The verdict is in folks and it isn't pretty. This could not only affect residents of Ontario but has the potential to spread through out Canada. We can only hope that it will proceed to the Supreme Court and be struck down in its entirety.

I have attached an overview plus the full court judgement.

OVERVIEW

[1] The appellant attacks the constitutionality of Ontario's law banning pit bull dogs. As a violation of the law can result in a penalty of imprisonment, the appellant invokes the right not to be deprived of "life, liberty, and security of the person… except in accordance with the principles of fundamental justice" guaranteed by s. 7 of the Charter of Rights and Freedoms. She argues that a total ban is grossly disproportionate to the risk pit bulls pose to public safety, rendering the law unconstitutionally overbroad, and that the law fails to provide an intelligible definition of pit bulls, rendering the law unconstitutionally vague. She also argues that a provision allowing the Crown to introduce as evidence a veterinarian's certificate certifying that the dog is a pit bull violates the right to a fair trial and the presumption of innocence, contrary to s. 11(d) of the Charter.

[2] In 2005, in the aftermath of a series of highly publicized pit bull attacks resulting in serious personal injury to several victims, the Ontario Legislature amended the Dog Owners' Liability Act, R.S.O. 1990, c. D.16 to ban the breeding, sale and ownership of pit bull dogs: Public Safety Related to Dogs Statute Law Amendment Act, 2005, S.O. 2005, c. 2. The pit bull provisions allow those who own pit bulls born at the time the amendments came into force or 60 days thereafter to keep their dogs ("restricted pit bulls"). However, owners of restricted pit bulls are required by regulation to have their dogs sterilized and to leash and muzzle their dogs when in public places.

[3] The appellant owns a "Staffordshire terrier cross" that is a restricted pit bull. In support of her overbreadth argument, the appellant submits that the legislature cannot justify the law's total ban on pit bulls and blanket application to all restricted pit bulls. It is her contention that there is insufficient evidence to indicate that all pit bulls are inherently dangerous and that significantly less drastic measures could satisfy any concern for public safety. In support of her vagueness argument, the appellant contends that the Act fails to provide an adequate definition of pit bulls and that it is impossible to determine whether a dog is or is not caught by the legislation. Finally, the appellant argues that the veterinarian certificate provision denies the right to cross-examine on crucial evidence and creates a mandatory evidentiary burden and thereby violates the right to a fair trial and the presumption of innocence protected by s. 11(d) of the Charter.

[4] The application judge rejected the overbreadth argument. She accepted the appellant's vagueness argument but only to a limited extent. The application judge struck down part of the definition of "pit bull" but left the most significant part of the definition intact. She accepted the appellant's s. 11(d) argument and struck down the veterinarian certificate provision.

[5] The appellant comes to this court asking us to reverse that judgment and to strike down the pit bull provisions as being unconstitutionally overbroad and vague. The Attorney General cross-appeals and asks us to restore the definition of "pit bull" as enacted by the legislature. The Attorney General also cross-appeals the order striking down the provision relating to the use of a veterinarian's certificate.

[6] For the following reasons, I conclude that the pit bull provisions do not violate any right guaranteed by the Charter. Accordingly, I would dismiss the appeal and allow the cross-appeal.

LEGISLATION

[7] The pit bull provisions prohibit the ownership, breeding, importation or transfer of pit bulls. Under regulations promulgated under the Act, individuals who own a restricted pit bull are required to muzzle, leash and sterilize their dogs: Pit Bull Controls, O. Reg. 157/05, ss. 1-2. Under s. 18 of the Act, a person who contravenes any provision of the Act or regulations is guilty of an offence and liable, on conviction, to a fine of up to $10,000, six months imprisonment or both.

[8] Subsection 1(1) of the Act defines the term "pit bull" as follows:
"pit bull" includes,
(a) a pit bull terrier,
(b) a Staffordshire bull terrier,
(c) an American Staffordshire terrier,

(d) an American pit bull terrier,
(e) a dog that has an appearance and physical characteristics that are substantially similar to those of dogs referred to in any of clauses (a) to (d); ("pit-bull")

[9] Subsection 1(2) provides:
In determining whether a dog is a pit bull within the meaning of this Act, a court may have regard to the breed standards established for Staffordshire Bull Terriers, American Staffordshire Terriers or American Pit Bull Terriers by the Canadian Kennel Club, the United Kennel Club, the American Kennel Club or the American Dog Breeders Association.

[10] The provision relating to the admissibility and use of veterinarians' certificates reads as follows:
19. (1) A document purporting to be signed by a member of the College of Veterinarians of Ontario stating that a dog is a pit bull within the meaning of this Act is receivable in evidence in a prosecution for an offence under this Act as proof, in the absence of evidence to the contrary, that the dog is a pit bull for the purposes of this Act, without proof of the signature and without proof that the signatory is a member of the College.
(2) No action or other proceeding may be instituted against a member of the College of Veterinarians of Ontario for providing, in good faith, a document described in subsection (1).
(3) For greater certainty, this section does not remove the onus on the prosecution to prove its case beyond a reasonable doubt.
THE APPLICATION JUDGE'S FINDINGS

[11] There was conflicting evidence before the application judge regarding the dangerousness of pit bulls. The applicant's evidence was to the effect that pit bulls are not inherently dangerous; that Canadian statistics indicate that pit bulls were involved in relatively few reported bites or attacks; and that most pit bulls pose no threat to public safety. The Attorney General relied on evidence of a series of pit bull attacks that had resulted in serious personal injury, including harm to children; expert evidence that pit bulls tended to be unpredictable in their behaviour and susceptible to unprovoked attacks; and evidence from the United States indicating that pit bulls were involved in a disproportionately high number of serious incidents.

[12] The application judge ruled that the applicant had failed to make out a violation of s. 7 of the Charter on grounds of overbreadth. She held that the legislature could act on a "reasoned apprehension of harm" and that conclusive evidence that pit bulls pose a threat to public safety was not required so long as the legislative response was not "grossly disproportionate" to the legislative objective. She found that it was unnecessary to resolve the conflicting evidence as to the danger posed by pit bulls and that the record established a sufficient body of evidence to permit the legislature to conclude that a total ban on pit bulls was required to protect the public.

[13] With respect to the vagueness challenge, the application judge concluded that, when read as a whole, ss. 1(1)(b)-(e) and (2) provide a sufficient definition to survive s. 7 scrutiny. However, she found that as there is no recognized "pit bull terrier" breed, the inclusion of "a pit bull terrier" (s. 1(1)(a)) was unconstitutionally vague. She also found that the use of the word "includes" in the definition of "pit bull" rendered the definition unconstitutionally vague. Accordingly, she struck down the word "includes" and s. 1(1)(a) and read into the opening of the definition of "pit bull" the word "means" in place of the word "includes".

[14] With respect to s. 19, the application judge found that a trial judge has the discretion to permit cross-examination of the veterinarian and therefore rejected the contention that s. 19 violated the accused's rights to a fair trial. However, the application judge also held that s. 19 created a mandatory evidentiary burden that violated the right to be presumed innocent guaranteed by s. 11(d) of the Charter and that the violation could not be justified as a reasonable limit pursuant to s. 1. She held that the appropriate remedy was to sever s. 19 and to strike it down.

[15] The application judge also rejected the applicant's submissions that the pit bull provisions were ultra vires the province and that they conflicted with federal legislation. No appeal is taken from those findings.

