Beartooth Pit and associated infrastructure will be performed in accordance with the existing Abandonment and Restoration Plan. The existing Abandonment & Restoration Plan will be updated to include all aspects of the Beartooth development.
>
> In part to satisfy DFO policy of no net loss to fisheries habitat a productive post-closure pit lake will be developed within Beartooth Pit. Once pit mining has ceased, the upper walls of the pit will be made stable and the pit will be allowed to flood. Prior to flooding, select areas of the pit lip will be excavated back at a shallow angle thus forming a bench areas with the drop off down to the first bench occurring at approximately 5 metres depth in the future pit lake. Granitic waste rock will be end dumped back into the pit to form steep rocky slopes extending from the littoral zone down to the first bench. Within the constructed littoral zone, screened and washed esker material or crushed granite will be used as substrate along with boulders placed strategically to provide wave breaks and refuge areas for smaller fish.
>
> During the final stages of flooding, the pit lake will be monitored to determine any need for nutrient addition or fish re-stocking. [emphasis added]

February 2000 Interim Abandonment and Restoration Plan

61. In the February 2000 version of the Interim Abandonment and Restoration Plan, at Section 4.2.1 "Reclamation", BHP stated (at pages 19-20):

> As each pit is closed, a productive post-closure pit lake will be developed if possible in accordance with Department of Fisheries and Oceans' (DFO) policy of no net loss to fisheries habitat. The upper walls of the pits will be modified and the pit will be allowed to flood. Select areas of the pit lip will be sloped back at a shallow angle to form beach areas. Waste rock will be used to form steep rocky slopes extending from the littoral zone down to the first bench. The constructed littoral zone will include esker material and crushed granite and boulders, for wave breaks, as well as fish refuge and spawning areas. …
>
> Lake productivity after the pits fill with water is expected to be low because only limited littoral development will be possible on the steep pit slopes. However, pit slopes that

> extend above the eventual high water level may provide perches for birds.
>
> Opportunities for habitat enhancement within the pit will also be explored as the mine develops. The option exitsexists to fill pits quicker by directing excess freshet flow from upstream watercourses into the pits or in the case of Misery, the use of Lac de Gras for pit infilling.
> [emphasis added]

Environmental Assessment Report for Sable, Pigeon and Beartooth

62. In April 2000, BHP submitted its Environmental Assessment ("EA") for the proposed new pits. In Section 4.5.1.6 of the EA, "Pit Restoration: Reclamation to Lake Status", BHP stated (at pgs 4-75 to 4-76):

> When mining has been completed, all three pits will be reclaimed as lakes that will include features to permit the re-establishment of viable lake ecosystems. Options for the reclamation of the mined-out pits at the Ekati Diamond Mine have been previously investigated by the company and a number of strategies have been developed (BHP, 1999). Generally, mined-out pits will be reclaimed such that normal hydrological regimes will be established for the location of the pits within their respective watersheds. Reclaimed pits will also be modified such that viable lake ecosystems will be created.
>
> Reclamation plans involving the creation of habitat and restoration of fish populations in pit lakes will be developed in consultation with the Department of Fisheries and Oceans. [emphasis added]

63. In the same document, in Section 4.8.3.3 "Fish/Aquatic Habitat", BHP stated:

> When mining has been completed, all three pits will be reclaimed as lakes that will include features to permit the re-establishment of viable lake ecosystems. Options for the reclamation of mine-out pits at Ekati have been previously investigated by the company and a number of strategies have been developed. … Generally, mined-out pits will be reclaimed such that normal hydrological regimes will be established for the pit lakes within their respective watersheds. Reclaimed pits will also be modified to re-establish viable lake ecosystems.

> Once acceptable water quality conditions have been achieved, fish stocks will be re-introduced into each lake. [emphasis added]

Mackenzie Valley Environmental Impact Review Board Report on the Sable, Pigeon and Beartooth EA

64. On February 7, 2001, the MVEIRB released its report on BHP's EA for the new pits. In Section 5.2 "Abandonment and Restoration, Reclaiming Mined Out Kimberlite Pits", the MVEIRB described BHP's reclamation plans as follows:

> BHP proposes to reclaim all three pits such that natural hydrological regimes would be re-established within their respective watersheds. As part of the reclamation process, BHP is also attempting to address DFO's requirement that the development have "no net loss" on fish habitat by modifying the pits to create suitable aquatic habitat.
>
> The first step in BHP's reclamation process for the pits is to select areas to be sloped back at a shallow angle to form beaches. Screened esker material and/or crushed granite would be used as substrate. Boulders would be placed at select locations to provide wave breaks and refuge areas for smaller fish. The upper pit walls would be modified and the pit flooded. The lakes will be monitored during flooding to determine any need for nutrient supplement or fish restocking. [emphasis added]

BHP's Submission to the Mackenzie Valley Land and Water Board ("MVLWB") re Reclamation Liability Estimates

65. In May 2001 and again on March 13, 2002, BHP submitted to the MVLWB estimates regarding its reclamation liability. In the May 2001 version, at Section 2.6.8 "Open Pits Liability Unit", BHP stated:

> Reclamation measures will be undertaken to facilitate the establishment of fish habitat and productive fish communities. Lake restoration will be conducted in accordance with BHPB's *Interim Abandonment and Reclamation Plan* (BHP, 2000). … The Sable, Pigeon and Beartooth Pits have been added to this liability unit.

> Reclamation measures will be undertaken to facilitate the establishment of fish habitat and productive fish communities. Lake restoration will be conducted in accordance with BHPB's *Interim Abandonment and Reclamation Plan* (BHP, 2000) and BHPB's *Ekati Diamond Mine: Environmental Assessment Report for Sable, Pigeon and Beartooth Kimberlite Pipes* (BHP 2000). [emphasis added]

June 15, 2001 Interim Abandonment and Restoration Plan

66. In Section 4.2.1 of the July 15, 2001 iteration of the plan, BHP stated in Section 4.2.1 "Reclamation of Landscape Development Units, Open Pits, Reclamation" (at pages 20-21):

> As each pit is closed, a productive post-closure pit lake will be developed if possible in accordance with the Guidelines for Abandonment and Restoration Planning for Mines in the Northwest Territories (DIAND, 1990). The upper walls of the pits will be modified and the pit will be allowed to flood. Select areas of the pit lip will be sloped back at a shallow angle to form beach areas. The drop off to the first bench will occur at approximately 5 m of water depth. Waste rock will be used to form steep rocky slopes extending from the littoral zone down to the first bench. The constructed littoral zone will include esker material and crushed granite and boulders, for wave breaks, as well as fish refuge and spawning areas. [emphasis added]

July 30, 2003 Interim Abandonment and Reclamation Plan

67. In this version of the plan, as stated in Section 4.1.1 "Reclamation of Landscape Units, Open Pits, Reclamation", BHP remained committed to the following (at page 31):

> As each pit is closed, a productive post-closure pit lake will be developed if possible in accordance with the Guidelines for Abandonment and Restoration Planning for Mines in the Northwest Territories (NWTWB/DIAND, 1990). The upper walls of the pits will be modified and the pit will be allowed to flood. Select areas of the pit lip will be sloped

> back at a shallow angle to form beach areas. The drop off to the first bench will occur at approximately 5 m of water depth. Waste rock will be used to form steep rocky slopes extending from the littoral zone down to the first bench. The constructed littoral zone will include esker material and crushed granite and boulders, for wave breaks, as well as fish refuge and spawning areas. Pit lakes will be monitored during the final stages of flooding, to determine whether there is a need for nutrient supplement (BHP & DiaMet Minerals, 2000). [emphasis added]

April 9, 2004 Interim Abandonment and Reclamation Plan

68. In Section 5.3, "Pit Lakes", of this version of the plan, BHP states (at page 68):

> The current EKATI mine plan involves the alteration of six lakes (Sable, Beartooth, Panda, Koala, Fox, and Misery) and one shallow pond (Pigeon) as part of pit development. As part of the mine's reclamation program, each of these exhausted pits will become a pit lake that will be much larger and deeper than the original lake basin (BHPB, 2003a), and altered in their physical character and possibly in their chemical and biological characteristics. These pit lakes will eventually support aquatic life, and be connected to the natural drainage and aquatic ecosystems within their watersheds.
>
> As each pit is closed, a productive post-closure pit lake will be developed if possible in accordance with the Guidelines for Abandonment and Restoration Planning for Mines in the Northwest Territories (NWTWB/DIAND, 1990, and INAC, 2002). [emphasis added]

Terms of Reference for Sable, Pigeon, Beartooth Pit Lake Studies

69. In October 2004, BHP submitted Terms of Reference ("TOR") for Pit Lake Studies for Sable, Pigeon and Beartooth pits. In Section 1.1 "Objectives" of the TOR, BHP stated (at page 1-2) that "DFO closure requirements for the Sable, Pigeon and Beartooth Pit Lakes are for the provision of fish passage". And at Section 2.3 "Closure of Pits" BHP stated:

> The current EKATI reclamation objective is to convert open pits into pit lakes. The pit lakes would be productive

> lakes connected to their natural drainages and aquatic ecosystems…..

70. In Sections 3.7.1 of the TOR (at page 3-17) BHP stated:

> The infilling of the Sable, Pigeon and Beartooth pits with water from source lakes will have the potential effect of temporarily reducing the available littoral habitat in the source lakes and in downgradient stream habitat, and of creating new habitat within the flooded pits. The new habitat in the flooded pits would allow for fish passage. General designs have been discussed for the creation of littoral habitat in the flooded pits, however, the usefulness of this habitat for fish communities may lie in the details of the ultimate design. [emphasis added]

71. At page 3-18 of the TOR, BHP stated:

> The design of pit lake littoral habitats and interconnecting stream habitats will therefore require the analysis of various physical and biological data to optimize these new habitats for local species. The amount of additional littoral zone area required for each pit lake will be calculated based on the amount required to satisfy the average ratios for a fish community of the desired species richness.
> [emphasis added]

72. Finally, in Section 3.7.3. "Deliverables", BHP stated (at page 3-19) that one of its two deliverables was "the design of fish passage through the pit lakes". BHP went on to state that "the preliminary design of habitat adequate for fish passage through the pit lakes will be developed. The purpose of this design will be to allow fish passage through these new pit lakes, to upstream and downstream water courses".

January 15, 2007 Interim Closure and Reclamation Plan

73. It was in this most recent version of the Interim Closure and Reclamation Plan that BHP stated, for the first time, that fish passage or habitat will not be constructed in the pit lakes and that fish access will be prevented by the use of fish barriers. The Agency submits that, as the above discussion illustrates, this position is completely contrary to BHP's well-established position in previous

versions of the ICRP and other documents that restoration of fish habitat in the pit lakes was one of its reclamation goals.

DISCUSSION

74. The Agency submits that BHP is simply wrong when it suggests that the WLWB does not have jurisdiction to require BHP to reclaim the pit lakes and Cell E of the containment facility to a standard suitable for fish passage on the basis that DFO has exclusive jurisdiction over fish habitat under the *Fisheries Act*. As has been demonstrated, there is simply no conflict, let alone an unavoidable conflict, between DFO's jurisdiction under the *Fisheries Act* with respect to fish habitat and the Board's jurisdiction under the Tłı̨chǫ Land Claim Agreement, the *Tłı̨chǫ Act* and the *MVRM Act*. Finally, to the extent any conflict exists, it is clear that the *Tłı̨chǫ Act* and *MVRM Act* must prevail over the *Fisheries Act*.

75. Further, the Agency submits that the factual record clearly shows that until very recently BHP accepted that its reclamation obligations included the restoration of fish habitat in the pit lakes and Cell E. BHP submits that DFO has changed its position. In fact, the contrary is true. It is BHP that has recently and dramatically changed its position.

76. BHP submits that the WLWB does not, as a statutory tribunal, have the power to interfere with the Compensation Agreement between DFO and BHP. With respect, this is a red herring.

77. The 1996 Compensation Agreement has nothing to do with reclamation. The issue before the Board now is the extent of the Board's jurisdiction to impose reclamation obligations on BHP. Any agreement that BHP entered into with DFO regarding compensation for loss of habitat is simply not relevant to the question of the Board's jurisdiction. Indeed, if BHP believes that DFO is somehow in breach of the 1996 Compensation Agreement, BHP's remedy is to enforce its contract, not to use the existence of the agreement in an attempt to constrain the

Board's jurisdiction. The Board's jurisdiction is separate from and has nothing to do with the 1996 Compensation Agreement.

78. BHP's assertion at paragraph 58 of its Submissions that "[r]estoration of fish habitat falls under the purview of the *Fisheries Act*" is simply wrong. As noted above, the sections of the *Fisheries Act* relied upon by BHP simply do not relate to the question of restoration or reclamation of habitat. Rather, they deal with prohibiting the harmful alteration, disruption or destruction of fish habitat or authorizing such HADD subject to mitigation measures authorized by DFO.

79. BHP's submissions with respect to the jurisdiction of statutory tribunals are, with respect, beside the point. The question whether the WLWB would be exceeding its jurisdiction by requiring BHP to restore fish habitat cannot be answered solely by reference to the *Fisheries Act.* Rather, it can only be answered by reference to the legislation conferring jurisdiction on the Board. As discussed above, that authority begins with the Tłı̨chǫ Land Claim Agreement, as ratified and enacted as legislation in the *Tłı̨chǫ Act*. It is repeated in the *MVRM Act*.

80. The Agency submits that when the Tłı̨chǫ Agreement, the *Tłı̨chǫ Act*, and the *MVRM Act* are looked at as a statutory regime, they disclose the clear intent to confer on the WLWB the jurisdiction to ensure that the use of water within the Wek'èezhìi area, and the deposit of waste in water in the Wek'èezhìi area, is done in such a manner as to respect the overriding principal of conservation. That jurisdiction, in our submission, empowers the Board to require the restoration of fish habitat as part of the mine reclamation. Further, this jurisdiction is complementary to DFO's jurisdiction, not contradictory to it.

81. BHP submits it would be unfair for the Board to require it to restore fish habitat as part of the mine reclamation. Given BHP's repeated acknowledgments and recognitions, up until 2007, that it would restore fish habitat in the pit lakes, the fairness argument has no merit. A requirement to restore fish habitat cannot possibly come as any surprise to BHP.

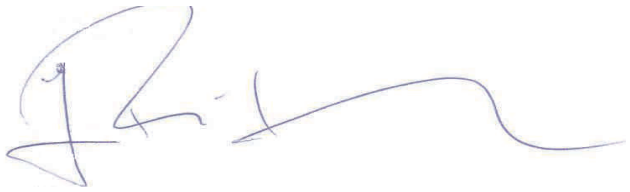
CONCLUSION

82. In conclusion, the Agency submits that WLWB does have jurisdiction to require, as part the ICRP, that BHP restore fish habitat in the pit lakes and Cell E of the containment facility. Doing so creates no conflict with DFO's jurisdiction, as is evidenced by the fact that DFO also supports restoration of fish habitat.

83. Accordingly, the Agency respectfully requests that the Board rejects BHP's request that the Board determine that it does not have jurisdiction to require the restoration of fish habitat as part of BHP's closure and reclamation obligations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF JUNE, 2009.

McLENNAN ROSS LLP



Per: Gavin S. Fitch
(signed electronically)
Solicitors for the Independent Environmental Monitoring Agency

SUPREME COURT OF CANADA

CITATION: Lévis (City) *v.* Fraternité des policiers de Lévis Inc., [2007] 1 S.C.R. 591, 2007 SCC 14

DATE: 20070322
DOCKET: 31103

BETWEEN:

City of Lévis
Appellant
and
Fraternité des policiers de Lévis Inc. and Danny Belleau
Respondents
- and -
Association des policières et policiers provinciaux du Québec
Intervener

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps and Fish JJ.

CORAM: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 81)	Bastarache J. (McLachlin C.J. and Binnie and Charron JJ. concurring)
JOINT CONCURRING REASONS: (paras. 82 to 105)	Deschamps and Fish JJ.
CONCURRING REASONS: (paras. 106 to 117)	Abella J.

Lévis (City) *v.* Fraternité des policiers de Lévis Inc., [2007] 1 S.C.R. 591, 2007 SCC 14

City of Lévis *Appellant*

v.

Fraternité des policiers de Lévis Inc. and Danny Belleau *Respondents*

and

Association des policières et policiers provinciaux du Québec *Intervener*

Indexed as: Lévis (City) *v.* Fraternité des policiers de Lévis Inc.

Neutral citation: 2007 SCC 14.

File No.: 31103.

2006: November 7; 2007: March 22.

Present: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for quebec

Legislation — Interpretation — Conflicting legislation — Whether s. 116(6) of Cities and Towns Act and s. 119, para. 2 of Police Act are incompatible

where separate sanctions they provide for upon conviction for criminal offence apply to municipal police officer — If so, which provision has precedence over the other — Police Act, R.S.Q., c. P-13.1, s. 119, para. 2 — Cities and Towns Act, R.S.Q., c. C-19, s. 116(6).

Municipal law — Persons disqualified from municipal employment — Municipal police officer convicted of criminal offences — Cities and Towns Act providing for automatic five-year disqualification of municipal employee convicted of criminal offence — Whether that sanction applies to municipal police officer concurrently with disciplinary sanction of dismissal provided for in Police Act — Cities and Towns Act, R.S.Q., c. C-19, s. 116(6) — Police Act, R.S.Q., c. P-13.1, s. 119, para. 2.

Police — Persons excluded from profession — Disciplinary sanction — Municipal police officer dismissed after being convicted of criminal offences — Arbitrator substituting another sanction for dismissal pursuant to specific circumstances exception provided for in s. 119, para. 2 of Police Act — Whether arbitrator wrong to conclude that s. 116(6) of Cities and Towns Act, which provides for automatic five-year disqualification of municipal employee convicted of criminal offence, was inapplicable — Whether arbitrator wrong to conclude that police officer had shown that there were specific circumstances that justified sanction other than dismissal — Police Act, R.S.Q., c. P-13.1, s. 119, para. 2 — Cities and Towns Act, R.S.Q., c. C-19, s. 116(6).

Administrative law — Judicial review — Standard of review — Standard applicable to decision of grievance arbitrator regarding conflict between s. 119,

para. 2 of Police Act and s. 116(6) of Cities and Towns Act — Standard applicable to that arbitrator's decision regarding interpretation of s. 119, para. 2 and its application to facts — Whether arbitrator's decisions should be subject to different standards of review — Police Act, R.S.Q., c. P-13.1, s. 119, para. 2 — Cities and Towns Act, R.S.Q., c. C-19, s. 116(6).

A police officer employed by a municipality pleaded guilty to several criminal offences, and the separate sanctions provided for in s. 116(6) of the *Cities and Towns Act* ("*C.T.A.*") and s. 119, para. 2 of the *Police Act* ("*P.A.*") applied to all of them. Following an internal investigation, the municipality dismissed him. The union filed a grievance. The arbitrator held that the existence of a specific disciplinary sanction in the *P.A.*, which requires that a police officer convicted of a criminal offence be dismissed subject to the possible application of an exception limited to hybrid offences, meant that the automatic five-year disqualification provided for in the *C.T.A.*, which allows for no exceptions, was inapplicable. He then found that the officer's family troubles, psychological problems and alcohol abuse had led him to commit the offences and that they constituted "specific circumstances" that allowed for a sanction other than dismissal under the exception provided for in s. 119, para. 2 *P.A.* He ordered that the officer be reinstated. The Superior Court set aside the arbitration award, but the award was restored by the Court of Appeal.

Held: The appeal should be allowed and the sanction of dismissal restored.

