IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *R. v. Gorman*, 2022 NLSC 3
Date: January 11, 2022
Docket: 202001G6082

HER MAJESTY THE QUEEN

v.

CHRISTOPHER GORMAN

Before: Justice Daniel M. Boone

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: November 15, 16, and 17, 2021

Summary:

The Court held that s. 41(1) of the *Canada Post Corporation Act* violates the guarantee against unreasonable search or seizure in s. 8 of the *Canadian Charter of Rights and Freedoms* because it allows for the search of any non-letter mail without any objective standard justifying a search.

Appearances:

Trevor N. Bridger and Paul Adams	Appearing on behalf of the Crown

Jonathan E. Noonan Appearing on behalf of the Accused

Authorities Cited:

CASES CONSIDERED: *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Fry* (1999), 183 Nfld. & P.E.I.R. 346, 556 A.P.R. 346 (Nfld. C.A.); *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Canada Post Corp. v. Canada (Attorney General)*, 1995 CarswellOnt 1803, 95 C.C.C. (3d) 568 (Ont. Ct. J. (Gen. Div.)); *R. v. Perkins*, 2018 CarswellBC 591, 405 C.R.R. (2d) 369 (B.C.S.C.); *R. v. Crane*, 156 A.P.R. 82, 53 Nfld. & P.E.I.R. 82 (Nfld. Dist. Ct.); *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *R .v. Nolet*, 2010 SCC 24; *Comité paritaire de l'industrie de la chemise c. Sélection Milton***,** [1994] 2 S.C.R. 406; *R. v. Wilcox*, 2001 NSCA 45; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *Ex parte Jackson* (1877), 96 U.S. 727; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Tessling*, [2004] 3 S.C.R. 432; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. M. (M.R.)***,** [1998] 3 S.C.R. 393; *R. v. Canfield*, 2020 ABCA 383; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Schachter v. Canada*. [1992] 2 S.C.R. 679

STATUTES CONSIDERED: *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Non-Mailable Matter Regulations*, Can. Reg. 90-10; *Criminal Code*, R.S.C. 1985, c. C-46; *Letter Definition Regulations*, Can.-Reg. 83-481; *Canada Post Corporation Act*, R.S.C. 1985, c. C-10; *Non-Mailable Matter Regulations*, Can. Reg. 90-10; *Constitution Act, 1982*, R.S.C. 1985, App. II, No. 44

TEXTS CONSIDERED: Lawson, "*Personal Privacy, Letter Mail, and the Post Office Espionage Scandal, 1844*". Ed. D.F. Felluga, *Extension of Romanticism and Victorianism on the Net*; M. Stone, "Joseph Mazzini, *English Writers, and the Post Office Espionage Scandal: Politics, Privacy and Twenty-First Century Parallels*", Ed. D.F. Felluga, BRANCH: *Britain, Representation, and Nineteenth-Century History, Extension of Romanticism and Victorianism on the Net*.

REASONS FOR JUDGMENT

BOONE, J.:

BACKGROUND

[1] The *Canada Post Corporation Act*, R.S.C. 1985, c. C-10 (the *CPCA*), s. 41(1) authorizes Canada Post to open any non-letter mail. The Applicant asks this Court to declare that provision unconstitutional because it violates the guarantee against unreasonable search or seizure in s. 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[2] The Applicant was the addressee on a parcel sent through the regular Canada Post parcel delivery service. A postal inspector opened the parcel because he suspected that it contained non-mailable material. The inspector found a substance that appeared to be cocaine and alerted police. The police took possession of the parcel and later determined that it contained two kilograms of cocaine. The police obtained a general warrant to effect a controlled delivery, and they arrested the Applicant after he had picked up, and then opened, the parcel. He was charged with trafficking in cocaine and is scheduled to be tried by a jury in June 2022.

[3] I have decided that s. 41(1) of the *CPCA* is inconsistent with s. 8 of the *Charter*.

THE IMPUGNED STATUTORY PROVISION

[4] The provision challenged by the Applicant is as follows:

> **41(1) Inspection of mail**
> The Corporation may open any mail, other than a letter, to determine in any particular case

(a) whether the conditions prescribed by regulations made pursuant to paragraph 19(1)(c) have been complied with;

(b) whether the manner prescribed by regulations made pursuant to paragraph 19(1)(e) has been adhered to; or

(c) whether the mail is non-mailable matter.

[5] The regulatory provisions referenced are found in *Non-Mailable Matter Regulations*, Can. Reg. 90-10:

3. For the purposes of the *Canada Post Corporation Act* and the regulations under that *Act*, the items set out in the schedule are non-mailable matter.

Schedule [1] — **Non-mailable Matter**

The number in square brackets has been editorially added by Carswell.

(Sections 3 to 5)

Item	**Non-mailable Matter**
1.	(1) Dangerous good as defined in the *Transportation of Dangerous Goods Act* or the regulations made thereunder, except where, in accordance with that *Act* and those regulations, (a) the sender of the dangerous goods offers them to the Corporation for transport; and (b) the Corporation is capable of handling and transporting the dangerous goods. (2) Items that because of the manner in which they are paced, may expose a person to the danger or may damage mail or postal equipment. (3) Letter-post items or parcels that contain dangerous items prohibited by article 19 of the Universal Postal Convention and by articles VIII and IX of the Final Protocol to that Convention, as contained in the *Decisions of the 2016 Istanbul Congress.* (4) Items that may soil mail or postal equipment. (5) Items that emit offensive odours. (6) Fish, game, meat, fruit, vegetables, perishable biological substances or other perishable items that are not prepared for posting in accordance with the applicable requirements of the current *Canada Postal Guide – Guide des postes du Canada*, published by the Corporation.
2.	(1) Live animals, other than live animals that are accepted for transmission by post pursuant to an agreement with the Corporation or that are

referred to in the current *Canada Postal Guide – Guide des postes du Canada*, published by the Corporation, and are prepared for posting in accordance with the applicable requirements set out in that guide.