[16] In view of the divided success, the application judge declined to award costs.
ISSUES

[17] The appeal and cross-appeal raise the following issues:
(1) Are the pit bull provisions unconstitutionally overbroad?

(2) Is the definition of "pit bull" unconstitutionally vague?
(3) Does s. 19, providing for proof that the dog is a pit bull through a veterinarian's certificate, violate s. 11(d) of the Charter?
(4) If there are any violations of the Charter, are they justified pursuant to s. 1?
(5) To the extent that the pit bull provisions are unconstitutionally vague, is severance and reading in the appropriate remedy?
(6) Did the application judge err by refusing to award the appellant costs?

ANALYSIS
Issue 1. Are the pit bull provisions unconstitutionally overbroad?
[18] Overbreadth is a term used to describe legislation that, as drafted, covers more than is necessary to attain the legislature's objective and thereby impinges unduly upon a protected right or freedom. A law is unconstitutionally overbroad if it deprives an individual of "life, liberty and security of the person" in a manner that is "grossly disproportionate" to the state interest that the legislation seeks to protect. Such a law is said to be "arbitrary" and offends "the principles of fundamental justice" and therefore violates s. 7 of the Charter. A law that restricts the rights guaranteed by s. 7 is also "arbitrary" unless it is grounded in a "reasoned apprehension of harm". The onus of proving that the law is "arbitrary" or "grossly disproportionate" lies on the applicant: see R. v. Malmo-Levine, [2003] 3 S.C.R. 571, at paras. 78, 133, 143.

[19] The Attorney General concedes that as the Act provides for a potential penalty of imprisonment, the s. 7 right not to be deprived of "life, liberty and security of the person… except in accordance with the principles of fundamental justice" is implicated. There is no dispute that the legislative purpose of the pit bull provisions is to reduce, and ultimately to eliminate, the risk of pit bull attacks in Ontario. The appellant concedes that the protection of the public from dog bites and dog attacks is a legitimate legislative objective.

[20] The contentious issue is whether the appellant satisfied the onus of demonstrating that the law is "arbitrary" or "grossly disproportionate" to the legislature's objective.

[21] The appellant relies on evidence to the effect that not all pit bulls are inherently dangerous and argues that by imposing a total ban on all pit bulls, whether shown to be dangerous or not, the sweep of the law is excessive and not capable of justification as proportionate to the alleged risk pit bulls pose to public safety. The appellant's evidence may be summarized as follows:
· Expert opinion that most dogs, including pit bulls, are kind and gentle and that many pit bulls have never bitten anyone and that it is not possible to link dangerousness to breed.
· Evidence that a variety of factors other than a dog's breed determine dangerousness, including: inherited and learned behaviours, breeding, socialization, function and physical condition and size of the dog, reproductive status, popularity of breed, individual temperament, environmental stresses, owner responsibility, victim behaviour, victim size and physical condition, timing and misfortune.
· Statistical and expert evidence that pit bulls are responsible for only a small proportion of recorded bite incidents and fatal dog attacks in Canada .

[22] The Attorney General responds with evidence that pit bulls do pose a serious threat to public safety. That evidence may be summarized as follows:
· Evidence of four savage pit bull attacks resulting in significant personal injury shortly before the enactment of the pit bull provisions and the evidence of several police officers who confronted and shot pit bulls that were attacking someone or that were aggressively threatening police officers.
· American expert witnesses who observed highly aggressive behaviour unique to pit bulls, not exhibited by any other type or breed of dog, and who considered pit bulls to be a recognized danger to public safety.
· An American statistical study finding that pit bull-type dogs were involved in a high proportion of dog bite related fatalities in the United States from 1981 to 1992.
· Expert evidence that pit bulls can be unusually unpredictable and as they have a tendency to attack without warning or provocation, there may be nothing a potential victim can do to prevent or avoid an attack.

[23] The application judge carefully reviewed and analyzed this evidence and concluded as follows, at paras. 74, 79 and 84 of her reasons on the constitutional challenge:
[T]here is inconclusive and competing evidence in the case at hand. However, conclusive evidence is not required before a government can take action. It is also not necessary for the court to resolve the conflicting evidence. There is, in my opinion,

sufficient evidence to conclude that the legislature, in enacting these provisions, had a "reasoned apprehension of harm" concerning the dangerousness of pit bulls.
…
It is my opinion that, in the face of this conflicting evidence, the legislature was entitled to decide that there was a sufficient body of evidence with respect to the inability to identify dangerous pit bulls in advance of an attack so as to justify restrictions that apply to all pit bulls. The recommended alternative approaches to breed-specific legislation largely depend on either a previous dangerous act or a responsible dog owner identifying a dangerous dog and taking appropriate action. Where public safety is concerned, it was open to the legislature to choose the more cautious approach.
…
It is not my task to substitute my opinion for that of the legislature as to how best to protect the public. It is also not necessary for me to resolve the conflicting evidence as to the role that breed plays in determining whether a dog is dangerous and whether pit bulls, as a breed, are dangerous. The legislature, in determining how to accomplish its objective, is not required to have conclusive evidence before it enacts legislation. The evidence with respect to the dangerousness of pit bulls, although conflicting and inconclusive, is sufficient, in my opinion, to constitute a "reasoned apprehension of harm". In the face of conflicting evidence as to the feasibility of less restrictive means to protect the public, it was open to the legislature to decide to restrict the ownership of all pit bulls.

[24] The appellant submits that the application judge erred by refusing to make findings of fact and by failing to resolve the conflicting evidence. The appellant submits that the application judge was required to decide whether pit bulls are in fact inherently dangerous and whether a total ban on pit bulls was required to meet the legislature's concerns in relation to public safety. Without making such findings, the appellant submits, the application judge was not in a position to dismiss the overbreadth challenge.

[25] I disagree with the appellant's submissions and see no error in the approach taken by the application judge. In my view, the appellant's submission misstates – and significantly understates – the burden that rests upon a claimant who challenges a law under s. 7 on grounds of overbreadth. As I have stated, the test for a breach of s. 7 on grounds of overbreadth is whether the law is "arbitrary" because there is no "reasoned apprehension of harm" or whether the law is "grossly disproportionate" to the legislative objective. To meet that test, the appellant had to satisfy the onus of demonstrating that the legislature did not have a basis for a "reasoned apprehension of harm" from pit bulls or that the action taken by the legislature was "grossly disproportionate" to the risk posed by pit bulls. Fairly read, the reasons of the application judge indicate that she quite properly focussed her analysis on these issues. In my view, the record amply supports the application judge's conclusion that the appellant failed to satisfy the onus of demonstrating a breach of s. 7 on grounds of overbreadth.
(i) Ban not arbitrary

[26] The application judge applied the well-established Charter principle that where the risk of harm or the efficaciousness of Parliament's remedy is difficult or impossible to measure scientifically it is for the legislature, not the courts, to decide upon the appropriate course of action, provided there is evidence of a "reasoned apprehension of harm". It was not the role of the application judge to make detailed factual findings as that would lead to "micromanagement of Parliament's agenda". Her task was rather to apply the "relevant constitutional control"; namely, "the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected": see Malmo-Levine, at para. 133.

[27] The Supreme Court of Canada has consistently held that the "legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case" and that in the absence of "determinative scientific evidence" it is appropriate for the court to rely "on logic, reason and some social science evidence" to determine whether there is "a reasoned apprehension of that harm": see Harper v. Canada (A.G.), [2004] 1 S.C.R. 827, at paras. 77-78.