Per McLachlin C.J. and Bastarache, Binnie and Charron JJ.: Two standards of review are needed. Multiple standards of review should be adopted only when there are clearly defined questions that engage different concerns under the

pragmatic and functional approach. The question whether s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* are in conflict and, if so, which one should prevail, clearly raises separate concerns from the question whether the arbitrator properly interpreted and applied s. 119, para. 2. While there is a relatively strong privative clause in the *Labour Code*, the question of compatibility is a pure question of law that does not engage the arbitrator's special knowledge of labour and employment law. Moreover, this question is of general importance and has precedential value. As for the purpose of legislation, while the *Labour Code* clearly contemplates calling on arbitrators to interpret and apply legislation in order to settle grievances in a prompt, final and binding manner, it does not follow that the question of the compatibility of conflicting legislative provisions was intended to be within the exclusive purview of the grievance arbitrator, or that such a task is at the core of the object of grievance arbitration. On balance, the question of compatibility must be subject to the strictest standard of review, the standard of correctness. [19-23]

The question whether the arbitrator correctly interpreted and applied s. 119, para. 2 *P.A.* to the police officer's conduct is one of mixed fact and law. It requires an analysis more in line with the traditional function of a grievance arbitrator under s. 100.12(*f*) of the *Labour Code*. It also requires a balancing of the competing interests of the police officer facing dismissal, of the municipality, both as an employer and as a public body responsible for public security, and of the community as a whole in maintaining respect and confidence in its police officers. But not all factors point to the highest standard of deference. The question has some degree of precedential value, the arbitrator's discretion is narrower under s. 119, para. 2 *P.A.* than it would otherwise be under s. 100.12(*a*) and (*f*) of the *Labour Code*, and the *P.A.* is external

to the collective agreement and to the Code. On balance, the reasonableness standard of review is suitable for this question. [24-28]

Municipal police officers are subject both to the *P.A.* and to the *C.T.A.* as municipal employees. While ss. 119 *P.A.* and 116(6) *C.T.A.* apply unproblematically both outside of the municipal police context and when a municipal police officer is convicted of an indictable offence, there is a clear zone where the statutes overlap and come into conflict. Both provisions apply to the officer's conduct in the instant case. One statute provides for an exception to the rule of dismissal and would allow him to maintain his employment if he can show specific circumstances, but the other does not. The conflict is unavoidable, because one statute implicitly takes away what another statute has explicitly allowed. In case of conflict, s. 119, para. 2 *P.A.* should prevail over s. 116(6) *C.T.A.* Section 119 satisfies the requirements of the presumptions developed to aid in determining the legislature's intent in that it is both more recent and more specific in comparison to s. 116(6). Furthermore, the specific circumstances exception was intended to meet the concern expressed at the time it was adopted as to the severity of the rule of dismissal. If s. 116(6) were held to prevail over s. 119, para. 2, this would defeat a clearly stated legislative objective. Lastly, the fact that the legislature has not amended s. 116(6) since adopting the new *P.A.* could indicate an intention to preserve the legislative bargain that was struck when s. 119 was drafted without affecting the applicability of s. 116(6) to other municipal employees. [40] [48-49] [56-57] [61-63]

It was unreasonable for the arbitrator to conclude that the specific circumstances raised by the police officer were sufficient to satisfy the s. 119, para. 2 exception. The burden of proof was on the police officer. In deciding whether

specific circumstances are proven or not, an arbitrator may take into account any circumstance surrounding the offence that could affect the police officer's ability to continue to serve the public effectively and credibly. The arbitrator equated his jurisdiction under s. 119, para. 2 *P.A.* to the jurisdiction he would normally enjoy under s. 100.12(*f*) of the *Labour Code* and failed to properly weigh the effect of the police officer's criminal conduct on his ability to carry out his duties; this affected the rationality of his decision. Referring to attenuating and aggravating circumstances in other employment law contexts may sometimes be useful, but this should have been done in this case having regard to the unique issues that are raised by the criminal conduct of police officers. The context here is one of domestic violence, and the officer pleaded guilty to a charge of assault on his wife; this is a very important consideration in light of the public's reliance on police intervention in such cases, and one that the arbitrator could not reasonably ignore. Furthermore, the firearm offences cannot be attributed to the officer's personal problems, nor can they be justified, as the arbitrator sought to do, merely on the ground that they are technical offences. More serious still is the officer's conscious defiance of his undertaking to the court not to communicate with his spouse. The breach of an undertaking by a police officer is especially serious given the role that police officers play in the administration of justice. It suggests a lack of respect for the judicial system of which he forms an integral part. Finally, public confidence was a factor to be considered. Media reports of criminal conduct by police officers have an effect on public confidence. But in treating the issue as one about properly informing the public of personal circumstances surrounding the offences committed, the arbitrator failed to take into account the gravity of these offences and the effect that they would have on public confidence. [68-80]

Per Deschamps and Fish JJ.: The sanction of dismissal should be restored. Section 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* are not incompatible. The courts have interpreted the meaning of the word "conflict" as narrowly as possible. The fact that one provision is more restrictive or imposes different conditions than the other, or that both provisions apply to the same person and the same fact situation, is in itself insufficient to support the conclusion that one of the provisions is inapplicable. [82-83] [87]

In the instant case, it can be seen by reading the *P.A.* and the *C.T.A.* together that the incompatibility is merely apparent: the former governs the capacity to serve as a police officer and the sanctions attached to breaches of the conditions of eligibility for a position as a police officer, while the latter governs the conditions of eligibility for municipal employment. A person who is qualified to serve in both capacities must meet the conditions of both statutes. If a municipal police officer commits an indictable offence, he will, by virtue of s. 119, para. 1 *P.A.* and of the *C.T.A.*, be both excluded from serving as a police officer and, where there is a connection with the employment, disqualified from municipal employment for five years. The same will be true if an officer commits a hybrid offence punishable by imprisonment for one year or more and is unable to prove the existence of specific circumstances under the *P.A.* Where specific circumstances are proven, the officer will not be dismissed, but will nonetheless be disqualified for five years under municipal law. There is no conflict in the fact that, in this last situation, a concurrent application of the provisions will deprive the officer of his or her employment as a municipal employee for a period of five years even though he or she has not ceased to be eligible to serve as a police officer. [91-93] [98]

Nor does the proposed interpretation frustrate the purposes of the provisions in question. Although s. 119 *P.A.* is disciplinary in nature, an arbitrator is not entitled to review an employer's decision to terminate the employment of a police officer who has been convicted of an indictable offence, since, under both s. 115 *P.A.* and s. 119, the officer is no longer eligible to serve as a police officer. Where an officer has been convicted of a hybrid offence and has benefited from the exception under s. 119, on the other hand, he or she will be able to apply for employment in a police force other than a municipal force, because he or she has not ceased to be eligible under the *P.A.* Where an officer has benefited from the exception under s. 119, this must be reflected in an interpretation of s. 115 that is consistent with the clear objective of the exception, namely to allow the individual in question to continue his or her career as a police officer. [92-95]

Per Abella J.: The arbitrator's decision whether to apply s. 119, para. 2 *P.A.* should not be subjected to a different standard of review than his decision on how to apply it. The privative clause in s. 101 of the *Labour Code*, which states that the arbitrator's award is without appeal, protects the arbitrator's exclusive responsibility for deciding a grievance, and s. 100.12(*a*) of the Code clothes him with the authority to determine how any relevant statutory provision ought to apply to it. These provisions, combined with the expertise of the arbitrator in labour disputes and the legislative objective of having them resolved expeditiously and conclusively, favour an integrated standard for assessing the arbitrator's interpretation both of his jurisdictional mandate and of its application. For the reasons given by the majority, even on a single deferential standard of review, the arbitrator's decision as to the appropriate sanction is unsustainable and the sanction of dismissal should be restored. [107-109] [117]

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By Bastarache J.

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employés municipaux de Beauce (C.S.D.) v. St-Georges (Ville de), J.E. 2000-540, SOQUIJ AZ-00019015; *Association des pompiers de Laval v. Ville de Laval*, [1985] T.A. 446; *Fraternité des policiers de Deux-Montagnes/Ste-Marthe-sur-le-Lac v. Deux-Montagnes (Ville de)*, J.E. 2001-524, SOQUIJ AZ-50083424; *L'Île-Perrot (Ville de) et Union des employés de service, section locale 800*, D.T.E. 2000T-619; *Duguay et Paspébiac (Ville de)*, D.T.E. 2003T-47, SOQUIJ AZ-50152875.

By Deschamps and Fish JJ.

Referred to: *Duval v. The King* (1938), 64 B.R. 270; *Daniels v. White*, [1968] S.C.R. 517; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Bell v. Attorney General for Prince Edward Island*, [1975] 1 S.C.R. 25; *Ricard v. Lord*, [1941] S.C.R. 1; *Beaudoin v. Roy*, [1984] R.L. 315; *Roy v. Mailloux*, [1966] B.R. 468.

By Abella J.

Referred to: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Canada Post Corp. v. Smith* (1998), 40 O.R. (3d) 97; *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 W.L.R. 163; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *Canadian Union of Public Employees, Local 963 v. New*

Brunswick Liquor Corp., [1979] 2 S.C.R. 227; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Mattel, Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, 2006 SCC 22; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157.

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Police Act, R.S.Q., c. P-13 [repl. 2000, c. P-13.1], s. 3(3).

Police Act, R.S.Q., c. P-13.1, ss. 70, para. 5, 87 to 89, 115, 117, 119, 127, 128 to 193, 194 to 255.11, 234(6), 256, 258, 260, 264, 286, 289, 316, 317.

Règlement numéro 756 relatif à l'éthique professionnelle et à la discipline interne des policiers-pompiers de la Ville de Lévis, August 18, 1997, ss. 13.10, 13.11, 22.

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APPEAL from a judgment of the Quebec Court of Appeal (Pelletier, Morin and Bich JJ.A.), [2005] Q.J. No. 8450 (QL), J.E. 2005-1271, 2005 QCCA 639, reversing a decision of Lemelin J., [2003] Q.J. No. 13008 (QL). Appeal allowed.

Richard Ramsay, *Sarto Veilleux* and *François LeBel*, for the appellant.

Serge Gagné and *Maude Gagné*, for the respondents.

Gino Castiglio and *André Fiset*, for the intervener.

The judgment of McLachlin C.J. and Bastarache, Binnie and Charron JJ. was delivered by

1 BASTARACHE J. — This appeal concerns the consequences of criminal conduct by municipal police officers in Quebec and whether that conduct should be sanctioned by the law governing police or by municipal law. Specifically, we are asked to determine whether s. 119, para. 2 of the *Police Act*, R.S.Q., c. P-13.1 ("*P.A.*"), and s. 116(6) of the *Cities and Towns Act*, R.S.Q., c. C-19 ("*C.T.A.*"), can apply

concurrently to a municipal police officer, and if not, which provision should take precedence. We are also asked to determine whether the arbitrator committed a reviewable error in his interpretation and application of the limited exception found in s. 119, para. 2 *P.A.* The latter provision provides for the mandatory dismissal of police officers who are convicted of serious criminal offences unless they can show specific circumstances justifying another sanction. In comparison, s. 116(6) *C.T.A.* disqualifies any person from municipal employment for similar types of offences but subject to no exception.

2 The appellant municipality dismissed the respondent Danny Belleau ("Belleau") after he pleaded guilty to several criminal offences, all of which fell within the scope of both s. 116(6) *C.T.A.* and s. 119, para. 2 *P.A.* The grievance arbitrator held that s. 119, para. 2 *P.A.* had rendered s. 116(6) *C.T.A.* inapplicable to municipal police officers. He also found that there were specific circumstances which justified another sanction under s. 119, para. 2 *P.A.*, and, as result, overturned the dismissal and ordered that Belleau's employment be restored. There is no question that had s. 116(6) *C.T.A.* applied alone, Belleau's challenge to his dismissal would have failed.

3 The arbitrator's decision was quashed by the Superior Court ([2003] Q.J. No. 13008 (QL)), but upheld by the Court of Appeal ([2005] Q.J. No. 8450 (QL), 2005 QCCA 639). Before this Court, the appellant argues that despite the enactment of s. 119, para. 2 *P.A.*, s. 116(6) *C.T.A.* is still applicable to Belleau and that on a proper application of either provision, its decision to dismiss Belleau should stand.

1. Background

4 Before he was dismissed, Belleau had been a member of the appellant's municipal police force for 15 years. The criminal conduct which led to the dismissal occurred on December 29 and 30, 2000. It would appear that on the evening of the 29th, Belleau, who was on leave at the time, had a heated argument with his spouse, Johanne Robitaille. He had been drinking heavily and he later admitted that he was intoxicated. The dispute worsened and Belleau became violent. When the police arrived, they found Robitaille wandering outside without a jacket, clutching her dog. They arrested Belleau and searched the house. In the basement they found three unsecured firearms. The next morning, Belleau was released on condition that he not communicate in any way with Robitaille. Less than two hours after his release, he breached that condition by appearing at the house of Robitaille's parents, where Robitaille was present. Belleau was arrested once more. On February 2, 2001, he pleaded guilty to threatening to cause death or bodily harm, assault, three counts of storing a firearm in a careless manner or without reasonable safety precautions, and failing to comply with a condition of his undertaking. Significantly for the purposes of this appeal, all of the offences were hybrid offences, punishable on indictment or on summary conviction and to imprisonment for a term of more than one year.

5 Belleau's employment was terminated following a disciplinary investigation by the appellant's director of public security, Gilles Drolet ("the director"). In his report, the director concluded that Belleau had failed to demonstrate specific circumstances sufficient to justify another sanction under s. 119, para. 2 *P.A.* Although he made reference to s. 116(6) *C.T.A.* in his report, there was no mention of it in his analysis or in the form summarizing his final recommendation. The council of the appellant municipality accepted the recommendation and passed a resolution

dismissing Belleau on June 18, 2001. The respondents contested this decision by way of a grievance filed on June 28, 2001.

6 It will be helpful to set out the relevant legislation before considering how the respondents' grievance was treated in the jurisdictions below.

2. Relevant Statutory Provisions

7 *Police Act*, R.S.Q., c. P-13.1

> **115.** To be hired as a police officer a person must meet the following requirements:
>
> (1) be a Canadian citizen;
>
> (2) be of good moral character;
>
> (3) not have been found guilty, in any place, of an act or omission defined in the Criminal Code (Revised Statutes of Canada, 1985, chapter C-46) as an offence, or of an offence referred to in section 183 of that Code under one of the Acts listed therein;
>
> (4) hold a diploma awarded by the École nationale de police du Québec or meet the standards of equivalence established by by-law by the school.
>
> . . .
>
> The hiring requirements do not apply to the members of police forces when police services are integrated, amalgamated or otherwise merged.
>
> . . .
>
> **119.** Any police officer or special constable who is found guilty, in any place, of an act or omission referred to in subparagraph 3 of the first paragraph of section 115 that is triable only on indictment, shall, once the judgment has become *res judicata*, be automatically dismissed.
>
> A disciplinary sanction of dismissal must, once the judgment concerned has become *res judicata*, be imposed on any police officer or special constable who is found guilty, in any place, of such an act or omission punishable on summary conviction or by indictment, unless the

police officer or special constable shows that specific circumstances justify another sanction.

Cities and Towns Act, R.S.Q., c. C-19

116. The following persons shall not be appointed to or hold any office as an officer or employee of the municipality:

. . .

(6) Any person convicted of treason or of an act punishable under a law of the Parliament of Canada or of the Legislature of Québec, by imprisonment for one year or more.

Such disqualification shall continue for five years after the term of imprisonment fixed by the sentence, and, if only a fine was imposed or the sentence is suspended, for five years from the date of such condemnation, unless the person has obtained a pardon;

. . .

Disqualification from municipal office or employment under subparagraph 6 or 7 of the first paragraph shall be incurred only if the offence is in connection with such an office or employment.

Labour Code, R.S.Q., c. C-27

100.12. In the exercise of his duties the arbitrator may

(*a*) interpret and apply any Act or regulation to the extent necessary to settle a grievance;

. . .

(*f*) in disciplinary matters, confirm, amend or set aside the decision of the employer and, if such is the case, substitute therefor the decision he deems fair and reasonable, taking into account the circumstances concerning the matter. However, where the collective agreement provides for a specific sanction for the fault alleged against the employee in the case submitted to arbitration, the arbitrator shall only confirm or set aside the decision of the employer, or, if such is the case, amend it to bring it into conformity with the sanction provided for in the collective agreement;

. . .

> **101.** The arbitration award is without appeal, binds the parties and, where such is the case, any employee concerned. Section 129 applies, with the necessary modifications, to the arbitration award; however, the authorization of the Commission provided for in that section is not required.

3. Judicial and Arbitral History

3.1 *Arbitration Award (October 2, 2002)*

8 The arbitrator set aside the municipality's decision and ordered that Belleau be reinstated without compensation, which in effect amounted to a 16-month suspension without pay. He held that s. 119, para. 2 *P.A.* had rendered inapplicable s. 116(6) *C.T.A.* to municipal police officers charged with an offence punishable on indictment or summary conviction on the basis that the special law prevails over the general. He found that s. 119, para. 2 *P.A.* was equivalent to an arbitrator's jurisdiction in relation to disciplinary matters under s. 100.12(*f*) of the Quebec *Labour Code*, R.S.Q., c. C-27 ("*L.C.*"). The arbitrator reasoned that under s. 119, para. 2 *P.A.*, he was entitled to consider the circumstances surrounding the criminal act(s) as well as the personal circumstances of the police officer.

9 With regard to the offences relating to the careless storage of firearms, the arbitrator was of the view that they were of a "technical" character. He considered the fact that Belleau had recently moved into the house and that it was undergoing extensive renovations. He concluded that there was no place in the house where the firearms could have been safely stored.

10 As for Belleau's violence toward his spouse and the breach of his undertaking not to communicate with her, the arbitrator was of the view that while the offences were serious, Belleau had demonstrated specific circumstances which justified a sanction other than dismissal. The arbitrator accepted the expert medical opinion put forward by Belleau that he was in a morbid mental state on December 29 and 30 due to family problems. The arbitrator also took into account Belleau's intoxication on the 29th as evidence that, along with his mental state, [TRANSLATION] "he was not entirely lucid". In addition, the arbitrator considered a number of attenuating factors: the length of Belleau's employment with the municipality; the lack of any previous disciplinary problems; testimony by his ex-spouses that he was not by nature a violent man; the fact that Belleau was off duty when the offences occurred; the fact that his victim had not suffered physical harm; and the fact that there was no evidence of physical violence.

11 Finally, the arbitrator dismissed objections to Belleau's reinstatement. He considered that Belleau had recovered from his family and alcohol problems and that there was little risk of him reoffending. As for public perception, the arbitrator concluded that the public had been misinformed by the media about the specific circumstances of Belleau's case. The arbitrator was of the opinion that Belleau's supervisors and colleagues would regain confidence in him once they were reasonably informed of those circumstances.

3.2 *Superior Court of Quebec*, [2003] Q.J. No. 13008 (QL)

12 Lemelin J. was of the view that the dispute related essentially to the interpretation of the collective agreement with regard to disciplinary matters, and as

such fell within the exclusive competence and expertise of the grievance arbitrator. He held that the arbitrator's decision should therefore not be interfered with unless it was patently unreasonable.

13 Nevertheless, Lemelin J. was of the opinion that the arbitrator's decision was patently unreasonable on two grounds. First, he concluded that the arbitrator had committed a reviewable error in holding that s. 116(6) *C.T.A.* was inapplicable to Belleau. According to Lemelin J., there was no indication that the legislature had intended to exclude the application of s. 116(6) *C.T.A.* to municipal police officers. In the absence of any specific legislative intent to the contrary, s. 116(6) applied to Belleau as a municipal employee and required his dismissal.

14 Lemelin J. further held that the arbitrator's decision as to the application of s. 119, para. 2 *P.A.* was also patently unreasonable. The expert opinion led by Belleau was not convincing on the issue of Belleau's alcoholism, and in Lemelin J.'s opinion should not have been accepted. Because the arbitrator's conclusion on this point was central, it rendered his whole decision patently unreasonable.

3.3 *Court of Appeal of Quebec*, [2005] Q.J. No. 8450 (QL), 2005 QCCA 639

15 The Court of Appeal held that since the arbitrator's decision raised separate questions, two different standards of review should govern the judicial review. Bich J.A., speaking for the court, agreed with Lemelin J. that the arbitrator's decision on s. 119, para. 2 *P.A.* should be evaluated on the patent unreasonableness standard. However, she saw the question of the compatibility of s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* as separate and distinct for the purpose of the pragmatic and

functional approach and concluded that the reasonableness *simpliciter* standard of review should be adopted.

16 On the compatibility question, Bich J.A. was of the view that the arbitrator had not committed an error. While s. 116(6) *C.T.A.* and s. 119, para. 2 *P.A.* could coexist, there were situations where the two provisions were necessarily in conflict. Applying the presumptions that, in case of conflict, the legislator intended the new law to prevail over the old law and the special law to prevail over the general one, Bich J.A. concluded that s. 119, para. 2 *P.A.* should prevail.

17 On the application of s. 119, para. 2 *P.A.* to Belleau's conduct, Bich J.A. held that the arbitrator had not committed a patently unreasonable or even an unreasonable error. The arbitrator was entitled to consider the technical nature of the firearm offences and the family crisis that Belleau was living through when assessing whether there were specific circumstances. Furthermore, Bich J.A. disagreed with Lemelin J. that the arbitrator's conclusion regarding Belleau's alcoholism was patently unreasonable. Even if it was, it had not played a central role in the arbitrator's decision. For these reasons, the Court of Appeal restored the arbitrator's award.

4. Issues

18 There are three main issues to be decided in this appeal. First, what are the appropriate standards to apply in reviewing the arbitrator's decision? The second issue is whether the arbitrator erred in holding that s. 116(6) *C.T.A.* was inapplicable to Belleau. The third is whether the arbitrator erred in finding that Belleau had

demonstrated specific circumstances which justified a sanction other than dismissal under s. 119, para. 2 *P.A.*

5. Analysis

5.1 *Standards of Review*

5.1.1 Multiple Standards of Review

19 It is clear that the pragmatic and functional approach may lead to different standards of review for separate findings made by an arbitrator in the course of his or her decision: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 14; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28, at para. 15. This will most frequently be the case when an arbitrator is called upon to construe legislation. The arbitrator's interpretation of the legislation — a question of law — *may* be reviewable on a different standard than the rest of the decision: see e.g. *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 ("*CBC*"), at para. 49; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, at para. 14. While interpretations of general public statutes or statutes external to an administrative decision maker's constituting legislation will often be reviewed on a standard of correctness, this will not always be so: *CBC*, at para. 48. The answer in each case will depend on the proper application of the pragmatic and functional approach, which requires various factors be taken into account such as the presence or absence of a privative clause, the expertise of the decision maker, the purpose of the governing legislation and the nature of the question

under review (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 29-38). Since the presence or absence of a privative clause will likely be the same for all aspects of an administrative decision, whether there is a possibility of more than a single standard of review under the pragmatic and functional approach will largely depend on whether there exist questions of different natures and whether those questions engage the decision maker's expertise and the legislative objective in different ways. Of course it may not always be easy or necessary to separate individual questions from the decision taken as a whole. The possibility of multiple standards should not be taken as a licence to parse an administrative decision into myriad parts in order to subject it to heightened scrutiny. However, reviewing courts must be careful not to subsume distinct questions into one broad standard of review. Multiple standards of review should be adopted when there are clearly defined questions that engage different concerns under the pragmatic and functional approach.

