Indexed as:

International Fund for Animal Welfare, Inc. v. Canada

International Fund for Animal Welfare, Inc., Stephen Best and Brian D. Davies (Plaintiffs)
v.
The Queen, the Minister of Fisheries and Oceans, the Minister of Justice and the Attorney General of Canada (Defendants)

[1987] 1 F.C. 244

[1986] F.C.J. No. 539

Court File No. T-494-83

Federal Court of Canada - Trial Division

McNair J.

Heard: Toronto, February 24 - 28 and March 3 and 4, 1986.
Judgment: Ottawa, September 18, 1986.

Constitutional law - Charter of Rights - Fundamental freedoms - Freedom of expression - Plaintiff Davies advocating abolition of seal hunt - Using helicopters to ferry media people to hunt scene contrary to Seal Protection Regulations prohibiting operation of aircraft over seals at low altitude - Applications to obtain sealing access turned down - Whether freedom of expression curtailed - Freedom of expression including freedom of access to all information pertinent to ideas or beliefs sought to be expressed, subject to reasonable limitations - Purpose of legislation, to prohibit unjustifiable interference with lawful activities of sealers, valid - Collective governmental interest of protecting seals and fundamental right of sealers to pursue livelihood outweighing right of freedom of access to information - Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982 c. 11 (U.K.), ss. 2(b), 24(1) - International Covenant on Civil and Political Rights, [1976] Can. T.S. No. 47, Art. 19 - Seal Protection Regulations, C.R.C., c. 833, ss. 5(a),(b), 11(2),(3),(6) (as am. by SOR/78-167, s. 3).

Constitutional law - Charter of Rights - Limitation clause - Regulations aimed at seal conservation and seal fishery management - Impinging on right of freedom of expression - Right outweighed by governmental interest in protecting seals and sealers' right to pursue livelihood - Restrictions reasonable, justified in democratic society Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 1 - Seal Protection Regulations, SOR/64-443, s. 17.

Fisheries - Seal Protection Regulations prohibiting landing of aircraft near seals or operation of aircraft over seals at less

than 2,000 feet except with Minister's permission - Plaintiff advocating abolition of seal hunt - Using helicopters to ferry media people to hunt scene - Whether Regulations ultra vires s. 34 Fisheries Act - Activities complained of within purposes and provisions of Act - "Fishery" including sealers as persons [page245] engaged in seal fishery - Fishery embracing marine animals as well as business of sealing - Right to legitimately exploit resource - Regulations within management and control of seacoast fisheries - Ministerial discretion to refuse sealing access permits properly exercised - Action for declaratory and injunctive relief dismissed - Fisheries Act, R.S.C. 1970, c. F-14, ss. 2 (as am. by S.C. 1985, c. 31, s. 1), 2.1 (as enacted idem, s. 2), 34 - Seal Protection Regulations, C.R.C., c. 833, ss. 5(a),(b), 11(2),(3),(6) (as am. by SOR/78-167, s. 3) - Seal Protection Regulations, SOR/64-443, s. 17.

The Seal Protection Regulations prohibit any person from landing a helicopter or other aircraft within half a nautical mile of any seal on the ice in the Gulf Area or Front Area or from operating such aircraft over any seal on the ice at less than 2,000 feet unless on a scheduled commercial flight, except with ministerial permission.

The plaintiff, Davies, has been adamantly committed to the abolition of the seal hunt. In 1969, he broadened the base of his attack by creating the International Fund for Animal Welfare, Inc. (IFAW). Through IFAW, he enlisted the aid of the media in spreading his message. IFAW used helicopters to ferry media people to the scene of the hunt. The plaintiff was charged with having violated the Regulations. Repeated applications by IFAW to obtain sealing access for representatives were turned down.

The plaintiffs challenge the constitutional validity of the Regulations. It is said that the Regulations deny the plaintiffs their paragraph 2(b) Charter right of freedom of expression. This right would include "freedom to seek, receive and impart information and ideas of all kinds" through any form of media, as stated in Article 19 of the International Covenant on Civil and Political Rights. In the alternative, it is argued that the Regulations are ultra vires section 34 of the Fisheries Act.

Held, the action for declaratory and injunctive relief should be dismissed.

An expansive and purposive scrutiny of paragraph 2(b) of the Charter leads to the conclusion that freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed, subject to reasonable limitations necessary to national security, public order, public health or morals, or the fundamental rights and freedoms of others.

The initial test of constitutionality is whether the purpose of the legislation is valid; the legislation's effects may be considered only when the law has passed the first test: R. v. Big M Drug Mart.

The purpose of the Regulations, as stated by the then Minister of Fisheries, was to prohibit unjustifiable interference [page246] in the lawful activities of the sealers. This was a valid purpose. The Regulations, it was stated, were aimed at the conservation and protection of seals and the proper management and control of the seal fishery, having regard to the seal harvest in light of its historic and traditional origins and the rights of those who earned a living therefrom. However, the actual effect of the regulatory provisions was to impinge on the plaintiffs' right of freedom of expression.

The question then was, as to whether those provisions fell within the limitation clause in Charter section 1. There was no compelling evidence that the Regulations were aimed at denying access to the news media. The prohibition against landing or flying an aircraft near any seal was justified by an intention to stop the unregulated and hazardous practice of hunting seals by aircraft, to prevent the dispersion of seal herds and the disruption of the normal pattern of nursing behaviour. Safety alone would necessarily impose some restriction of free access. There was a fine line between the activity of searching for information to mount an effective protest against a lawful commercial activity and the act of protesting that activity at the very scene of operations. The collective governmental interest of protecting both the seals and the fundamental right of the sealers to pursue their livelihood outweighed the plaintiffs' right of freedom of access to information. In the result, the limitations prescribed by the Seal Protection Regulations are reasonable in the circumstances and demonstrably justifiable by the normal, perceptive standards of a free and democratic society.