[28] In R. v. Sharpe, [2001] 1 S.C.R. 45, at para. 89, McLachlin C.J. stated with respect to disputed evidence regarding the impact of child pornography that "the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of" and that as "some studies" linked child pornography to the incitement of offences, a "reasoned apprehension of harm" was made out. Similarly, in R. v. Butler, [1992] 1 S.C.R. 452, at pp. 502-503, another case dealing with disputed evidence regarding the effects of pornography, Sopinka J. assessed the evidence as being "inconclusive" but, applying Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927, at p. 990, recognized that the government must be "afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence."

[29] In each of these cases, the Supreme Court declined to make factual findings on disputed scientific evidence and, once satisfied that there was sufficient evidence to give rise to a "reasoned apprehension of harm", deferred to legislative judgment. The application judge correctly took the same approach and concluded that there was sufficient evidence of a reasoned apprehension of harm to permit the legislature to act.

[30] I disagree with the appellant's submission that this reasoning applies only at the minimal impairment stage of s. 1 and that the application judge erred by applying it to determine whether there had been a violation of s. 7 on account of overbreadth. First, as a matter of authority, the Supreme Court of Canada appears to have assimilated the minimal impairment analysis under s. 1 with the overbreadth analysis under s. 7: see e.g. R. v. Clay, [2003] 3 S.C.R. 735, at para. 35; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 629. Second, as a matter of principle, I fail to see why the determination of whether legislation is overbroad and therefore in violation of s. 7 should involve a more stringent test than the test to determine whether minimal impairment has been satisfied. The s. 1 minimal impairment test only comes into play when the government is attempting to justify an infringement of Charter rights. If anything, one would expect the test to be more stringent where the claimant has demonstrated a Charter breach and the onus rests with the government to demonstrate that the breach is justified.
(ii) Law not grossly disproportionate

[31] To determine whether a law is "grossly disproportionate" to the legislative objective, one must consider the nature and gravity of the alleged Charter infringement in relation to the importance of the legislature's objective. As the application judge correctly observed, the right to own a dog is not protected by the Charter. The applicant is able to invoke s. 7 only because of the possibility that a court might impose a penalty of imprisonment for violation of the Act, an unlikely prospect absent blameworthy conduct by an owner leading to personal injury. This possibility of imprisonment must be weighed against the risk that pit bulls pose to public safety. The test of gross disproportionality clearly incorporates a substantial measure of deference to the legislature's assessment of the risk to public safety and the need for the impugned law: R. v. Heywood, [1994] 3 S.C.R. 761, at p. 793; Clay, at para. 40.

[32] In my view, the reasons of the application judge demonstrate an entirely appropriate and defensible analysis and weighing of these competing factors. At para. 86 of her reasons, she states:
When one considers the interests at stake, that is, the objective of public safety as against the restrictions on dog owners, it is my opinion that this was a choice that the legislators were entitled to make. I conclude, therefore, that the means the legislature has chosen are not too sweeping in relation to the objective and the provisions are not unconstitutionally overbroad.

[33] I also agree with the application judge's conclusion that the total ban on pit bulls is not "arbitrary" or "grossly disproportionate" in light of the evidence that pit bulls have a tendency to be unpredictable and that even apparently docile pit bulls may attack without warning or provocation. This evidence of unpredictability provided the legislature with a sufficient basis to conclude that the protection of public safety required no less drastic measures than a total ban on pit bulls.

[34] I agree with the Attorney General's submission that the Charter does not require an individual assessment of each dog before it can be required to wear a leash or muzzle. Evidence of the unpredictable risk of severe harm is sufficient to allow the legislature reasonably to conclude that pit bulls as a group are dangerous because of the risk they pose. Legislatures frequently enact blanket prohibitions on things or activities that may be used or conducted safely because of the risk that severe harm can result from misuse or misconduct. The prohibition and regulation of certain firearms provides an example.

[35] The legislature's response to the problem posed by pit bulls is not analogous to the legislative responses in the cases relied upon by the appellant. In Heywood, and R. v. Demers, [2004] S.C.R. 489, the impugned laws directly impinged upon the claimants' liberty interest in a manner more significant than the pit bull provisions. Furthermore, in those cases, there existed adequate and less drastic measures capable of protecting public safety. In Heywood, the impugned law provided a lifetime ban on sex offenders from frequenting all public parks and bathing areas. The court found that the risk of harm could be satisfied by limiting the ban to parks frequented by children and reviewing the need to continue the order from time to time. In Demers, all permanently unfit accused, including persons who were not a significant threat to the public, were consigned to indefinite assessment and review with no possibility of trial or discharge. The court concluded that indefinite incarceration of such individuals could not be justified.

[36] Accordingly, I do not accept the submission that the application judge erred by rejecting the challenge to the Act on grounds of overbreadth.

Issue 2. Is the definition of “pit bull” unconstitutionally vague?

[37] Vagueness describes a lack of precision in legislation that leaves its meaning and application unacceptably uncertain. Legislation should provide fair notice to citizens as to what conduct is prohibited, appropriate limits on the discretion of law enforcement officials and a proper basis for coherent judicial interpretation. A law that implicates the s. 7 right to life, liberty and security of the person will be struck down as being inconsistent with the principles of fundamental justice if it is not sufficiently intelligible to meet these objectives.

[38] On the other hand, certainty is not the standard and legislation is not unconstitutionally vague simply because it is subject to interpretation. As the Supreme Court of Canada held in Nova Scotia Pharmaceutical Society, at pp. 638-39:
Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
…
Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

[39] It is sufficient for the law to delineate an area of risk. It is only “where a court has embarked upon the interpretative process, but has concluded that interpretation is not possible” that a law will be declared unconstitutionally vague: Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, at para. 79.

[40] The appellant submits that in concluding that s. 1(1)(e) of the Act was not impermissibly vague, the application judge erred for the following reasons:
· The application judge understated the test for vagueness by allowing a law to stand which failed to identify a clear area of risk to dog owners.
· The Canadian Kennel Club does not register any dog as a “pit bull” or recognize the “American Pit Bull terrier” as a breed. There are very few American Staffordshire Terriers or Staffordshire Terriers in Canada and the application of the law rests essentially on the “substantially similar” clause which fails to provide sufficient guidance.
· Subsection 1(2) of the Act, which refers to breed standards, is permissive rather than mandatory and as it does not require a judge to have regard to the listed breeds, it fails to provide sufficient guidance.
· The application judge misapplied expert evidence indicating that it was impossible to identify a pit bull.

[41] I agree with the application judge’s conclusion that the definition of “pit bull” in ss. 1(1)(b)-(e) and 1(2) sufficiently delineates an area of risk and provides a basis for intelligible debate and interpretation. The core of the definition is the reference in ss. 1(1)(b)-(d) to the three named breeds that have defined physical characteristics that are accepted by kennel clubs and dog breeder associations. That well-defined core is not exhaustive, but it provides a point of reference that identifies the essential physical characteristics for pit bulls. The phrase “substantially similar” is commonly used in statutes to embrace a somewhat broader class than that captured by an enumerated list of referents. To the extent that the definition of “pit bull” extends beyond the specified breeds, the substantially similar clause is capable of controlling or limiting the reach of the law within constitutionally acceptable limits.

[42] As the application judge stated at para. 176, the breed standards “provide guidance to dog owners and others to assist them in determining whether a particular dog falls within the definition.” While s. 1(2) permits rather than mandates reference to breed standards, the application judge correctly observed at para. 177 that the court “is required to exhaust its interpretative function before it can be said that a law is vague.” I agree with her conclusion at para. 177 that the reference to the identified breeds “provides an interpretive guide and is sufficient… to provide the necessary guidance or benchmarks.”

