



SUPREME COURT OF CANADA

CITATION: Sriskandarajah v. United States of America,
2012 SCC 70

DATE: 20121214
DOCKET: 34009, 34013

BETWEEN:

Suresh Sriskandarajah

Appellant

and

United States of America, Minister of Justice and Attorney General of Canada

Respondents

- and -

**Attorney General of Ontario, Canadian Civil Liberties Association and British
Columbia Civil Liberties Association**

Interveners

AND BETWEEN:

Piratheepan Nadarajah

Appellant

and

United States of America, Minister of Justice and Attorney General of Canada

Respondents

- and -

**Attorney General of Ontario, Canadian Civil Liberties Association and British
Columbia Civil Liberties Association**

Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and
Karakatsanis JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 37)

McLachlin C.J. (LeBel, Fish, Abella, Rothstein, Cromwell
and Karakatsanis JJ. concurring)

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SRISKANDARAJAH v. UNITED STATES OF AMERICA

Suresh Sriskandarajah

Appellant

v.

**United States of America, Minister of Justice
and Attorney General of Canada**

Respondents

and

**Attorney General of Ontario, Canadian Civil Liberties
Association and British Columbia Civil Liberties Association**

Intervenors

- and -

Piratheepan Nadarajah

Appellant

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and Attorney General of Canada**

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Indexed as: Sriskandarajah v. United States of America

2012 SCC 70

File Nos.: 34009, 34013.

2012: June 11; 2012: December 14.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Mobility rights — Extradition — Minister ordering surrender of Canadian citizens to U.S. authorities to be tried there on terrorism charges — Whether extradition violates right to remain in Canada even when foreign state's claim of jurisdiction is weak or when prosecution in Canada is feasible — Whether surrender decisions unreasonable on the evidence — Canadian Charter of Rights and Freedoms, s. 6(1); Extradition Act, S.C. 1999, c. 18.

Administrative law — Natural justice — Procedural fairness — Minister providing all materials considered in making decisions to surrender, except legal advice — Whether procedural fairness required minister to obtain and disclose Canadian prosecutorial authority's assessment of whether to prosecute in Canada.

After the Ontario Superior Court of Justice found that there was sufficient evidence to commit S and N, who are Canadian citizens, for extradition to the United States to be tried there on charges related to their alleged support of a terrorist organization, the Minister of Justice ordered their surrender. Those decisions were subsequently upheld on appeal.

Held: The appeals should be dismissed.

Extradition does not violate the right of citizens to remain in Canada under s. 6(1) of the *Charter*, even when the foreign state's claim of jurisdiction is weak or when prosecution in Canada is feasible. To hold otherwise would amount to overruling *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532, and *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761. No compelling reasons have been shown to depart from the principles set out in those cases. Extradition does not violate the core values of s. 6(1). Rather, it fulfills the needs of an effective criminal justice system. The decision to extradite is a complex matter, involving numerous factual, geopolitical, diplomatic and financial considerations. The Minister of Justice has superior expertise in this regard, and his discretion is not conclusively bound by any of the *Cotroni* factors. The ability of Canada to prosecute the offences remains but one factor in the inquiry; nor is the strength of the foreign jurisdiction's claim to prosecute always determinative.

Here, the record shows that the Minister properly considered and weighed the factors relevant to the situations of S and N. The Minister did not ascribe determinative weight to the fact that charges were not laid against them in Canada, and he conducted an independent *Cotroni* assessment. His conclusion that there were sufficient links to the U.S. to justify extradition flowed from this independent assessment and has not been shown to be unreasonable on the evidence.

The claim of procedural unfairness has not been established. S and N's request for disclosure of the assessment of the Public Prosecution Service of Canada on whether to prosecute them in Canada is a thinly disguised attempt to impugn the state's legitimate exercise of prosecutorial authority. Procedural fairness does not require the Minister to obtain and disclose every document that may be indirectly connected to the process that ultimately led him to decide to extradite.

