

# 1996 CASES INVOLVING CONSTITUTIONAL CHALLENGES

| CASE NAME   | SECTION(S)<br>ON WHICH<br>CHALLENGE<br>IS BASED | EXISTENCE<br>OF<br>INFRINGEMENT  | WHETHER INFRINGEMENT SAVED<br>BY S. 1 OR REMEDY GRANTED<br>UNDER S. 24   | OBJECT OF<br>CHALLENGE  |
|---|---|--|--|---|
| <i>R. v. EVANS</i>  | 8   | Yes  | Not excluded under 24(2)   | Action  |
| <i>R. v. MCCARTHY</i>                                     | 8   | Yes  | New trial ordered due to error<br>of trial judge <sup>1</sup>  | Action  |
| <i>R. v. MCKARRIS</i>                                     | 8   | No   | —  | Action  |
| <i>R. v. RICHARD</i>                                      | 8   | No   | —  | Action  |
| <i>R. v. CLEMENT</i>                                      | 8   | No   | —  | Action  |
| <i>R. v. GOLDHART</i>                                     | 8   | Yes <sup>2</sup>   | Not excluded under 24(2)   | Action  |
| <i>R. v. JACQUES</i>                                      | 8   | No   | —  | Action  |
| <i>R. v. KESHANE</i>                                      | 8   | Undecided  | Not excluded under 24(2)   | Action  |
| <i>R. v. FITT, KOUYAS</i>                                 | 8   | No   | —  | Action  |
| <i>R. v. EDWARDS</i>                                      | 8   | No   | —  | Action  |
| <i>R. v. MARTIN</i>                                       | 8   | Undecided  | Not excluded under 24(2)   | Action  |
| <i>R. v. CALDER</i>                                       | 10(b)   | Yes <sup>3</sup>   | Excluded under 24(2)   | Action  |
| <i>R. v. DEWALD</i>                                       | 8   | Yes  | Not excluded under 24(2)   | Action  |
|   | 10(b)   | Yes  |  |   |
| <i>R. v. TERRY</i>  | 10(b)   | No   | —  | Action  |
| <i>JAMIESON v. CANADA</i>                                 |   |  |  |   |
| <i>(MIN. OF JUSTICE)</i>                                  | 7   | No   | —  | Action  |
| <i>WHITLEY v. UNITED STATES OF AMERICA</i>                | 6(1)  | No   | —  | Action  |
| <i>ROSS v. UNITED STATES OF AMERICA</i>                   | 6(1)  | No   | —  | Action  |
| <i>R. v. ROBINSON</i>                                     | 7   | Yes  | Not saved by s. 1  | Common Law  |
|   | 11(d)   | Yes  |  |   |
| <i>R. v. KEEGSTRA</i>                                     | 11(d)   | Yes  | Saved by s. 1  | Legislation (F)   |
| <i>R. v. HOWELL</i>                                       | 11(d)   | No   | —  | Action  |
| <i>R. v. RICHARD</i>                                      | 11(d)   | No   | —  | Legislation (P)   |
| <i>C.B.C. v. NEW BRUNSWICK (ATT. GEN.)</i>                |   |  |  |   |
|   | 2(b)  | Yes  | Saved by s. 1  | Legislation (F)   |
| <i>HARVEY v. NEW BRUNSWICK (ATT. GEN.)</i>                | 3   | Yes  | Saved by s. 1  | Legislation (P)   |
|   | 12  | No   | —  |   |
| <i>R. v. M. (C.A.)</i>                                    | 12  | No   | —  | Action  |
| <i>MOORING v. CANADA</i>                                  |   |  |  |   |
| <i>(NATIONAL PAROLE BOARD)</i>                            | 8/24(2)   | The issue was whether the parole board was a court of competent jurisdiction to exclude evidence as they based a judgment on evidence that arguably would have been excluded under s. 24 | The board was not found to be a court of competent jurisdiction, hence their judgment based on the evidence in question was allowed to stand | The decision was action-related in that an administrative decision was challenged for failing to make a constitutional determination. |
| <i>R. v. BURKE</i>  | 7   | No   | —  | Action  |
| <i>ATTIS v. BOARD OF SCHOOL TRUSTEES, DISTRICT No. 15</i> |   |  |  |   |
|   | 2(a)  | Yes  | Saved under s. 1   | Action  |
|   | 2(b)  | Yes  | Saved under s. 1 <sup>4</sup>  |   |
| <i>ADLER v. ONTARIO</i>                                   | 2(a)  | No   | —  | Legislation (P)   |
|   | 15(1)   | No   | —  |   |