20 The question whether s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* are in conflict and, if so, which one should prevail, clearly raises separate concerns from the question of whether the arbitrator properly interpreted and applied s. 119, para. 2 *P.A.* The one factor that is common to both questions is the presence of a privative clause. By virtue of s. 101 *L.C.*, the arbitrator's decision is not subject to appeal. Combined with ss. 139, 139.1 and 140 *L.C.*, s. 101 forms a relatively strong privative clause. However, a privative clause is not determinative and regard must be had to the other factors under the pragmatic and functional approach: *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4, at para. 25. In this case, the privative clause suggests greater deference in general but does not shed light on whether the level of scrutiny should be different for each question.

5.1.2 Compatibility of Section 119, para. 2 *P.A.* and Section 116(6) *C.T.A.*

21 On the issue of compatibility, the nature of the question and the relative expertise of the arbitrator suggest that a searching review is necessary. Unlike the other findings of the arbitrator, the question of whether s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* are in conflict is a pure question of law. It therefore does not engage the relative expertise of the arbitrator in relation to the courts and is entitled to less deference (*Pushpanathan*, at para. 37; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 8). The lower courts focussed on the fact that s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* both related to the disciplining of police officers, a matter clearly within the scope of the arbitrator's domain in this case by virtue of the collective agreement and the *Labour Code*. It is true that the interpretation of external legislation that is linked to the administrative decision maker's mandate may be given a certain degree of deference: *CBC*, at para. 48. However, the *compatibility* of these two statutes is not a question about what disciplinary sanctions should apply. It does not engage the arbitrator's special knowledge of labour and employment law. Furthermore, the determination of whether s. 119, para. 2 *P.A.* prevails over s. 116(6) *C.T.A.* is of general importance and has precedential value, a consideration which points to a lesser degree of deference (*Lethbridge*, at para. 19; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 34).

22 As for the purpose of the legislation, the object of grievance arbitration is to "secure prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and the disciplinary actions taken

by an employer" (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 17). Section 100.12 *L.C.* attributes broad discretion to arbitrators in disciplinary matters in order to fulfill this purpose. In particular, s. 100.12(*a*) *L.C.* empowers arbitrators to consider any act or regulation to the extent necessary to settle the grievance. While the *Labour Code* clearly contemplates that arbitrators will be called on to interpret and apply legislation in order to settle grievances in a prompt, final and binding manner, it does not follow that the question of the compatibility of conflicting legislative provisions was intended to be within the exclusive purview of the grievance arbitrator or that such a task is at the core of the object of grievance arbitration. This suggests that the question of whether both provisions apply concurrently should be evaluated on a less deferential standard.

23 On balance, the factors to be considered in the pragmatic and functional approach suggest that the question of compatibility must be subject to the strictest standard of review, the standard of correctness.

5.1.3 Interpretation and Application of Section 119, para. 2 *P.A.*

24 The question of whether the arbitrator correctly interpreted and applied s. 119, para. 2 *P.A.* to Belleau's conduct raises different concerns than the question of compatibility. It is not a pure question of law but rather a question of mixed fact and law. The arbitrator had to decide whether the specific circumstances raised by Belleau fell within the proper scope of s. 119, para. 2 *P.A.* and whether those circumstances had been established on the evidence. He also had to decide what sanction was appropriate once the presence of specific circumstances had been made out. This

analysis is more in line with the traditional function of a grievance arbitrator under s. 100.12(*f*) *L.C.* Furthermore, it is a decision that requires the balancing of competing interests of the police officer facing dismissal, the municipality, both as an employer and as a public body responsible for the security of the public, and of the community as a whole in maintaining respect and confidence in its police officers. Thus, the arbitrator's decision has some elements of polycentric decision making which would suggest a higher degree of deference: *Pushpanathan*, at para. 36.

25 However, not all of the factors to be considered under the pragmatic and functional approach point to the highest degree of deference. First, there is still a significant legal component to the question. The arbitrator was required to decide what counts as specific circumstances sufficient to justify another sanction for the purpose of s. 119, para. 2 *P.A.* This is an important question that has a certain degree of precedential value: *Lethbridge*, at para. 19.

26 Second, the discretion exercised by the arbitrator under s. 119, para. 2 *P.A.* is not the same as that exercised under s. 100.12 *L.C.* Section 119 *P.A.* is mandatory and, where it applies, results in the dismissal of a police officer except in the limited exception provided in its second paragraph. The arbitrator's discretion in disciplinary matters is thus narrowed significantly under s. 119, para. 2 *P.A.* with respect to what it would otherwise be under s. 100.12(*a*) and (*f*) *L.C.* While the decision-making process of an arbitrator called upon to interpret and apply s. 119, para. 2 *P.A.* certainly falls within the broader purpose of grievance arbitration, it is a much more limited exercise. This would suggest that the legislative intent to confide disciplinary matters to arbitrators is not as strong in the case of criminal conduct which engages s. 119 *P.A.*

27 Third, the *Police Act* is an external statute. It is not part of the collective agreement or the *Labour Code*. Furthermore, the Court of Québec also has limited jurisdiction to apply s. 119, para. 2 *P.A.* in the context of directors, managers or other police officers who do not count as employees for the purposes of the *Labour Code* (ss. 87 to 89 *P.A.*). The arbitrator's relative expertise in relation to s. 119 does not suggest the highest level of deference.

28 Taking these factors into account suggests something less than the most deferential standard of review. Review on a patent unreasonableness standard will, by its nature, be relatively rare: *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at para. 18. The countervailing factors in this case point to the reasonableness standard of review for the interpretation and application of s. 119, para. 2 *P.A.*

5.2 *Compatibility of Section 119, para. 2 P.A. and Section 116(6) C.T.A.*

29 Before examining whether the arbitrator's decision regarding the conflict between s. 119, para. 2 *P.A.* and s. 116(6) *C.T.A.* was correct, it will be helpful to briefly consider the legislative framework which governs municipal police officers.

5.2.1 Legislative Context

30 Municipal police officers, like all police officers, are governed by the *Police Act.* In 2000, the *Police Act* replaced the old *Police Act*, R.S.Q., c. P-13 and *An Act respecting Police Organization*, R.S.Q., c. O-8.1 ("*Police Organization Act*"). The

new legislation is a comprehensive statute providing for the training of police officers (ss. 1 to 47), the composition, organization and regulation of provincial police forces (ss. 48 to 111), the basic requirements for entry into the profession (ss. 115 and 116), and limitations on the activities and interests of police officers (ss. 117 to 125). It is in the context of the latter provisions that s. 119 provides for the dismissal of police officers who are found guilty of indictable or hybrid criminal offences (i.e., offences which may be prosecuted either by indictment or summary conviction). The new *Police Act* also incorporates the provisions from the *Police Organization Act* relating to professional ethics. The *Code of ethics of Québec police officers*, (1990) 122 G.O. II, 1760 ("*Code of ethics*") is continued (s. 127), as well as the Police Ethics Commissioner (ss. 128 to 193), and the Comité de déontologie policière, charged with sanctioning breaches of the *Code of ethics* (ss. 194 to 255.11).

31 Municipal police forces are regulated extensively by the Act (ss. 69 to 89). In particular, every municipality has the responsibility to make a by-law regarding the internal discipline of the members of its police force (s. 256). The by-law must establish the duties and standards of conduct expected of its police officers, a disciplinary procedure and the sanctions that may be imposed for breach of the by-law (s. 258).

32 The conduct of municipal police officers is thus regulated by three separate sources flowing from the *Police Act*. One is the internal discipline by-law of the municipality, which, in the case of the appellant municipality, is entitled *Règlement numéro 756 relatif à l'éthique professionnelle et à la discipline interne des policiers-pompiers de la Ville de Lévis* ("*Règlement n^{o} 756*"). Section 13.10 prohibits the municipality's police officers from violating any law or regulation that the Public

security service of Lévis was charged with enforcing (s. 13.10) or with contravening [TRANSLATION] "any law or regulation enacted or made by a legally constituted authority in a manner likely to compromise the effectiveness, credibility or quality of the Service" (s. 13.11). Breach of one of the requirements of *Règlement n^{o} 756* can lead to a number of disciplinary sanctions, including dismissal (s. 22).

33 Another source is the *Code of ethics*. The Code establishes "the duties and standards of conduct of police officers in their relations with the public in the performance of their duties" (s. 1). This includes the general duty to "act in such a manner as to preserve the confidence and consideration that his duties require" (s. 5). Breach of the Code may lead to dismissal (s. 234(6) *P.A.*).

34 Finally, the conduct of police officers is in some measure regulated by the *Police Act* itself. Section 117 prohibits police officers from undertaking certain activities or having financial interests related to those activities. Section 119, as we have seen, is concerned with criminal conduct of police officers.

35 It is important to note that s. 119 was a new addition to the legislative framework governing police. It reflects a heightened concern by the legislature to impose strict consequences for criminal conduct by police officers. This concern can be seen throughout the provisions of the Act that, like s. 119, were not present in the previous legislation. Section 3(3) of the former *Police Act* prevented only those who had been convicted of a criminal offence by way of indictment from becoming police officers. By contrast, s. 115(3) *P.A.* requires that a potential candidate have no prior criminal convictions of any kind. Other new provisions ensure that allegations of

criminal conduct by police officers are investigated and that such investigations are carried out objectively and thoroughly: ss. 70, para. 5, 260, 264, 286 and 289.

36 The general sanction of dismissal provided in s. 119 *P.A.* is a significant change from the former legislation. Previously, police officers could be disciplined, and even dismissed — as they still can be — for breach of the *Code of ethics* or internal discipline regulations, including for committing a criminal offence, but the result was not certain: see *Fraternité des policiers de la Communauté urbaine de Montréal Inc. v. Communauté urbaine de Montréal*, [1985] 2 S.C.R. 74, at p. 83. This was due to the fact that the former *Police Act* was silent on the issue of criminal conduct by acting police officers. Section 3(3) of that Act prevented persons who had been convicted of a criminal offence by way of indictment from *becoming* police officers, but it did not extend to police officers during their employment: *Péloquin v. Syndicat des agents de la paix en services correctionnels du Québec*, [2000] R.J.Q. 2215 (C.A.). The new Act, through s. 119 *P.A.*, ensures that dismissal will generally be the result of serious criminal conduct and thus brings the expectations of acting police officers in line, although not perfectly, with what is required of those seeking entry into the profession.

37 The main practical effect of s. 119 *P.A.* is that it removes a large part of the discretion that previously existed with directors of police, the Police Ethics Commissioner and the Comité de déontologie policière as to whether a police officer who is convicted of a indictable or hybrid criminal offence should be disciplined and, if so, to what extent. A director who discovers that a member of his or her police force has committed an offence that falls within the ambit of s. 119, para. 2 *P.A.* has no

choice but to dismiss the police officer. This sanction will apply in all cases unless the officer can show there are specific circumstances that justify another sanction.

38 Of course discipline regulations and the *Code of ethics* continue to apply to police officers and may result in sanctions independently of s. 119 *P.A.* Criminal offences that fall outside the ambit of s. 119 *P.A.* may still be punishable by dismissal in appropriate circumstances: see e.g. *Lévis (Ville de) v. Syndicat des policiers et pompiers de Lévis*, D.T.E. 89T-344 (T.A.). However, where the offence is covered by s. 119, s. 258 *P.A.* makes clear that disciplinary sanctions imposed in accordance with the municipality's discipline by-law do not remove the general requirement to impose dismissal.

39 Similarly, a grievance arbitrator may no longer refer to his or her plenary discretion under s. 100.12(*f*) *L.C.* to review the reasonableness of the municipality's decision and substitute what sanction he or she sees fits considering all the circumstances. Absent specific circumstances, which must be proven by the police officer, the only finding open to the arbitrator under s. 119, para. 2 *P.A.* is dismissal.

40 Having set out the context of the legislation governing the conduct of police officers, we must now consider the effect of municipal law. Municipal police officers, *unlike* other police officers, are also subject to municipal law as municipal employees. In particular, s. 116 *C.T.A.*, which applies to the appellant municipality, establishes conditions for being appointed or holding office as an officer or employee ("*charge de fonctionnaire ou d'employé*"). An almost identical provision applies to municipal police officers employed by municipalities that are governed by the *Municipal Code of Québec*, R.S.Q., c. C-27.1, s. 269. Subparagraph 6 of the first

paragraph of s. 116 *C.T.A.* functions to disqualify persons who have committed an offence punishable by imprisonment for one year or more from taking up or *holding* office. As such, it disqualifies those who are employed by the municipality when the offence is committed. The period of disqualification lasts for five years from the end of the term of imprisonment or from the date of condemnation if no sentence was imposed.

41 There is, however, an important limitation to the disqualification set out in s. 116(6) *C.T.A.* The penultimate paragraph of s. 116 limits disqualification to situations where "the offence is in connection with" the office or employment. This qualification was added in 1986 in order to bring s. 116(6) and (7) *C.T.A.* in line with s. 18.2 of the Quebec *Charter of human rights and freedoms,* R.S.Q., c. C-12, which protects employees from being dismissed or otherwise penalized in their employment for the mere fact that they were convicted of a penal or criminal offence (*An Act to amend various legislation having regard to the Charter of human rights and freedoms,* S.Q. 1986, c. 95, s. 46). Under s. 18.2 of the Quebec *Charter* there must be an objective connection with the offence and the employment in order for the dismissal not to be discriminatory: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] 3 S.C.R. 228, 2003 SCC 68, at para. 30.

42 I make note of this because it appears that the connection requirement applies differently to municipal police officers than it does to other municipal employees. A criminal offence committed by a police officer is more likely to have a connection with his or her employment than an offence committed by another municipal employee. Thus, for example, a municipal employee was able to prove that

a sexual assault during working hours was not connected with his employment, and therefore that he should not be dismissed by virtue of s. 116(6) *C.T.A.* (*Syndicat des employés municipaux de Beauce (C.S.D.) v. St-Georges (Ville de)*, J.E. 2000-540, SOQUIJ AZ-00019015 (C.A.)). Similarly, a municipal firefighter who defrauded the municipality's employees' credit union was held not to have committed an offence in connection with his employment (*Association des pompiers de Laval v. Ville de Laval*, [1985] T.A. 446).

43 The same results would not be possible for municipal police officers under s. 116(6) *C.T.A.* This is because most, if not all, criminal offences committed by a municipal police officer will be connected to his or her employment due to the importance of public confidence in the police officer's abilities to discharge his or her duties. In *Fraternité des policiers de Deux-Montagnes/Ste-Marthe-sur-le-Lac v. Deux-Montagnes (Ville de)*, J.E. 2001-524, SOQUIJ AZ-50083424, a case decided before s. 119 *P.A.* came into effect, the Court of Appeal of Quebec concluded that the arbitrator had committed a patently unreasonable error in not upholding the dismissal of a police officer convicted of concealing a stolen automobile under s. 116(6) *C.T.A.* The court noted that the arbitrator had in fact found that even though the offence had been committed outside of the officer's employment, it was of such a nature as to compromise the integrity and respect for the law that the municipality and the public were entitled to expect from a police officer (para. 18). As such, the court held that the conditions of s. 116(6) *C.T.A.* were satisfied and the officer should have been dismissed.

44 A similar principle emerges from the judicial application of s. 18.2 of the Quebec *Charter* to police officers who are dismissed for criminal conduct. In *Pelland*

v. St-Antoine (Ville de), J.E. 94-499, 1994 CarswellQue 1900 (C.Q.), a director of police had been dismissed following a conviction for making false declarations in order to secure bank loans. The court held that the connection requirement in s. 18.2 had been satisfied: [TRANSLATION] "In light of the nature of the position held by the applicant, his having been convicted of an indictable offence is incompatible with the very performance of the duties of that position, and this incompatibility is necessarily connected with his employment" (para. 38 (emphasis added)).

45 A dismissal which is the result of a disciplinary sanction will usually not attract the protection of s. 18.2 because it cannot be said that the dismissal was effected for the mere reason of the criminal offence: *Maksteel*, at para. 31. This will often be the case with municipal police officers who, unlike other municipal employees, face disciplinary sanctions for violations of the law. For example, s. 13.11 of the appellant municipality's discipline by-law prohibits police officers from violating any laws in a way that would compromise the effectiveness, credibility and quality of the public security service. In short, a municipal police officer would rarely, if ever, be able to benefit from the protection afforded by the penultimate paragraph of s. 116 to other municipal employees in the context of criminal offences.

46 This brief review of the legislative framework governing the criminal conduct of municipal police officers suggests that s. 116(6) *C.T.A.* is similar in effect to s. 119, para. 2 *P.A.* What is not clear is whether the strict consequences of criminal conduct provided for in s. 116(6) *C.T.A.* were intended to continue to apply to municipal police officers whose conduct also falls under s. 119, para. 2 *P.A.* It is to this question that I now turn.

5.2.2 Are Section 116(6) *C.T.A.* and Section 119, para. 2 *P.A.* in Conflict?

47 The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

> According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818).

48 The arbitrator and the Court of Appeal both found that s. 116(6) *C.T.A.* and s. 119, para. 2 *P.A.* were in conflict and that the conflict could not be avoided by any reasonable interpretation. I agree. Section 119, para. 2 *P.A.* requires the dismissal of police officers who have been convicted of a hybrid criminal offence, *except* if he or

she can demonstrate specific circumstances which would justify another sanction. Section 116(6) *C.T.A.* provides for disqualification *without exception* from municipal employment for criminal and penal offences punishable with imprisonment for one year or more where the connection requirement is satisfied. There is a clear zone where the statutes overlap and come into conflict. Most, if not all, hybrid *Criminal Code*, R.S.C. 1985, c. C-46, offences targeted by s. 119, para. 2 *P.A.* also carry a term of imprisonment of at least 12 months. Because of the seriousness of criminal conduct by police officers, the connection requirement in the penultimate paragraph of s. 116 *C.T.A.* will most often be satisfied, especially in the case of hybrid offences, which are more serious than summary offences. Disqualification under s. 116 *C.T.A.* will, by necessity, lead to the municipal police officer's dismissal, but without any opportunity, in contrast to s. 119, para. 2 *P.A.*, to demonstrate specific circumstances.

49 In any event, it is certainly the case that Belleau's conduct in this appeal is caught by both provisions. All of his offences were punishable by imprisonment for a term of more than one year. There is also no question that they are sufficiently connected with his employment as a police officer. As a result, Belleau is faced with the situation where one statute would allow him to maintain his employment with the appellant municipality if he can show specific circumstances while the other would not. The application of s. 116(6) *C.T.A.* would necessarily preclude the application of the exception found in s. 119, para. 2 *P.A.* It is a situation where "one enactment says 'yes' and the other says 'no'" (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191).

50 The appellant urges that the two provisions are complementary because s. 119 *P.A.* is concerned with a disciplinary sanction while s. 116 *C.T.A.* is a purely

administrative measure providing for admissibility to municipal employment. It is true that s. 119 *P.A.* speaks of "dismissal" ("*destitution*") while s. 116 *C.T.A.* speaks of "disqualification" ("*inhabilité*"). However, the difference in wording should not obscure the practical effect of these two provisions. Both provisions ultimately result in the termination of the employment relationship. The effect of disqualification under s. 116(6) *C.T.A.* is slightly broader in that it prevents a person from holding *any* municipal employment for a period of five years, but that does not diminish the fact that disqualification first and foremost results in the dismissal of the municipal employee. If an employee is disqualified from holding employment, then dismissal must follow. This seems to me to be a necessary corollary of disqualification for acting employees.

51 This is also the interpretation given to s. 116(6) *C.T.A.* by the jurisprudence. In cases involving municipal employees convicted of a criminal offence, it is accepted that if s. 116(6) *C.T.A.* applied, it would be the basis for the employee's dismissal: *Beauce*; *Association des pompiers de Laval*. Indeed, dismissal was the result in cases where the offence was held to have a sufficient connection with the employment: *L'Île-Perrot (Ville de) et Union des employés de service, section locale 800*, D.T.E. 2000T-619 (T.A.); *Duguay et Paspébiac (Ville de)*, D.T.E. 2003T-47, SOQUIJ AZ-50152875 (C.T.). This is also true of the application of s. 116(6) *C.T.A.* to municipal police officers before the enactment of s. 119 *P.A.* (see e.g. *Deux-Montagnes*). Section 116(6) *C.T.A.* may not be worded as a legislative sanction of dismissal, but it undeniably has such an effect.

52 Furthermore, it is hard to see the appellant's invocation of s. 116(6) *C.T.A.* in this case as anything other than an attempt to give effect to a disciplinary measure.

Through s. 116(6) *C.T.A.*, the appellant hopes to find a legal basis for its decision to implement the recommendation of its director of public security to dismiss Belleau, a recommendation which was the result of a disciplinary hearing conducted in accordance with the provisions of the collective agreement and the appellant's *Règlement n^{o} 756* relating to disciplinary sanctions. I cannot see how an application of s. 116(6) *C.T.A.* in this case could qualify as an administrative measure.

53 I further agree with the Court of Appeal that it would not be possible to resolve the conflict by interpreting s. 116(6) *C.T.A.* as imposing, in effect, a five-year suspension rather than an outright dismissal after which the police officer would regain his or her position. That would be markedly out of step with the existing jurisprudence on s. 116(6) *C.T.A.*, which, as we have seen, has uniformly interpreted s. 116(6) as operating to terminate the municipal employee's employment.