(2) Letter-post items or parcels that contain live animals prohibited by article 19 of the Universal Postal Convention, as contained int eh *Decisions of the 2016 Istanbul Congress.*

3. (1) Items that have on their outside cover
   (a) anything written or printed or attached thereto, other than the name and address of the addressee and of the sender or endorsements or attachments that are authorized by or under applicable regulations or by the Corporation;
   (b) on the address side thereof, a stamp of a charity or some other non-postal stamp indicating value;
   (c) in the space reserved for postage stamps, stamps or stickers of private manufacture;
   (d) hand-stamped or printed facsimiles of postal cancelling or franking stamps; or
   (e) successive addresses.

(2) Envelopes with windows, unless
   (a) each window has a transparent covering; and
   (b) the longest sides of the window through which the address is visible are parallel to the longest sides of the envelope.

(2.1) Letter-post items in wholly transparent envelopes, unless
   (a) The envelopes are constructed in such a way that they can be easily handles while in the course of transmission by post; and
   (b) a label is securely attached to the outer surface of the envelope and the label has sufficient space to include the name and address of the addressee, the postage and any applicable service instructions.

(3) [Repealed SOR/2002-166, s. 2.]

(4) Letter-post items or parcels, other than those referred to in subitems 1(3) and 2(2), that contain matter prohibited by article 19 of the Universal Postal Convention and by articles VIII and IX of the Final Protocol to that Convention, as contained in the *Decisions of the 2016 Istanbul Congress.*

4. Any item transmitted by post in contravention of an Act or a regulation of Canada.

5. Gold bullion, gold dust and non-manufactured precious metals unless accepted for transmission by post pursuant to an agreement with the Corporation.

6. [Repealed SOR/2010-289, s. 1.]

7. Replica or inert munitions, as well as other devices that simulate explosive devices or munitions, including replica or inert grenades or other simulated military munitions, whether or not such items are for display purposes.

8. (1) For the purposes of subitems (2) and (3), sexually explicit material that is sent as addressed admail or unaddressed admail means

(a) images or representations of nudity that are suggestive of sexual activity;
(b) images or representations of sexual intercourse, with no suggestion of violence or degradation; or
(c) written text that describes sexual acts in a way that is more than purely technical, with no suggestion of violence or degradation.

(2) Sexually explicit material that is not in an opaque envelope with the words "adult material" or a similar warning.

(3) Sexually explicit material that is on the outside of any envelope.

[6] The authority to turn over a parcel to the police is found in this provision of those *Regulations*:

> **4.** Any non-mailable matter found in course of post, other than non-mailable matter that is seized under the *Customs Act*, shall be disposed of as follows:
>
> > (d) any non-mailable matter included in item 4 of the schedule shall be delivered to a police officer, a peace officer or the competent authority, as applicable;

ISSUES

[7] The following issues arise in this case:

1. Does s. 41(1) authorize a search?

2. Did the Applicant have a reasonable expectation of privacy in the mailed parcel?

3. Is the search authority in s. 41(1) of the *Canada Post Corporation Act* reasonable?

4. If s. 41(1) of the *Canada Post Corporation Act* violates s. 8 of the *Charter*, is it saved by s. 1?

5. If s. 41(1) of the *Canada Post Corporation Act* violates s. 8 of the *Charter*, and is not saved by s. 1, should the Court read in the necessary statutory language to save the provision from unconstitutionality?

ANALYSIS

Issue 1: Did the postal inspector opening the parcel constitute a search?

[8] The Crown maintains that the power accorded to the postal inspector under s. 41(1)(c) of the *Act* is an *inspection* power and not a *search* power and that the activity of the inspector amounted to an inspection and not a search.

[9] The postal inspector opened the parcel addressed to the Applicant and looked inside it. He then removed and opened a sealed case inside the parcel, revealing two vacuum-sealed plastic packages that appeared to him to contain cocaine.

[10] I cannot see how opening both the parcel and the closed box inside it could not be considered a search. The inspector opened the parcel to see what was hidden or packaged within it. This may have amounted also to an inspection - the examination of the parcel against established standards - but it was certainly a search.

Issue 2: Reasonable Expectation of Privacy

[11] However, not every search attracts the protection of s. 8. It is only when a search intrudes within a zone where an individual has a reasonable expectation of privacy that the protection provided by s. 8 attaches: *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145, at para. 25; and *R. v. Fry* (1999), 183 Nfld. & P.E.I.R. 346, 556 A.P.R. 346 (Nfld. C.A.), at para. 23.

[12] Determining whether there is a reasonable expectation of privacy, and defining the level of expectation if it exists, requires analysis of the context in which the search or seizure occurs. As Cory J stated in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at para. 46, a case like this one that considered s. 8 rights in the context of a regulatory search: "It is now clear that the *Charter* is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of *Charter* rights, as well as to the determination of the balance to be struck between individual rights and the interests of society."

[13] The Applicant says that there is nothing in the context of a search under s. 41(1) that detracts from his expectation of privacy in the package. The Crown takes the position that several factors, some of which overlap, lead to the conclusion that there is either no, or only a very low, constitutionally-protected expectation of privacy in a mailed parcel.

[14] Although several of these factors overlap or describe the same circumstance from a different perspective, it is helpful to consider them discretely and in a more nuanced way. The Crown described the significance of each of these factors as follows:

1. There is no reasonable expectation of privacy in the mail;

2. There is a reduced expectation of privacy in a parcel as opposed to a letter;

3. A participant in a regulatory regime such as the mail has a diminished expectation of privacy;

4. Once someone gives up control over a package by putting it in the postal system, they have no expectation of privacy in it;

5. The contractual terms and conditions under which a package is mailed alerts users that the Canada Post Corporation may search their packages;

6. Section 41(1) is directed at the important objective of ensuring the security of the postal system and this diminishes the user's expectation of privacy.

Is there a reasonable expectation of privacy in the mail?

[15] The position expressed by the Crown may be put in this way: Anybody who sends or receives mail through the post must know that they are using a regulated system that includes provisions for ensuring the security of the system and its legitimate use, and therefore expect that it may be subject to search.