| CASE NAME  | SECTION(S)<br>ON WHICH<br>CHALLENGE<br>IS BASED   | EXISTENCE<br>OF<br>INFRINGEMENT   | WHETHER INFRINGEMENT SAVED<br>BY S. 1 OR REMEDY GRANTED<br>UNDER S. 24  | OBJECT OF<br>CHALLENGE   |
|--|---|---|---|--|
| <i>COOPER V. CANADA (HUMAN RIGHTS COMMISSION)</i>  | This case decided the jurisdiction of administrative tribunals in making constitutional decisions | The Human Rights Commission was considering making a decision which would have struck down a section of the <i>Canadian Human Rights Act</i> based on the <i>Charter</i>              | The Court held that they did not have the jurisdiction to subject the <i>Act</i> to constitutional scrutiny because no tribunal has an independent source of jurisdiction pursuant to s. 52(1) of the <i>Constitution Act, 1982</i> to interpret questions of law | Administrative jurisdiction with respect to constitutional questions |
| <i>R. v. OMNIYAK</i> <sup>5</sup>  | 35(1)   | Yes   | New trial directed to decide if infringement is justified   | Legislation (P)  |
| <i>R. v. NIKAL</i>   | 35(1)   | Yes   | Not justified under a <i>SPARROW</i> analysis   | Legislation (P)  |
| <i>R. v. GLADESTONE</i>  | 35(1)   | Yes   | Insufficient evidence and testimony to make determination on the issue of justification   | Legislation (F)  |
| <i>R. v. ADAMS</i>   | 35(1)   | Yes   | Not justified under a <i>SPARROW</i> analysis   | Legislation (P)  |
| <i>R. v. BADGER</i>  | 35(1)   | No  | —   | Legislation (P)  |
| <i>R. v. PAMAJEWON</i>   | 35(1)   | No  | —   | Legislation (F)  |
| <i>R. v. LEWIS</i>   | 35(1)   | No  | —   | Legislation (P)  |
| <i>R. v. N.T.C. SMOKEHOUSE LTD.</i>  | 35(1)   | No  | —   | Legislation (P)  |
| <i>R. v. VAN DER PEET</i>  | 35(1)   | No  | —   | Legislation (P)  |
| <i>R. v. COTE</i>  | 35(1) <sup>6</sup>  | Yes   | Not justified under a <i>SPARROW</i> analysis   | Legislation (1) (P)  |
|  | 35(1)   | No  | —   | Legislation (2) (P)  |
| <i>REFERENCE RE AMENDMENTS TO THE RESIDENTIAL TENANCIES ACT (N.S.) ONTARIO HOMEBUILDERS ASSN. V. YORK BOARD OF EDUCATION</i> | 96  | <i>Ultra vires</i> the province   | —   | Legislation  |
|  | 92(2)   | The power was held to be <i>ultra vires</i> the province but the provisions were nonetheless held to be <i>within provincial competence</i> as ancillary to a valid regulatory scheme | For the provision of educational facilities as a component to land use planning under s. 92 (9, 13, 16) and therefore valid and <i>intra vires</i> despite a s. 92(2) infringement  | Legislation (P)  |

<sup>1</sup> While the section is not specifically mentioned in *McCarthy*, forcing the courts to retry this issue after finding the trial judge to be in error may be deemed a remedy under s. 24(1).

<sup>2</sup> The section 8 determination was not in fact made in the *Goldhart* case itself which was concerned with the exclusion of evidence based on the strength of its connection with the violation of section 8.

<sup>3</sup> The determination on s. 10(b) was made prior to this case and the central issue in *Calder* was whether evidence, which had been previously excluded at trial for certain purposes, could now be admitted at trial for a supposedly different function.

<sup>4</sup> In fact, in the *Attis* case the order of the Human Rights Tribunal was not entirely saved; one of the four sections in question, s. 2(d) (which dealt with possible termination of employment at the school board for the publishing, writing, or selling of anti-Semitic material) failed the minimal impairment branch of the s. 1 analysis.

<sup>5</sup> *Omiyak* was decided with *Badger*, but was dealt with separately here due to the distinct circumstances and outcome of the case.

<sup>6</sup> The *Cote* case involved two separate convictions based on two separate regulations.