S and N's challenge to the constitutionality of the Canadian terrorism provisions corresponding to the alleged conduct for which they are sought in the U.S. is considered (and dismissed) in the companion case, *R. v. Khawaja*, 2012 SCC 69.

Cases Cited

Discussed: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; **referred to:** *R. v. Khawaja*, 2012 SCC 69; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v.*

Stinchcombe, [1991] 3 S.C.R. 326.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2, 6(1), 7.

Extradition Act, S.C. 1999, c. 18, ss. 3, 7.

International Transfer of Offenders Act, S.C. 2004, c. 21.

Authors Cited

Blackstone, William. *Commentaries on the Laws of England*, 4th ed., Book IV.
Oxford: Clarendon Press, 1770.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Moldaver and Cronk JJ.A.), 2010 ONCA 859, 109 O.R. (3d) 662, 278 O.A.C. 1, 266 C.C.C. (3d) 447, 81 C.R. (6th) 285, [2010] O.J. No. 5473 (QL), 2010 CarswellOnt 9667, affirming a committal order of Pattillo J., 2009 CanLII 9482, 95 O.R. (3d) 514, 243 C.C.C. (3d) 281, [2009] O.J. No. 946 (QL), 2009 CarswellOnt 1524, and a decision of the Minister of Justice dated November 17, 2009, ordering the surrender of the appellant to the United States of America. Appeal dismissed.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Moldaver and Cronk JJ.A.), 2010 ONCA 857, 109 O.R. (3d) 680, 275 O.A.C. 121, 266 C.C.C. (3d) 435, 223 C.R.R. (2d) 339, [2010] O.J. No. 5474 (QL), 2010 CarswellOnt 9674, affirming a committal order of Pattillo J., 2009 CanLII 9482, 95

O.R. (3d) 514, 243 C.C.C. (3d) 281, [2009] O.J. No. 946 (QL), 2009 CarswellOnt 1524, and a decision of the Minister of Justice dated November 17, 2009, ordering the surrender of the appellant to the United States of America. Appeal dismissed.

John Norris, Breese Davies, Brydie Bethell and Erin Dann, for the appellants.

Croft Michaelson, Nancy Dennison and Sean Gaudet, for the respondents.

Michael Bernstein, for the intervener the Attorney General of Ontario.

Anil K. Kapoor and Lindsay L. Daviau, for the intervener the Canadian Civil Liberties Association.

Kent Roach and Michael Fenrick, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

[1] The Minister of Justice has ordered the surrender of the appellants, who are Canadian citizens, to the United States to be tried there on terrorism charges, related to their alleged support of the Liberation Tigers of the Tamil Eelam (“Tamil Tigers or LTTE”), a terrorist organization involved in insurgency in Sri Lanka.

1. Overview

[2] Suresh Sriskandarajah is alleged to have assisted the Tamil Tigers in researching and acquiring submarine and warship design software, communications equipment and other technology. He is said to have helped smuggle items into territory controlled by the Tamil Tigers. He is also alleged to have laundered money for the Tamil Tigers and to have counselled individuals on how to smuggle goods to them in Sri Lanka.

[3] Pirathepan Nadarajah is alleged to have been part of a group of four individuals who attempted to purchase on behalf of the Tamil Tigers both surface to air missiles and AK-47s from an undercover police officer posing as a black market arms dealer in Long Island, New York. The undercover officer had arranged the meeting with one Mr. Sarachandran, who had allegedly named Nadarajah as his armaments expert in telephone conversations.

[4] In 2006, the United States of America requested the Canadian Minister of Justice for the extradition of both appellants to stand trial in the U.S., on various terrorism-related charges. Pattillo J. of the Ontario Superior Court of Justice found

that there was sufficient evidence to commit the appellants for extradition on terrorism charges ((2009), 95 O.R. (3d) 514). In decisions dated November 17, 2009, the Minister of Justice ordered the surrender of the appellants to the United States. These decisions were subsequently upheld by the Court of Appeal (2010 ONCA 857, 109 O.R. (3d) 680, and 2010 ONCA 859, 109 O.R. (3d) 662).