54 More importantly, such an approach would not actually resolve the conflict in this case. The legislature, in s. 119, para. 2 *P.A.*, has provided for a limited exception to dismissal. When that exception applies, it results in the police officer's employment relationship with his or her police force being maintained. This is a key point. The purpose of the exception in s. 119, para. 2 *P.A.* is to allow a police officer, after the imposition of any disciplinary sanctions, to return to his or her post. An interpretation which suggests that s. 116(6) *C.T.A.* imposes a five-year suspension would negate this important objective of s. 119, para. 2 *P.A.* As Deschamps and Fish JJ. admit, such a lengthy suspension — if it can really be called a "suspension" — would force a police officer to find an equivalent position elsewhere as an officer in the Sûreté du Québec, to seek an appointment as a special constable, or even to give up police work altogether and attempt to become a municipal civil servant. These

options, even if one considers them to be viable, are far removed from what the exception in s. 119, para. 2 *P.A.* provides: the preservation of the employment relationship between police officer and police force. With respect, the reading suggested by my colleagues would create two classes of police officers. Those who benefit from the exception in s. 119, para. 2 *P.A.* and those who do not.

55 Moreover, it is doubtful whether a municipal police officer who had been suspended for five years pursuant to s. 116(6) *C.T.A.* would be eligible to transfer to the Sûreté du Québec or to be hired as a special constable. Section 115 *P.A.*, including the requirement in s. 115(3) that a person must be free of a criminal conviction in order to become a police officer, applies whenever a person seeks "to be hired" as a police officer. As such, the hiring requirements apply equally to persons who want to be hired as police officers and to acting police officers who, for whatever reason, would like to be hired by another police force. This is made clear by the last paragraph of s. 115 *P.A.*, which does not apply the hiring requirements when police forces are integrated, amalgamated or merged. There would be little reason for this specific exemption if the s. 115 requirements did not also apply to acting police officers. All this to say that a municipal police officer who was "suspended" by virtue of s. 116(6) *C.T.A.* would also be unable to be rehired by the Sûreté du Québec or as a special constable by virtue of s. 115(3). There is therefore little grounds for thinking that the application of s. 116(6) *C.T.A.* would somehow allow a municipal police officer to potentially continue working as a police officer.

56 The appellant also argues that there is nothing inconsistent in the fact that Belleau is subject to two sets of obligations: one as a police officer, and the other as a municipal employee. There is of course nothing wrong with a municipal police

officer having to abide by higher standards as a police officer or as a municipal employee, but where those standards come into conflict, the conflict cannot be explained away by the fact that the two standards emanate from different sources. Here, both statutes provide for the consequences of criminal conduct. One provides for an exception to the rule of dismissal; the other does not. The practical effect of s. 116(6) *C.T.A.* as it applies to municipal police officers is to negate the limited exception provided by the legislature in s. 119, para. 2 *P.A.* As such, this is not a case of one legislative regime imposing a higher standard than another. Rather, it is a case of one statute implicitly taking away what another statute has explicitly allowed. It is for this reason that whatever one thinks about which provision should prevail, the conflict is, in my opinion, unavoidable.

57 I hasten to add, as Bich J.A. noted, that the conflict between s. 116(6) *C.T.A.* and s. 119 *P.A.* is not complete. Both provisions continue to apply unproblematically outside of the municipal police officer context. In the case of a municipal police officer convicted of indictable offences, the two sections are also not in conflict since the first paragraph of s. 119 *P.A.* provides for dismissal without exception. Section 116(6) also covers penal offences that are not captured by s. 119 *P.A.* Some federal penal offences are punishable for a term of imprisonment for one year or more and could lead to the dismissal of a police officer as a municipal employee: *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 160.1; *Importation of Intoxicating Liquors Act*, R.S.C. 1985, c. I-3, s. 5(*c*); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 238(1); *Air Travellers Security Charge Act*, S.C. 2002, c. 9, s. 62(2).

5.2.3 How Should the Conflict Between Section 116(6) *C.T.A.* and Section 119, para. 2 *P.A.* Be Resolved?

58 When a conflict does exist and it cannot be resolved by adopting an interpretation which would remove the inconsistency, the question that must be answered is which provision should prevail. The objective is to determine the legislature's intent. Where there is no express indication of which law should prevail, two presumptions have developed in the jurisprudence to aid in this task. These are that the more recent law prevails over the earlier law and that the special law prevails over the general (Côté, at pp. 358-62). The first presumes that the legislature was fully cognizant of the existing laws when a new law was enacted. If a new law conflicts with an existing law, it can only be presumed that the new one is to take precedence. The second presumes that the legislature intended a special law to apply over a general one since to hold otherwise would in effect render the special law obsolete. Neither presumption is, however, absolute. Both are only indices of legislative intent and may be rebutted if other considerations show a different legislative intent (Côté, at pp. 358-59).

59 In this case, both presumptions point to the conclusion that the *Police Act* should prevail over the *Cities and Towns Act*. Section 116 *C.T.A.* has existed in some form at least since the enactment of *An Act respecting Cities and Towns*, S.Q. 1922, 13 Geo. V, c. 65, s. 123(12), while s. 119 *P.A.* is of much more recent vintage. Section 116, and the *Cities and Towns Act* generally, have been modified since the *Police Act* came into force but none of these affected s. 116(6) *C.T.A.* Section 119 *P.A.* is therefore the newer provision suggesting that the legislature intended it to prevail over s. 116 *C.T.A.* in case of conflict.

60 The *Police Act*, and s. 119 in particular, is also of a special nature in relation to the *Cities and Towns Act* in the context of disciplinary matters. The *Police*

Act applies to municipal police officers' training, the conditions for their employment and generally how the municipal police force is organized. Discipline of municipal police officers is governed either by the professional ethics regime set out in the Act or the disciplinary regulations that municipalities are *required* by the *Police Act* to put in place. Section 119 *P.A.* further requires municipalities to deal with criminal conduct by automatic dismissal. By contrast, the *Cities and Towns Act* is a general statute providing for the organization and operation of municipalities generally. Section 116 is not focussed exclusively on discipline and also serves to prevent certain persons from taking up municipal employment.

61 Section 119 *P.A.* thus satisfies both presumptions in that it is more recent and more specific in comparison to s. 116 *C.T.A.* But there is another reason to hold that s. 119, para. 2 *P.A.* should prevail. This has to do with the reasons for the inclusion of the exception in s. 119, para. 2 *P.A.* In particular, the specific circumstances exception was intended to meet the concerns of police associations that it might not always be fair to dismiss an acting police officer convicted of a hybrid offence (*Journal des débats de la Commission permanente des institutions*, 1st Sess., 36th Leg., May 26, 2000, at pp. 2-4). It appears from the debates surrounding s. 119, para. 2 *P.A.*, that it was drafted, like most legislation, so as to satisfy various interests. The Minister of Public Security described the balancing achieved by s. 119 in the following way:

> [TRANSLATION] In [the case of a hybrid offence], the rule is again dismissal, except that a disciplinary committee will be convened and the police officer, if he can raise the fact that the act was committed in exceptional or specific circumstances that justify a sanction other than dismissal, then he can be heard and get something.
>
> . . . This also satisfies concerns in the submissions made to us by the police associations, which said: Listen, it's terrible, someone who, after a

> 20-year career, for example, can in exceptional circumstances, let us say he is depressed because a member of his family is seriously ill, and then commits an offence he would never have committed otherwise, a minor offence such as shoplifting, or even impaired driving, etc. Well, in such circumstances, he could raise those specific circumstances, which might justify another sanction. So I think this responds at the same time to the justified criticisms that were made.
>
> . . .
>
> I also believe that this satisfies the public's concerns. . . . As you can see, members of the general public think, like us, that a police officer should not have a criminal record. But I think that, if certain exceptional cases, like those presented by the Fraternité des policiers de Montréal, were put to them, they might be open to their having one. This is what it means. [Emphasis added; pp. 2-3.]

62 If s. 116(6) *C.T.A.* is held to prevail over s. 119, para. 2 *P.A.*, then the stated legislative objective of providing a narrow exception for all police officers who have committed a hybrid offence during the course of their career will be defeated. Municipal police officers will be dismissed by virtue of s. 116(6) *C.T.A.* (or s. 269 of the *Municipal Code of Québec*) without the benefit of being able to prove that there are specific circumstances to justify another sanction. There is no indication in the debates that the exception in para. 2 of s. 119 *P.A.* was not intended to apply to municipal police officers. Indeed, the debates suggest that a conscious policy choice was made, after taking into account the views of various interests, to provide a specific exception for *all* acting police officers. In my view, courts should avoid an interpretation that would serve to defeat such a clearly stated legislative objective. This gives further support for the conclusion that s. 119, para. 2 *P.A.* should prevail over s. 116(6) *C.T.A.* in case of conflict.

63 Like the Court of Appeal, I do not find persuasive the appellant's argument that the absence of any positive exclusion of s. 116(6) *C.T.A.* in relation to municipal police officers suggests that it should prevail over s. 119, para. 2 *P.A.* The appellant

points to the fact, as did Lemelin J., that the *Cities and Towns Act* has been modified a number of times subsequent to the enactment of the new *Police Act*. Some provisions of the *Cities and Towns Act* relating to discipline were even modified by the *Police Act* itself (ss. 71 and 72 *C.T.A.* by ss. 316 and 317 *P.A.*). On none of these occasions did the legislature see fit to disapply or modify the application of s. 116(6) *C.T.A.* to municipal police officers. This line of argument is, however, of little assistance when confronted with an absence of express legislative intent. It could just as easily be said that since s. 119 *P.A.* was enacted without expressly excluding municipal police officers, it was intended to apply to all police officers without distinction. Indeed, this makes more sense as it preserves the legislative bargain that was struck when s. 119 *P.A.* was drafted without offending the applicability of s. 116(6) *C.T.A.* to other municipal employees. Moreover, as Bich J.A. noted, the amendments made to the *Cities and Towns Act* were to references to the previous version of the *Police Act*. This is hardly evidence of legislative intent that s. 116(6) *C.T.A.* should take precedence over s. 119, para. 2 *P.A.*

64 For similar reasons, I see nothing determinative in the fact that s. 116(6) *C.T.A.* was not mentioned in the legislative debates surrounding s. 119, para. 2 *P.A.* On the contrary, this would seem to be further evidence that the legislature intended that provision to apply equally to all police officers. If municipal police officers were meant to be treated differently, one would expect that this point would have been raised in the debates.

65 A final argument raised by the appellant is that allowing s. 119, para. 2 *P.A.* to prevail over s. 116(6) *C.T.A.* would create two classes of municipal employees. The implication is that municipal police officers might be treated more leniently than

other municipal employees. The Court of Appeal rejected this argument on the grounds that the same could be said about allowing s. 116(6) *C.T.A.* to prevail. This would in effect create two classes of police officers contrary to the stated intentions behind s. 119 *P.A.* There is another reason why the appellant's concern is unfounded. As we have seen, municipal police officers were treated differently from other municipal employees *before* s. 119, para. 2 *P.A.* was enacted, by virtue of the way the connection requirement in s. 116(6) *C.T.A.* applied to police officers. The concern over creating distinctions between municipal police officers and other municipal employees is therefore misplaced. Moreover, s. 119, para. 2 *P.A.*, by requiring dismissal except if there are specific circumstances, continues to impose higher standards on municipal police officers. Allowing it to prevail over s. 116(6) *C.T.A.* would not significantly alter the relative treatment of municipal police officers compared to municipal employees. It would, *a fortiori*, not result in municipal police officers being treated more leniently than municipal employees.

66 Lastly, the predominance of s. 119, para. 2 *P.A.* seems to concord with the *status quo* and would not represent a marked departure from current practice. For instance, in his report recommending the dismissal of Belleau, the appellant's director of public security relied on the breaches of the municipality's discipline regulations, s. 119, para. 2 *P.A.* and the absence, in his opinion, of specific circumstances rather than the *Cities and Towns Act*. This is not surprising given the comprehensive nature of the new *Police Act* in relation to disciplinary matters, including criminal conduct, but it does confirm that the disruptions that would be caused by disapplying s. 116(6) *C.T.A.* in the limited context of municipal police officers convicted of hybrid criminal offences are not as grave as the appellant, with hindsight, makes them out to be.

67 To summarize, the conflict between s. 116(6) *C.T.A.* and s. 119, para. 2 *P.A.* should be resolved in favour of the latter. As the more recent and more specific provision, s. 119, para. 2 *P.A.* should take precedence. This would give effect to legislative intention as reflected by the presumptions and, more specifically, in the debates surrounding the enactment of s. 119, para. 2 *P.A.* Section 119, para. 2 *P.A.* was intended to satisfy a number of divergent interests and to recognize that dismissal may not be the appropriate sanction in every case. No violence is done to municipal law and no unfairness is visited upon municipal employees by allowing s. 119, para. 2 *P.A.* to prevail in case of conflict. Municipal employees are still subject to s. 116(6) *C.T.A.* and still benefit from the less restrictive (relative to municipal police officers) application of its terms. Municipal police officers must still suffer the consequences of s. 116(6) *C.T.A.* for offences outside the ambit of s. 119, para. 2 *P.A.*, and they are still bound by s. 119, para. 2, which requires, as a general rule, dismissal for hybrid offences. Only in limited situations where a police officer can demonstrate specific circumstances will another sanction be possible.

5.3 *Application of Section 119, para. 2 P.A.*

68 The final issue that must be considered is whether the arbitrator committed a reviewable error in finding that Belleau had demonstrated specific circumstances that justified a sanction other than dismissal under s. 119, para. 2 *P.A.* I am of the opinion that the arbitrator's decision on this issue was unreasonable, although for different reasons than those given by the Superior Court.

69 An initial problem with the arbitrator's decision is that he equated his jurisdiction under s. 119, para. 2 *P.A.* to the jurisdiction he would normally enjoy

under s. 100.12(*f*) *L.C.* A grievance arbitration involving the application of s. 119, para. 2 *P.A.* is different than one involving only s. 100.12(*f*) *L.C.* Under s. 119, para. 2 *P.A.*, the municipality does not have the burden of proving that dismissal was the appropriate sanction. The burden is rather on the police officer to show that specific circumstances exist to exclude dismissal. The arbitrator is also not free to substitute the decision that he or she deems to be fair and reasonable. Unless the police officer can demonstrate specific circumstances, the arbitrator *must* confirm the dismissal. The arbitration is still governed by the collective agreement and the *Labour Code*, but the arbitrator does not have the same discretion in disciplinary matters that he or she would otherwise enjoy under s. 100.12(*f*). This is a necessary implication of s. 119 *P.A.*, which was intended to make dismissal for criminal conduct the general rule. If arbitrators maintained their plenary jurisdiction under s. 100.12(*f*) there would be little point to a provision that mandates dismissal. The reasonable interpretation of s. 119, para. 2 *P.A.* is one under which the arbitrator's jurisdiction is limited to considering whether the police officer has demonstrated specific circumstances and, if so, what other sanction should be applied.

70 In deciding whether there are specific circumstances, the arbitrator must not lose sight of the special role of police officers and the effect of a criminal conviction on their capacity to carry out their functions. A criminal conviction, whether it occurs on-duty or off-duty, brings into question the moral authority and integrity required by a police officer to discharge his or her responsibility to uphold the law and to protect the public. It undermines the confidence and trust of the public in the ability of a police officer to carry out his or her duties faithfully: *Deux-Montagnes*; *Ville de Lévis*. This requirement is reflected in the police *Code of ethics*,

discipline regulations such as the appellant's *Règlement n^o 756* and, importantly, in the *Police Act* itself in ss. 115(3) and 119 *P.A.*

71 While dismissal is the harshest disciplinary sanction that can be imposed, it is worth recalling that the criminal offences targeted by both paragraphs of s. 119 *P.A.* are serious ones. They are all offences for which Parliament has considered it necessary to attach the possibility of significant terms of imprisonment. A conviction for a summary offence does not entail dismissal in all cases. Dismissal is only mandatorily prescribed for indictable or hybrid offences that can be prosecuted either by indictment or summary conviction.

72 The limited exception provided in the second paragraph of s. 119 *P.A.* must be considered in this light. The general rule is that conviction for an indictable or hybrid criminal offence by an acting police officer leads to dismissal. The ability to invoke "specific circumstances" to justify a lesser sanction, while an important safeguard against unfairness, must not be taken as a general licence for arbitrators to impose what sanction they think is appropriate.

73 What constitutes "specific circumstances" is not defined in the legislation. However, in discussing the exception in s. 119, para. 2 *P.A.*, the Minister commented on what types of specific circumstances might be considered:

> [TRANSLATION] Listen, it's terrible, someone who, after a 20-year career, for example, can in exceptional circumstances, let us say he is depressed because a member of his family is seriously ill, and then commits an offence he would never have committed otherwise, a minor offence such as shoplifting, or even impaired driving, etc. Well, in such circumstances, he could raise those specific circumstances, which might justify another sanction.

. . .

> If we consider the examples given to us by the associations representing police officers, I think it is clear that [specific circumstances] can or cannot be shown. I mean, if someone, for example, following a severe depression, continued to work, or even if he was on leave without pay because of an unfortunate incident that occurred, well, I mean, it either did or did not occur, and then, I mean, I feel that such things, which are established in an award. . . . I do not believe the burden of proof generally has so great. . . . When such things happen, they are easy to prove on a preponderance of evidence rather than by raising a doubt.
>
> (*Journal des débats de la Commission permanente des institutions*, May 26, 2000, at pp. 3-4)

The range of appropriate considerations is of course in no way exhausted by the Minister's comments. Indeed, in the absence of any legislative indication to the contrary, it would be inappropriate to limit specific circumstances to certain types of considerations. Broadly speaking, an arbitrator may take into account any circumstance surrounding the offence which relates to whether the police officer will be able to continue to serve the public effectively and credibly. Reference to attenuating and aggravating circumstances in other employment law contexts may sometimes be useful, but this must be done with regard to the unique issues that are raised by the criminal conduct of police officers.

74 In light of these comments, the arbitrator was entitled to consider the specific circumstances that he did. Belleau's family problems were plausibly related to his conduct on the evening and morning of December 29 and 30. Similarly, it was relevant that Belleau was a long-serving officer who had no prior record of disciplinary problems and who, the evidence suggested, was generally seen as a non-violent man.

75 Another important element is of course consideration of the gravity and the nature of the offences. The Minister spoke of [TRANSLATION] "a minor offence" but, as I have said, that cannot be determinative. While s. 119, para. 2 *P.A.* imposes dismissal for all hybrid offences, that does not mean that the nature of the offences and the circumstances surrounding them will not be relevant to whether specific circumstances can be found to exist in a given case. This is especially so, given the variety of hybrid offences and the obvious fact that not all offences are committed in the same way. In my view, the decision of the arbitrator is unreasonable in this case mainly because of his failure to properly relate the factors considered to the special role of a police officer. For instance, though it may have been reasonable for the arbitrator to take into account that there were no traces of violence or physical harm, it was not reasonable for him to attach great importance to this fact without considering the violent nature of the conduct of the officer. Even if there are no definitive findings of fact regarding specific acts of violence, the context here is one of domestic violence, and the officer pleaded guilty to a charge of assault on his wife; this is a very important consideration in light of the reliance of the public on police intervention in such cases, one the arbitrator could not reasonably ignore.

76 Furthermore, the firearm offences cannot be attributed to Belleau's personal problems, nor can they be justified, as the arbitrator sought to do, merely on the grounds that they are technical offences. Firearms are dangerous. That is why the *Criminal Code* prohibits their storage in a careless manner. Belleau, as a police officer, would have known the importance of safety surrounding firearms. The fact that his house may have been under construction is not a reasonable excuse for why the firearms were not properly stored. He knew the importance of properly storing firearms and that the state of one's house was no exception to the legal requirements.

He could have easily brought the firearms to a place where they would have been legally and safely stored.

77 More serious still is Belleau's conscious defiance of his undertaking to the court not to communicate with his spouse. As a police officer, Belleau would have known the importance of undertakings to the court. The breach of an undertaking by a police officer is especially serious, given the role that police officers play in the administration of justice. It suggests a lack of respect for the judicial system of which he forms an integral part. Moreover, the obligation not to communicate with his spouse was the most important obligation in the undertaking. The seriousness of the breach of this obligation is further evidenced by the fact that the Crown chose to prosecute the offence by way of indictment.

78 The arbitrator excused Belleau's breach of his undertaking on the grounds that his conduct on December 29 and 30 had to be seen as forming a continuum. But it is difficult to see how his mental state and intoxication from the previous evening could reasonably explain Belleau's conduct the next day, several hours after the incident and two hours after he had agreed to the undertaking. There is no question that Belleau clearly understood the terms of his release. Indeed, his arraignment that day would have impressed upon him the seriousness of his actions the night before. I am thus unable to see how it would be reasonable to conclude that Belleau's conduct could be justified on the grounds that he was not fully aware of what he was doing when he breached his undertaking.

79 As mentioned earlier, the arbitrator failed to properly weigh the effect of Belleau's criminal conduct on his ability to carry out his duties as a police officer; this

affected the rationality of his decision. Although the issue of public trust and confidence should not be approached exclusively from the vantage of media reports, it is also unreasonable to suggest that had the public been properly informed of the specific circumstances, it would still have confidence in Belleau as a police officer. Unfortunately, whether they tell the whole story or not, media reports of criminal conduct by police officers do have an effect on public confidence, and, once lost, that confidence is extremely difficult to regain. Moreover, it is entirely possible that for some members of the public, even if they were informed of the specific circumstances, they would still lack confidence in Belleau's ability to perform his duties. One only needs to think of a victim of domestic abuse to realize that some would have understandable difficulty trusting Belleau. This is not to say that such considerations should necessarily trump any specific circumstances that have been proven. Rather, public confidence must be an important part of the balancing that takes place when considering whether specific circumstances are found to justify the avoidance of dismissal. But in treating the issue as one about properly informing the public, the arbitrator failed to take into account the gravity of the offences committed by Belleau and the effect that they would have on public confidence.