[16] Ever since people started sending written messages to each other they have developed ways to thwart unintended people reading them. These methods have run the gambit from codes and ciphers to wax seals, elaborate spiral locking, and eventually the envelope. Once European governments created post offices as government monopolies, there probably was an expectation that the government would open and read the mail at will. However, that changed with the development of the modern post office. Only five years after the creation of the British Penny Post system, the Post Office Espionage Scandal of 1844 erupted when it was revealed that the government had aided Austria by opening letters of an Italian independence activist. The ensuing debate in the House of Lords, the popular press, and the writings of social critics such as Carlyle and Dickens led to a clamour for guarantees of privacy from government snooping into the mail: Lawson, "*Personal Privacy, Letter Mail, and the Post Office Espionage Scandal, 1844*". Ed. D.F. Felluga, *Extension of Romanticism and Victorianism on the Net*; M. Stone, "Joseph Mazzini, *English Writers, and the Post Office Espionage Scandal: Politics, Privacy and Twenty-First Century Parallels*", Ed. D.F. Felluga, BRANCH: *Britain, Representation, and Nineteenth-Century History, Extension of Romanticism and Victorianism on the Net*.

[17] The *CPCA* provides statutory recognition of the expectation of privacy in the mail. Section 48 makes it an offence, punishable under s. 60 as either an indictable offence with imprisonment up to five years or a summary conviction offence, for anyone to even open a piece of mail unless authorized to do so by the *Act*. The serious nature of unauthorized opening of the mail is also recognized in the *Criminal Code*, [R.S.C. 1985, c. C-46], s. 345 which creates an offence, punishable by up to life imprisonment, for stopping a mail conveyance with intent to rob or search it. Moreover, s. 40(3) of the *CPCA* provides that nothing in the course of the post (i.e. before delivery) is liable to demand, seizure, detention, and retention except in

accordance with the *Act*. The Crown noted during argument that that provision has been included in post office legislation since the time of confederation. There is an unresolved question whether that provision precludes the police from obtaining search warrants for something in the course of the post: see *Canada Post Corp. v. Canada (Attorney General)*, 1995 CarswellOnt 1803, 95 C.C.C. (3d) 568 (Ont. Ct. J. (Gen. Div.)); *R. v. Perkins*, 2018 CarswellBC 591, 405 C.R.R. (2d) 369 (B.C.S.C.).

[18] Counsel were not able to direct me to any case that has considered the constitutional validity of s. 41(1) of the *CPCA*. The question of the expectation of privacy in the mail has been the subject of very limited judicial commentary in Canada. The only general comment on the topic of which I am aware is the following from Riche DCJ (as he then was) in *R. v. Crane*, 156 A.P.R. 82, 53 Nfld. & P.E.I.R. 82 (Nfld. Dist. Ct.), at para. 29: "The search and seizure of private mail is in my opinion a most serious matter. The privacy of one's mail is a most important and highly-protected element of our society."

[19] I agree. The expectation of privacy in the mail arises naturally from the basis for the constitutional right to privacy protected by the s. 8 guaranteed protection from unreasonable search or seizure. In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, the Court considered whether there was a reasonable expectation of privacy (in response to a restrictive trade practice investigation) in business records. In one of the majority judgments, LaForest J, in distinguishing business records from private papers, described the basis for s. 8:

> 146 While such records are not devoid of any privacy interest, it is fair to say that they raise much weaker privacy concerns than personal papers. The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life. It is for the individual to decide what persons or groups he or she will associate with, what books he or she will read, and so on. One does not have to look far in history to find examples of how the mere possibility of the intervention of the eyes and ears of the state can undermine the security and confidence that are essential to the meaningful exercise of the right to make such choices. But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious

> opinions. They do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state. …

[20] Historically and currently, the mail has been used for the transmission of those very aspects of private life and individual identity described in the foregoing passage. People using the post have a reasonable expectation that the government will not search the mail and see what they are sending or receiving.

[21] No evidence was offered in this matter to displace my inference that people expect that the government will refrain from opening their mail.

[22] Therefore, in general there is a reasonable expectation of privacy in the mail that includes an expectation that the Crown Corporation that is delegated the privilege of operating the postal system will not search it.

[23] It remains to engage in deeper consideration of the specific contextual factors relied on by the Crown to see if the totality of the circumstance displaces that conclusion, or in other words, whether the general expectation of privacy in the mail is displaced or diminished because of the legal and practical context in which a person uses the mail to send or receive a parcel.

Is there an expectation of privacy in the parcel mail?

[24] Section 41(1) authorizes Canada Post to open any mail except a letter. A letter for the purposes of the *CPCA* is defined in the *Letter Definition Regulations*, Can.-Reg. 83-481, as any message (with certain exceptions) under a specified weight. The Crown argues that letters may contain all manner of private information, but parcels contain only inanimate objects that don't tend to reveal intimate details about either sender or recipient. I disagree.

[25] It must certainly be that the vast bulk of mailed parcels contain innocuous and banal consumer or business items, and that only the most libertarian of mail users would care if the government took a peek at those in the interest of mail security. However, there are also items sent through the Canada Post parcel system that reveal the very core of a person's identity that anybody would naturally expect would be kept from the eyes or ears of the state. A rush of examples flows easily to mind: books, magazines, political brochures, medical aids, religious material, intimate dress or objects. Such items, though perhaps inanimate in form, are things that animate life through the expression of (in the words of LaForest J) "aspects of individual identity, which the right of privacy is intended to protect from the overbearing influence of the state."

[26] Although people that use the post office system to send or receive *parcels* perhaps have a diminished expectation of privacy from those that send or receive *letters*, there is no reason to conclude that s. 8 protection does not also apply to parcels handled by Canada Post.

Does the regulatory nature of post office activity displace or diminish the expectation of privacy in mailed parcels?

[27] The Crown says that the postal system is a regulatory regime and that searches for the purpose of inspecting compliance with regulations do not attract the protection of s. 8 of the *Charter*.