2. Issues

[5] The appellants oppose their extradition on four grounds: (1) that the conduct alleged against them apart from association with the LTTE is not criminal conduct because the Canadian terrorism provisions corresponding to the alleged conduct for which the appellants are sought in the United States are unconstitutional; (2) that extradition violates s. 6(1) of the *Canadian Charter of Rights and Freedoms*, which guarantees the right of citizens to remain in Canada, when the foreign state's claim of jurisdiction is weak or when prosecution in Canada is feasible; (3) that the Minister's review of the extradition order did not comply with the requirements of procedural fairness; and (4) that the surrender decisions were unreasonable in all the circumstances.

3. Are the Canadian Terrorism Offences Unconstitutional?

[6] The *Extradition Act*, S.C. 1999, c. 18, requires that the conduct for which extradition is sought be an offence in Canada: s. 3. The appellants challenge the constitutionality of the Canadian terrorism offences relied on in the Authority to Proceed. Pattillo J. and the Court of Appeal rejected these arguments.

[7] I consider the constitutionality of the impugned Canadian terrorism provisions in the companion case, *R. v. Khawaja*, 2012 SCC 69, concluding that they do not infringe the rights protected under ss. 2 and 7 of the *Charter*. For the reasons there stated, this ground of appeal is dismissed.

4. What Is the Scope of the Right to Remain in Canada Under Section 6(1) of the Charter?

[8] Section 6(1) of the *Charter* provides that “[e]very citizen of Canada has the right to enter, remain in and leave Canada”. This Court first analyzed the rapport between extradition and the right to remain in Canada in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469. The scheme proposed in *Cotroni* was subsequently confirmed and refined in *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532, and in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761. From this jurisprudence, six principles provide guidance to respond to the interpretation of s. 6(1) proposed by the appellants.

a) *The Jurisprudence*

[9] First, *Cotroni*, *Kwok* and *Lake* hold that extradition constitutes a marginal limitation of the s. 6(1) right to remain in Canada. Although the surrender of a Canadian citizen to a foreign country impairs the individual’s right to remain on Canadian soil, s. 6(1) is primarily aimed against exile and banishment, i.e. exclusion from membership in the national community. As a consequence, this limitation “lies at the outer edges of the core values” of s. 6(1): *Cotroni*, at p. 1481.

[10] Second, and flowing from the previous point, extradition will be generally warranted under s. 1 of the *Charter* as a reasonable limitation of the right to remain in Canada: *Cotroni*, at p. 1483; *Lake*, at para. 37. This is supported by the pressing and substantial objectives of extradition: (1) protecting the public against crime through its investigation; (2) bringing fugitives to justice for the proper determination of their criminal liability; (3) ensuring, through international cooperation, that national boundaries do not serve as a means of escape from the rule of law.

[11] Third, the Minister's discretion to extradite or to prosecute in Canada is a necessary condition for the effective enforcement of the criminal law, and it attracts a high degree of deference: *Cotroni*, at p. 1497; *Kwok*, at paras. 93-96; *Lake*, at para. 34. The Minister's assessment of whether the infringement of a fugitive's s. 6(1) right is justified under s. 1 involves a determination of whether, based on his superior expertise of Canada's international obligations and interests, Canada should defer to the interests of the requesting state. This is mostly a political decision. Courts should interfere with the Minister's discretion only in the "clearest of cases" (*Lake*, at para. 30).