The plaintiffs' alternative argument, that the Regulations are ultra vires in that they exceed the purposes and provisions of the Fisheries Act, had to be rejected. There was ample evidence to show that the full range of the activities complained of are in fact within the purposes and provisions of the empowering Act. The definition of "fishery" in the Act includes sealers as persons engaged in the seal fishery. The law recognizes the fishery as a natural and public resource that embraces not only the marine animals themselves but the business of sealing in the context of the right to legitimately exploit the resource in the place where it is found. The Regulations were made for the proper management and control of the seacoast fisheries and for the conservation and protection of seals. They are therefore intra vires Parliament.

Nor was there merit in the plaintiffs' contention that the ministerial discretion to refuse them permits had been exercised for an unauthorized purpose. The policy of the government was to protect the sealers from interference by protesters. The Minister laid down the policy that permits would not be issued to persons or groups whose stated objective was to disrupt the seal hunt. That policy was aimed at all active protesters and did not single out the plaintiffs as a particular target of oppression. The discretion was properly exercised having regard to the purposes of the Act and its subject-matter in terms of management and control of the seal fishery.

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Cases Judicially Considered

Distinguished:
Fowler v. The Queen, [1980] 2 S.C.R. 213; (1981), 113 D.L.R. (3d) 513.

Considered:
R. v. Big M Drug Mart Ltd. et al., [1985] 1 S.C.R. 295; 18 D.L.R. (4th) 321; 58 N.R. 81.
R. v. Oakes, [1986] 1 S.C.R. 103.
Switzman v. Elbling and A.-G. Que., [1957] S.C.R. 285.
Northwest Falling Contractors Ltd. v. The Queen, [1980] 2 S.C.R. 292; (1981), 113 D.L.R. (3d) 1.
Cumings v. Birkenhead Corpn., [1972] Ch. 12 (C.A.).
Roncarelli v. Duplessis, [1959] S.C.R. 121; 16 D.L.R. (2d) 689.

Referred to:
Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn., [1948] 1 K.B. 223 (C.A.).
Thorne's Hardware Ltd. et al. v. The Queen et al., [1983] 1 S.C.R. 106; 143 D.L.R. (3d) 577.
The Queen v. Robertson (1882), 6 S.C.R. 52.
Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.
Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145.

Counsel:

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Solicitors:

McMillan, Binch, Toronto, for the plaintiffs.
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The following are the reasons for judgment rendered in English by

1 **McNAIR J**:-- The case arises from the controversial Atlantic seal hunt about which so much has been seen, heard and told. The great debate has raged since the mid-sixties but the clamour has abated of late because of vanishing markets. The visual spectrum is one of stark and vivid contrast, ranging from the appealing image of whitecoat pups in their natural habitat to the grim spectacle of the sealers doggedly plying their trade on the icepacks of the Gulf of St. Lawrence and the Front Area of the North Atlantic off Newfoundland and Labrador.

2 The issue is not concerned with the legality or morality of the hunt per se but rather the question of the constitutional validity of certain provisions [page248] of the Seal Protection Regulations [C.R.C., c. 833] made under section 34 of the Fisheries Act, R.S.C. 1970, c. F-14.

3 The plaintiffs' action is for declaratory relief and an injunction restraining the defendants, their servants and agents, from enforcing certain impugned provisions of the Seal Protection Regulations or initiating summary conviction or criminal proceedings in consequence thereof. Declarations are sought that the said provisions are inoperative and unconstitutional in that they contravene guaranteed rights of freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, under paragraph 2(b) of the Canadian Charter of Rights and Freedoms [being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.)], or, alternatively, that they are ultra vires the powers of the Governor in Council to make regulations under section 34 of the Fisheries Act.

4 The defendants deny that the plaintiffs' guaranteed rights and freedoms under the Charter have been inhibited or curtailed in any way by the Seal Protection Regulations but, in the event they have, the defendants say that any such inhibition or curtailment constitutes reasonable limits prescribed by law within the exception afforded by section 1 of the Charter. They also raise the question of plaintiffs' status to bring the action.

5 The plaintiff, Brian Davies, is a remarkable man of many talents. He came out from Wales in 1955 and joined the famous Black Watch regiment, serving mostly at CFB Gagetown. On the termination of his engagement in 1961, he became executive secretary of the New Brunswick SPCA. He was invited by the Minister of Fisheries, Hedard J. Robichaud, to attend a meeting in Moncton, New Brunswick, in May 1964 between departmental officials and representatives of the Canadian sealing industry. The meeting failed to convince and from what he afterwards witnessed on the ice floes, Davies became adamantly committed to the cause [page249] of total abolition of the seal hunt. He deliberately chose this course and rejected the option exercised by others of his compatriots to press the government for betterment of the hunt conditions and the preservation of the harp and hood seal species. Henceforth, he was energetic and unrelenting in his efforts to spread the abolitionist message throughout the court of public opinion.

6 The government, on the other hand, viewed the hunt as the harvesting of an economic and living resource that necessitated a system of proper quotas and humaneness in the method of killing. In 1964 the government enacted the Seal Protection Regulations [SOR/64-443] establishing licensing requirements and quota systems for the seal hunt and prescribing the killing methods. Section 17 of the Regulations prohibited anyone from skinning a seal until it was dead. Prior to 1970, public access to the seal hunt was virtually unrestricted.