80 Given all the elements discussed above, taken together, it was unreasonable for the arbitrator to conclude that the specific circumstances raised by Belleau were sufficient to satisfy the s. 119 *P.A.* exception. Such a conclusion undercuts the grave importance that is attached by s. 119 *P.A.* to criminal conduct by police officers.

6. Conclusion

81 This appeal should be resolved according to the law governing police and not municipal law. While s. 119, para. 2 *P.A.* allows for a narrow exception to dismissal when a police officer can demonstrate specific circumstances, the justification of another sanction must itself be reasonable. Accordingly, the appeal should be allowed and the sanction of dismissal restored, with costs to the appellant before the Court of Appeal and before this Court.

English version of the reasons delivered by

82 DESCHAMPS AND FISH JJ. — We agree with Bastarache J.'s conclusion concerning the applicability of s. 119, para. 2 of the *Police Act*, R.S.Q., c. P-13.1 ("*P.A.*"), to the facts of this case. With respect, however, we are of the opinion that s. 119, para. 2 *P.A.* is compatible with s. 116(6) of the *Cities and Towns Act*, R.S.Q., c. C-19 ("*C.T.A.*").

83 For almost one hundred years, the Court's view has been that two provisions can apply concurrently if they are not contradictory. The fact that one provision is more restrictive or imposes different conditions than the other, or that both provisions apply to the same person and the same fact situation, is in itself insufficient to support the conclusion that one of the provisions has been repealed or is inapplicable in part. In the case at bar, disqualifying individuals from municipal employment during the five-year period provided for in s. 116 *C.T.A.* is not incompatible with the exception to dismissal set out in s. 119, para. 2 *P.A.* In the words used by Bastarache J., this is not a case where one enactment says "yes" and the other says "no". We therefore agree with the principles stated by Bastarache J. on this

point, but we find that he applies them in a way that gives the concept of conflict a scope that is broader than the one it is recognized as having at law.

1. Provisions in Issue

84 Bastarache J. is of the opinion that s. 116 *C.T.A.* is inapplicable where an arbitrator concludes under s. 119, para. 2 *P.A.* that specific circumstances justify a sanction other than dismissal. In his interpretation of the provisions in question, our colleague relies, *inter alia*, on s. 18.2 of the Quebec *Charter of human rights and freedoms*, R.S.Q., c. C-12, and s. 115 *P.A.* In our view, there is no need to rely on s. 18.2 of the Quebec *Charter* to resolve this dispute. We feel that the interpretation of that provision should await a case in which the issue is raised. Section 115 *P.A.*, however, is quite relevant, and it will be appropriate for us to discuss it, since our interpretation differs from the one advanced by Bastarache J. The provisions to which we will be referring read as follows:

Police Act

> Police Officers.
>
> **115.** To be hired as a police officer a person must meet the following requirements:
>
> . . .
>
> (3) not have been found guilty, in any place, of an act or omission defined in the Criminal Code (Revised Statutes of Canada, 1985, chapter C-46) as an offence, or of an offence referred to in section 183 of that Code under one of the Acts listed therein;
>
> . . .
>
> Special constables.

The requirements specified in subparagraphs 1 to 3 of the first paragraph apply also to special constables.

Additional requirements.

The Government may, by regulation, prescribe additional hiring requirements for police officers and special constables.

Additional requirements.

Municipalities may do likewise as regards members of their police forces and municipal special constables. Such additional requirements may vary depending on whether they apply to a police officer or to a special constable.

Applicability.

The hiring requirements do not apply to the members of police forces when police services are integrated, amalgamated or otherwise merged.Conviction.

119. Any police officer or special constable who is found guilty, in any place, of an act or omission referred to in subparagraph 3 of the first paragraph of section 115 that is triable only on indictment, shall, once the judgment has become *res judicata*, be automatically dismissed.

Conviction.

A disciplinary sanction of dismissal must, once the judgment concerned has become *res judicata*, be imposed on any police officer or special constable who is found guilty, in any place, of such an act or omission punishable on summary conviction or by indictment, unless the police officer or special constable shows that specific circumstances justify another sanction.

Cities and Towns Act

Disqualification under other Act.

116. The following persons shall not be appointed to or hold any office as an officer or employee of the municipality:

. . .

Crime;

> (6) Any person convicted of treason or of an act punishable under a law of the Parliament of Canada or of the Legislature of Québec, by imprisonment for one year or more.
>
> Such disqualification shall continue for five years after the term of imprisonment fixed by the sentence, and, if only a fine was imposed or the sentence is suspended, for five years from the date of such condemnation, unless the person has obtained a pardon;
>
> . . .
>
> Disqualification.
>
> Disqualification from municipal office or employment under subparagraph 6 or 7 of the first paragraph shall be incurred only if the offence is in connection with such an office or employment.

2. Golden Rule Applicable to Conflicts

85 The golden rule where laws conflict is that if there is a reasonable interpretation that allows two enactments to be reconciled, that interpretation must prevail. As Professor Pierre-André Côté writes:

> But there is a strong presumption against implied repeal of one enactment by another. Any interpretation permitting reconciliation is to be favoured, because it is assumed this better reflects the work of a . . . legislature.
>
> (*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 349)

86 This statement of the rule is based on a comment by the Quebec Court of King's Bench that has never been called into question:

> Repeal by implication is not favoured. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the statute book or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any

> reasonable construction which offers an escape from it, is more likely to be in consonance with the real intention.
>
> (*Duval v. The King* (1938), 64 B.R. 270, at p. 273)

87 In *Daniels v. White*, [1968] S.C.R. 517, at p. 526, Judson J. endorsed an equally clear and restrictive formulation of the rule taken from *Halsbury's Laws of England* (3rd ed. 1961), vol. 36, at p. 466: two laws conflict "if, but only if, [one of them] is so inconsistent with or repugnant to [the] other that the two are incapable of standing together" (see to the same effect R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 178). The courts have interpreted the meaning of the word "conflict" as narrowly as possible.

88 Some commentators implicitly incorporate the constitutional principles of the paramountcy doctrine into the analysis of conflicts between statutes or regulations: Sullivan, at pp. 178-79. The "doctrinal similarity" to the principles of paramountcy was noted by La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 38-39. The parallels are obvious. Thus, in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, a "conflict" is defined as a situation in which "one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other".

89 If, for reasons related in large part to the balancing of legislative powers within Confederation, a restrictive approach has been taken to conflicts in constitutional law, the rule should in our view be applied even more rigorously where the conflicting laws have been enacted by a single legislature. Since the legislature is presumed to know its own laws and to intend that they be applied consistently, the

application of a rule favouring an interpretation that makes it possible to avoid conflicts is fully justified.

90 A finding by a court that a conflict exists is necessarily founded on an assumption that the legislature has been inconsistent in enacting its laws. It is therefore only where conflict is unavoidable that a court must apply the principles of interpretation that give precedence to one law over the other, in which case the conflicting provision will be tacitly repealed or found to be partially inapplicable.

3. The Two Provisions in Issue Are Reconcilable

91 The respondents contend that neither the appellant nor the Superior Court judge has explained how the two provisions can be applied concurrently in practice. In our opinion, the following scenarios provide a full answer to this statement:

(1) Where a municipal police officer commits an indictable offence. In such a case, the first paragraph of s. 119 *P.A.* provides that dismissal from the police force is automatic. Section 116 *C.T.A.* imposes a five-year disqualification from employment by the municipality except where the offence is not in connection with the office or employment. (This exception implicitly does not apply to police officers because there will generally be a connection between the commission of an indictable offence and employment as a police officer.) After five years, the dismissed officer is still ineligible, under s. 115 *P.A.*, to be rehired as a police officer, but can be hired as a municipal employee in any other capacity. There is no conflict under this scenario, and both laws can apply concurrently.

(2) Where a municipal police officer commits a crime that is a hybrid offence punishable by imprisonment for one year or more and there are no specific circumstances that justify a sanction other than dismissal. Both laws can apply concurrently in the same manner as in scenario (1).

(3) Where a municipal police officer commits a crime that is a hybrid offence punishable by imprisonment for one year or more but there are specific circumstances that justify a sanction other than dismissal from employment as a police officer. In this case, the officer is not dismissed from the municipal police force but, in light of s. 116 *C.T.A.*, is nonetheless disqualified for five years from employment by the municipality. After five years, however, the officer requalifies as an employee of the municipality. During the five years of disqualification, the officer can work as a police officer for the Sûreté du Québec or as a special constable, or can work for a municipality in any capacity where the offence is not in connection with the office or employment. The two laws can apply concurrently.

In our view, the two provisions are thus perfectly reconcilable. There is no conflict in the fact that, in the third scenario, they apply concurrently to deprive the officer of his or her employment as a municipal employee for a period of five years even though he or she has not lost the right to serve as a police officer: this is the consequence of the relevant provision of the *C.T.A.* The *C.T.A.* clearly evinces the legislature's intention in this regard.

92 Although the rule appears to involve a purely literal test, it is now accepted that a court assessing the compatibility of two laws must, in addition to determining whether there is an express conflict between them, consider their respective purposes to ensure that the legislature's objective will not be frustrated if the laws in question are applied concurrently: *Rothmans, Benson & Hedges Inc. v. Saskatchewan,* [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 12. Thus, the court must ensure that the proposed interpretation does not frustrate the purposes of the provisions in question.

4. Purposes of the Provisions in Issue

93 Bastarache J. refers to certain elements that, in his opinion, show the provisions to be incompatible. In our view, it can be seen by reading all the provisions in issue together that this incompatibility is merely apparent.

94 Section 119 *P.A.* is disciplinary in nature. However, the sanction of dismissal has an impact on the individual's eligibility to serve as a police officer under the *P.A.* The use of the words *dismissal* in English and *destitution* in French clearly demonstrates the overlap. An arbitrator is not entitled to review an employer's decision to terminate the employment of a police officer who has been convicted of an indictable offence. Under s. 115 *P.A.*, the officer is not only dismissed, but is also no longer eligible to serve as a police officer. Where an officer is convicted of a hybrid offence, on the other hand, the employer and the arbitrator have a discretion that, when exercised, can have a decisive impact both on the officer's employment and on his or her eligibility to serve as a police officer. If the officer establishes the existence of specific circumstances, the employer or the arbitrator may substitute a less

severe sanction for dismissal. In such a case, the officer is not disqualified from serving as a police officer under the *P.A.*

95 The fact that an officer who benefits from the exception under s. 119 *P.A.* continues to be eligible to serve as a police officer obviously has an impact on the interpretation of s. 115 *P.A.* If it is found under s. 119 that the officer is fit to serve as a police officer, this also holds true for any other police officer positions that he or she may apply for in the future. Thus, an officer could be dismissed because a municipality that is duly authorized to do so decides to abolish its police force and terminate the employment of all its police officers. An officer who has benefited from the exception under s. 119 *P.A.* will be able to apply for a position on another police force, because he or she will still be eligible to serve as a police officer under the *P.A.* Similarly, an officer who wants to apply for a position on another police force for personal reasons, relating perhaps to a move or a possibility of promotion, cannot be told, on the basis of s. 115 *P.A.* alone, that he or she is ineligible owing to a conviction for a hybrid offence. Section 115 must necessarily be read in conjunction with s. 119 *P.A.* Where an officer has benefited from the exception under s. 119 *P.A.*, this must be reflected in the interpretation of s. 115 *P.A.* Otherwise, it would be difficult to meet the clear objective of the exception that the legislature has expressly established, namely to allow the individual in question to continue his or her career as a police officer.

96 We agree with Bastarache J. that the exception must be interpreted very narrowly. However, if an officer can establish the existence of specific circumstances, he or she should be able to benefit from the conclusion of the employer or the arbitrator, as the case may be, for the purposes of any employment that requires

eligibility under the *P.A.* To limit the benefit of the exception to the employment held by the officer at the time of the decision to let the officer keep his or her job would be to make the retention of eligibility conditional on circumstances that have nothing to do with the officer's conduct or competence. This cannot be in keeping with the spirit and the purpose of the exception.

97 Consequently, we are of the opinion that a police officer who benefits from the exception also benefits from job mobility. Should the officer's employment be terminated for any reason whatsoever, he or she may apply for employment in another police force. This is relevant where the compatibility of s. 119 *P.A.* with s. 116 *C.T.A.* is concerned, because an officer who retains his or her eligibility is not barred from working for the Sûreté du Québec or as a special constable.

98 When the *P.A.* and the *C.T.A.* are read together, it is clear that the former governs the capacity to serve as a police officer and the sanctions attached to breaches of the conditions of eligibility for a position as a police officer, while the latter governs the conditions of eligibility for municipal office or employment. A person who is qualified to serve in both capacities must meet the conditions of both statutes. This dual impact on the individual's employment is not a ground for not applying one of the standards.

5. Examples From the Case Law

99 The Court has heard similar arguments in criminal law cases in which the facts were clearly analogous to those of the case at bar. In *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, the Court had to decide whether

two statutory provisions could be applied concurrently. The first, a provision of the *Criminal Code*, authorized the imposition of restrictions on the operation of motor vehicles. Under the second, a provision of a province's highway safety legislation, the driver's licence of a person convicted of an offence under the *Criminal Code* was to be suspended or revoked automatically. What was in issue in the case was that the trial judge, in sentencing the offender, had exercised his discretion and decided, under the federal legislation, that no driving restrictions would be imposed on the offender. The Court did not see any problem in applying the two standards concurrently. The fact that the judge who heard the criminal case had not imposed a suspension did not render the automatic suspension provided for under provincial law inapplicable. See to the same effect: *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Bell v. Attorney General for Prince Edward Island*, [1975] 1 S.C.R. 25.

100 In our view, the parallel with the case at bar is obvious. In one case, the provincial provision requiring the suspension of the driver's licence was not rendered inapplicable by the exercise of the discretion not to suspend it. In the other case, the one now before the Court, the sanction of temporary disqualification provided for in s. 116 *C.T.A.* would not have been rendered inapplicable by the arbitrator's conclusion under s. 119, para. 2 *P.A.* that specific circumstances justified the imposition of a sanction other than dismissal.

101 Both cases concern the exercise of an activity: one, the driving of a motor vehicle, and the other, the holding of employment. In both situations, the activity could continue to be carried out under one provision, but was suspended under the other. These decisions make it particularly clear that conflict is to be interpreted narrowly.

102 In municipal law, the area of law applicable to the facts of the instant case, there are several examples of the concurrent application of two standards that differ in severity. For present purposes, it is enough to say that municipal employees are often subject to standards in addition to those provided for in the *C.T.A.* Professionals or other officers or employees who perform duties governed by different statutes are not automatically exempt from any of those statutes. For example, the courts have held that a statute establishing an administrative measure designed solely to regulate the conditions to be met to be eligible for and hold municipal office was perfectly compatible with a penal provision that applied to the same person and the same fact situation: *Ricard v. Lord*, [1941] S.C.R. 1; *Beaudoin v. Roy*, [1984] R.L. 315 (Sup. Ct.); *Roy v. Mailloux*, [1966] B.R. 468. The provisions in question are complementary. In the case of police officers, s. 115 *P.A.* explicitly provides for the possibility of imposing additional conditions on them.

103 Thus, the argument that a police officer who would otherwise benefit from the exception under s. 119 cannot have that benefit taken away by means of a suspension under s. 116 *C.T.A.* is supported neither by the rule for interpreting conflicts between statutes nor by the case law. The need to comply with two rules, one of which is more restrictive than the other, is an insufficient basis for concluding that a conflict exists.

6. Conclusion

104 In the case at bar, the respondents have not shown that the two provisions were incompatible. On the contrary, the two provisions complement each other in that they address two different aspects of the same fact situation.

105 For these reasons, we agree with Bastarache J.'s conclusion that the arbitrator's decision was unreasonable but would add that the two provisions at issue are not incompatible.

The following are the reasons delivered by

106 ABELLA J. — I agree with Justice Bastarache's analysis of s. 119, para. 2 of the *Police Act*, R.S.Q., c. P-13.1; with his conclusion that it is in conflict with and should prevail over s. 116(6) of the *Cities and Towns Act*, R.S.Q., c. C-19; with his conclusion that the arbitrator's application of s. 119, para. 2 to Belleau was unreasonable. Where I part company with him, with great respect, is in his discussion of the standards of review.

107 The primary concern I have relates to his determination that the arbitrator's decision *whether* to apply s. 119, para. 2 should be subjected to a different standard than his decision on *how* to apply it. It seems to me that applying the factors in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the clear legislative directive here is that the arbitrator's decision as a whole is entitled to deference.

108 First, there is an unequivocal privative clause in s. 101 of the Quebec *Labour Code*, R.S.Q., c. C-27, stating that the arbitrator's award is "without appeal"

and "binds the parties". Second, s. 100.12(*a*) of the *Labour Code* authorizes the arbitrator to "interpret and apply any Act or regulation to the extent necessary to settle a grievance".

109 The privative clause is the legislature's way of protecting the arbitrator's exclusive responsibility for deciding the grievance, and s. 100.12(*a*) clothes him with the authority to determine how *any* relevant statutory provision ought to apply to it. Any assessment of the degree of deference owed to the arbitrator must be respectful of these unambiguous legislative instructions. Combined with the expertise of the arbitrator in labour disputes and the legislative objective of having them resolved expeditiously and conclusively, there seems to me to be a strong argument in favour of an integrated standard for assessing the arbitrator's interpretation both of his jurisdictional mandate and its application.

110 As this Court held in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39, the interpretation of legislation, external or otherwise, that is "intimately connected with the mandate of the tribunal and is encountered frequently as a result" is entitled to deference. (See also *Canada Post Corp. v. Smith* (1998), 40 O.R. (3d) 97 (C.A.).) In interpreting the applicability of s. 119, para. 2 of the *Police Act* and s. 116(6) of the *Cities and Towns Act*, the arbitrator was interpreting and applying legislation relating to issues of the discipline and sanctioning of police officers. Both issues are central to his mandate to decide the grievance under the collective agreement and the *Labour Code*.

111 There is a danger that the routine segmentation of such mandates leads to an unduly interventionist approach more reminiscent of "the wrong question" or

"preliminary or collateral matter" doctrines found in cases like *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 W.L.R. 163 (H.L.), and *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, than of the more deferential approach applied by Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233. Dickson J.'s admonition in *C.U.P.E.* remains instructive:

> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

112 Similarly, legal issues ought not to be declared readily extricable when they are legitimately and necessarily intertwined with the adjudicator's mandate and expertise. In such circumstances, the decision ought to be reviewed as a whole, not as a segmented compilation subject to an increased degree of scrutiny and intervention. As LeBel J. observed in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 76:

> [T]he various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

113 This integrated approach was reinforced by Iacobucci J. in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 56, when he emphasized that "not . . . every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision."

114 Similarly in *Mattel, Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, 2006 SCC 22, Binnie J., writing for the majority, refused to separate the legal issue, the interpretation of s. 6 of the *Trade-marks Act*, R.S.C. 1985, c. T-13, from the Trade-marks Opposition Board's overall decision, noting, at para. 39, that the "legal issue is not neatly extricable from its factual context, but calls for an interpretation within the expertise of the Board".

115 If, on the other hand, the legal issue is genuinely external to the adjudicator's mandate or expertise and easily differentiated from other issues in the case, such heightened scrutiny is entirely warranted: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157.

116 In this case, the labour arbitrator's mandate and expertise merge to entitle him to a single deferential standard of review both for his decision as to the scope of the relevant legislation and its application to this case.

117 But I agree, for the reasons given by Bastarache J., that even on that standard, the arbitrator's decision as to the appropriate sanction is unsustainable.

Appeal allowed with costs.

Solicitors for the appellant: Langlois Kronström Desjardins, Lévis.

Solicitors for the respondents: Trudel, Nadeau, Anjou.

Solicitors for the intervener: Castiglio & Associés, Montréal.

Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act*

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COMPLIANCE AND ENFORCEMENT POLICY FOR THE HABITAT PROTECTION AND POLLUTION PREVENTION PROVISIONS OF THE *FISHERIES ACT*

NOVEMBER 2001

Environment Canada Environnement Canada

Canada

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EXPLANATORY NOTE

The terms “deposit”, “fish” and “fish habitat” appear many times in this Compliance and Enforcement Policy. For easy understanding of what these terms mean in the context of the *Fisheries Act*, you should know that the *Fisheries Act* defines:

“deposit” as any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

“fish” as (a) fish and parts of fish, (b) shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, and (c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals; and

“fish habitat” as spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

INTRODUCTION

Under the *Constitution Act, 1867*, the federal government of Canada is responsible for protecting and conserving the nation's fisheries resource and its supporting habitats. This responsibility includes protecting the intrinsic nature of the resource that will contribute to the preservation and enhancement of social, health and economic benefits derived by Canadians from fish habitats and the fisheries resource that those habitats support.

One of the principal tools available to the federal government to ensure sustainable fisheries for Canadians is the *Fisheries Act*. The *Act* provides the legal basis for protecting and conserving fish and fish habitat. Specifically, the habitat protection and pollution prevention provisions of the *Fisheries Act* include sections 20 through 22, 26 through 28, 30, 32, and 34 through 42, and are intended to protect fish and fish habitat from harm caused by physical alteration or pollution (a synopsis of these sections is presented in Annex A). These provisions are an important component of the federal government's overall environmental protection program.

However, laws and regulations are not sufficient in themselves; they must be administered and enforced in a fair, predictable, and consistent manner. Those who administer the laws and those who must comply with them need to understand how the government intends to achieve compliance with the legal requirements. For these reasons, this *Compliance and Enforcement Policy* has been developed for the habitat protection and pollution prevention provisions of the *Fisheries Act*.