[12] Fourth, ministerial discretion to extradite is not unfettered. Public authorities must give due regard and weight to the citizen's *Charter* right to remain in Canada in considering whether to prosecute domestically or order surrender. The Minister must order surrender only if satisfied that extradition is more appropriate

than domestic prosecution, having balanced all factors which he finds relevant under the circumstances, such as:

- Where was the impact of the offence felt or likely to have been felt?
- Which jurisdiction has the greater interest in prosecuting the offence?
- Which police force played the major role in the development of the case?
- Which jurisdiction has laid charges?
- Which jurisdiction has the most comprehensive case?
- Which jurisdiction is ready to proceed to trial?
- Where is the evidence located?
- Is the evidence mobile?
- How many accused are involved and can they be gathered together in one place for trial?
- In what jurisdiction were most of the acts in furtherance of the crime committed?
- What is the nationality and residence of the accused?
- What is the severity of the sentence that the accused is likely to receive in each jurisdiction?

[13] Fifth, no single factor is dispositive. Nor need all relevant factors be given equal weight. The Minister may decide to grant an extradition request because of one factor which he finds determinative in a given case. The pertinence and significance of the “*Cotroni* factors” vary from case to case: *Lake*, at para. 30.

Nothing precludes the Minister from paying more heed to one factor than another in a given case. The inquiry is essentially a fact-based, balancing assessment within the expertise of the Minister.

[14] Sixth, the question of whether a Canadian prosecution is a realistic option is simply one factor that must be considered. It is not the determinative factor in the Minister's assessment: *Cotroni*, at p. 1494; *Kwok*, at para. 92; *Lake*, at para. 37. In *Kwok*, Arbour J. noted that “[t]he efficacy of a prosecution goes beyond simply determining whether it has any chance of resulting in a conviction. It requires an assessment, in the public interest, of all the costs and risks involved, including delay, inconvenience to witnesses and applicable rules” (para. 90). In addition, the interest of the foreign nation in prosecuting the fugitive on its territory must not be neglected. Indeed, it would not be wrong for a Minister, after having pondered all the relevant factors, to “yield to the superior interest of the Requesting State, even in a case where some form of prosecution Canada [was] not materially impossible or totally unlikely to succeed” (*Kwok*, at para. 91).

b) *Should the Jurisprudence be Reconsidered?*

[15] The appellants ask the Court to reconsider *Cotroni*. First, they submit that extradition should no longer automatically be seen as a marginal limitation of the right to remain in Canada, “[y]ing] at the outer edges of the core values” protected by s. 6(1) of the *Charter* (Sriskandarajah factum, at para. 47). They submit that where a citizen is sought by a foreign country which has a weak claim of jurisdiction “by

Canadian lights”, extradition should be seen as a more serious infringement of s. 6(1) than contemplated in *Cotroni* (at para. 52). They say this evolution is needed because of recent trends in extradition and criminal justice, in particular the emergence of sweeping claims of jurisdiction by foreign states over the conduct of Canadian citizens within Canadian territory.

[16] On the basis of this revised interpretation of s. 6(1), the appellants argue that two factors should have near-dispositive weight in the s. 1 analysis: (1) a weak claim of jurisdiction by the foreign state; and (2) a realistic possibility of prosecuting in Canada. They argue that if the requesting state’s claim of jurisdiction is weak or there is a realistic possibility of prosecuting a citizen in Canada for the crimes, the Minister will not be justified in ordering the surrender of the citizen in question.

[17] To accept the appellant’s propositions would amount to overruling *Cotroni*, *Kwok* and *Lake*. The appellants’ interpretation of s. 6(1) of the *Charter* departs from the *Cotroni* jurisprudence in two important ways. First, it rejects the proposition that extradition is a marginal limitation of the right to remain in Canada. Second, it abandons the view that ministerial discretion is not conclusively bound by any of the *Cotroni* factors.

[18] The Court does not lightly depart from the law set out in the precedents. Adherence to precedent has long animated the common law: “[I]t is an established rule to abide by former precedents, where the same points come again in litigation” (W. Blackstone, *Commentaries on the Laws of England* (4th ed. 1770), Book I, at p.

69). The rule of precedent, or *stare decisis*, promotes predictability, reduces arbitrariness, and enhances fairness, by treating like cases alike.