7 In 1966 Davies arranged for Dr. Elizabeth Simpson, a veterinarian then practicing in Fredericton, to attend the hunt in the Gulf Area to observe and report on the humaneness of the killing methods to the NBSPCA. She submitted a detailed report to her principal, complete with photographs. Her final conclusion was that the manner in which the hunt was presently being conducted gave rise to a great deal of cruelty. The NBSPCA was quick to circulate the findings of Dr. Simpson. Because of the controversy occasioned by the message, Davies arranged that Dr. Simpson return to the hunt in 1967. She did and summarized her findings in an article which was published in the scientific periodical Nature, wherein her final conclusion is thus stated:

> These post mortem findings suggest that a large percentage of the hunted animals die in a manner

which is of doubtful humanity.

8 Public indignation was mounting but the government had not been reluctant about summoning up reserves to counter the abolitionists. In 1971 the government was instrumental in bringing [page250] about the formation of the Committee on Seals and Sealing (COSS) under terms of reference to study all aspects of the hunting of seals in the Arctic and North Atlantic Oceans and to recommend changes in the present Regulations to the Minister. Prominent amongst its members were Professor Keith Ronald, Dean of the College of Biological Science at the University of Guelph, Tom Hughes, Director of the Ontario Humane Society, Trevor H. Scott, of the International Society for the Protection of Animals, London, England, Dr. Harry C. Rowsell, a veterinary pathologist and Executive Director of the Canadian Council of Animal Care, and other eminent persons interested in the cause of seals.

9 In 1968 Davies arranged to have a news team from the Daily Mirror of London, England, taken to the ice. One of the cameramen took a photograph which was afterwards flashed on the front page of that newspaper and became something of a symbol of opposition to the seal hunt. The famous Canadian author, Farley Mowat, was also in attendance at the 1968 hunt.

10 In 1969 Davies broadened the base of attack by causing the International Fund for Animal Welfare, Inc. (IFAW) to be incorporated as a nonprofit corporation under the New Brunswick Companies Act [R.S. 1952, c. 33]. Public response was instantaneous and widespread. Meanwhile, Davies maintained close watch over successive annual hunts. His energy and zeal were prodigious. Undaunted by his failure to favourably impress the Parliamentary Committee before whom he appeared in 1969, Davies redoubled his efforts through IFAW to enlist the aid of the media in spreading the message of the hunt. IFAW assisted members of the media to get out to the ice on numerous occasions. Pictures were taken and events were described and the story of the hunt was graphically covered by newspapers and TV stations.

11 Davies became qualified as a pilot of fixed-wing and helicopter aircraft with a view of facilitating IFAW's operation "Air Bridge" for getting media personnel and protest spokesmen out to the hunt. [page251] He also found time to publish a book under the fetching title Seal Song.

12 Starting in 1970 a number of revisions were enacted to the Seal Protection Regulations. Helicopters and other aircraft could no longer be used in sealing except in searching for seals and then only under licence from the Minister. Moreover, the history of the Regulations reflects the government's growing concern over the question of unrestricted access to the seal hunt. The 1970 Regulations prohibited the landing of a helicopter or other aircraft within half a nautical mile of any seal herds in the Gulf Area or Front Area. This prohibition was repealed by the Regulations of 1974, which substituted the words "any seal" for the words "any seal herds" in the former Regulations. New Regulations were enacted in 1976 to the effect that no person could land a helicopter or other aircraft within half a nautical mile of any seal on the ice in the Gulf Area or Front Area or operate such aircraft over any seal on the ice at less than 2,000 feet unless on a scheduled commercial flight, except with permission of the Minister.

13 In 1976 IFAW chose the Front Area as its target and the base of operations became the small outport community of St. Anthony on the northeast tip of Newfoundland. IFAW used its own and five chartered helicopters to ferry a group of media people to the scene of the hunt. Five airline stewardesses were brought along for promotional purposes. The IFAW helicopter was seized and Davies was charged with violating the low flying and landing prohibitions of the Regulations. The case went to trial and appeal and was finally dismissed on the ground that the infractions occurred outside the twelve mile jurisdictional limit.

14 In mid-March of 1977, St. Anthony again became the centre of international attention. Hordes of reporters and cameramen from a number of different countries descended on St. Anthony and neighbouring communities to witness the scene of the hunt about 50 miles or so offshore. [page252] IFAW again became involved in the vital ferrying operations, despite a telegram from the Minister, Roméo LeBlanc, warning Davies that the landing of a helicopter nearer than half a mile of any seal on the ice was prohibited by the Regulations. The 1977 hunt sparked quite a bit of

local hostility and featured for the first time organized opposition on the part of hunt proponents.

15 Davies was again charged with violations of the Regulations in operating a helicopter over seals on the ice at less than 2,000 feet and landing less than half a nautical mile from a seal on the ice. Davies frankly admitted afterwards to having deliberately breached the Regulations. In the interim, the government by proclamation had extended the offshore fisheries jurisdiction to 200 miles. Davies was convicted and eventually had to serve three weeks in jail and pay a fine of $1,000. The convictions also contained a probation order that prohibited Davies or any group with which he was associated from operating a helicopter or other aircraft in the Front Area or the Gulf Area during the months of March and April in the years 1978, 1979 and 1980.

16 The 1977 hunt and its aftermath only served to arouse more spirited opposition on the part of Davies and IFAW. They took their case to the press, charging that the Canadian government had deliberately adopted a policy of denying newsmen free access to report on the hunt. The message they proclaimed is contained in the following quotation from Davies' comments at a press conference, as reported in the Medicine Hat News:

> Tens of thousands of seals, most of them babies, may be beaten to death for their skins in order to manufacture trinkets, but anyone interested in saving the seals, or photographing them, or writing about them, may not land within half a mile of a seal or fly at less than 2000 feet.