[43] The appellant’s arguments must be considered in light of the established jurisprudence dealing with vagueness. In my view, the appellant’s submissions assume that a higher degree of precision is required for a law to survive s. 7 vagueness scrutiny than is warranted by the case law. As the Attorney General points out in its factum, the Supreme Court of Canada has upheld a long list of laws that are arguably more vague and uncertain in their application than the pit bull provisions. The statutory provisions upheld by

the Supreme Court include:
· A Criminal Code provision creating a defence to assault where the force used is "reasonable under the circumstances": Canadian Foundation for Children, Youth and the Law v. Canada , [2004] 1 S.C.R. 76.
· A Competition Act offence of entering into an agreement to "unduly" lessen competition: Nova Scotia Pharmaceutical Society.
· A Divorce Act provision requiring the judge making a custody order to take into account only "the best interests of the child": Young v. Young, [1993] 4 S.C.R. 3.
· A Criminal Code prohibition against publishing material where a dominant characteristic is "the undue exploitation of sex": Butler.
· Immigration Act provisions allowing for the deportation of persons who pose a "danger to the security of Canada " or who are members of organizations who have engaged in "terrorism": Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3.
· A Canada Elections Act provision limiting the ability of third parties to promote one or more candidates by taking a position on an issue with which they are particularly "associated": Harper.
· An Environmental Protection Act prohibition against the discharge of a "contaminant" that "causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it": Canadian Pacific.
· A Tobacco Act prohibition on the promotion of tobacco products by means that are "likely to create an erroneous impression about the characteristics, health effects or health hazards of the… product or its emissions": Canada (Attorney General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610.

[44] These cases demonstrate that a law will not be struck down as being vague simply because reasonable people might disagree as to its application to particular facts. No doubt individuals, even experts, may disagree about what is in the "best interests of the child", whether a particular contract would "unduly" lessen competition, whether a specific political issue is "particularly associated" with a given political party, or whether a dominant characteristic of a publication is the "undue exploitation of sex". Yet each one of those phrases has been held to have sufficient precision to survive s. 7 scrutiny. In these and other areas of social or regulatory policy, the fact that identification and classification does not lend itself to linguistic certainty will not defeat laws which provide a degree of clarity capable of supporting intelligible debate. In my view, given the nature of the subject-matter and the importance of the objective, the Attorney General's submission that the impugned provision gives sufficient guidance is well supported by the authorities cited.

[45] It is worth noting that while not directly applicable to a Charter challenge, vagueness challenges to similar definitions in municipal by-laws restricting pit bulls have failed in Canada: Madronero v. Lachine (Ville), [1990] Q.J. No. 307 (S.C.); Manitoba Assn. of Dog Owners v. Winnipeg (City), [1993] M.J. No. 661 (Q.B.), at paras. 11-13, aff'd [1994] M.J. No. 643 (C.A.).

[46] I note as well that laws banning or restricting pit bulls have been enacted in many American jurisdictions and American courts have overwhelmingly rejected vagueness challenges to pit bull laws containing definitions similar to the one at issue here. Included in the long list of cases to this effect cited by the Attorney General are: Hearn v. Overland Park, 244 Kan. 638, 772 P.2d 758 (1989), cert. denied, 493 U.S. 976 (1989); State of Ohio v. Anderson, 57 Ohio St. 3d 168, 566 N.E.2d 1224 (1991), cert. denied, 501 U.S. 1257 (1991); American Dog Owners Asso. v. Yakima, 13 Wn.2d 213, 777 P.2d 1046 (1991); Colorado Dog Fanciers, Inc. v. City and County of Denver, 820 P.2d 644 (Colo. 1991); American Dog Owners Assn. v. Des Moines, 469 N.W.2d 416 (Iowa 1991); Greenwood v. North Salt Lake, 817 P.2d 816 (Utah 1991).

[47] I turn now to the issue raised by the Attorney General's cross-appeal: did the application judge err in holding that the word "includes" in the opening of s. 1(1) and the inclusion of the phrase "a pit bull terrier" in s. 1(1)(a) render the definition of "pit bull" unconstitutionally vague?

[48] The application judge held that it should be presumed that by adding the phrase "a pit bull terrier", the legislature must have meant to add something to the definition not captured by the balance of s. 1. She found that there is no recognized breed of pit bull terrier and no agreement among the experts as to what dogs are or are not pit bull terriers. At para. 185 of her reasons, she concluded as follows:
[T]he phrases "pit bull includes" and "pit bull terriers" are problematic in so far as they appear to include an undefined number of dogs that fall beyond the three specified breeds and dogs substantially similar to those three breeds. In so far as these terms go beyond the three breeds, they do not, in my opinion, provide sufficient guidance to courts or to those who have to enforce the legislation. They also do not define an "area of risk" for dog owners.

[49] For the following reasons, I respectfully disagree with this conclusion. In my opinion, the definition of "pit bull" as enacted by the legislature survives s. 7 vagueness scrutiny.

[50] There is ample evidence in the record to demonstrate that the terms "pit bull" and "pit bull terrier" are generic, dictionary terms commonly used by members of the public, scholars, veterinarians, animal control officers and humane societies to describe American Staffordshire terriers, American pit bull terriers, Staffordshire bull terriers, and dogs that are hybrids or mixes of these breeds or that have substantially similar characteristics. The terms "pit bull" and "pit bull terrier" are found in many of the articles and the professional literature cited in the record as well as in the testimony of most of the witnesses. The Canadian Oxford Dictionary, 2001 ed., defines a "pit bull" or "pit bull terrier" as "a dog of an American variety of bull terrier, noted for its ferocity". The legislature cannot be faulted for using vernacular or generic terms to alert the public to the nature of a prohibition also described in more precise scientific or technical language: Canadian Pacific, at para. 53.

[51] The terms "pit bull" and "pit bull terrier" must also be read in their context as elements of a more comprehensive definition. I do not agree with the application judge that by enacting the phrase "pit bull includes" and including the phrase "a pit bull terrier", the legislature must have intended to add to the reach of the definition of "pit bull" to include a broader class than captured by ss. 1(1)(b)-(e). Legislatures commonly use repetitive and redundant language, repeating commonly used synonymous words out of an abundance of caution to ensure that the terms of a statute are given a compendious meaning. The test for vagueness is unintelligibility, not redundancy, and the inclusion of repetitive language does not render the definition constitutionally infirm.

[52] In addition, the word "includes" does not necessarily require an expansive interpretation extending the definition beyond the itemized list contained in ss. 1(1)(a)-(e). The word "includes" "may… depending on the context, precede a list that exhausts the definition": Re Canada 3000 Inc. (Re), [2006] 1 S.C.R. 865, at para. 47. Where possible, legislation should be interpreted in a manner that corresponds to constitutional rights and values. To the extent the word "includes" is susceptible of importing an unacceptably vague definition, giving it narrow import as exhausting the definition is preferable to striking it down.

[53] Accordingly, I would allow this part of the cross-appeal, set aside paragraph 1 of the judgment and restore s. 1 as enacted.
Issue 3. Does s. 19, providing for proof that the dog is a pit bull through a veterinarian's certificate, violate s. 11(d) of the Charter?
[54] Before the application judge, the appellant made two arguments in relation to s. 19:
(i) the lack of a provision for cross-examination in respect of the document from the veterinarian contravenes the right to a fair trial guaranteed by s. 11(d) of the Charter, and
(ii) the fact that the document is proof that the dog is a pit bull, in the absence of evidence to the contrary, infringes the defendant's right to be presumed innocent contrary to s. 11(d) of the Charter.