[19] Exceptionally, this Court has recognized that it may depart from its prior decisions if there are compelling reasons to do so: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44. The benefits must outweigh the costs. For instance, compelling reasons will be found when a precedent has become unworkable, when its validity has been undermined by subsequent jurisprudence or when it has been decided on the basis of considerations that are no longer relevant.

[20] No compelling reasons have been shown to depart from the principles set out in *Cotroni*, *Kwok* and *Lake*. These principles have been consistently and repeatedly upheld by this Court. The common theme is that extradition, unlike exile and banishment, does not lie at the core of the right to remain in Canada under s. 6(1) of the *Charter*. A Canadian citizen who is extradited to stand trial in a foreign state does not necessarily become *persona non grata*: the accused may return to Canada if he is acquitted or, if he is convicted, at the end of his sentence or even to serve his sentence in accordance with the *International Transfer of Offenders Act*, S.C. 2004, c. 21. Extradition does not violate the core values of s. 6(1), but rather, it fulfills the needs of an effective criminal justice system.

[21] The appellants have not shown that the considerations on which *Cotroni* (1989), *Kwok* (2001) and *Lake* (2008) were based are no longer valid. If anything,

the march of globalization calls for increased international cooperation in law enforcement.

[22] The decision to extradite is a complex matter, involving numerous factual, geopolitical, diplomatic and financial considerations. A strong factor in one case may be a weak factor in another. This supports maintaining a non-formalistic test that grants flexibility to the Minister's decision when faced with a foreign state's request. The Minister of Justice has superior expertise in this regard, and his discretion is necessary for the proper enforcement of the criminal law.

[23] More particularly, the case for elevating either of the factors on which the appellants rely to near-dispositive factors has not been made. It is for the Minister to decide whether granting the foreign state's request of extradition is appropriate in the circumstances. The ability of Canada to prosecute the offences remains but one factor in this inquiry, and may be offset by other factors, such as where the prosecution may most efficaciously be carried out. Extradition is not to be avoided at all costs. In an age when crimes span borders, states should not be reduced to piecemeal prosecutions of one perpetrator in one jurisdiction and another in another jurisdiction. Nor is the strength of the foreign jurisdiction's claim to prosecute always determinative. It is one factor among others. A highly tenuous claim of jurisdiction might be a reason to refuse extradition, to be sure. However, a weak claim does not conclusively entail an unjustified breach of s. 6(1). . Rather, the

weakness of a claim of jurisdiction informs the reasonableness of the Minister's decision, which I discuss later.

5. The Argument on Procedural Fairness

[24] The appellants argue that the Minister's duty of procedural fairness goes beyond providing reasons to explain which *Cotroni* factors prompted his decision. Procedural fairness, they say, also requires the Minister of Justice to obtain and disclose the assessment of the Public Prosecution Service of Canada ("PPSC") on whether to prosecute them in Canada. The appellants argue that they should be given time to respond to the prosecution assessment by the PPSC, following which the Minister should address their concerns in his final decision to extradite. They submit that disclosure is important because the decision not to lay charges in Canada was a key factor in the final decision to extradite. They add that this would ensure that the prosecutorial authorities' assessment was not based on erroneous or out-dated information.

[25] The Minister refused the appellants' requests for this information, stating that he had provided the appellants with all of the materials which he had considered in making the decisions on surrender, with the exception of legal advice, and that he had not been provided with a copy of any PPSC assessment. With respect to the PPSC's assessment of prosecution in Canada, the Minister took the position that the decision whether to prosecute in Canada was only one of many relevant factors, and pointed out that the appellant's right of appeal was from the decision to extradite, not

the decision whether to prosecute, which involves prosecutorial discretion. (See Minister's Reasons on Surrender re Sriskandarajah, A.R., vol. I, at pp. 50-51; see also Minister's reasons on Surrender re Nadarajah, at pp. 58-59.)

[26] The appellants' submission that they are entitled to see the PPSC's prosecution assessment cannot be sustained.