17 The government's side of the controversy was ably summed up by the Prime Minister of the day, The Right Honourable: Pierre E. Trudeau, in this way:

> On the issue of humane killing methods, the same distortions appear over and over again. It is not a pretty sight; no one could argue that it is. The fact however, is that the seals are dispatched [page253] in a more humane manner than most domestic animals. This is supported by the observation of methods completed by animal pathologists who have examined the seals and have concluded that the present method causes the animal no suffering. Qualified animal pathologists and representatives of animal welfare organizations attend the hunt each year to help government officials ensure that this continues to be the case.
>
> The point that must be kept in mind when considering the hunt is that the government has a twofold responsibility in this area. We must ensure that the species is protected from extinction and that hunting methods are humane. We have done this, and will continue to do so. The second responsibility is to the people who carry out the activity, the fishermen. For nearly two centuries they have hunted seals during the difficult winter months to augment what is for most a very small annual income. The returns for the approximately 4,000 participants represents an important part of yearly income in an area which depends almost totally on marine resources for survival. If we conclude, as we have, that this activity does not endanger the species, and that humane methods are used, then it follows that we have no reason to pass legislation to ban the hunt.

18 Each side had stated its case and the battlelines were now drawn.

19 Repeated applications by IFAW to obtain permits for representatives to go to the ice were turned down. In 1981, IFAW sought a permit to fly Dr. Eugen Weiss, a German veterinarian, to the ice for the purpose of performing autopsies on seal carcasses. A restrictive permit was issued to this individual to witness the hunt. For some reason, the restrictions were lifted and Dr. Weiss was flown to the hunt by the Department. IFAW contends that he was not then acting under their auspices. The Weiss permit was the excuse given by the department for denying a permit to Stephen Best to get to the ice in 1981. Davies himself was an observer at the 1981 hunt. Whether by freak of wind or current, the icepack carried the seals onto the very shores of Prince Edward Island and attracted great numbers of unskilled landsmen and

thrill-seekers to join in pursuit of the quarry. By another quirk of nature, the ice disintegrated very quickly and many of that years' harvest of whitecoat pups were drowned. The hunt became a disaster and the Department moved quickly to end it. Davies never went back again to observe the hunt. He continued his efforts, however, to bring about its permanent demise.

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20 In late 1981 or early 1982, IFAW applied to the Department for sealing access permits for five persons, two of whom, Paul F. Howell and Stanley Johnson, were members of the Parliament of the European Economic Community (EEC). EEC was about to debate and vote on a resolution to ban the importation of seal furs and trinkets, save for those produced by native Canadian Indians and Eskimos. The other three were IFAW representatives, namely, Davies, Best and Thomas McCollum, a skilled photographer. The requests of the European Parliament members, Howell and Johnson, were approved but those of the three IFAW representatives were denied.

21 On December 10, 1981 Stephen Best wrote a letter to the Honourable Roméo LeBlanc, Minister of Fisheries and Oceans, in anticipation of the advent of the Charter, pointing out that the restricted access provisions of the Seal Protection Regulations seemed to violate a number of the freedoms guaranteed by the Charter. The letter closed with a request for official clarification as to whether or not the restrictive provisions of the Regulations pertaining to the use of helicopters and other aircraft in proximity to the seals would be enforced. On February 18, 1982 the Minister responded through his correspondence secretary in the following vein:

> Dear Mr. Best:
>
> The Minister has asked me to reply to your letter of December 10, 1981, concerning the Seal Protection Regulations as they relate to the new Canadian Constitution.
>
> Firstly, it is the mandate of the Department of Fisheries and Oceans to protect and conserve all of our marine populations as public resources for the benefit of all Canadians. The Seal Protection Regulations, and all of the Department's other regulations, are designed to achieve these goals. The Seal Regulations provide the guidelines for the effective management of the seal resource and attempt to ensure through responsible practices that our seal herds continue to grow and to remain commercially exploitable. Only through the enforcement of such regulations can the annual hunt be properly managed so that it continues to bring a much-needed boost to fishermen's income during a period of the year when their finances are particularly low.
>
> In recent years some individuals have gone to great lengths to discredit this traditional harvest and to disrupt the actual hunting activity. Consequently, the regulations now have the dual purpose of protecting the seal population from the danger of uncontrolled hunting and of protecting the licensed sealers from the protesters who seek to harass them and to interfere with their hunting activities. The professional sealers have their [page255] own right "to pursue the gaining of a livelihood", free from such interference. Moreover, there is an increasingly widespread feeling among the sealers that such protesters pose a threat to their continued access to this source of income. In a very real sense the seal regulations go a long way towards protecting the protesters from physical abuse at the hands of the sealers.

The Minister has asked me to assure you that regardless of the wording of our new Constitution, this Department will always uphold the "principles of fundamental justice". The seal regulations will continue to protect the seal herds from the dangers of uncontrolled exploitation, and to protect the licensed sealers from the uncontrolled excesses of those who would deny the sealers' right to harvest this renewable resource.

Yours sincerely,
(Sgd) Dixi Lambert
Dixi Lambert
Correspondence Secretary

22 The regulations subjected to attack in the present lawsuit are the following provisions of the Seal Protection Regulations, C.R.C., c. 833, viz.:

Subsections 11 (2) and (3)

11. ...

(2) No person shall use a helicopter or other aircraft in searching for seals unless he has an aircraft sealing licence issued by the Minister.

(3) An aircraft sealing licence may be issued only in respect of an aircraft registered in Canada under Part II of the Air Regulations made pursuant to the Aeronautics Act.