[55] On the first issue, the application judge concluded that ss. 39 and 46 of the Provincial Offences Act, R.S.O. 1990, c. P.33 give trial judges a discretion to allow for cross-examination of the veterinarian who signed the certificate. She held at para. 215 of her reasons that "it should be assumed that the discretion of the court to give leave to a defendant to cross-examine will be exercised in a way that is consistent with Charter rights and, in particular, with the right to trial fairness and the due administration of justice."

[56] We agree. This ruling, from which no appeal was taken, is a full answer to the appellant's first ground of attack on s.19. A trial judge's discretion to permit cross-examination of the veterinarian is an important safeguard of an accused's s. 11(d) rights. There is no reason to suppose that leave to cross-examine, if sought, will be improperly or lightly denied.

[57] On the second issue, the application judge concluded that by providing for proof by veterinarian's certificate, s. 19 creates a mandatory evidentiary presumption that violates the s. 11(d) Charter right "to be presumed innocent until proven guilty". The Attorney General cross-appeals on this issue. For the following reasons, I conclude that, properly interpreted, s. 19 does not create a situation where the accused is liable to be convicted in spite of a reasonable doubt and therefore does not violate the right to be presumed innocent until proven guilty. I would therefore allow the Attorney General's cross-appeal on this issue.

[58] As I read s. 19, it simply provides that as proof of the fact that a dog falls within the definition of "pit bull", the Crown may introduce a certificate to that effect purporting to be signed by a member of the College of Veterinarians of Ontario. Despite the rather complicated wording of s. 19, in the end, when properly interpreted, its legal effect is to overcome the effect of the hearsay evidence rule that would make a veterinarian's certificate inadmissible. Allowing for proof by way of veterinarian's certificate does not create a presumption, nor does it violate the presumption of innocence. Rather, s. 19 is an enabling provision that merely affords

the prosecution a more expedient method of proving a fact necessary to sustain a conviction.

[59] In R. v. Downey, [1992] 2 S.C.R. 10, at p. 21, Cory J. referred to the landmark case of R. v. Oakes [1986] 1 S.C.R. 103, at p. 115, where Dickson C.J. identified two types of presumptions:
Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact. [Citations omitted.]

[60] Presumptions without basic facts are the legal starting point for the determination of a factual issue. Presumptions without basic facts relate to placement of the legal or evidentiary burden of proof as a matter of law. The presumption of innocence is the classic example. Until the Crown proves the guilt of the accused beyond a reasonable doubt, the accused is presumed to be innocent.

[61] Presumptions with basic facts operate by either permitting (a permissive presumption) or requiring (a mandatory presumption) the trier of fact to find the presumed fact upon proof of some other "basic fact". For example, the provision in the Narcotics Control Act at issue in Oakes required the trier of fact to find an intention to traffic drugs (the presumed fact) upon proof of possession of drugs (the basic fact). Similarly, the provision at issue in Downey involved a presumption from basic facts: s. 212(3) of the Criminal Code provided that "[e]vidence that a person lives with or is habitually in the company of prostitutes… is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution".

[62] As Downey and Oakes make clear, the focus for inquiry in relation to the presumption of innocence guaranteed by s. 11(d) is this: does the legislative provision create a situation where the accused is liable to be convicted despite the existence of a reasonable doubt?

[63] In Downey, Cory J. explained at p. 29 how this concern may or may not arise in the case of presumptions with basic facts:
Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11(d) if it requires the trier of fact to convict in spite of a reasonable doubt.

[64] Thus, in Oakes, proof of possession of drugs did not lead inexorably to proof of an intention to traffic drugs. Similarly, in Downey, proof that the accused lived with prostitutes did not lead inexorably to proof that the accused was living off the avails of prostitution. In both cases, the accused were liable to be convicted in spite of a reasonable doubt as to their guilt.

[65] Does s. 19 create a situation where the accused is liable to be convicted in spite of a reasonable doubt, either through the existence of a basic fact presumption or otherwise?

[66] It is clear that s. 19 does not fall into the category of presumptions with basic facts. The veterinarian's certificate does not prove a basic fact from which the trier of fact may or must find the presumed fact, i.e. that the dog is a pit bull. The certificate is direct evidence of that fact and its evidentiary force does not depend upon any presumption. Section 19 of the Act simply renders the certificate admissible and capable of being used by the trier of fact as direct evidence of the dog's breed, not as proof of some other fact that in turn allows or requires the trier of fact to presume the dog's breed.

[67] Could s. 19 nonetheless give rise to a conviction in spite of a reasonable doubt? By providing that the veterinarian's certificate is "proof, in the absence of evidence to the contrary", s. 19(1) is, on its face, perhaps suggestive of a reverse onus. However, in the end, I am not persuaded that it has that effect. The provision at issue in Downey used similar language. However, Downey dealt with a presumption with a basic fact which clearly gave rise to the possibility of conviction in spite of a reasonable doubt. Section 19 does not operate by creating a presumption from a basic fact. As the appellant candidly acknowledged during oral argument, s. 19 is not analogous to the statutory provision at issue in Downey. It follows that the reasoning in Downey is therefore distinguishable. Moreover, s. 19(3) explicitly preserves the presumption of innocence and requires the Crown to prove the guilt of the accused beyond a reasonable doubt.

[68] Once the Crown relies on s. 19 to introduce a veterinarian's certificate that a dog is a pit bull, it is true that the accused risks being convicted unless he or she offers something, either through cross-examination of the veterinarian or by adducing other evidence, to suggest that the dog is not a pit bull. The certificate creates a situation where the accused faces a tactical burden to point to some evidence capable of raising a reasonable doubt as to the dog's breed. But to the extent that s. 19 thereby creates what may be described as an evidentiary burden, I do not agree that it violates the presumption of innocence. It is simply the tactical burden that any accused faces once the Crown makes out a prima facie case on an essential element of the offence. Unanswered – for the certificate is only "proof" that the dog is a pit bull when it is unanswered – the certificate is proof that the dog is a pit bull. The provision that the certificate is "proof, in the absence of evidence to the contrary" in this context amounts to a statement of the obvious rather than a legal prescription altering the burden of proof.

[69] Finally, to remove any doubt on the matter, I repeat that s. 19(3) explicitly preserves the presumption of innocence, providing that "this section does not remove the onus on the prosecution to prove its case beyond a reasonable doubt." Nothing in s. 19 relieves against the Crown's obligation to prove all elements of an offence under the Act to the requisite criminal standard of proof.

[70] Accordingly, I do not agree that s. 19 violates s. 11(d) of the Charter and I would therefore set aside paragraph 2 of the judgment striking down s. 19.
Issue 4. If there are any violations of the Charter, are they justified pursuant to s. 1?
Issue 5. To the extent that the pit bull provisions are unconstitutionally vague, is severance and reading in the appropriate remedy?
Issue 6. Did the application judge err by refusing to award the appellant costs?