The federal Minister of Fisheries and Oceans has the legislative responsibility for the administration and enforcement of the *Fisheries Act*. The Minister reports annually to Parliament on the administration and enforcement of the fish habitat protection and pollution prevention provisions of the *Act*. However, in 1978, the Prime Minister assigned to the Minister of the Environment responsibility for administration and enforcement of the pollution prevention provisions of the *Fisheries Act*, which deal with the deposit of deleterious substances into water frequented by fish. In 1985 a Memorandum of Understanding between the Department of Fisheries and Oceans (DFO) and the Department of the Environment (DOE) was signed, outlining the responsibilities of DFO and DOE for the administration and enforcement of the pollution prevention provisions of the *Fisheries Act*. Therefore, this *Compliance and Enforcement Policy* has been developed jointly by DFO and DOE.

This *Compliance and Enforcement Policy* lays out general principles for application of the habitat protection and pollution prevention provisions of the *Fisheries Act*. The *Policy* explains the role of regulatory officials in promoting, monitoring and enforcing the legislation. It is a national *Policy* which applies to all those who exercise regulatory authority, from Ministers to enforcement personnel.

The *Policy* explains what measures will be used to achieve compliance with the *Fisheries Act* habitat protection and pollution prevention provisions. It sets out principles of fair, predictable, and consistent enforcement that govern application of the law, and responses by enforcement personnel to alleged violations. This *Policy* also tells everyone who shares a responsibility for protection of fish and fish habitat—including governments, industry, organized labour and individuals—what is expected of them.

Within five years of implementing the *Compliance and Enforcement Policy*, DFO and DOE will review the manner in which the *Policy* has been applied by their officials, to determine whether administration and enforcement activities have been consistent with the *Policy* and whether changes in these activities, or in the *Policy*, are required.

This document and its annexes are intended to provide general guidance only. They are not a substitute for the *Fisheries Act*. In the event of an inconsistency between this document and the *Act*, the latter prevails. Individuals with specific legal problems are urged to seek advice from legal counsel.

WHAT ARE COMPLIANCE AND ENFORCEMENT?

The terms “compliance” and “enforcement” are used many times throughout this *Policy*. For purposes of clarity, these terms are defined below.

Compliance means the “state of conformity” with the law. Regulatory officials will secure compliance with the habitat protection and pollution prevention provisions of the *Fisheries Act* through two types of activity: promotion and enforcement.

Measures to promote compliance include:

i) communication and publication of information;

ii) public education;

iii) consultation with parties affected by these provisions of the *Fisheries Act*; and

iv) technical assistance.

Enforcement is achieved through the exercise or application of powers granted under legislation. Enforcement of the habitat protection and pollution prevention provisions is carried out through the following activities:

i) inspections to monitor or verify compliance;

ii) investigations of alleged violations;

iii) issuance of warnings, directions by Fishery Inspectors, authorizations, and Ministerial orders, without resorting to court action; and

iv) court actions, such as injunctions, prosecution, court orders upon conviction, and civil suits for recovery of costs.

GUIDING PRINCIPLES

The following general principles govern application of the habitat protection and pollution prevention provisions of the *Fisheries Act*:

- Compliance with the habitat protection and pollution prevention provisions and their accompanying regulations is mandatory.
- Compliance will be encouraged through communication with parties affected by the habitat protection and pollution prevention provisions.
- Enforcement personnel will administer the provisions and regulations in a manner that is fair, predictable, and consistent. Rules, sanctions and processes securely founded in law will be used.
- Enforcement personnel will administer the provisions and accompanying regulations with an emphasis on preventing harm to fish, fish habitat or human use of fish caused by physical alteration of fish habitat or pollution of waters frequented by fish. Priority for action to deal with suspected violations will be guided by:
    - the degree of harm to fish, fish habitat or human use of fish caused by physical alteration of habitat or pollution of waters frequented by fish, or the risk of that harm; and/or
    - whether or not the alleged offence is a repeat occurrence.
- Enforcement personnel will take action consistent with this *Compliance and Enforcement Policy*.
- The public will be encouraged to report suspected violations of the habitat protection and pollution prevention provisions of the *Fisheries Act*.

JURISDICTION AND RESPONSIBILITIES

Jurisdiction

Under section 91 of the *Constitution Act*, 1867, the federal government has exclusive jurisdiction over the conservation and protection of Canada's sea coast and inland fisheries. The *Fisheries Act*, first passed by Parliament in 1868, is the federal statute promulgated pursuant to this constitutional authority.

The Department of Fisheries and Oceans has primary, and ultimate, responsibility for administration of the *Fisheries Act*, which includes responsibility for administration and enforcement of the provisions dealing with physical alteration of fish habitat. The Department of the Environment has been assigned responsibility for administration and enforcement of the *Fisheries Act* provisions dealing with the deposit of deleterious substances into water frequented by fish through a 1978 Prime Ministerial decision. A 1985 Memorandum of Understanding between DFO and DOE reiterated the responsibilities of both departments and set out mechanisms for information sharing and co-operation.

Provincial, territorial and municipal governments also have powers that can have an impact on fishery resources and fish habitat through their authority to deal with water pollution and land and water use activities (e.g., forestry, mining, agriculture, hydro-electric power developments).

In order to implement the habitat protection and pollution prevention provisions of the *Fisheries Act*, the federal, provincial and territorial governments may co-operate to promote compliance and enforce these provisions. This co-operation may include the designation of enforcement officials of these governments as Fishery Officers or Fishery Inspectors under the *Act*.

Authorities Responsible for Implementing the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act*

Minister of Fisheries and Oceans

The Minister of Fisheries and Oceans is the federal Minister accountable to Parliament for all sections of the *Fisheries Act*. The Minister has responsibility for making regulations under the *Act*; designating Fishery Officers, Fishery Guardians, Fishery Inspectors, and Analysts; exercising the discretionary powers under the *Act*; and issuing Ministerial orders.

Minister of the Environment

As explained above, the Minister of the Environment has the responsibility for administration and enforcement of the pollution prevention provisions of the *Fisheries Act*.

The assignment of administrative and enforcement authority with respect to subsection 36(3) does not include powers to make regulations, to appoint Fishery Officers, Fishery Guardians, Fishery Inspectors and Analysts, or to issue Ministerial orders. These powers rest with the Minister of Fisheries and Oceans.

Interdepartmental and Intergovernmental Co-operation

Administrative and enforcement activity by the Department of Fisheries and Oceans and the Department of the Environment may depend on working arrangements between the two federal departments at the regional level, or between DFO or DOE and a provincial or territorial agency. Those activities may also be governed by administrative agreements signed with provincial and territorial governments by the Minister of Fisheries and Oceans under the Department of Fisheries and *Oceans Act*. Where administrative agreements involve the pollution prevention provisions of the *Fisheries Act*, both the Minister of Fisheries and Oceans and the Minister of the Environment sign the document.

Personnel Who Are Involved in Compliance Promotion

Personnel from the Department of Fisheries and Oceans and the Department of the Environment carry out many activities intended to promote compliance, including developing guidelines and codes of practice and providing technical advice. These personnel may review proposals and referrals for new projects and provide technical advice on how to achieve compliance. They may also provide expert testimony in court to support prosecutions under the *Fisheries Act*.

Habitat Management personnel from DFO, on behalf of the Minister of Fisheries and Oceans, may authorize harmful alteration, disruption or destruction of fish habitat pursuant to subsection 35(2) of the *Act*. Project proposals that may affect fish habitat are received directly from proponents or through various referral processes from other government agencies. Habitat Management personnel review these proposals and provide technical advice on avoiding and/or mitigating potential effects on fish habitat; or where this is impossible and the proposal is nevertheless acceptable, advice on habitat compensation. Their activities are guided by the *Policy for the Management of Fish Habitat* (1986). Its operating (guiding) principle is “no net loss” of the productive capacity of fish habitats.

Enforcement Personnel

Enforcement personnel are individuals designated by the Minister of Fisheries and Oceans under the *Fisheries Act* as Fishery Officers or Fishery Guardians (section 5), or as Fishery Inspectors (section 38).

Powers of Fishery Officers and Fishery Guardians

Subject to limitations of their powers pursuant to subsection 5(1) of the *Fisheries Act*, Fishery Officers and Fishery Guardians are charged with enforcing all of the provisions of the *Fisheries Act*, including the habitat protection and pollution prevention provisions. However, they must exercise their powers in accordance with the requirements of the *Canadian Charter of Rights and Freedoms*. The enforcement powers of Fishery Officers and Fishery Guardians depend on whether they intend to conduct an inspection or a search. The main distinction between inspection and search will be discussed below.

Inspections

Inspection requires that a Fishery Officer or Fishery Guardian must have reasonable grounds to believe that there are activities or things that are subject to the *Act* or are relevant to its administration. In carrying out an inspection, the Fishery Officer or Fishery

Guardian is verifying compliance with the *Act* and is not undertaking a search in order to gather evidence of an alleged offence.

To ensure compliance with the *Act* and regulations, a Fishery Officer or Fishery Guardian may, therefore, enter and inspect any place in which the Fishery Officer or Fishery Guardian believes on reasonable grounds there is any work or undertaking or any fish or other thing to which the *Act* or regulations apply. Activities or things regulated by the *Act* may be in any place including any premises, vessel or vehicle. Entry does not require an inspection warrant. There is one exception. A Fishery Officer or Fishery Guardian may not enter any place, premises, vessel or vehicle that is a dwelling place, unless the occupant has given consent or unless they have obtained an inspection warrant.

To conduct an inspection, a Fishery Officer or Fishery Guardian may:

- open any container;
- examine any fish or other thing and take samples of it;
- conduct any tests or analyses and take any measurements;
- require any person to produce records or documents for examination;
- use or cause to be used any data processing system;
- reproduce or cause to be reproduced any print-out or intelligible output for examination or copying; and
- use or cause to be used any copying equipment.

A Fishery Officer or Fishery Guardian or anyone accompanying them, may enter on and pass through or over private property without being liable for trespass. In addition, a Fishery Officer has the power to authorize another person who may not be accompanying the Fishery Officer, to enter on and pass through or over private property.

Searches

Search requires the belief, on reasonable grounds, that an offence has been committed before a Fishery Officer may enter premises to search for evidence of an alleged offence. The officer may search for any thing that he or she believes on reasonable grounds will provide evidence of a violation of the *Act*, or that was used in connection with the commission of an offence against the *Act*. The Fishery Officer must conduct a search under the authority of a search warrant, except when exigent circumstances make it impracticable to obtain a warrant and, under those circumstances, the officer may enter and search without a search warrant. Under the *Fisheries Act*, exigent circumstances include situations in which the delay necessary to get a search warrant would result in danger to human life or safety or the loss or destruction of evidence.

In conducting a search, a Fishery Officer may exercise any of the powers that are described above under the heading “Inspections”.

Although the *Fisheries Act* does not authorize a Fishery Guardian to conduct searches, a Fishery Guardian may do so pursuant to a search warrant obtained under subsection

487(1) of the *Criminal Code* or without a search warrant pursuant to section 487.11 of the *Code*. A Fishery Guardian may not conduct such searches if the Minister of Fisheries and Oceans imposes limits on the exercise of these powers when designating Fishery Guardians under subsection 5(1) of the *Fisheries Act*. Similarly, the Minister may impose limits on Fishery Officers when designating them.

Seizures

A Fishery Officer or Fishery Guardian may seize any thing that the Fishery Officer or Fishery Guardian believes on reasonable grounds was obtained by or used in connection with the commission of an offence against the *Act* or will afford evidence of an offence under the *Act*. The Fishery Officer or Fishery Guardian may use this power during an inspection or when investigating under the authority of a search warrant or without a search warrant in exigent circumstances. The Fishery Officer or Fishery Guardian may seize evidence in plain view as authorized by subsection 489(2) of the *Code*.

If the Fishery Officer or Fishery Guardian were to enter a place to carry out an inspection without any belief that an offence had occurred, and, during that inspection, came to the belief that there was a violation of the *Fisheries Act*, the Fishery Officer or Fishery Guardian would have three options:

- the Fishery Officer or Fishery Guardian may seize evidence in plain view; or
- if the Fishery Officer or Fishery Guardian wishes to search further and seize items that may not be in plain view, he or she must seek a search warrant; or
- the Fishery Officer or Fishery Guardian may search further and seize such items without a search warrant where there are exigent circumstances and it would be impracticable to obtain a warrant.

Arrests

Under authority of section 50 of the *Fisheries Act*, and subject to the limitations set out in section 495 of the *Criminal Code*, a Fishery Officer or Fishery Guardian may arrest, without warrant, a person who the Fishery Officer or Fishery Guardian believes, on reasonable grounds, has committed an offence against the *Act* or any of its regulations, or whom the Fishery Officer or Fishery Guardian finds committing or preparing to commit an offence against the *Act* or any of its regulations. Fishery Officers and Fishery Guardians are "peace officers" under the *Criminal Code* when performing any of their duties or functions pursuant to the *Fisheries Act* and are authorized in using as much force as is reasonably necessary for that purpose.

Generally, Fishery Officers and Fishery Guardians are employees of the Department of Fisheries and Oceans. The Minister of Fisheries and Oceans may also designate federal, provincial and territorial officials as Fishery Officers or Fishery Guardians.

Duty to Assist

Fishery Officers and Fishery Guardians must be given all reasonable assistance to enable them to carry out inspections and to exercise their inspection powers, and they must also be provided with any information relevant to the administration of the *Fisheries Act* or

the regulations that they may reasonably require. It is an offence not to do so. It is also an offence to obstruct Fishery Officers and Fishery Guardians when they are carrying out their duties or functions under the *Act*, including investigations and searches.

Powers of Fishery Inspectors

Generally, Fishery Inspectors are employees of the Department of Fisheries and Oceans or the Department of the Environment. In some cases, employees of other federal, provincial and territorial governments may also be designated Fishery Inspectors by the Minister of Fisheries and Oceans.

Fishery Inspectors' powers relate specifically to the pollution prevention provisions of the *Fisheries Act*. Fishery Inspectors, like Fishery Officers and Fishery Guardians, must also exercise their powers in accordance with the requirements of the *Canadian Charter of Rights and Freedoms*. The distinction between the terms "inspections" and "searches" that is discussed above under the heading "Powers of Fishery Officers and Fishery Guardians" also applies to the activities of a Fishery Inspector.

Inspections

Fishery Inspectors have the power to enter and inspect any place, premises, vehicle or vessel, except a private dwelling place or any part of any place, premises, vehicle or vessel used as a permanent or temporary private dwelling-place. A Fishery Inspector does not require an inspection warrant to inspect. Unlike the authority given by the *Act* to Fishery Officers and Fishery Guardians, there is no authority for Fishery Inspectors to obtain an inspection warrant to inspect a private dwelling place.

To enter and inspect, a Fishery Inspector must have reasonable grounds to believe that there is an activity resulting, or likely to result, in a deposit of a deleterious substance: (a) in water frequented by fish; or (b) in any place under conditions where the deleterious substance or any other deleterious substance that results from the deposit of that deleterious substance may enter any water frequented by fish.

Fishery Inspectors may conduct inspections, including:

- examining any substance or product;
- taking samples of any substance or product;
- conducting tests; and
- taking measurements.

Searches and Seizures

Fishery Inspectors may enter and search for and seize any thing that the Fishery Inspector believes on reasonable grounds will afford evidence of an offence under the *Act* or was used in connection with the commission of an offence against the *Act*. They must do so under the authority of a search warrant authorized under subsection 38(3.2) of the *Fisheries Act* (search powers) or under subsection 487(1) of the *Criminal Code* (search and seizure powers), unless there are exigent circumstances where it would be

impracticable to obtain a warrant as authorized by subsection 487.11 of the *Code*. The Fishery Inspector may seize evidence in plain view as authorized by subsection 489(2) of the *Code*.

As stated earlier, under the *Fisheries Act*, exigent circumstances include situations in which the delay necessary to obtain the search warrant would result in danger to human life or safety or the loss or destruction of evidence.

A Fishery Inspector may exercise powers of search if that Fishery Inspector believes on reasonable grounds, during an inspection, that an offence has been, is being or is about to be committed.

Arrests

Fishery Inspectors are not authorized to arrest under the pollution prevention provisions of the *Fisheries Act*. Nor are they authorized to arrest under section 495 of the *Criminal Code*, since they are not peace officers.

Reporting and Directions

Anyone who owns, manages or controls a deleterious substance has a duty to report any deposit or danger of deposit out of the normal course of events to a Fishery Inspector or such other person or authority as is prescribed by the regulations.

In the case of deposit of a deleterious substance, or serious and imminent danger of deposit, a Fishery Inspector may take or direct remedial measures. Directions by Fishery Inspectors are further discussed in the chapter entitled “Responses to Alleged Violations”.

Duty to Assist

Fishery Inspectors must be given all reasonable assistance to enable them to carry out their inspection duties and functions, and they must also be provided with such information relevant to the administration of section 38 of the *Fisheries Act* that they may reasonably require. It is an offence not to do so. It is also an offence to obstruct them when they are carrying out their duties or functions under the *Act*, including investigations and searches.

Attorney General of Canada and Officials

Generally, the Attorney General of Canada has responsibility for all litigation relating to the *Fisheries Act*.

While Fishery Officers, Fishery Guardians and Fishery Inspectors may lay charges for alleged offences under the *Act*, the ultimate decision on whether to proceed with prosecution of the charges rests with the Attorney General of Canada. However, in some provinces or territories, provincial or territorial officials that have been designated as Fishery Officers, Fishery Guardians and Fishery Inspectors may refer charges to the provincial or territorial Crown Attorney.

In these cases, responsibility for prosecution rests with the respective provincial or territorial Attorney General. With respect to an application for an injunction or a civil suit for recovery of costs in the various circumstances in which such recovery is allowed under the *Act*, enforcement personnel will recommend these civil actions to officials of the Attorney General. The legal counsel representing the Attorney General has the ultimate decision on proceeding with the injunction or civil suit for cost recovery.

Courts

The courts make the final decision regarding disposition of injunctions, prosecutions and civil suits brought by Her Majesty in Right of Canada, a province or a territory under the habitat protection and pollution prevention provisions of the *Fisheries Act*. They also have authority to impose penalties and/or court orders following the conviction of a *Fisheries Act* offender.

MEASURES TO PROMOTE COMPLIANCE

The Department of Fisheries and Oceans and the Department of the Environment believe that promotion of compliance through information, education and other means is an effective tool in securing conformity with the law. Many of the situations that threaten fish and fish habitat can be avoided by foresight and good planning. It is the responsibility of the proponent to obtain information regarding any proposed activity he or she undertakes which could have an impact on fish or fish habitat.

Accordingly, the departments will undertake public education and communication measures. Consultation will take place with other federal departments and agencies, provinces, the territories, municipal governments, industry, environmental groups, Aboriginal groups and other interested parties, so that information and concerns can be exchanged about the habitat protection and pollution prevention provisions, their accompanying regulations, as well as compliance promotion and enforcement practices (see Annex B for regulations and Annex C for guidelines and codes of practice).

Departmental officials will promote public awareness of this information using a combination of communication techniques, through activities such as:

- interacting formally and informally with industry;
- making presentations to various community groups and schools;
- preparing and distributing habitat protection and pollution prevention guidelines and codes of practice and policies;
- preparing and presenting educational and training materials, including audio-visual materials and films;
- encouraging community projects aimed at habitat protection and improvement;
- promoting stewardship, partnerships, and planning; and
- providing Internet and web site information.

Review of Works or Undertakings/Authorizations

The habitat protection and pollution prevention provisions of the *Fisheries Act* provide authority to issue "authorizations" for activities that would otherwise contravene the requirements of the legislation. In the case of the pollution prevention provision of the *Act* (section 36), authorizations for deposit of deleterious substances are issued only by or pursuant to regulations. Under subsection 35(2) of the *Act*, authorizations may be issued to allow for the harmful alteration, disruption or destruction of fish habitat.

Any person who proposes to carry out any work or undertaking that is likely to result in the harmful alteration, disruption or destruction of fish habitat and who wishes to have the work authorized by the Minister of Fisheries and Oceans under subsection 35(2) of the *Fisheries Act*, must first apply to the Minister. The form (Annex D) set out in Schedule VI of the *Fishery (General) Regulations* must be used for the purposes of requesting an authorization.

An authorization when given under subsection 35(2) of the *Fisheries Act* must be in the form (Annex E) set out in Schedule VII of the *Fishery (General) Regulations*.

Anyone who harmfully alters, disrupts or destroys fish habitat without an authorization is in contravention of the *Fisheries Act*. Anyone who conducts activities inconsistent with the conditions of an authorization is also in contravention of the *Fisheries Act*.

Education and Information

The Department of Fisheries and Oceans and the Department of the Environment will make available various materials related to enforcement and compliance, including:

- the *Fisheries Act* and the accompanying regulations (see Annex B for current general regulations); the *Fisheries Act*, including the pollution prevention and habitat protection provisions, is located on the Internet at: http://www.dfo-mpo.gc.ca/communic/policy/dnload_e.htm
- regulations pursuant to the *Fisheries Act* relevant to pollution prevention, located on the Internet at: http://www.ec.gc.ca/enforce/homepage/pollut/english/lstreg.htm
- the *Policy* for the Management of Fish Habitat, located on the Internet at: http://www.dfo-mpo.gc.ca/habitat/Policy/english/index_e.htm
- the Habitat Conservation and Protection Guidelines;
- the Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat, located at the Internet address for the *Fisheries Act*, and at: http://www.dfo-mpo.gc.ca/habitat/HADD/english/index_e.htm
- technical guidance documentation outlining methodologies on how to meet regulatory monitoring requirements, including Environmental Effects Monitoring (EEM);
- the *Compliance and Enforcement Policy*: http://www.ec.gc.ca/enforce/homepage/english/Fisheries_Act_compliance_e
- the *Annual Reports to Parliament on the Administration and Enforcement of the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act*, located at the Internet address for the *Fisheries Act*;
- information on completed court proceedings related to prosecutions and civil actions
- habitat inventory and planning documents, and
- fact sheets, handbooks, pamphlets and reports on subjects relevant to the habitat protection and pollution prevention provisions and their accompanying regulations.