Paragraphs 11(5)(a) and (b)

11. ...

(5) Except with the permission of the Minister, no person shall

(a) land a helicopter or other aircraft less than 1/2 nautical mile from any seal that is on the ice in the Gulf Area or Front Area; or
(b) operate a helicopter or other aircraft over any seal on the ice at an altitude of less than 2,000 feet, except for commercial flights operating on scheduled flight plans.

Subsection 11(6) (SOR/78-167, s. 3)

11. ...

(6) No person shall, unless he is the holder of a licence or a permit, approach within half a nautical mile of any area in which a seal hunt is being carried out.

23 The first issue concerns the constitutional validity of the above mentioned provisions of the Seal Protection Regulations, which the plaintiffs have challenged in their action by invoking paragraph [page256] 2(b) of the Charter. The question thus raised for determination is whether the Regulations deny to the plaintiffs their guaranteed right of freedom of expression within the meaning of paragraph 2(b) of the Charter. This right, it is contended, must be seen to include "freedom to seek, receive and impart information and ideas of all kinds", whether by the written or spoken word

or photography or whatever other media of communication might be chosen. Although IFAW is unquestionably a redoubtable protester, the gist of the case is not concerned with the right to protest per se. The plaintiffs' evidence is that they have never deliberately interfered with the sealers. Their avowed objective is access to information rather than altercation and confrontation.

24 It is now settled beyond doubt or question that the Charter is a constitutional document of the living tree genus that must be accorded a large, liberal and purposive interpretation in respect of the enshrined rights guaranteed thereby. A judicial analysis of whether a Charter right has been infringed involves a two-stage inquiry. The question to be addressed in the first stage of inquiry is whether the specific right and freedom, viewed generously and purposively, has been violated by the law that has been challenged. If it transpires that it has then this launches stage two of the inquiry which brings into play section 1 of the Charter where the issue becomes that of determining whether the challenged law represents "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The burden of persuading a court that this is so rests on the party asserting the affirmative of the issue and the appropriate standard of proof is weighed by the preponderance of probability test. See Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Big M Drug Mart Ltd. et al., [1985] 1, S.C.R. 295; 18 D.L.R. (4th) 321; 58 N.R. 81; and R. v. Oakes, [1986] 1 S.C.R. 103.

25 In R. v. Big M Drug Mart Ltd., supra, Dickson J. [as he then was], for the majority, held that the initial test of constitutionality must be whether or not the legislation's purpose is valid; the legislation's effects need only be considered when the law [page257] under review has passed the purpose test. The effects test can never be relied on to save legislation with an invalid purpose. The minority member, Wilson J., took the contrary view that the Charter was "an effects-oriented document" so that an evaluation of legislative impingement on fundamental rights and freedoms fell to be determined according to whether or not the impugned legislation "had the effect of violating an entrenched individual right". The learned Judge agreed with her majority colleagues on the broad issue of section 1 consideration, stating at pages 361 S.C.R.; 373 D.L.R.; 121 N.R.:

> ... the analysis required under s. 1 of the Charter will entail an evaluation of the purpose underlying the impugned legislation. I agree with Dickson J. when he states in his reasons that s. 1 demands an assessment of the "government interest or policy objective" at stake, followed by a determination as to whether this interest is of sufficient importance to override a Charter right and whether the means chosen to achieve the objective are reasonable.

26 One of the justificatory criteria for measuring any governmental limitation on guaranteed rights and freedoms is the concept embraced by the words "free and democratic society", which are multifarious in their scope and application. Dickson C.J., assayed but a few of the embodiments in R. v. Oakes, supra, and drew this conclusion at page 136 S.C.R.:

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.
>
> The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

27 The fact remains that most Charter cases involve the striking of a balance between the legitimate social and collective goals of the state and some guaranteed right and freedom of the [page258] individual. The governmental

interest or policy objective must be one of sufficient importance to justify the overriding of a Charter right and the means adopted for its implementation must be reasonable. It can scarcely be gainsaid that a free and democratic society is an open society that accepts diversity of belief and accommodates freedom of opinion and expression.

28 Rand J., eloquently resounded this theme in Switzman v. Elbling and A.-G. Que., [1957] S.C.R. 285, long before the advent of the Charter, when he said at page 306:

> ... Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.
>
> But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas.

29 Freedom itself was thus defined by Dickson J., in the Big M Drug Mart case at page 337:

> Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

30 The plaintiffs rely on Article 19 of the International Covenant on Civil and Political Rights [[1976] Can. T.S. No. 47] to support their argument that the language of paragraph 2(b) of the Charter must be taken to contemplate freedom to seek, receive and impart information on the seal hunt. Article 19 guarantees freedom of expression and states:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

31 The rule is well established that an enactment should be interpreted, as far as practicable and its language admits, in conformity with the rules of international law. Canada acceded to the Covenant on May 19, 1976. The plaintiffs contend that the terms of the Article are relevant to the interpretation of paragraph 2(b) of the Charter, and I am bound to agree. In R. v. Oakes, supra, the Chief Justice utilized another provision of the Covenant as an aid in the interpretation of the presumption of innocence language of paragraph 11(d) of the Charter.

32 Subsection 24(1) of the Charter provides as follows:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

33 The subsection is clearly intended to grant a remedy to anyone whose Charter rights and freedoms have been infringed. The plaintiffs' action for declaratory and injunctive relief falls within the ambit of this provision. The Charter became law on April 17, 1982 and operates prospectively only from that date. Initially, I had some concern that the events relating to the infringements of which plaintiffs complain occurred for the most part prior to the enactment of the Charter. Counsel are agreed that the Seal Protection Regulations, leaving aside the issue of their constitutionality, operate as a continuing restraint against the plaintiffs so that the issue of retroactivity is not germane to the proper determination of the case.