[71] As I have concluded that there is no Charter breach, and that the appeal should be dismissed and cross-appeal allowed, it is not necessary for me to consider the issues of s. 1 justification, the appropriate remedy or the application judge's disposition as to costs.
CONCLUSION

[72] For these reasons, I would dismiss the appeal and allow the cross-appeal, set aside paragraphs 1 and 2 of the judgment below and dismiss the application. If the parties are unable to agree as to costs, we will receive brief written submissions to be provided by the Attorney General within ten days of the release of these reasons and by the appellant within five days thereafter.

CITATION: Cochrane v. Ontario (Attorney General), 2008 ONCA 718

DATE: 20081024

DOCKET: C47649

COURT OF APPEAL FOR ONTARIO

Laskin, Sharpe and Cronk JJ.A.

BETWEEN

Catherine Cochrane

Applicant (Appellant/
Respondent by way of cross-appeal)

and

Her Majesty the Queen In Right of Ontario, as represented by the Attorney General of Ontario

Respondent (Respondent/
Appellant by way of cross-appeal)

Clayton C. Ruby and Breese Davies, for the appellant/respondent by way of cross-appeal

Robert E. Charney, Michael T. Doi and S. Zachary Green, for the respondent/appellant by way of cross-appeal

Heard: September 15 and 16, 2008

On appeal from the judgment of Justice Thea P. Herman of the Superior Court of Justice dated July 27, 2007, with reasons reported at 2007 CanLII 9231 (constitutional challenge) and 2007 CanLII 29973 (remedy).

Sharpe J.A.:

OVERVIEW

[1] The appellant attacks the constitutionality of Ontario's law banning pit bull dogs. As a violation of the law can result in a penalty of imprisonment, the appellant invokes the right not to be deprived of "life, liberty, and security of the person… except in accordance with the principles of fundamental justice" guaranteed by s. 7 of the *Charter of Rights and Freedoms*. She argues that a total ban is grossly disproportionate to the risk pit bulls pose to public safety, rendering the law unconstitutionally overbroad, and that the law fails to provide an intelligible definition of pit bulls, rendering the law unconstitutionally vague. She also argues that a provision allowing the Crown to introduce as evidence a veterinarian's certificate certifying that the dog is a pit bull violates the right to a fair trial and the presumption of innocence, contrary to s. 11(d) of the *Charter*.

[2] In 2005, in the aftermath of a series of highly publicized pit bull attacks resulting in serious personal injury to several victims, the Ontario Legislature amended the *Dog Owners' Liability Act*, R.S.O. 1990, c. D.16 to ban the breeding, sale and ownership of pit bull dogs: *Public Safety Related to Dogs Statute Law Amendment Act, 2005*, S.O. 2005, c. 2. The pit bull provisions allow those who own pit bulls born at the time the amendments came into force or 60 days thereafter to keep their dogs ("restricted pit bulls"). However, owners of restricted pit bulls are required by regulation to have their dogs sterilized and to leash and muzzle their dogs when in public places.

[3] The appellant owns a "Staffordshire terrier cross" that is a restricted pit bull. In support of her overbreadth argument, the appellant submits that the legislature cannot justify the law's total ban on pit bulls and blanket application to all restricted pit bulls. It is her contention that there is insufficient evidence to indicate that all pit bulls are inherently dangerous and that significantly

less drastic measures could satisfy any concern for public safety. In support of her vagueness argument, the appellant contends that the Act fails to provide an adequate definition of pit bulls and that it is impossible to determine whether a dog is or is not caught by the legislation. Finally, the appellant argues that the veterinarian certificate provision denies the right to cross-examine on crucial evidence and creates a mandatory evidentiary burden and thereby violates the right to a fair trial and the presumption of innocence protected by s. 11(d) of the *Charter*.

[4] The application judge rejected the overbreadth argument. She accepted the appellant's vagueness argument but only to a limited extent. The application judge struck down part of the definition of "pit bull" but left the most significant part of the definition intact. She accepted the appellant's s. 11(d) argument and struck down the veterinarian certificate provision.

[5] The appellant comes to this court asking us to reverse that judgment and to strike down the pit bull provisions as being unconstitutionally overbroad and vague. The Attorney General cross-appeals and asks us to restore the definition of "pit bull" as enacted by the legislature. The Attorney General also cross-appeals the order striking down the provision relating to the use of a veterinarian's certificate.

[6] For the following reasons, I conclude that the pit bull provisions do not violate any right guaranteed by the *Charter*. Accordingly, I would dismiss the appeal and allow the cross-appeal.

LEGISLATION

[7] The pit bull provisions prohibit the ownership, breeding, importation or transfer of pit bulls. Under regulations promulgated under the Act, individuals who own a restricted pit bull are required to muzzle, leash and sterilize their dogs: *Pit Bull Controls,* O. Reg. 157/05, ss. 1-2. Under s. 18 of the Act, a person who contravenes any provision of the Act or regulations is guilty of an offence and liable, on conviction, to a fine of up to $10,000, six months imprisonment or both.

[8] Subsection 1(1) of the Act defines the term "pit bull" as follows:

> "pit bull" includes,
>
> (a) a pit bull terrier,
>
> (b) a Staffordshire bull terrier,
>
> (c) an American Staffordshire terrier,
>
> (d) an American pit bull terrier,
>
> (e) a dog that has an appearance and physical characteristics that are substantially similar to those of dogs referred to in any of clauses (a) to (d); ("pit-bull")

[9] Subsection 1(2) provides:

> In determining whether a dog is a pit bull within the meaning of this Act, a court may have regard to the breed standards established for Staffordshire Bull Terriers, American Staffordshire Terriers or American Pit Bull Terriers by the Canadian Kennel Club, the United Kennel Club, the American Kennel Club or the American Dog Breeders Association.

[10] The provision relating to the admissibility and use of veterinarians' certificates reads as follows:

> 19. (1) A document purporting to be signed by a member of the College of Veterinarians of Ontario stating that a dog is a pit bull within the meaning of this Act is receivable in evidence in a prosecution for an offence under this Act as proof, in the absence of evidence to the contrary, that the dog is a

pit bull for the purposes of this Act, without proof of the signature and without proof that the signatory is a member of the College.

(2) No action or other proceeding may be instituted against a member of the College of Veterinarians of Ontario for providing, in good faith, a document described in subsection (1).

(3) For greater certainty, this section does not remove the onus on the prosecution to prove its case beyond a reasonable doubt.

THE APPLICATION JUDGE'S FINDINGS

[11] There was conflicting evidence before the application judge regarding the dangerousness of pit bulls. The applicant's evidence was to the effect that pit bulls are not inherently dangerous; that Canadian statistics indicate that pit bulls were involved in relatively few reported bites or attacks; and that most pit bulls pose no threat to public safety. The Attorney General relied on evidence of a series of pit bull attacks that had resulted in serious personal injury, including harm to children; expert evidence that pit bulls tended to be unpredictable in their behaviour and susceptible to unprovoked attacks; and evidence from the United States indicating that pit bulls were involved in a disproportionately high number of serious incidents.

[12] The application judge ruled that the applicant had failed to make out a violation of s. 7 of the *Charter* on grounds of overbreadth. She held that the legislature could act on a "reasoned apprehension of harm" and that conclusive evidence that pit bulls pose a threat to public safety was not required so long as the legislative response was not "grossly disproportionate" to the legislative objective. She found that it was unnecessary to resolve the conflicting evidence as to the danger posed by pit bulls and that the record established a sufficient body of evidence to permit the legislature to conclude that a total ban on pit bulls was required to protect the public.