Promotion of Technology Development and Evaluation

The Department of Fisheries and Oceans and the Department of the Environment will continue to co-operate with other federal departments and agencies, industry, and provincial and territorial governments to promote the development of new technology in Canada for the protection of fish habitat from physical impacts and for pollution prevention and control. The departments will also promote the evaluation of such technology used elsewhere, to facilitate its application to Canadian conditions.

Technology Transfer

The departments will continue to provide to other federal departments, other governments, other bodies and the private sector, technical information on:

- methodologies for fish habitat assessment, analysis, and effectiveness monitoring;
- fish habitat mitigation and compensation techniques;
- fish habitat restoration and development techniques;
- pollution control and abatement; and
- measures to prevent creation of pollution, and releases of deleterious substances into the environment.

The transfer of technology will be carried out through a number of means, including:

- publications, such as scientific and technical reports, and newsletters intended to promote exchange of information between governments and industry nationwide;
- seminars and conferences;
- training materials;
- joint government/private sector research projects;
- sale or licence, to the private sector, of technology developed by the federal government; and
- Internet sites.

Consultation on Regulation Development and Amendment

The federal government believes that more effective regulations are achieved through public consultation on regulatory proposals, particularly with individuals, companies and government agencies who will be subject to the legal requirements. The government also recognizes that compliance with regulations is significantly improved when there has been involvement by those parties in their development or amendment. Accordingly, the Department of Fisheries and Oceans and the Department of the Environment will consult with affected parties during regulation development and amendment.

Guidelines and Codes of Practice

The Department of Fisheries and Oceans will develop guidelines and codes of practice for the habitat protection provisions of the *Fisheries Act* using, where appropriate, a process of consultation with interested parties. Guidelines and codes of practice are designed to:

- provide general information respecting project design, including the construction, operation and abandonment phases of proposed activities or projects. Proponents will be advised in the guidelines and codes to seek specific advice with respect to specific projects; and
- assist the departments in reviewing specific plans for activities or projects with the potential to adversely affect fish or fish habitat.

Current guidelines and codes of practice are available at the DFO and DOE regional offices listed in Annex G.

Promotion of Environmental Audits

Environmental audits are internal evaluations by companies and government agencies, to verify their compliance with legal requirements as well as their own internal policies and standards. They are conducted by companies, government agencies and others on a voluntary basis, and are carried out by either outside consultants or employees of the company or facility from outside the work unit being audited. Audits can identify compliance problems, weaknesses in management systems, or areas of risk. The findings are documented in a written report.

The Department of Fisheries and Oceans and the Department of the Environment recognize the power and effectiveness of environmental audits as a management tool for companies and government agencies, and promote their use by industry and others.

To encourage the practice of environmental auditing, inspections and investigations under the habitat protection and pollution prevention provisions of the *Fisheries Act* will be conducted in a manner which will not inhibit the practice or quality of auditing. Enforcement personnel will not request environmental audit reports during routine inspections to verify compliance with the *Act*.

Access to environmental audit reports may be required when enforcement personnel have reasonable grounds to believe that:

- an offence has been committed;
- the audit's findings will be relevant to the particular violation, necessary to its investigation and required as evidence; and
- the information being sought through the audit cannot be obtained from other sources through the exercise of the powers of enforcement personnel.

In particular reference to the latter criterion, environmental audit reports must not be used to shelter monitoring, compliance or other information that would otherwise be accessible to enforcement personnel under the habitat protection and pollution prevention provisions of the *Act*.

Any demand for access to environmental audit reports during investigations will be made under the authority of a search warrant. The only exception to the use of a search warrant is exigent circumstances.

Compliance Monitoring

Compliance monitoring is conducted to verify that activities governed by the *Fisheries Act* are carried out in accordance with its provisions, regulations, directions by Fishery Inspectors, Ministerial orders and authorization requirements. Enforcement personnel will also verify compliance with injunctions and court orders issued under the *Act*. Compliance monitoring may also measure potentially harmful impacts on the environment associated with suspected violations of the *Act*.

Means to accomplish compliance monitoring include:

- inspections;
- mandatory reporting of information by regulatees in accordance with requirements under the *Act*, and its regulations, or in response to injunctions and court orders;
- sampling by enforcement officials of deleterious substances being deposited and products containing those substances; and
- monitoring of requirements of the *Act* and/or its regulations.

INSPECTION AND INVESTIGATION

Enforcement personnel will carry out two main types of enforcement activity under the habitat protection and pollution prevention provisions of the *Fisheries Act*: inspections and investigations.

Inspections

The purpose of an inspection is to verify compliance. The Department of Fisheries and Oceans and the Department of the Environment will carry out a program of inspections to verify compliance with the habitat protection and pollution prevention provisions of the *Fisheries Act*, related regulations and authorizations issued pursuant to those regulations, and authorizations issued pursuant to subsection 35(2).

The inspection program will be prioritized based on compliance history and the risk to fishery resources. Compliance with new regulations may also become an inspection priority. Inspection schedules are established to verify adherence to regulations, warnings, directions and orders by the Minister of Fisheries and Oceans, injunctions, and court orders upon conviction of an offender.

When information or complaints are brought to the attention of enforcement personnel, additional inspections will be carried out as required. In addition, the departments may develop special inspection schedules when companies or facilities undertake expansion or alteration of a process, or temporarily or permanently shut down.

Investigation

The purpose of an investigation is to gather evidence of a suspected violation. A Fishery Officer, Fishery Guardian or Fishery Inspector will conduct an investigation either:

- when there is suspicion that a violation has occurred; or
- when there are reasonable grounds to believe that an offence is being or has been committed.

In carrying out investigations, enforcement personnel are limited by the powers of search, seizure and arrest as set out in the *Act* and the *Criminal Code*.

RESPONSES TO ALLEGED VIOLATIONS

Enforcement measures are directed towards ensuring that violators comply with the *Fisheries Act* within the shortest possible time and that violations are not repeated.

Enforcement personnel will respond to suspected violations. They will take into account the harm or risk of harm to fish, fish habitat and/or human use of fish. If they determine that there is sufficient evidence a violation has occurred, they may take enforcement action.

Criteria for Responses to Alleged Violations

If enforcement personnel are able to substantiate that an alleged violation of the habitat protection or pollution prevention provisions of the *Act* has occurred and there is sufficient evidence to proceed, they will decide on an appropriate action, applying the criteria outlined below.

Nature of the Alleged Violation

Factors considered in assessing the nature of an alleged violation will include:

- the seriousness of the damage or potential damage to fish habitat, the fishery resource, or the risks associated with the human use of fish;
- the intent of the alleged violator;
- whether it is a repeated occurrence; and
- whether there were attempts by the alleged violator to conceal information or otherwise circumvent the objectives and requirements of the habitat protection and pollution prevention provisions.

Effectiveness in Achieving the Desired Result with the Alleged Violator

The desired result is compliance with the *Act* in the shortest possible time and with no further occurrence of violations, in order to protect fish and fish habitat and human use of fish. Factors to be considered include:

- the alleged violator's history of compliance with the habitat protection and/or pollution prevention provisions;
- the alleged violator's willingness to co-operate with enforcement personnel;
- evidence and extent of corrective action already taken; and
- the existence of enforcement actions by other federal or provincial/territorial authorities.

Consistency in Enforcement

Enforcement personnel aim to achieve consistency in their responses to alleged violations. Accordingly, they will consider how similar situations in Canada are being or have been handled when deciding what enforcement action to take.

Range of Responses to Alleged Violations

The following responses are available to deal with alleged violations of the habitat protection and pollution prevention provisions of the *Fisheries Act*:

- warnings;
- directions by Fishery Inspectors;
- orders by the Minister;
- injunctions; and
- prosecutions.

Warnings

Enforcement personnel may use warnings:

- when they have reasonable grounds to believe that a violation of the *Act* has occurred;
- where the degree of harm or potential harm to the fishery resource, its supporting habitat or to human use of fish appears to be minimal; and
- where the alleged violator has made reasonable efforts to remedy or mitigate the negative impact of the alleged offences on the fishery resource and its habitat.

In deciding whether to use warnings or another enforcement response, enforcement personnel may also consider:

- whether reasonable efforts have been taken to remedy or mitigate the negative consequences of the alleged offence or further offences;
- whether the alleged violator has a good history of compliance with the habitat protection and/or the pollution prevention provisions of the *Fisheries Act*; and
- whether sufficient action has been taken to ensure that future offences are not committed.

Warnings will be confirmed in writing and will contain the following information:

- the section of the *Act* or regulations involved;
- a description of the alleged offence; and
- a statement that, if the alleged violator does not take necessary action, enforcement personnel will consider taking other steps.

When enforcement officers use a warning, it brings an alleged violation to the attention of an alleged violator, in order to promote any necessary action by the recipient. Warnings do not have the legal force of an order. Furthermore, they are not a finding of guilt, civil liability or an administrative decision. Warnings and the circumstances to which they refer will form part of the records of either the Department of Fisheries and Oceans or the Department of the Environment, whichever department carried out the investigation. In addition, warnings will be taken into account in future responses to alleged violations, and may influence the frequency of inspection.

When an alleged violator receives a warning, they may wish to provide written comments to the Fishery Inspector, Fishery Officer or Fishery Guardian who signed the warning. These comments

will be placed in the compliance history file of the alleged violator, along with the warning. The comments will be taken into consideration by enforcement personnel and, where appropriate, a response will be provided.

Directions by Fishery Inspectors

Where there is a deposit of a deleterious substance out of the normal course of events to waters frequented by fish, or where there is serious and imminent danger of such an incident and immediate action is necessary, enforcement personnel who are appointed as Fishery Inspectors under the *Fisheries Act* may issue directions regarding remedial or preventative action to be taken by the alleged offender:

- who owns the deleterious substance;
- who has or had charge, management or control of the substance at the relevant time; or
- who caused or contributed to the deposit or the danger thereof.

Fishery Inspectors may issue a direction where immediate action is necessary to counteract adverse effects of a deposit of a deleterious substance or to prevent a serious and imminent deposit of a deleterious substance. The direction may require the person to take all reasonable measures, consistent with safety and the conservation of fish and fish habitat:

- to counteract, mitigate or remedy any adverse effects that result or may result from the incident; or
- to prevent a serious and imminent deposit of a deleterious substance out of the normal course of events.

As the *Fisheries Act* already imposes on persons the obligation to take such measures, a Fishery Inspector will not ordinarily issue such directions unless the obligation is not being met. The directions will be given in writing; however, during the initial response to a situation out of the normal course of events, directions may be given orally and later confirmed in writing.

Failure to comply with a direction by a Fishery Inspector may lead to prosecution of the individual, company, or government agency for such failure. Also, in the event of failure or inability to comply with a direction by a Fishery Inspector, the Fishery Inspector is empowered under the *Act* to take remedial measures.

Order by the Minister of Fisheries and Oceans

Under subsection 37(1) of the *Fisheries Act* the Minister of Fisheries and Oceans, or designate, may request plans, specifications, studies, procedures, schedules, analyses, samples or other information concerning any work or undertaking to enable the Minister to determine whether the work or undertaking results, or is likely to result, in harm to fish habitat or a deposit of a deleterious substance that constitutes or would constitute an offence under the *Act*. Failure to respond to the request within a reasonable time or within the date specified by the Minister may lead to prosecution.

If the Minister of Fisheries and Oceans, after examining information received under subsection 37(1), is of the opinion that an offence under the habitat protection and pollution prevention

provisions is being or is likely to be committed, the Minister, with the approval of the Governor in Council or if authorized by the regulations, may issue orders:

- requiring modifications of or additions to a work or undertaking or modifications to specifications, procedures or schedules related to the work or undertaking;
- restricting the operation of the work or undertaking; or
- only with the approval of the Governor in Council, closing the work or undertaking for a stipulated period of time.

The purpose of such orders under subsection 37(2) of the *Fisheries Act* is to prevent the occurrence or repetition of a violation of the habitat protection and pollution prevention provisions of the *Fisheries Act*. The Minister may resort to these types of orders where a violation of the habitat protection and pollution prevention provisions has occurred or seems likely to occur.

Failure to comply with an order may result in prosecution.

An order to close an operation will normally be used only where an order to modify or alter would not achieve compliance and prevent harm to the fish, or fish habitat, or both.

Ministerial orders may be used in conjunction with prosecutions. If the Minister, when issuing the order, has reasonable grounds to believe that a violation has, in fact, taken place, and if the offence giving rise to the order meets the criteria for prosecution listed below, initiation of prosecution proceedings will be recommended to the Attorney General.

Injunctions

The Attorney General has the authority to seek from the court an injunction in order to stop an alleged violation of the habitat protection and pollution prevention provisions of the *Fisheries Act*. Enforcement personnel will recommend injunctive action where continuation of the activity that is alleged to be a violation of the *Fisheries Act* constitutes a significant and immediate threat to fish or fish habitat, including when:

- a direction by a Fishery Inspector is not followed or is judged not to be suitable;
- an order by the Minister of Fisheries and Oceans will not address the problem in a timely fashion; or
- an order issued by the Minister is not being complied with.

In addition to seeking an injunction, the Crown may initiate:

- prosecution; or
- civil action for recovery of costs where the government was required to take action due to the failure of an alleged violator to comply with a direction issued under the habitat protection or pollution prevention provisions.

Inspections will be carried out to ensure that the alleged violator subject to the injunction is complying with its terms. If the party does not comply with the injunction, the Attorney General may apply to the court for enforcement of those terms.

Prosecution

Prosecution is the preferred course of action where evidence establishes that:

- the alleged violation resulted in risk of harm to fish or fish habitat;
- the alleged violation resulted in harmful alteration, disruption or destruction of fish habitat (not authorized by the Minister of Fisheries and Oceans);
- the alleged violator had previously received a warning for the activity and did not take all reasonable measures to stop or avoid the violation;
- the alleged violator had previously been convicted of a similar offence.

Enforcement personnel will examine each case to determine whether a warning, a direction by a Fishery Inspector, Ministerial order or injunction is the appropriate alternative to prosecution. Prosecution may still be the enforcement action chosen, in accordance with the criteria set out in "Responses to Alleged Violations", above.

Prosecution will always be pursued where evidence establishes that:

- there is evidence that the alleged violation was deliberate;
- the alleged violator knowingly provided false or misleading information to enforcement personnel;
- the alleged violator obstructed enforcement personnel in the carrying out of their duties or interfered with anything seized under the *Act*;
- the alleged violator concealed or attempted to conceal or destroy information or evidence after the alleged offence occurred; or
- the alleged violator failed to take all reasonable measures to comply with a direction or an order issued pursuant to the *Act*.

It is the role of the Attorney General to approve prosecutions based on evidentiary and public interest considerations. Alleged offences under the *Fisheries Act* can be prosecuted either by summary conviction or by indictment. The Crown prosecutor has the prerogative to select the type of prosecution after examining the facts and evidence of the case, and may take into account any recommendation by a Fishery Officer, Fishery Guardian or Fishery Inspector.

The onus is on everyone to be aware of the responsibilities concerning pollution prevention and protection of fish habitat. Information on these legal responsibilities is available from the Department of Fisheries and Oceans and the Department of the Environment through regional offices (listed in Annex G).

To secure a finding of guilt for an alleged violation of the habitat protection and pollution prevention provisions of the *Fisheries Act* or of regulations made under them, the Crown prosecutor must prove the accused guilty beyond a reasonable doubt. The prosecutor does not have to prove that the accused intended to violate the law. It is open to the accused to avoid a finding of guilt by establishing, on a balance of probabilities, that:

- they exercised all due diligence to prevent commission of the offence; or

- they reasonably and honestly believed in the existence of facts that, if true, would render their conduct innocent.

Summary proceedings under the *Fisheries Act* may be instituted at any time within two years after the time when the subject matter of the proceedings came to the attention of the Minister of Fisheries and Oceans. Enforcement personnel will bring any charges in as short a time as possible, having regard to the need for proper substantiation of the alleged violation and gathering of sufficient and appropriate evidence.

There are no such time limits when legal proceedings are initiated by way of indictment.

PENALTIES AND COURT ORDERS UPON CONVICTION

Fines and court orders may be imposed by a court upon conviction for offences under the habitat protection and pollution prevention provisions of the *Fisheries Act* (Annex F lists penalties for convictions under the *Fisheries Act*).

Recommendations for Sentencing

Upon conviction, enforcement personnel will recommend that Crown prosecutors request penalties that are proportionate to the nature and gravity of the offence. In preparing their recommendations, enforcement personnel will take into account:

- the nature of the violation and the benefit gained as a result;
- the number and nature of previous convictions by the offender;
- the effectiveness of the recommended penalty in deterring the violator from committing similar violations and ensuring compliance with the statute (specific deterrence);
- the prevalence of the same type of violation generally and any trends in the frequency of occurrence;
- sentencing precedents set by other courts in similar cases;
- the effectiveness of the recommended penalty in remediating the area of negative impact; and
- the effectiveness of the recommended penalty in addressing future protection of habitat, conservation of fish and fish habitat, and pollution prevention issues.

Use of Court Order upon Conviction

Upon conviction of an offender, enforcement personnel will recommend that the Crown request the court to impose an order under section 79.2 of the *Fisheries Act*. Under this section, a court may impose an order to achieve one or more of the following:

(a) prohibit the person from doing any act or engaging in any activity that may result in the continuation or repetition of the offence;

(b) direct the person to take action to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;

(c) direct the person to publish in a manner acceptable to the court facts relating to the commission of the offence;

(d) direct the person to compensate the Minister for the costs of remedial or preventive actions;

(e) direct the person to perform community service;

(f) direct the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of conservation and protection of fish or fish habitat;

(g) direct the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement;

(h) direct the person to submit to the Minister on application, within three years after the date of conviction, any information respecting the activities of the person in question that the court considers appropriate in the circumstances; and

(i) require the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences.

Section 79.6 provides for penalties for non-compliance with a court order by a violator who fails to carry out all of the requirements of an order made pursuant to sections 79.2 or 79.3 of the *Fisheries Act*. Alternatively, a violator may be found in contempt of court. Contempt of court is a procedure by which the courts enforce compliance with their orders.

Courts can defer sentencing and allow a person convicted of an offence to restore a site to the specifications of regulatory authorities. This co-operation and the value of the work in restoring lost habitat can then be considered as a mitigating factor in sentencing proceedings.

CIVIL SUIT BY THE CROWN TO RECOVER COSTS

The *Fisheries Act*, section 42, allows the federal or a provincial or territorial government to recover costs by civil suit when those costs are incurred by the government (or by a provincial or territorial government) to prevent or correct harm caused to fish or to a fish habitat where there is an unauthorized deposit or serious and imminent danger of a deposit of a deleterious substance. It is possible to recover costs even in the absence of a prosecution or where a prosecution does not result in a conviction.

The federal government may also sue to recover costs (subsection 21(2)) incurred to construct, maintain, and operate fishways and canals.

The defendant in these cases could be the alleged violator who or that:

- owned or had charge or control of a deleterious substance immediately prior to its unauthorized deposit;
- caused or contributed to the deposit or the danger thereof; or
- obstructed a stream, or failed to take corrective action (including installation and maintenance of fishways, canals, or hatcheries) as ordered by the Minister of Fisheries and Oceans.

The Crown will attempt to obtain recovery of costs through negotiation with those responsible. In the event that negotiation is unsuccessful, the Crown will initiate or proceed with civil action under the *Fisheries Act*. The time limit imposed for the initiation of civil proceedings by the Crown to recover costs is at any time within two years after the occurrence for which recovery of the costs for preventive or corrective measures could reasonably be expected to have become known to the Crown.

ANNEX A

THE HABITAT PROTECTION AND POLLUTION PREVENTION PROVISIONS OF THE *FISHERIES ACT*

Application

The *Fisheries Act* applies to "persons" who may be individuals or companies. It also applies to federal, territorial, and provincial government departments and agencies and their employees.

The following are brief descriptions of the habitat protection and pollution prevention provisions of the *Fisheries Act*. **This overview is not an official version of the law**.

Section 20 – Ensures safe passage for fish around obstructions to fish migration.
- Minister may require a fishway be constructed and maintained, and that adequate flows are provided to ensure fish passage.
- Where a fishway is not feasible, the Minister may require that a fish hatchery be established.

Section 21 – Where a fishway is constructed around obstructions to migration, the Minister may authorize payment of one half of the construction costs.
- The Minister of Fisheries and Oceans may construct a fishway and recover costs.

Section 22 – Ensures that water flows below water-control structures are maintained at a level that protects fisheries.
- The Minister may remove or destroy an obstruction to fish passage and recover costs.
- The Minister may require fish stops or diverters to be installed above and below an obstruction.
- Flows downstream of a dam, control structure or obstruction must be approved.

Section 26 – Requires that at least one third of a river or stream width is left unobstructed for fish passage.
- Minister may authorize the placement and maintenance of barriers, screens or other obstructions in streams to prevent the escape of fish.

Section 27 – Prohibits the damage or obstruction of fishways, the impediment of fish to fishways and fishing near the downstream entrance to a fishway.

Section 28 – Prohibits the use of explosives to hunt or kill fish.

Section 30 – Water diversions or intakes may require a fish guard or screen to prevent the entrapment of fish.
- Fish guards or screens must be approved by the Minister.