34 On the issue of constitutionality, it is the plaintiffs' contention that the impugned provisions of the Seal Protection Regulations violate their right of free access to information contrary to paragraph 2(b) of the Charter. It is further contended that the regulatory prohibitions against landing or flying an aircraft in proximity to any seal on the ice have the effect of rendering meaningless any licence or permit to approach within half a nautical mile of an area where a seal hunt is being [page260] carried out. The plaintiffs also submit that IFAW is a member of the media. I cannot accept this last mentioned submission. The defendants contend, on the other hand, that the right of freedom of expression is limited to the dissemination of ideas and beliefs in the expressible sense and does not comprehend the broader aspect of access to information as the fountain-head for the formulation and expression of those ideas and beliefs. Alternatively, it is argued that if there is such a right of free access to information then the limitations imposed by the Regulations are justifiable limits within the meaning of section 1 of the Charter.

35 Sections 1 and 2(b) of the Charter state:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

36 An expansive and purposive scrutiny of paragraph 2(b) leads inevitably, in my judgment, to the conclusion that freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed, subject to such reasonable limitations as are necessary to national security, public order, public health or morals, or the fundamental rights and freedoms of others.

37 Much of the underpinning of the plaintiffs' case rests on a memorandum submitted by Donald D. Tansley, Deputy Minister, to the Honourable Roméo LeBlanc sometime during the latter part of 1978. The memorandum dealt with objectives and policies for controlling access to the sealing operations in 1979 and sets out a number of alternative policy options and conclusions. The stated objectives to which the plaintiffs take most exception are the following:

a. to reduce adverse national and international publicity on sealing
b. an ostensible mechanism for reducing interference with the sealing operations.

38 The plaintiffs make much play of the word "ostensible". The face page of the memorandum indicated that the majority consensus of those [page261] involved with the Seal Protection Regulations favoured the view that a limited

number of protesters should be permitted access to the 1979 sealing operations for observational purposes only. It is true that the memorandum dealt with the pros and cons of a number of policy alternatives but there is no compelling evidence that the underlying purpose was the suppression of freedom of opinion and expression. In my view, the Tansley memorandum is relatively innocuous and largely inconclusive.

39 More telling from the plaintiffs' standpoint is a news release from the Honourable Roméo LeBlanc dated February 28, 1978 wherein the Minister explained the Regulations requiring a permit or licence for any person to visit the immediate area of the seal hunt. The Minister explained that the purpose of the amendments to the Regulations was to prohibit unjustifiable interference in the lawful activities of the sealers rather than to prevent legitimate observation of the seal herds. He went on to make this further statement regarding the issuing of permits and licences:

> We will not, however, allow persons or groups near the sealing operations whose announced intention is to interfere with the livelihood of authorized and licensed fishermen.

40 A departmental circular of February 16, 1982 respecting procedures and guidelines for visitors' permits repeated the admonition that permits would not be issued "to individuals or groups whose stated objective is to disrupt the hunt".

41 The question thus posed is this: were the Regulations aimed at the conservation and protection of seals and the proper management and control of the seal fishery, having regard to the seal harvest in light of its historic and traditional origins and the rights of those who earned a living therefrom, or was the paramount purpose that of suppressing freedom of expression? In my opinion, the purpose behind the Regulations was a perfectly valid one. Nonetheless, the actual effect was to impinge on the plaintiffs' right of freedom of expression enshrined in the Charter in the broad connotation of freedom of access to information. Prima facie, their right has been violated and it becomes necessary [page262] to turn now to section 1 of the Charter to determine whether the limit is one that is "reasonable" and "demonstrably justified in a free and democratic society".

42 Hogg, Constitutional Law of Canada, 2nd ed., makes this significant statement in reference to section 1 consideration at page 688:

> In the end, Charter cases will not be decided by a nice parsing of the words and phrases in s. 1. What is called for is a weighing of three factors: (1) the importance of the Charter right that has been infringed; (2) the extent of the infringement; and (3) the importance of the governmental interest asserted in justification. The significance of the phrase "demonstrably justified" is that a court must be satisfied that factor (3) clearly outweighs the combined effect of factors (1) and (2). This is an ineluctably discretionary judgment by a court which cannot easily be captured in any verbal formula.

43 The burden of proof of justification rests on the defendants as the proponents of the impugned legislation. What kind of proof is required? The answer is far from clear. The prevailing view is that there should be sufficient cogent evidence to persuade the court as to the reasonableness of the limitation in terms of striking a balance between legitimate social interests and the rights of the individual, except in cases where this is obvious and self-evident: per Dickson C.J., in R. v. Oakes, supra, at page 138. In the latter situation, strong submissions would probably suffice to tip the scale. In other cases the evidence of justification could conceivably take the form of social science reports or studies. The modes of proof will undoubtedly vary according to the circumstances of the particular case.

44 The Prime Minister made a statement concerning the 1977 conviction of Brian Davies in which he stated that the purpose of the regulatory prohibitions against landing or flying an aircraft near any seal on the ice was to bring to an end the former unregulated and extremely hazardous practice of hunting seals by aircraft. Henceforth, hunters could only approach the site of the hunt by ship. There is other evidence to the same effect. There is no compelling evidence that the purpose of the Regulations was to deny access to the news media. In fact, all indications point the other way. In 1982 there were forty-nine requests for observer permits to view the hunt of which eight were refused, including the

three representatives [page263] of IFAW. Of the forty-one requests granted, the bulk were to members of the media. Similarly, in 1983 nineteen requests for permits were made, of which fifteen were granted and four were refused. Among those granted, nine were to media personnel.