[28] That a search is provided for or conducted within the framework of a regulatory or administrative framework is a relevant factor in s. 8 analysis. The circumstances where a regulatory statute providing for search or seizure will not be subject to s. 8 are rare, but they do exist. In *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at para. 25, Wilson J described those cases as follows:

> Undoubtedly there will be instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed. Under such circumstances, the state authorized inspection or the state demand for production of documents will not amount to a search or seizure

> within section 8: see *R. v. Hufsky*, [1988] 1 S.C.R. 621 at page 638; 4 M.V.R. (2d) 170.

[29] In many other situations, a search within a regulatory or administrative regime has been found to involve low or diminished expectations of privacy: see *R. v. Wholesale Travel Group Inc*.; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*; *R .v. Nolet*, 2010 SCC 24; *R. v. McKinlay Transport Ltd.*; and *Comité paritaire de l'industrie de la chemise c. Sélection Milton***,** [1994] 2 S.C.R. 406. But, those authorities demonstrate that even in a regulatory regime low or diminished reasonable expectations of privacy can attract the protection of s. 8.

[30] Where a search is directed at determining whether a criminal or quasi-criminal offence has been committed, s. 8 protection almost always attaches because of considerations such as the stigma involved in being investigated for such an offence, the presumption of innocence, and the possible penalties: *Thomson Newspapers*, at para. 129, per Lamer J.

[31] The rationale for holding that that there ought to be different treatment for regulatory offences than criminal offences and a diminished expectation of privacy in a regulated system have been explained in various and overlapping ways.

[32] The rationale that is usually utilized to support a lower expectation of privacy in a regulated field is the licensing justification: those who choose to enter a regulated field for personal gain or advantage implicitly agree to accept the rules imposed to ensure the continued safety and viability of the endeavor for the public generally, and other participants specifically. This rationale was described by Cory J in *R. v. Wholesale Travel Group Inc*. as follows:

> 86 What some writers have referred to as "licensing" considerations lead to the same conclusion. The regulated actor is allowed to engage in activity which potentially may cause harm to the public. That permission is granted on the understanding that the actor accept, as a condition of entering the regulated field, the responsibility to exercise reasonable care to ensure that the proscribed harm does not come about. As a result of choosing to enter a field of activity known to

> be regulated, the regulated actor is taken to be aware of and to have accepted the imposition of a certain objective standard of conduct as a precondition to being allowed to engage in the regulated activity. In these circumstances, it misses the mark to speak in terms of the "unfairness" of an attenuated fault requirement, because the standard of reasonable care has been accepted by the regulated actor upon entering the regulated sphere.

[33] The licensing argument rests on the concept of free choice, but also on the recognition of the gain or profit that the licensee achieves by entering the regulated industry: see *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, at paras. 39−40 and *R. v. Wilcox*. That rationale does not justify a diminishment of the expectation of privacy on the part of a user of the postal system. Choosing to access the public postal system is not equivalent to the choice to enter a regulated professional or industrial field. Under s. 14 of the *CPCA*, Canada Post is granted the "exclusive privilege" of distributing letters, but it shares with commercial providers the right to distribute parcels. It is the Corporation and its private competitors who enter the regulated field of parcel delivery. The customer does not enter a regulatory field by mailing a parcel but merely asks the Corporation to perform a service. The question of implicit consumer acceptance of terms and conditions of mailing parcels is best considered as a matter of contract, which I will do later in these reasons.

[34] Another rationale for the different treatment of the expectation of privacy in a regulatory context rests on consideration of the importance of regulation in ensuring public safety and protecting the vulnerable in Canadian society. As LaForest J said in *Thompson Newspapers*:

> 127 The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8. As Dickson J. made clear in *Investigation & Research, Combines Investigation Branch*) v. Southam Inc., 41 C.R. (3d) 97, [1984] 6 W.W.R. 57733 Alta. L.R. (2d) 19327 B.L.R. 29784 D.T.C. 646714 C.C.C. (3d) 9711 D.L.R. (4th) 6412 C.P.R. (3d) 19 C.R.R. 35555 A.R. 29155 N.R. 241, the purpose of s. 8 is the protection of the citizen's reasonable expectation of privacy (p. 159). But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's

> interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation and the developer's or homeowner's compliance with building codes or zoning regulations can be tested only by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often be assessed only by inspection of the employer's files and records.
>
> 128 It follows that there can be only a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity. As Alan D. Reid and Alison Harvison Young point out in their article "*Administrative Search and Seizure Under the Charter*" (1985), 10 Queen's L.J. 392, at p. 399, there is a "large circle of social and business activity in which there is a very low expectation of privacy", and in which the "issue is not *whether*, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements".

[35] Once again, I would not equate mailing or receiving a parcel to participation in a regulated field based on this rationale. There is nothing inherently dangerous in the parcel system that would cause an innocent user to contemplate that any package could be searched at any time as a matter of course without justification on the basis of an objective standard.

[36] The Crown argues that a person who sends a parcel through Canada Post with non-mailable matter must know such items are prohibited from the system as a matter of regulation, and therefore that the search of packages for non-mailable matter in the system will occur as a matter of course. However, the expectation of privacy on the part of users of the parcel system must be measured from the perspective of the innocent user of the system. The question is whether a user who sends mailable matter that presents no threat would expect that the parcel could be searched without any justification. As Green JA (as he then was) put it in *R. v. Fry*:

> 44 It must be remembered that in determining whether a reasonable expectation of privacy exists, the analysis in this case is not with respect to whether there was an obligation on the part of the courier company to keep the existence of the illicit drugs, as ultimately found, confidential but, whether given all the circumstances, it could be said that there was a reasonable expectation on the part of persons receiving packages forwarded to them by courier, regardless of their contents, that they would not be interfered with or intruded into. This matter must be approached, not on the basis of whether a person intended as the recipient of illicit drugs has a reasonable expectation of privacy in the means of transportation, but rather on the basis of whether a potentially innocent person intended as the recipient of legal, but possibly personally embarrassing or confidential material, has a reasonable expectation of privacy.-

[37] Moreover, the *Non-Mailable Material Regulations*, on which the Crown depends to support its argument regarding the importance of the regulatory context for this search, cannot be categorized as solely or predominantly directed toward public safety. The *Regulations* do prohibit the transport of dangerous goods, but also material that is prohibited by law because it is obscene, or fraudulent, or is a controlled item, or a live animal, or is offensively odorous, or gold bullion, or because the package is transparent or inappropriately stamped.