[27] First and foremost, prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives: *Kwok*, at paras. 104-108. Not only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law: *Cotroni*, at pp. 1497-98. The appellants do not allege bad faith. Their request to see the prosecution assessment is a thinly disguised attempt to impugn the state's legitimate exercise of prosecutorial authority.

[28] Second, as the Minister pointed out, the ability to prosecute in Canada is but one of many factors to be considered in deciding whether to extradite a person for prosecution in another country. Procedural fairness does not require the Minister to obtain and disclose every document that may be indirectly connected to the process that ultimately led him to decide to extradite.

[29] Finally, concerns that the decision may have been based on out-dated information are met by the appellants' ability to bring full and correct information to

the attention of the Minister. In turn, the Minister must, in good faith, transfer to the prosecution authorities the information he finds relevant.

[30] As a matter of procedural fairness, full *Stinchcombe*-type disclosure is not required at the surrender stage (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326). The Minister must present the fugitive with adequate disclosure of the case against him or her, and with a reasonable opportunity to state his or her case against surrender (*Kwok*, at paras. 99 and 104), and he must provide sufficient reasons for *his* decision to surrender (*Lake*, at para. 46; *Kwok*, at para. 83). In this case, the Minister complied with these requirements.

[31] I conclude that the claim of procedural unfairness has not been established.

6. Were the Minister's Decisions Unreasonable?

[32] The appellants argue that the Minister's decisions to order their surrender to the United States was unreasonable because he failed to consider all relevant factors bearing on the *Cotroni* assessment. In particular, they submit, the Minister failed to address (1) the weak American claim of jurisdiction over the appellants' alleged conduct, and (2) the ability to prosecute in Canada. Accordingly, extradition was an unjustifiable limitation on the appellants' s. 6(1) rights.

[33] As explained above, the Minister's order of surrender is a political decision that attracts a high degree of judicial deference. The *Extradition Act* confers broad discretion on the Minister's decision to extradite: s. 7.

[34] In these cases, the record shows that the Minister properly considered and weighed the factors relevant to the situation of the appellants. With respect to the appellants' first concern, the Minister found that the "negative impact of [their] actions, when considered in concert with the alleged actions of [their] many co-conspirators, would have been felt in jurisdictions outside of Canada", implicitly including the United States (A.R., vol. I, at pp. 54 and 60). Additionally, it seems clear on the facts alleged here that the conduct described is connected in one way or another with the use of e-mail accounts, companies and bank accounts based within the United States. With respect to the appellants' second concern, the Minister considered whether prosecution should proceed in Canada and concluded that this factor did not negate extradition.

[35] In concluding that extradition was a justifiable limitation of the appellants' s. 6(1) right, the Minister provided five reasons which were relevant: the investigation was initiated and developed by American authorities; charges have been laid in the U.S.; the U.S. is ready to proceed to trial; all of the co-accuseds have been charged in the U.S.; and most of the witnesses are located in the U.S. Contrary to the suggestion of the appellants (Sriskandarajah factum, at paras. 78-82), the Minister did not ascribe determinative weight to the fact that the PPSC decided not to lay charges

in Canada against them. The Minister conducted an independent *Cotroni* assessment and concluded that the surrender of the appellants would not unjustifiably violate their s. 6(1) rights, principally on the basis of the fact that the U.S. had taken the lead in investigating and prosecuting the actions of the appellants. The Minister's conclusion that there were sufficient links to the U.S. to justify extradition flowed from this independent assessment and has not been shown to be unreasonable on the evidence.

[36] The claim that the Minister's decision was unreasonable must be rejected.

7. Conclusion

[37] The appeals are dismissed and the orders of surrender confirmed.

Appeals dismissed.

*Solicitors for the appellants: John Norris, Toronto; Breese Davies Law,
Toronto.*

*Solicitor for the respondents: Attorney General of Canada, Toronto;
Attorney General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney
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