45 What other justifications are there, if any, for the stringent prohibition against landing or flying aircraft close to any seal on the ice? I find on the evidence that the presence of low-flying aircraft would cause some dispersion of the seat herds. Dr. David Lavigne, the plaintiffs' principal expert on seals, confirmed this during his testimony. Davies himself honestly admitted to it. The fact was also unequivocally corroborated by the evidence of Messrs. Renaud and Small, sealing captains of many years proven experience. The evidence also established that buzzing aircraft would disrupt the normal pattern of nursing behaviour between mother seal and whitecoat pup but the quantifiable extent of actual detriment was left to conjecture and inference. Conceivably, there would have to be some.

46 Was the governmental restriction against active protestors reasonable in the circumstances? There is something of a fine line between the activity of searching for information to mount an effective protest against a lawful commercial activity and the act of protesting that activity at the very scene of operations. The sealers were becoming sensitive to the fanfare and reluctant to have their photographs taken. The sealers were perceived by the government as an important social, economic and political constituency and the governmental objective was to recognise their right to pursue their livelihood free from the interference of protestors. The ice pans are no place to stage a protest. This was the firm conviction of senior fisheries protection officer, Stanley Dudka, born of long experience at the scene of many hunts. He alluded to five occasions over the years when he had to rescue Davies or some of his compatriots because of weather conditions or other adversities.

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47 Dr. Lavigne related the eerie personal experience of having crossed an ice pan in the morning on his way to the hunt and retracing his steps in the afternoon to find that his footprints were obliterated because the ice pan which he had earlier traversed had afterwards done a complete flip-flop in the leads of open water. Safety alone would necessarily impose some restriction of free access.

48 Based on the totality of evidence, it is my opinion that the collective governmental interest of protecting both the seals and the fundamental right of the sealers to pursue their historical avocation clearly outweighs the plaintiffs' enshrined right of freedom of access to information. In the result, the limitations prescribed by the Seal Protection Regulations are reasonable in the circumstances and demonstrably justifiable by the normal, perceptive standards of a free and democratic society.

49 The next point is that of ultra vires.

50 The plaintiffs take the position that the Seal Protection Regulations are not authorized by the empowering statute in that they go far beyond "the purposes and provisions" of the Fisheries Act by imposing limitations that are inconsistent therewith or superfluous thereto and by prohibiting conduct that is not linked to actual or potential harm to the fishery. The defendants' answer is that the Regulations must be read in context and in keeping with the scheme of the Act as a whole.

51 Section 2.1 of the Fisheries Act [as enacted by S.C. 1985, c. 31, s. 2] states, inter alia, the following purposes:

> 2.1 The purposes of this Act are
>
> (a) to provide for the conservation and protection of fish and waters frequented by fish;
> (b) to provide for the proper management, allocation and control of the seacoast fisheries of Canada;

52 Seals, as a species of marine animals, are brought within the definition of "fish" in the interpretation section [section 2 of the Act]. Section 34 of the Act deals with the power to make regulations which, for the purposes of this case, are contained within the following provisions:

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> 34. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations
>
> (a) for the proper management and control of the seacoast and inland fisheries;
> (b) respecting the conservation and protection of fish;

53 By virtue of the interpretation section, the seacoast fisheries would include not only the locale of the Canadian fisheries waters where fishing and related activities occur but also the persons engaged in the fishery and their vessels, gear and equipment [section 2 of the Act (as am. by S.C. 1985, c. 31, s. 1)].

54 It is now authoritatively settled that the fisheries are a public resource within the legislative competence of the Parliament of Canada as a matter of national and general concern that does not fall within the local purview of the "property and civil rights" jurisdiction of the provinces. The power to control and regulate that resource must include the authority to protect all those creatures which form part of it: see The Queen v. Robertson (1882), 6 S.C.R. 52, at pages 120-121; and Northwest Falling Contractors Ltd. v. The Queen, [1980] 2 S.C.R. 292; (1981), 113 D.L.R. (3d) 1.

55 The question in Northwest Falling Contractors Ltd. v. The Queen, supra, was whether subsection 33(2) of the Fisheries Act which prohibited any person from depositing a deleterious substance in water frequented by fish was ultra vires. The Supreme Court held that the section was intra vires of the Parliament of Canada because the definition of "deleterious substance" was such as to ensure that the scope of subsection 33(2) was restricted to the prohibition of deposits that threatened fish, fish habitat or the use of fish by man. Martland J., in giving the decision of the Court, made this statement at pages 299-300 S.C.R.; 6 D.L.R.:

> The meaning of the word "fishery" was considered by Newcombe J. in this Court in Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914, at p. 472:
>
> > In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:
> >
> > > A fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also [page266] frequently used to denote the locality where such right is exercised.
> >
> > In Dr. Murray's New English Dictionary, the leading definition is:
> >
> > > The business, occupation or industry of catching fish or of taking other

products of the sea or rivers from the water.

The above definitions were quoted and followed by Chief Justice Davey in Mark Fishing Co. v. United Fishermen & Allied Workers Union, at pp. 591 and 592. Chief Justice Davey at p. 592 added the words:

> The point of Pattersor's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.