[38] Where the search or seizure is directed at a regulatory or administrative investigation, what is important in the assessment of reasonable expectation of privacy is whether the search or seizure in question engages the values of privacy protected by s. 8: *R. v. Wholesale Travel Group Inc*., at para. 249, per LaForest J; *R. v. Wilcox*, 2001 NSCA 45, at para. 106, per Cromwell JA.

[39] The search in this case was conducted pursuant to a statute governing the regulated postal scheme. However, that factor is not in and of itself sufficient to displace any reasonable expectation of privacy of those using the parcel post system. The values engaged in trusting parcels to the post office impact on the core aspects of identity protected by s. 8 of the *Charter.*

Does relinquishing control of a package to the postal system displace or diminish the expectation of privacy in mailed parcels?

[40] The Crown says that people who mail a package voluntarily give up control of the parcel to Canada Post and therefore cannot have any expectation of privacy in the parcel as it is transmitted through the mail.

[41] I note that American jurisprudence has dealt with the question whether ceding to the post office control over a mailed letter or package diminishes the expectation of privacy by treating mailed items as if they had never left the sender's home: see *Ex parte Jackson* (1877), 96 U.S. 727, at 733.

[42] In *R. v. Fry*, the Court of Appeal considered the question whether there was a reasonable expectation by a recipient of a package, mailed through a private courier, that it would not be visualized by the police through x-ray. The Court concluded:

> 43 Here, the parties have stipulated that the respondent is the rightful claimant of the package. I see no reason in principle why in those circumstances, a person in the position of the respondent should not be said to have a reasonable expectation that private property being sent to him (whether or not he was aware of the specific contents) would not, once it was entrusted to the care of the courier and safely in the hands of the receiving office, be examined or interfered with by the police, unless specifically authorized by law, in a manner that would disclose any information as to the nature of the contents that would not otherwise be apparent from a visual inspection.

[43] I draw the same inference here. The mere fact of consignment of a parcel to Canada Post does not result in an expectation that the contents might be examined. The Court of Appeal in *Fry* did temper its expression of the expectation of privacy by accounting for search authorized by law, but that is not the point here, where I am considering only the question of whether ceding control alone results in a diminished expectation of privacy.

[44] The expectation of privacy stays bundled with the package as it travels through the system.

Do the contractual terms and conditions under which a package is mailed displace or diminish the expectation of privacy in mailed parcels?

[45] The Crown argues that the reasonable expectation of anyone mailing a parcel would be influenced by the General Terms and Conditions of mailing. These terms and conditions obligate the sender to ensure that all requirements of the *Act* and *Regulations* are met and note that parcels may be verified to ensure compliance. Therefore, says the Crown, any expectation on the part of users of the postal system must be considered with their actual or imputed knowledge of the terms and conditions in mind.

[46] There are three reasons why that factor has minimal importance in assessing the reasonable expectation of privacy in this case.

[47] First, the evidence demonstrated that the General Terms and Conditions are not presented to any customer. Rather, the sender is presented with a document recording the transaction. This document directs the customer to the Canada Postal Guide, which includes the General Terms and Conditions. This might be sufficient to contractually bind the sender to the conditions; but I am not tasked with deciding whether the customer is bound by the conditions, only with considering how the General Terms and Conditions impact on the customer's expectations of privacy.

[48] Second, the evidence in this matter demonstrates that recipients of parcels, such as the Applicant, are not presented with the General Terms and Conditions of Mailing. This factor therefore can have no significance when assessing the reasonable expectations of recipients, such as the Applicant.

[49] Third, there is no explicit reference within the General Terms and Conditions to any authority that Canada Post may have to search parcels. The General Terms

and Conditions do not direct the customer to s. 41(1) of the *CPCA.* There is only an oblique reference to the possibility of search in Article 6.2 of the General Terms and Conditions, which says:

> Items presented for mailing to Canada Post may be verified to determine compliance with applicable Terms and Conditions. Items determined not to be compliant may, at the discretion of Canada Post, be:
>
> a) returned at the Customer's expense, to be made compliant by the Customer, where possible;
>
> b) processed and charged at the next or most appropriate Product or Service category, where available;
>
> c) subject to a surcharge;
>
> d) refused for mailing or
>
> e) deemed undeliverable, undeliverable items will be disposed of in accordance with the *Canada Post Corporation Act* and *Regulations.*

[50] A statement that Canada Post may verify the compliance of items presented for delivery does not convey to a customer that Canada Post might search any parcel accepted for delivery during the course of the transit of that item through the system.

Does the important objective of ensuring the security of the postal system displace or diminish the expectation of privacy in mailed parcels?

[51] The Crown argues that the important objective of ensuring the safety and security of the mail system that underpins s. 41(1) is a contextual factor that reduces the reasonable expectation of privacy of postal system users.

[52] The Crown called evidence at the hearing from Jagjit Singh Sumra, the Senior Postal Inspector for Canada Post Security and Investigations Service. Mr. Sumra described the significant safety concerns encountered by Canada Post in the operation of the parcel system. These safety concerns have arisen because of

customers attempting to send in parcels dangerous items including toxic chemicals, explosives, or lithium batteries. Even the transmittal of illegal drugs that are not dangerous unless ingested causes risks to postal workers as the presence of those drugs in the system creates the possibility of associated criminal activity in the postal facilities.