[13] With respect to the vagueness challenge, the application judge concluded that, when read as a whole, ss. 1(1)(b)-(e) and (2) provide a sufficient definition to survive s. 7 scrutiny. However, she found that as there is no recognized "pit bull terrier" breed, the inclusion of "a pit bull terrier" (s. 1(1)(a)) was unconstitutionally vague. She also found that the use of the word "includes" in the definition of "pit bull" rendered the definition unconstitutionally vague. Accordingly, she struck down the word "includes" and s. 1(1)(a) and read into the opening of the definition of "pit bull" the word "means" in place of the word "includes".

[14] With respect to s. 19, the application judge found that a trial judge has the discretion to permit cross-examination of the veterinarian and therefore rejected the contention that s. 19 violated the accused's rights to a fair trial. However, the application judge also held that s. 19 created a mandatory evidentiary burden that violated the right to be presumed innocent guaranteed by s. 11(d) of the *Charter* and that the violation could not be justified as a reasonable limit pursuant to s. 1. She held that the appropriate remedy was to sever s. 19 and to strike it down.

[15] The application judge also rejected the applicant's submissions that the pit bull provisions were *ultra vires* the province and that they conflicted with federal legislation. No appeal is taken from those findings.

[16] In view of the divided success, the application judge declined to award costs.

ISSUES

[17] The appeal and cross-appeal raise the following issues:

(1) Are the pit bull provisions unconstitutionally overbroad?

(2) Is the definition of "pit bull" unconstitutionally vague?

(3) Does s. 19, providing for proof that the dog is a pit bull through a veterinarian's certificate, violate s. 11(d) of the *Charter*?

(4) If there are any violations of the *Charter*, are they justified pursuant to s. 1?

(5) To the extent that the pit bull provisions are unconstitutionally vague, is severance and reading in the appropriate remedy?

(6) Did the application judge err by refusing to award the appellant costs?

ANALYSIS

Issue 1. Are the pit bull provisions unconstitutionally overbroad?

[18] Overbreadth is a term used to describe legislation that, as drafted, covers more than is necessary to attain the legislature's objective and thereby impinges unduly upon a protected right or freedom. A law is unconstitutionally overbroad if it deprives an individual of "life, liberty and security of the person" in a manner that is "grossly disproportionate" to the state interest that the legislation seeks to protect. Such a law is said to be "arbitrary" and offends "the principles of fundamental justice" and therefore violates s. 7 of the *Charter*. A law that restricts the rights guaranteed by s. 7 is also "arbitrary" unless it is grounded in a "reasoned apprehension of harm". The onus of proving that the law is "arbitrary" or "grossly disproportionate" lies on the applicant: see *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, at paras. 78, 133, 143.

[19] The Attorney General concedes that as the Act provides for a potential penalty of imprisonment, the s. 7 right not to be deprived of "life, liberty and security of the person… except in accordance with the principles of fundamental justice" is implicated. There is no dispute that the legislative purpose of the pit bull provisions is to reduce, and ultimately to eliminate, the risk of pit bull attacks in Ontario. The appellant concedes that the protection of the public from dog bites and dog attacks is a legitimate legislative objective.

[20] The contentious issue is whether the appellant satisfied the onus of demonstrating that the law is "arbitrary" or "grossly disproportionate" to the legislature's objective.

[21] The appellant relies on evidence to the effect that not all pit bulls are inherently dangerous and argues that by imposing a total ban on all pit bulls, whether shown to be dangerous or not, the sweep of the law is excessive and not capable of justification as proportionate to the alleged risk pit bulls pose to public safety. The appellant's evidence may be summarized as follows:

- Expert opinion that most dogs, including pit bulls, are kind and gentle and that many pit bulls have never bitten anyone and that it is not possible to link dangerousness to breed.

- Evidence that a variety of factors other than a dog's breed determine dangerousness, including: inherited and learned behaviours, breeding, socialization, function and physical condition and size of the dog, reproductive status, popularity of breed, individual temperament, environmental stresses, owner responsibility, victim behaviour, victim size and physical condition, timing and misfortune.

- Statistical and expert evidence that pit bulls are responsible for only a small proportion of recorded bite incidents and fatal dog attacks in Canada .

[22] The Attorney General responds with evidence that pit bulls do pose a serious threat to public safety. That evidence may be summarized as follows:

- Evidence of four savage pit bull attacks resulting in significant personal injury shortly before the enactment of the pit bull provisions and the evidence of several police officers who confronted and shot pit bulls that were attacking someone or that were aggressively threatening police officers.

- American expert witnesses who observed highly aggressive behaviour unique to pit bulls, not exhibited by any other type or breed of dog, and who considered pit bulls to be a recognized danger to public safety.

- An American statistical study finding that pit bull-type dogs were involved in a high proportion of dog bite related fatalities in the United States from 1981 to 1992.

- Expert evidence that pit bulls can be unusually unpredictable and as they have a tendency to attack without warning or provocation, there may be nothing a potential victim can do to prevent or avoid an attack.

[23] The application judge carefully reviewed and analyzed this evidence and concluded as follows, at paras. 74, 79 and 84 of her reasons on the constitutional challenge:

> [T]here is inconclusive and competing evidence in the case at hand. However, conclusive evidence is not required before a government can take action. It is also not necessary for the court to resolve the conflicting evidence. There is, in my opinion, sufficient evidence to conclude that the legislature, in enacting these provisions, had a "reasoned apprehension of harm" concerning the dangerousness of pit bulls.
>
> …
>
> It is my opinion that, in the face of this conflicting evidence, the legislature was entitled to decide that there was a sufficient body of evidence with respect to the inability to identify dangerous pit bulls in advance of an attack so as to justify restrictions that apply to all pit bulls. The recommended alternative approaches to breed-specific legislation largely depend on either a previous dangerous act or a responsible dog owner identifying a dangerous dog and taking appropriate action. Where public safety is concerned, it was open to the legislature to choose the more cautious approach.
>
> …
>
> It is not my task to substitute my opinion for that of the legislature as to how best to protect the public. It is also not necessary for me to resolve the conflicting evidence as to the role that breed plays in determining whether a dog is dangerous and whether pit bulls, as a breed, are dangerous. The legislature, in determining how to accomplish its objective, is not required to have conclusive evidence before it enacts legislation. The evidence with respect to the dangerousness of pit bulls, although conflicting and inconclusive, is sufficient, in my opinion, to constitute a "reasoned apprehension of harm". In the face of conflicting evidence as to the feasibility of less restrictive means to protect the public, it was open to the legislature to decide to restrict the ownership of all pit bulls.

[24] The appellant submits that the application judge erred by refusing to make findings of fact and by failing to resolve the conflicting evidence. The appellant submits that the application judge was required to decide whether pit bulls are in fact inherently dangerous and whether a total ban on pit bulls was required to meet the legislature's concerns in relation to public safety. Without making such findings, the appellant submits, the application judge was not in a position to dismiss the overbreadth challenge.

[25] I disagree with the appellant's submissions and see no error in the approach taken by the application judge. In my view, the appellant's submission misstates – and significantly understates – the burden that rests upon a claimant who challenges a law under s. 7 on grounds of overbreadth. As I have stated, the test for a breach of s. 7 on grounds of overbreadth is whether the law is "arbitrary" because there is no "reasoned apprehension of harm" or whether the law is "grossly disproportionate" to the legislative objective. To meet that test, the appellant had to satisfy the onus of demonstrating that the legislature did not have a basis for a "reasoned apprehension of harm" from pit bulls or that the action taken by the legislature was "grossly disproportionate" to the risk posed by pit bulls. Fairly read, the reasons of the application judge indicate that she quite properly focussed her analysis on these

issues. In my view, the record amply supports the application judge's conclusion that the appellant failed to satisfy the onus of demonstrating a breach of s. 7 on grounds of overbreadth.