56 Plaintiffs' counsel relies strongly on the Supreme Court decision in Fowler v. The Queen, [1980] 2 S.C.R. 213; (1981), 113 D.L.R. (3d) 513. The case raised the constitutional issue of whether subsection 33(3) of the Fisheries Act was within the legislative competence of the Parliament of Canada, and directly involved a conflict between the federal legislative competence in relation to the fishery and subject matters of provincial jurisdiction, including property and civil rights. Subsection 33(3) prohibited anyone engaged in logging operations from putting any slash or other debris into any water frequented by fish. The appellant had been prosecuted on two counts under the section and was acquitted at trial and convicted on appeal. The Supreme Court allowed the appeal and restored the acquittal at trial. The ratio is thus stated by Martland J., at pages 226 S.C.R.; 521-522 D.L.R.:

> Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is ultra vires of the federal Parliament.

57 Interestingly enough, the Court utilized the same definition of "fishery" to which resort was had in the Northwest Falling Contractors case.

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58 In Northwest Falling Contractors, Martland J., distinguished the Fowler decision in this way at pages 301 S.C.R.; 7-8 D.L.R.:

> The situation in this case is different from that which was considered in Dan Fowler v. Her Majesty The Queen, a judgment of this Court recently delivered. That case involved the constitutional validity of subs. 33(3) of the Fisheries Act and it was held to be ultra vires of Parliament to enact. Unlike subs. (2), subs. (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat.

59 The learned Judge went on to quote the passage from his judgment in the Fowler case which pointed out that the prohibitory subsection there made no attempt to link the proscribed conduct to actual or potential harm to fisheries.

60 The Fowler case bears another distinguishing facet from the case at bar in that the constitutional conflict was between the federal and provincial fields of legislative competence. That issue does not arise here, where the real point of ultra vires is whether the Regulations were made by the Governor in Council for carrying out the purposes and provisions of the Fisheries Act in terms of the proper management and control of the seacoast and inland fishery and the conservation and protection of seals. Unlike Fowler there is ample evidence to show that the full range of the activities

complained of are in fact within the purposes and provisions of the empowering Act. The definition of "fishery" in the Fisheries Act includes the sealers as persons engaged in the seal fishery. The law recognizes the fishery as a natural and public resource that embraces not only the marine animals themselves but the business of sealing in the context of the right to legitimately exploit the resource in the place where it is found and the right is lawfully exercised. In my opinion, the Seal Protection Regulations are intra vires as being within the purposes and provisions of the Fisheries Act by reason that they are Regulations made for the proper management and control of the seacoast fisheries and for the conservation and protection of seals. In the result, the plaintiffs' argument of ultra vires must fail.

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61 Finally, the plaintiffs contend that the Minister's refusal to grant them permits constituted an improper exercise of ministerial discretion in that the policy rationale underlying such refusal was aimed at the reduction of adverse publicity on the seal hunt. In other words, the ministerial discretion was exercised for an unauthorized purpose.

62 It is clear on principle that an administrative or public authority must exercise its discretionary powers in good faith and for an authorized statutory purpose. Whether such powers must be exercised reasonably is something of a moot point. Generally speaking, the test of relevancy is to be preferred over that of reasonableness except in those rare cases where the administrative decision is so manifestly unreasonable that no reasonable person could ever have sensibly come to it. Indeed, the connection between irrelevancy and unreasonableness is so close that the one, more often than not, blurs over into the other. One thing is clear the repository of a statutory power must have regard to relevant considerations and not allow itself to be influenced by irrelevant considerations. In final analysis, unreasonableness may become a criterion for challenging administrative action where the authority exercising the discretion has deviated from the path of relevancy in coming to its decision: 1 Halsbury's Laws of England, 4th ed., paras. 20 and 62; deSmith, Judicial Review of Administrative Action, 4th ed., pages 346-348; Reid and David, Administrative Law and Practice, 2nd ed., page 315; Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn., [1948] 1 K.B. 223 (C.A.); Cumings v. Birkenhead Corpn., [1972] Ch. 12 (C.A.); Roncarelli v. Duplessis, [1959] S.C.R. 121; 16 D.L.R. (2d) 689; and Thorne's Hardware Ltd. et al. v. The Queen et al., [1983] 1 S.C.R. 106; 143 D.L.R. (3d) 577.

63 Lord Denning M.R., put it this way in Cumings v. Birkenhead Corpn., supra, at page 36:

> It is well settled that, when a public authority is given an administrative discretion, it must exercise its discretion fairly. It must be guided by relevant considerations and not by irrelevant considerations.

64 Rand J., stated his version of the principle in the Roncarelli case at pages 140 S.C.R.; 705 D.L.R.:

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> ... no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute ... "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. [Emphasis added.]

65 In Roncarelli the permanent revocation of the restaurateur's liquor licence was held to be without legal justification because it was expressly done to punish the licensee for acts that were wholly irrelevant to the licensing statute.

66 The question comes down to this: did the Minister exercise his discretion within the four corners of the matters which he was obliged to consider in refusing permits to the plaintiffs? The policy of the government was to protect the sealers in their means of livelihood from interference by protesters. The Minister laid down the policy that permits would not be issued to persons or groups whose stated objective was to disrupt the seal hunt. The policy was aimed at all active protesters and did not single out the plaintiffs as a particular target of oppression. Under the circumstances, I find that the Minister exercised his discretion properly, having regard to the purposes of the empowering enactment and its subject-matter in terms of the management and control of the seal fishery. In my opinion, there is no ground for challenging the exercise of ministerial discretion in this instance.

67 The plaintiffs' claim for injunctive relief crumples with the constitutional linch-pins of their case. Consequently, it is unnecessary to determine the vexing question of whether an injunction will lie in a proper case against a Minister of the Crown purporting to act under statutory authority in a manner contrary to law.

68 For the foregoing reasons, the plaintiffs' action is dismissed, with costs.

qp/s/qlsrr