[53] Certainly, the state objective in a search or seizure power is part of the context within which the constitutionality of the power should be assessed. However, care must be taken not to engage in a balancing determination as to whether the state objective is urgent or pressing or important enough to outweigh a constitutional right. That is an exercise that ought to be conducted as part of a s. 1 analysis. As noted by McLachlin CJC in a partial dissent in *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46:

> 101 It is sometimes said that whether a search or seizure is reasonable is determined by asking whether the state action represents an appropriate balance between the state purpose (the first requirement) and the individual's privacy interest: see for example *Tessling*, at paras. 17-18. The balancing metaphor is best understood as a gloss on the requirements for reasonable search or seizure under s. 8. Without suggesting that balancing necessarily produces the wrong result, to view the s. 8 analysis simply as a matter of balancing the state interest against the individual's privacy interest may fail to capture what is required to establish that a search or seizure is reasonable.
>
> 102 One concern is that a balancing approach may suggest that if the state's purpose is sufficiently compelling, it may dispense with restraint and procedures that permit judicial review. In my view this cannot be so. Even where the state purpose (as in this case) is of great importance, the state must not intrude upon the individual's protected sphere more than reasonably justified by that purpose, nor do so in a way that lacks appropriate safeguards capable of judicial review. Once again, what constitutes appropriate judicial supervision may vary with the nature of the scheme and other circumstances. In some circumstances warrants are not required. And an administrative appeal mechanism, subject to judicial review, may suffice for regulatory regimes: see, e.g., *McKinlay Transport* and *Branch*

[54] The fact that government has a legitimate purpose is part of the contextual analysis because it affects the subjective expectation of privacy that a person encountering the state in pursuit of that purpose will have, and it affects the Court's assessment as to whether that expectation is objectively reasonable. For instance, in

R. v. Simmons, [1988] 2 S.C.R. 495, the Supreme Court of Canada considered the constitutionality of searches at border crossings. Dickson CJC considered the importance of the government objective as affecting the reasonable expectation of privacy on the part of the person presenting at the border:

> 52 I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enter their boundaries. For the general welfare of the nation, the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process beginning with completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods.

[55] The government objective may also be a contextual factor relevant to the safeguards required to protect the right to privacy. For instance, in *Goodwin* the Supreme Court of Canada considered the compelling nature of the government objective (preventing impaired driving) as one of the factors in determining whether a roadside screening program ought to have included a provision for prior judicial authorization. But it is not the case that a significantly important government objective can eradicate a constitutional right unless it is shown that ought to be the case through a s. 1 analysis. As Dickson J (as he then was) stated in *Hunter v. Southam*, at para. 19: "an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective."

[56] The Crown also argued that the Canada Post power to open parcels is an important tool in the control of the illicit drug trade. In his evidence, Mr. Sumra noted the public health danger presented by the opioid crisis in Canada, and that dealers in illicit opioids such as fentanyl frequently attempt to use the mail for that

traffic. The possible restriction of the search warrant power contained in s. 40(3) of the *CPCA* renders the Canada Post power to open mail even more important in control of the drug trade.

[57] However, reliance by the Crown on this state objective undermines the position that there is a diminished expectation of privacy in the parcel mail. Utilizing the power to open mail for this purpose, together with the regulatory requirement in s. 4 of the *Non-Mailable Matter Regulations* to turn over illegal items to the police, renders this power close to a law enforcement mechanism. This state objective would have the contextual effect of increasing, not diminishing, the expectation of privacy. As noted by Laforest J in *Thomson Newspapers*:

> 129 The situation is, of course, quite different when the state seeks information not in the course of regulating a lawful social or business activity but in the course of investigating a criminal offence. For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations. …

The Entirety of the Context

[58] I have addressed each of the contextual factors that the Crown says displace or diminish the reasonable expectation of privacy in a mailed parcel. Neither of these factors by itself alters my general conclusion that there is a significant expectation of privacy in the mail. However, the authorities prescribe that the contextual analysis ought to consider the totality of the circumstances: *R. v. Edwards*, [1996] 1 S.C.R. 128; and *R. v. Tessling*, [2004] 3 S.C.R. 432. In other words, I must consider whether all of the contextual circumstances (including the general expectation of privacy in the mail), in the aggregate, displace or diminish the expectation of privacy in mailed parcels.

[59] I start again with the position that people generally have a significant expectation of privacy in the mail. That expectation arises even though the item put into the mail is a parcel and not a letter. The service provided by Canada Post is regulated but it is still a service, and the customer cannot be said to have accepted a

lesser degree of privacy just because the service is regulated. The contract between Canada Post and the customer does not include any explicit reference to the possibility of search, and in any event, any considerations of the contract would not affect the expectations of the recipient of a parcel because the recipient does not see the contractual provisions. The consignment of mail to the care of Canada Post does not relinquish the privacy interest of the customer. The legitimate government objective in ensuring the safety of the mail system was not demonstrated to have impacted on the expectations of customers who mail or receive parcels that those parcels would be delivered unopened. As neither of these factors eliminates nor significantly diminishes the expectation of privacy in mailed parcels, aggregation of these factors cannot do so.

[60] Consequently, I conclude that the person using the Canada Post parcel system has an expectation of privacy that attracts the protection of s. 8.

Issue 3: Is the search authority in s. 41(1) of the Canada Post Corporation Act reasonable?

[61] In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court of Canada held that if contextual analysis demonstrates a reasonable expectation of privacy attracting the protection of s. 8, then determining whether a search is reasonable involves three steps: "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable" (at para. 34).

[62] There is no issue in this case that the search of the package sent to the Applicant was authorized by s. 41(1) of the *CPCA*. The Applicant takes no issue with the manner in which the search was conducted. The sole issue to be determined in applying the three-part *Collins* analysis to this case is whether s. 41(1) of the *CPCA* is reasonable.

[63] The question therefore is whether the *CPCA*, s. 41(1) adequately safeguards the reasonable expectation of privacy that customers of Canada Post have in the mailed parcel system.

[64] Section 41(1) says that Canada Post may open "*any mail, other than a letter to determine"* whether the parcel or its contents meet prescribed standards. The Crown suggested during argument that the stated purpose of s. 41(1) provides a sufficient limitation on the power of search under the section. It does not. It limits only the purpose for which Canada Post can search.