Section 32 – Prohibits the destruction of fish by means other than fishing without prior approval.
– This section is used to regulate the use of explosives in construction and seismic operations.

Section 34 – Definitions of deleterious substance, deposit, fish habitat, water frequented by fish, and regulations.

Section 35 – Prohibits works or undertakings that result in the harmful alteration, disruption or destruction of fish habitat, unless authorized by the Minister or under regulations made by the Governor in Council (there are currently no regulations).
– This is the most frequently applied habitat protection provision of the *Act*, as it applies to most projects that have the potential to negatively affect fish habitat.

Section 36 – Prohibits the deposit of deleterious substances into waters frequented by fish unless authorized under regulations made by the Governor in Council.
– Provides for the Governor in Council to make regulations regarding the deposit of deleterious substances.
– The Minister may direct a person authorized to deposit a deleterious substance to conduct sampling, analyses, tests, measurements or monitoring that are required to determine if the deposits are being undertaken in the manner authorized.

Section 37 – Provides the authority to request plans and specifications for works or undertakings that have the potential to negatively affect fish and/or fish habitat.
– Subsection 37(2) provides the authority to order certain changes or restrictions or to close a work or undertaking with Governor in Council approval.

Section 38 – Minister may designate Fishery Inspectors and Analysts.
– Remainder of the section describes the power of Fishery Inspectors to carry out inspections and lists examples of activities that may comprise an inspection.

Section 40 – Specifies the fines and penalties for contravening sections 35, 36 and 37.

Section 42 – Describes the civil liability to Her Majesty and to fishers where a deposit of a deleterious substance occurs that is not authorized under section 36.

Sections 66, 69 and 78 – Describe offences and punishments under the *Act*.

Section 79 – Describes additional fines, other penalties and court orders under the *Act*.

ANNEX B

FISHERIES ACT REGULATIONS

1. Pulp and Paper

- Pulp and Paper Effluent Regulations, May 20, 1992
- Port Alberni Pulp and Paper Effluent Regulations, July 25, 1992

2. Chlor-Alkali Mercury

- Chlor-Alkali Mercury Liquid Effluent Regulations, published 1972, amended 1977, republished 1978 C.R.C. c.811

3. Petroleum Refineries

- Petroleum Refinery Liquid Effluent Regulations, published 1973, republished 1978 C.R.C. c.828

4. Metal Mining

- Metal Mining Liquid Effluent Regulations, published 1977, republished 1978 C.R.C. c.819
- Alice Arm Tailings Deposit Regulations, April 10, 1979

5. Meat and Poultry Products Plants

- Meat and Poultry Plant Liquid Effluent Regulations, published 1977, republished 1978 C.R.C. c.818

6. Potato Processing Plants

- Potato Processing Plant Liquid Effluent Regulations, published 1977, republished 1978 C.R.C. c.829

ANNEX C

GUIDELINES AND CODES OF PRACTICE RESPECTING THE HABITAT PROTECTION AND POLLUTION PREVENTION PROVISIONS OF THE *FISHERIES ACT*

Guidelines and Codes of Practice are available on various issues, at regional DFO and DOE offices listed in Annex G.

ANNEX D

APPLICATION FOR AUTHORIZATION FOR WORKS OR UNDERTAKINGS AFFECTING FISH HABITAT

See Schedule VI of the *Fishery (General) Regulations*.

Application Form to Harmfully Alter, Disrupt or Destroy Fish Habitat

SCHEDULE VI / ANNEXE VI
(Subsection 58(1)/paragraphe 58(1))

Fisheries and Oceans Canada / Pêches et Océans Canada

Application No./N° de la demande _____

APPLICATION FOR AUTHORIZATION FOR WORKS OR UNDERTAKINGS AFFECTING FISH HABITAT
DEMANDE D'AUTORISATION POUR DES OUVRAGES OU ENTREPRISES MODIFIANT L'HABITAT DU POISSON

I, the undersigned, hereby request authorization to carry out the works or undertakings described on this application form. I understand that the approval of this application, if granted, is from the Minister of Fisheries and Oceans' standpoint only and does not release me from my obligation to obtain permission from other concerned regulatory agencies.

If an authorization is granted as a result of this application, I hereby agree to carry out all activities relating to the project within the designated time frames and conditions specified in the authorization.

Je soussigné, demande par les présentes l'autorisation d'exploiter les ouvrages ou entreprises décrits dans la formule. Je comprends que l'approbation de cette demande, le cas échéant, porte sur ce qui relève du ministre des Pêches et des Océans et ne me dispense pas d'obtenir la permission d'autres organismes réglementaires concernés.

Si la demande est approuvée, je consens par les présentes à exécuter tous les travaux relatifs à ce projet selon les modalités et dans le laps de temps prescrits dans l'autorisation.

Applicant's Name (please print) _____ Nom du requérant (lettres moulées)

Applicant's Business Address _____ Adresse d'affaires du requérant

_____

_____

Applicant's Telephone No./ N° de téléphone du requérant _____ Date _____

I solemnly declare that the information provided and facts set out in this application are true, complete and correct, and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath. This declaration applies to all material submitted as part of this application.

Je déclare solennellement que les renseignements fournis et les faits énoncés dans cette demande sont véridiques, complets et exacts, et je fais cette déclaration solennelle, la croyant consciencieusement vraie et sachant qu'elle a la même force et le même effet que si elle était faite sous serment. Cette déclaration s'applique à tout document qui est présenté dans le cadre de cette demande.

_____ _____

Applicant's Signature (and corporate seal) Signature du requérant (et sceau de la société)

Name of watercourse or waterbody (give coordinates)
Cours d'eau ou plan d'eau (donner les coordonnées) _____

This watercourse is a tributary of (where applicable)
Cours d'eau tributaire de (le cas échéant) _____

Nearest community / Localité la plus proche

County / Comté

Province / Province

_____ _____

SCHEDULE VI – *Continued* / ANNEXE VI *(suite)*
(Subsection 58(1)/paragraphe 58(1))

Fisheries and Oceans Canada / Pêches et Océans Canada

Application No./N° de la demande

APPLICATION FOR AUTHORIZATION FOR WORKS OR UNDERTAKINGS AFFECTING FISH HABITAT
DEMANDE D'AUTORISATION POUR DES OUVRAGES OU ENTREPRISES MODIFIANT L'HABITAT DU POISSON

Type of Activity/Genre d'activité

[ ] Bridge Pont	[ ] Stream Realignment Alignement de cours d'eau	[ ] Gravel Removal Enlèvement du gravier	[ ] Stream Traverse Traversée de cours d'eau
[ ] Culvert Ponceau	[ ] Channelization Canalisation	[ ] Obstruction Removal - Bypass Enlèvement ou contournement d'obstacle	[ ] Seismic Survey Levé sismique
[ ] Dam Barrage	[ ] Wharf - Breakwater Quai - Brise-lames	[ ] Stream Utilization - Recreation Utilisation récréative du cours d'eau	[ ] Agriculture
[ ] Stream Diversion Dérivation de cours d'eau	[ ] Dewatering Assèchement	[ ] Erosion Control Lutte contre l'érosion	[ ] Other (specify) Autres (préciser)
[ ] Mining Activité minière	[ ] Aquaculture	[ ] Flood Protection Protection contre les inondations	

List of agencies (federal, provincial or municipal) contacted or notified, or who have initiated contact with the applicant.
Liste des organismes (fédéraux, provinciaux ou municipaux) contactés ou qui ont pris contact avec le requérant.

PROVIDE DETAILS OF PROPOSED ACTIVITY, INCLUDING REASONS FOR THE PROJECT AND TYPES OF EQUIPMENT TO BE USED
DONNER DES PRÉCISIONS SUR LES TRAVAUX PROJETÉS Y COMPRIS LA JUSTIFICATION DU PROJET ET LE TYPE D'ÉQUIPEMENT À UTILISER

SCHEDULE VI *Continued* / ANNEXE VI *(suite)*
(Subsection 58(1)/paragraphe 58(1))

Fisheries and Oceans Canada / Pêches et Océans Canada

Application No./N° de la demande

APPLICATION FOR AUTHORIZATION FOR WORKS OR UNDERTAKINGS AFFECTING FISH HABITAT
DEMANDE D'AUTORISATION POUR DES OUVRAGES OU ENTREPRISES MODIFIANT L'HABITAT DU POISSON

SCHEDULE/CALENDRIER

	D/J	M/M	Y/A
Proposed Starting Date Date prévue du début des travaux	_____	_____	_____
Proposed Completion Date Date prévue de l'achèvement des travaux	_____	_____	_____

Approximate Timing of Work in shoreline, foreshore, tidal zone, or underwater areas.
Période approximative des travaux sur le rivage et les estrans ainsi que dans les zones à marées et les zones sous-marines.

	D/J	M/M	Y/A		D/J	M/M	Y/A
From/De	_____	_____	_____	To/A	_____	_____	_____

The following documents will assist in assessing your application and help expedite its approval. Please check which documents you have attached.	**Les documents suivants faciliteront l'évaluation de votre demande et permettront d'accélérer son approbation. Veuillez cochez les documents vous avez joints à votre demande.**
Map Indicating Location of Project	[ ] Carte indiquant l'emplacement du projet
Engineering Specifications	[ ] Spécifications techniques
Scale Drawings	[ ] Dessins à l'échelle
Dimensional Drawings	[ ] Plans cotés
Assessment of Existing Fish Habitat Characteristics	[ ] Évaluation des caractéristiques existantes de l'habitat du poisson
Assessment of Potential Effects of Project on Fish Habitat	[ ] Évaluation des répercussions possibles sur l'habitat du poisson
Measures Proposed to Offset Potential Damage to Fish Habitat	[ ] Mesures proposées pour compenser les éventuels dommages à l'habitat du poisson
Other	[ ] Autres

ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS CONSIDERATIONS	**CONSIDÉRATIONS CONCERNANT LE PROCESSUS D'ÉVALUATION ET D'EXAMEN EN MATIÈRE D'ENVIRONNEMENT**
NOTE: All applications pursuant to section 35 of the *Fisheries Act* will be assessed in accordance with applicable federal environmental assessment requirements	REMARQUE : Toute demande en vertu l'article 35 de la *Loi sur les pêches* sera soumise aux exigences fédérales applicables à l'évaluation environnementale.

SCHEDULE VI – *Continued* / ANNEXE VI *(suite)*
(Subsection 58(1)/paragraphe 58(1))

Fisheries and Oceans Canada / Pêches et Océans Canada

Application No./N° de la demande

APPLICATION FOR AUTHORIZATION FOR WORKS OR UNDERTAKINGS AFFECTING FISH HABITAT
DEMANDE D'AUTORISATION POUR DES OUVRAGES OU ENTREPRISES MODIFIANT L'HABITAT DU POISSON

COMPLETE ONLY IF USE OF EXPLOSIVES IS INTENDED
A REMPLIR SEULEMENT EN CAS D'UTILISATION D'EXPLOSIFS

EXPLOSIVES CONTRACTOR (IF DIFFERENT FROM APPLICANT)/RESPONSABLE DES EXPLOSIFS (SI AUTRE QUE LE REQUÉRANT)

Name/Nom : _____

Address/Adresse : _____

_____

Telephone No./N° de téléphone : _____

	D/J	M/M	Y/A		D/J	M/M	Y/Y
Anticipated Starting Date Date prévue du début des travaux				Completion Date Date d'achèvement			

DETAILS OF EXPLOSIVES/PRÉCISIONS SUR LES EXPLOSIFS

Type (including trade name)
Genre (y compris la marque _____

_____

Weight and configuration (where applicable)
Poids et forme (le cas échéant) _____

_____

Weight of individual shots and shot pattern where multiple charges are used
Poids des coups individuels et déploiement des coups, en cas de charges multiples _____

_____

_____

Detonation depth (in the rock; note also the depth of water, if applicable)
Profondeur de détonation (dans le roc; indiquer aussi, la profondeur de l'eau, s'il y a lieu) _____

_____

Method of detonation
Méthode de détonation _____

_____

_____

ANNEX E

AUTHORIZATION FOR WORKS OR UNDERTAKINGS AFFECTING FISH HABITAT

See Schedule VII of the *Fishery (General) Regulations*.

Authorization for the Harmful Alteration, Disruption or Destruction of Fish Habitat

SCHEDULE VII / ANNEXE VII
(Subsection 58(2)/paragraphe 58(2))

Fisheries and Oceans Canada / Pêches et Océans Canada

Authorization No./N° de l'autorisation

AUTHORIZATION FOR WORKS OR UNDERTAKINGS AFFECTING FISH HABITAT
AUTORISATION POUR DES OUVRAGES OU ENTREPRISES MODIFIANT L'HABITAT DU POISSON

Authorization issued to:
Autorisation délivrée à :

Name: _____ Nom _____

Address: _____ Adresse : _____

Telephone No.: _____ N° de Téléphone : _____

Location of Project/Emplacement du projet

_____

_____

Valid Authorization Period/Période de validité de l'autorisation

From/De D/J _____ M/M _____ Y/A _____ To/A D/J _____ M/M _____ Y/A _____

Description of Works or Undertakings (Type of Work, Schedule, etc.)
Description des ouvrages ou entreprises (Genre de travail, calendrier, etc.)

_____

_____

_____

_____

_____

_____

Conditions of Authorization/Conditions de l'autorisation

_____

_____

_____

_____

_____

_____

_____

Authorization for the Harmful Alteration, Disruption or Destruction of Fish Habitat (cont'd)

SCHEDULE VII – *Continued* / ANNEXE VII*(suite)*
(*Subsection 58(2)/paragraphe 58(2)*)

Fisheries and Oceans Canada / Pêches et Océans Canada

Authorization No./N° de l'autorisation

AUTHORIZATION FOR WORKS OR UNDERTAKINGS AFFECTING FISH HABITAT
AUTORISATION POUR DES OUVRAGES OU ENTREPRISES MODIFIANT L'HABITAT DU POISSON

Conditions of Authorization *(continued)*/Conditions de l'autorisation *(suite)*

The holder of this authorization is hereby authorized under the authority of section 35(2) of the *Fisheries Act*, R.S.C., 1985, c. F-14, to carry out the work or undertaking described herein.

This authorization is valid only with respect to fish habitat and for no other purposes. It does not purport to release the applicant from any obligation to obtain permission from or to comply with the requirements of any other regulatory agencies.

Failure to comply with any condition of this authorization may result in charges being laid under the *Fisheries Act*.

This authorization form should be held on site and work crews should be made familiar with the conditions attached.

Le détenteur de la présente est autorisé en vertu du paragraphe 35(2) de la *Loi sur les pêches*, L.R.C. 1985, ch. F-14, à exploiter les ouvrages ou entreprises décrits aux présentes.

L'autorisation n'est valide qu'en ce qui concerne l'habitat du poisson et pour aucune autre fin. Elle ne dispense pas le requérant de l'obligation d'obtenir la permission d'autres organismes réglementaires concernés ou de se conformer à leurs exigences.

En vertu de la *Loi sur les pêches*, des accusations pourront être portées contre ceux qui ne respectent pas les conditions prévues dans la présente autorisation.

Cette autorisation doit être conservée sur les lieux des travaux, et les équipes de travail devraient en connaître les conditions.

Date of issuance _____ Date de délivrance _____

Approved by _____ Approuvée par _____

Title _____ Titre _____

ANNEX F

FINES AND SENTENCES FOR OFFENCES UNDER THE HABITAT PROTECTION AND POLLUTION PREVENTION PROVISIONS OF THE *FISHERIES ACT*

Violation of sections 35 and 36

Summary Conviction— Every person who contravenes subsection 35(1), 36(1) or 36(3) and is guilty of an offence punishable on summary conviction is liable, for a first offence, to a fine to a maximum of $300,000, and for any subsequent offence to a fine up to a maximum of $300,000 and/or imprisonment up to six months.

Indictable Offence—Every person who contravenes subsection 35(1), 36(1) or 36(3) and is guilty of an indictable offence is liable, for a first offence, to a fine to a maximum of one million dollars and, for any subsequent offence, to a fine up to one million dollars and/or imprisonment up to three years.

Other Violations

Under subsection 40(3), the following offences are punishable on summary conviction for a first offence by a fine not exceeding $200,000 and for subsequent offences by a fine not exceeding $200,000 and/or imprisonment up to six months:

- failure to provide plans pursuant to subsection 37(1);
- failure to provide information required under regulations pursuant to subsection 37(3);
- failure to report a deposit of a deleterious substance pursuant to subsection 38(4);
- failure to carry out work in accordance with plans, specifications, orders, etc. pursuant to section 37;
- failure to take reasonable measures required to prevent or mitigate the deposit of a deleterious substance under subsection 38(5); and
- failure to comply with the directions of a Fishery Inspector pursuant to subsection 38(6).

Under section 66, every owner or occupier of an obstruction across or in any stream who refuses or neglects to provide and maintain a fishway or canal in accordance with section 20, to install and maintain fish stops or diverters in accordance with subsection 21(4) or to provide for a sufficient flow of water and the free passage of fish in accordance with section 22 is guilty of an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding $200,000 and, for any subsequent offence, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding six months, or to both.

Under section 69, every owner or occupier of a water intake, ditch, channel or canal referred to in subsection 30(1) who refuses or neglects to provide and maintain a fish guard, screen, covering or netting in accordance with subsections 30(1) to (3), permits the removal of a fish guard, screen, covering or netting in contravention of subsection 30(3) or refuses or neglects to close a sluice or gate in accordance with subsection 30(4) is guilty of an offence punishable on summary

conviction and liable, for a first offence, to a fine not exceeding $200,000 and, for any subsequent offence, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding six months, or to both.

Section 78 of the *Act* specifies that except as otherwise provided for in the *Act* offenders are guilty of an offence, punishable on summary conviction and liable for a first offence, to a fine not exceeding $100,000 and for subsequent offences to a fine not exceeding $100,000 and/or imprisonment for up to one year; or guilty of an indictable offence, and liable for a first offence, to a fine not exceeding $500,000 and, for any subsequent offence, to a fine not exceeding $500,000 and/or to imprisonment for a term up to two years.

Under section 79.6, a person convicted of an offence under the *Act* who subsequently contravenes court orders made under sections 79.2 or 79.3 is guilty of an offence punishable on summary conviction and liable to a punishment not exceeding the maximum punishment to which a person is liable on summary conviction for the original offence, or in the case of an indictable offence, liable to a punishment not exceeding the maximum punishment to which a person is liable on conviction by way of indictment for the original offence.

ANNEX G

FOR INFORMATION

Anyone who has questions about this *Compliance and Enforcement Policy* or who wishes further information about enforcement or compliance promotion procedures or guidelines under the habitat protection and pollution prevention provisions of the *Fisheries Act* should contact one of the following:

Department of Fisheries and Oceans—Headquarters

Director General
Conservation and Protection
Fisheries Management
Department of Fisheries and Oceans
200 Kent Street
Ottawa, Ontario
K1A 0E6

Telephone: (613) 990-6012

Department of Fisheries and Oceans—Regional Offices

Newfoundland Region

Regional Director General
Newfoundland Region
Department of Fisheries and Oceans
P.O. Box 5667
St. John's, Newfoundland
A1C 5X1

Telephone: (709) 772-4417

Maritimes Region

Regional Director General
Maritimes Region
Department of Fisheries and Oceans
P.O. Box 550
Halifax, Nova Scotia
B3J 2S7

Telephone: (902) 426-2581

Laurentian Region

Regional Director General
Laurentian Region
Department of Fisheries and Oceans
104 Dalhousie Street
Québec, Quebec
G1K 7X7

Telephone: (418) 648-4158

Central and Arctic Region

Regional Director General
Central and Arctic Region
Department of Fisheries and Oceans
501 University Crescent
Winnipeg, Manitoba
R3T 2N6

Telephone: (204) 983-5118

Pacific Region

(includes Yukon Territory)
Regional Director General
Pacific Region
Department of Fisheries and Oceans
555 West Hastings Street
Vancouver, British Columbia
V6B 5G3

Telephone: (604) 666-6098

Gulf Region

Regional Director General
Gulf Region
Department of Fisheries and Oceans
343 University Avenue
P.O. Box 5030
Moncton, New Brunswick
E1C 9B6

Telephone: (506) 851-7750

Department of the Environment—Headquarters

Director
Enforcement Branch
National Programs Directorate
Environmental Protection Service
Environment Canada
351 St. Joseph Blvd.
17th Floor—Place Vincent Massey
Ottawa, Ontario
K1A 0H3

Telephone: (819) 953-1523

Department of the Environment—Regional Offices

Atlantic Region

Regional Director
Environmental Protection Branch
Atlantic Region
Environment Canada
45 Alderney Drive
5th Floor—Queen Square
Dartmouth, Nova Scotia
B2Y 2N6

Telephone: (902) 426-3593

Ontario Region

Regional Director
Environmental Protection Branch
Ontario Region
Environment Canada
4905 Dufferin Street
Downsview, Ontario
M3H 5T4

Telephone: (416) 739-5850

Pacific and Yukon Region

Regional Director
Environmental Protection Branch
Pacific and Yukon Region
Environment Canada
224 West Esplanade—5th Floor
North Vancouver, British Columbia
V7M 3H7

Telephone: (604) 666-0064

Quebec Region

Directeur régional
Direction de la protection de l'environnement
Région du Québec
Environnement Canada
105, rue McGill—4ième étage
Montréal (Québec)
H2Y 2E7

Téléphone : (514) 283-0178

Prairie and Northern Region

(includes Northwest Territories)
Regional Director
Environmental Protection Branch
Prairie and Northern Region
Environment Canada
4999—98th Avenue
Twin Atria #2—2nd Floor
Edmonton, Alberta
T6B 2X3

Telephone: (780) 951-8862

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