[65] The wording of s. 41(1) provides authority to open *any* parcel for the stated purpose and, therefore, authorizes Canada Post to open *all* parcels. Canada Post could adopt a practice under s. 41(1) of searching every parcel during its transit through the system, or of searching parcels randomly selected, in order to determine whether each package, or each randomly selected package, meets regulatory requirements. The breadth of search power in the statute is entirely inconsistent with the reasonable expectation that government will not intrude on privacy in the mail.

[66] The leading authority on the reasonableness of a statute authorizing a search is *Hunter v. Southam*, which held generally that a search that intrudes on constitutionally protected privacy will meet the requirements of s. 8 if the search is required to meet an important state purpose, provides for an objective standard of suspicion, and a system of judicial authorization. The authorities following on that case make it clear that the criteria in *Hunter v. Southam* were developed in the context of a search authorized under a statute that created a quasi-criminal offence, and that those criteria needed to be flexibly applied based upon the kind of contextual analysis that I earlier described.

[67] As to the requirement for judicial authorization, the Supreme Court in *Hunter v. Southam*, at para. 29, recognized that it might not always be practical or feasible to insist on judicial authorization in every statute providing a search. This qualification has been built upon in later cases. For instance, in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, the court determined that school officials could search students without warrant where the officials had reasonable grounds for believing that a

student was in violation of school rules. The court reasoned that the lowered expectation of privacy of students, together with the officials' greater understanding of school policy and their knowledge of their students were contextual factors justifying dispensing with the need for judicial authorization.

[68] In this case, prior judicial authorization ought not to be required. In this regard, I do consider the state objective in ensuring the safety of the mail system to be relevant. The possibility of toxic chemicals or explosives or other potentially harmful agents being shipped through the system requires an immediate response by postal officials, rather than a response delayed by the requirement for a warrant. As with the school officials in *R. v. M. (M.R.)*, postal officials are better placed than judicial officers to determine the possibility of packages containing such substances. Leaving aside the presence of contraband or dangerous goods, the other regulatory requirements (packaging, postage, etc.) against which postal officials can measure searched parcels are fairly mundane and do not require judicial attention. The efficient operation of the postal system requires that parcels move through the system with no more interference than necessary.

[69] However some form of objective standard ought to be required before a search can proceed. It is not a sufficient safeguard of postal users' constitutional rights to leave the decision whether to search a parcel entirely to the unfettered discretion of postal officials. The authority provided in s. 41(1) to search any or all parcels clashes with the reasonable expectation of privacy in the mail. I do not think that users of the postal system would expect that the post office could never search a parcel under any circumstance. However, they would expect that a search would only take place on the basis of an objective standard that the regulatory purpose of the search is engaged.

[70] Therefore, s. 41(1) violates the guarantee against unreasonable search in s. 8 of the *Charter*.

[71] As to the question of setting the appropriate standard, I agree with the following comments of the Alberta Court of Appeal in *R. v. Canfield*, 2020 ABCA 383:

> 75 … Recognizing that complex issues must be weighed in altering the law in this area, we decline to set a threshold requirement for the search of electronic devices at this time. Whether the appropriate threshold is reasonable suspicion, or something less than that having regard to the unique nature of the border, will have to be decided by Parliament and fleshed out in other cases. However, to the extent that s 99(1)(a) permits the unlimited search of personal electronic devices without any threshold requirement at all, it violates the protection against unreasonable search in s 8 of the *Charter.*

[72] For similar reasons, I would decline to define the requisite standard for determining whether searches under the *CPCA*, s. 41(1) should be conducted.

Issue 4: Is the authorization of searches under s. 41(1) of the CPCA a reasonable limit under s. 1 of the Charter?

[73] The rights guaranteed under the *Charter* are not absolute but are subject, under s. 1 "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[74] The Crown submits that if I determine that s. 41(1) of the *CPCA* violates s. 8 of the *Charter*, then that limit is justified under s. 1.

[75] The approach to the application of s. 1 was determined early in the history of *Charter* litigation, in the Supreme Court of Canada decision in *R. v. Oakes*, [1986] 1 S.C.R. 103. As noted by the Alberta Court of Appeal in *R. v. Canfield*:

> 82 … The justification criteria were recently reiterated in *Frank v. Canada (Attorney General)*, 2019 SCC 1 (S.C.C.) at para 38:

> Two central criteria must be met for a limit on a *Charter* right to be justified under s. 1. First, the objective of the measure must be pressing and substantial in order to justify a limit on a *Charter* right. This is a threshold requirement, which is analyzed without considering the scope of the infringement, the means employed or the effects of the measure (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 61). Second, the means by which the objective is furthered must be proportionate. The proportionality inquiry comprises three components: (i) rational connection to the objective, (ii) minimal impairment of the right, and (iii) proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective (*Oakes*, at pp. 138-39; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 139; *K.R.J.*, at para. 58). The proportionality inquiry is both normative and contextual, and requires that courts balance the interests of society with those of individuals and groups (*K.R.J.*, at para. 58; *Oakes*, at p. 139).

[76] The Crown bears the burden of demonstrating that each of the criteria in the *Oakes* test applies.

[77] The Crown has demonstrated a pressing and substantial state purpose for the search of parcels sent through the postal system. The evidence of Mr. Sumra, the Senior Postal Inspector, described the significant threats to the safety of postal employees and the public, which the searches under s. 41(1) are at least partially designed to prevent. The possible presence of toxic chemicals and explosive substances are real concerns and have materialized. Fires have occurred in the system because of seemingly ubiquitous lithium batteries installed in electronic items. Even the use of the system to ship illegal drugs can affect the security of the system because of associated illegal activity. The authority to search helps to alleviate and guard against such threats.

[78] Searches by postal inspectors are therefore rationally connected to the state objective of ensuring the security and safety of the system.

[79] However, the present s. 41(1) does not meet the criteria of minimal intrusion on the constitutional right that it infringes. The Crown did not demonstrate that

unfettered authority to search any and all packages is necessary to keep the postal system safe.

[80] In fact, the evidence called by the Crown demonstrated that the objective could be achieved with the lesser impairment that would result if the legislation included an objective standard of suspicion or belief prior to search were adopted. Mr. Sumra described the guidelines under which Canada Post operates the search power under s. 41(1). The Security Management Manual, Ch. 501.06, "Inspection of Mail" requires that a local postal inspector, who is trained to spot parcels that may contravene the regulations, formulate reasonable and probable grounds before asking for authority to search of a parcel. These grounds must be reduced to writing in a Corporation-prescribed form that is then presented to the regional postal inspector in charge, who is required to review the forms and form an independent conclusion as to whether there are reasonable and probable grounds to believe that the parcel or the items within it contravene the postal regulations. Only if the inspector in charge concludes there are reasonable and probable grounds is a search of the parcel authorized.

[81] The evidence of Mr. Sumra demonstrated that the safety and security of the postal system has been sufficiently protected with adherence to those guidelines. Moreover, the guidelines and the training of postal workers seem to work to protect the rights of innocent users of the postal system. Mr. Sumra testified that in each of the last several years, about 3000 parcels have been searched by Canada Post pursuant to s. 41(1). Of those, about 2800 parcels have been found to contain non-mailable matter or were otherwise in contravention of the regulations.

[82] Therefore, although the Crown has demonstrated that effective security measures are necessary to ensure the safety and security of the parcel system, the unfettered search authority in s. 41(1) is not proportionately responsive to the intrusion on postal users' s. 8 rights. The statute is not saved by s. 1.

Issue 5: [If s. 41(1) violates s. 8 and is not saved by s. 1 should the Court Read in the necessary statutory language?

[83] The Crown asks that if I determine that s. 41(1) is constitutionally invalid and not saved by s. 1, then that I should read into the provision the necessary constitutional safeguards that would render the statute valid.

[84] Section 51 of the *Constitution Act, 1982*, R.S.C. 1985, App. II, No. 44, provides that any law that is inconsistent with the *Constitution*, including the *Charter*, is to the extent of the inconsistency of no force and effect. Section 24 of the *Charter* provides that a court can provide an appropriate and just remedy for the violation of a *Charter* right.

[85] The combined reading of those constitutional provisions has led to jurisprudence that recognizes that in some circumstances where a statute omits words necessary to protect *Charter* guarantees, then the appropriate remedy would be to read the necessary words into the statute rather than striking it down: *Schachter v. Canada*, [1992] 2 S.C.R. 679.

[86] The remedy of reading in will only be appropriate where it can be said that doing so actually helps to achieve the legislative objective determined through the s. 1 analysis. If the law is determined to have been drafted to achieve a pressing and substantial legislative purpose, but includes provisions that disproportionately impair constitutional rights, then the court can read in appropriate language that maintains the objective but restores proportionality in the means chosen to achieve it. In this case, the Crown submits that if s. 41(1) would be constitutionally valid if it included an objective standard before a search of a parcel can be conducted, then I should read the provision as if it included such a standard.

[87] However, the remedy of reading in is not a panacea for constitutional invalidity. In cases where the constitutional failing may be generally stated but not defined with precision from a range of choices, then reading in intrudes into the responsibility of the legislature and is inappropriate. This point was made by

Dickson J in *Hunter v. Southam*, at para. 44, in response to a Crown submission that reading in was an appropriate remedy in that case:

> … While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s.8 of the *Charter*. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. I would hold ss.10(1) and 10(3) of the *Combines Investigation Act* to be inconsistent with the *Charter* and of no force and effect, as much for their failure to specify an appropriate standard for the issuance of warrants as for their designation of an improper arbiter to issue them.

[88] The remedy of reading in is inappropriate in this case for another reason. Where a finding of constitutional invalidity arises because a statute fails to provide for procedural safeguards, then the presumptive intention of the legislature is that it chose to ignore or avoid the requisite safeguards. It would therefore be inappropriate for the Court to read the legislation as including the safeguard: *Schacter v. Canada*, at para. 62:

> 62 This Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, is instructive as to the second level of legislative intention referred to above. There, it was held that s. 542(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, which provides for the automatic detention at the pleasure of the Lieutenant Governor of an insanity acquittee, was in violation of s. 7 of the *Charter* in that it deprived the appellant of his right to liberty without meeting the requirements of procedural fairness that attach to the principles of fundamental justice. In my judgment, I rejected the argument that the requirements of procedural fairness could just be read into the legislation as it stood because it was clear that, to achieve its objectives, Parliament had deliberately chosen the means which ultimately failed the minimal impairment element of the proportionality test under s. 1. Where the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.

[89] The statutory provision in this case violates the *Charter* prohibition against unreasonable search because it fails to include an objective standard for determining

whether a search can take place. The remedy proposed by the Crown to read such a standard into the legislation is not available here because it is for Parliament to choose which standard would be appropriate or even to decide that it will achieve its objective of ensuring the safety of the parcel system through another means than searching parcels.

Other Remedies

[90] The usual consequence of a court finding that legislation violates the *Charter* is an order declaring the statute of no force and effect. In some cases, the courts have suspended a declaration of invalidity in order to allow the legislature time to rectify the constitutional failing without jeopardizing a pressing legislative objective in the meantime.

[91] The remedy that is most important to the Applicant is whether the substance found in the parcel sent to him will be admitted into evidence at his trial or whether it ought to be excluded pursuant to s. 24(2) of the *Charter*.

[92] The Applicant and the Crown have asked that I not decide on either of those remedies until they have opportunity to make further argument.

CONCLUSION and DISPOSITION

[93] Therefore, although I have found that s. 41(1) is inconsistent with s. 8 of the *Charter*, and is not saved by s. 1, and that the remedy of reading in is not appropriate, I will not make any further order as to remedy at this time. The parties should arrange for a time to be heard on the remaining remedial questions.

_____

DANIEL M. BOONE
Justice