(i) Ban not arbitrary

[26] The application judge applied the well-established *Charter* principle that where the risk of harm or the efficaciousness of Parliament's remedy is difficult or impossible to measure scientifically it is for the legislature, not the courts, to decide upon the appropriate course of action, provided there is evidence of a "reasoned apprehension of harm". It was not the role of the application judge to make detailed factual findings as that would lead to "micromanagement of Parliament's agenda". Her task was rather to apply the "relevant constitutional control"; namely, "the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected": see *Malmo-Levine*, at para. 133.

[27] The Supreme Court of Canada has consistently held that the "legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case" and that in the absence of "determinative scientific evidence" it is appropriate for the court to rely "on logic, reason and some social science evidence" to determine whether there is "a reasoned apprehension of that harm": see *Harper v. Canada (A.G.)*, [2004] 1 S.C.R. 827, at paras. 77-78.

[28] In *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 89, McLachlin C.J. stated with respect to disputed evidence regarding the impact of child pornography that "the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of" and that as "some studies" linked child pornography to the incitement of offences, a "reasoned apprehension of harm" was made out. Similarly, in *R. v. Butler*, [1992] 1 S.C.R. 452, at pp. 502-503, another case dealing with disputed evidence regarding the effects of pornography, Sopinka J. assessed the evidence as being "inconclusive" but, applying *Irwin Toy Ltd. v. Quebec (A.G.),* [1989] 1 S.C.R. 927, at p. 990, recognized that the government must be "afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence."

[29] In each of these cases, the Supreme Court declined to make factual findings on disputed scientific evidence and, once satisfied that there was sufficient evidence to give rise to a "reasoned apprehension of harm", deferred to legislative judgment. The application judge correctly took the same approach and concluded that there was sufficient evidence of a reasoned apprehension of harm to permit the legislature to act.

[30] I disagree with the appellant's submission that this reasoning applies only at the minimal impairment stage of s. 1 and that the application judge erred by applying it to determine whether there had been a violation of s. 7 on account of overbreadth. First, as a matter of authority, the Supreme Court of Canada appears to have assimilated the minimal impairment analysis under s. 1 with the overbreadth analysis under s. 7: see *e.g. R. v. Clay,* [2003] 3 S.C.R. 735, at para. 35; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 629. Second, as a matter of principle, I fail to see why the determination of whether legislation is overbroad and therefore in violation of s. 7 should involve a *more* stringent test than the test to determine whether minimal impairment has been satisfied. The s. 1 minimal impairment test only comes into play when the government is attempting to justify an infringement of *Charter* rights. If anything, one would expect the test to be *more* stringent where the claimant has demonstrated a *Charter* breach and the onus rests with the government to demonstrate that the breach is justified.

(ii) Law not grossly disproportionate

[31] To determine whether a law is "grossly disproportionate" to the legislative objective, one must consider the nature and gravity of the alleged *Charter* infringement in relation to the importance of the legislature's objective. As the application judge correctly observed, the right to own a dog is not protected by the *Charter*. The applicant is able to invoke s. 7 only because of the possibility that a court might impose a penalty of imprisonment for violation of the Act, an unlikely prospect absent blameworthy conduct by an owner leading to personal injury. This possibility of imprisonment must be weighed against the risk that pit bulls pose to public safety. The test of gross disproportionality clearly incorporates a substantial measure of deference to the legislature's assessment of the risk to public safety and the need for the impugned law: *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 793; *Clay*, at para. 40.

[32] In my view, the reasons of the application judge demonstrate an entirely appropriate and defensible analysis and weighing of these competing factors. At para. 86 of her reasons, she states:

> When one considers the interests at stake, that is, the objective of public safety as against the restrictions on dog owners, it is my opinion that this was a choice that the legislators were entitled to make. I conclude, therefore, that the means the legislature has chosen are not too sweeping in relation to the objective and the provisions are not unconstitutionally overbroad.

[33] I also agree with the application judge's conclusion that the total ban on pit bulls is not "arbitrary" or "grossly disproportionate" in light of the evidence that pit bulls have a tendency to be unpredictable and that even apparently docile pit bulls may attack without warning or provocation. This evidence of unpredictability provided the legislature with a sufficient basis to conclude that the protection of public safety required no less drastic measures than a total ban on pit bulls.

[34] I agree with the Attorney General's submission that the *Charter* does not require an individual assessment of each dog before it can be required to wear a leash or muzzle. Evidence of the unpredictable risk of severe harm is sufficient to allow the legislature reasonably to conclude that pit bulls as a group are dangerous because of the risk they pose. Legislatures frequently enact blanket prohibitions on things or activities that may be used or conducted safely because of the risk that severe harm can result from misuse or misconduct. The prohibition and regulation of certain firearms provides an example.

[35] The legislature's response to the problem posed by pit bulls is not analogous to the legislative responses in the cases relied upon by the appellant. In *Heywood*, and *R. v. Demers*, [2004] S.C.R. 489, the impugned laws directly impinged upon the claimants' liberty interest in a manner more significant than the pit bull provisions. Furthermore, in those cases, there existed adequate and less drastic measures capable of protecting public safety. In *Heywood*, the impugned law provided a lifetime ban on sex offenders from frequenting all public parks and bathing areas. The court found that the risk of harm could be satisfied by limiting the ban to parks frequented by children and reviewing the need to continue the order from time to time. In *Demers*, all permanently unfit accused, including persons who were not a significant threat to the public, were consigned to indefinite assessment and review with no possibility of trial or discharge. The court concluded that indefinite incarceration of such individuals could not be justified.

[36] Accordingly, I do not accept the submission that the application judge erred by rejecting the challenge to the Act on grounds of overbreadth.

Issue 2. Is the definition of "pit bull" unconstitutionally vague?

[37] Vagueness describes a lack of precision in legislation that leaves its meaning and application unacceptably uncertain. Legislation should provide fair notice to citizens as to what conduct is prohibited, appropriate limits on the discretion of law enforcement officials and a proper basis for coherent judicial interpretation. A law that implicates the s. 7 right to life, liberty and security of the person will be struck down as being inconsistent with the principles of fundamental justice if it is not sufficiently intelligible to meet these objectives.

[38] On the other hand, certainty is not the standard and legislation is not unconstitutionally vague simply because it is subject to interpretation. As the Supreme Court of Canada held in *Nova Scotia Pharmaceutical Society*, at pp. 638-39:

> Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
>
> …
>
> Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

[39] It is sufficient for the law to delineate an area of risk. It is only "where a court has embarked upon the interpretative process, but has concluded that interpretation is not possible" that a law will be declared unconstitutionally vague: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 79.

[40] The appellant submits that in concluding that s. 1(1)(e) of the Act was not impermissibly vague, the application judge erred for the following reasons:

- The application judge understated the test for vagueness by allowing a law to stand which failed to identify a clear area of risk to dog owners.

- The Canadian Kennel Club does not register any dog as a "pit bull" or recognize the "American Pit Bull terrier" as a breed. There are very few American Staffordshire Terriers or Staffordshire Terriers in Canada and the application of the law rests essentially on the "substantially similar" clause which fails to provide sufficient guidance.

- Subsection 1(2) of the Act, which refers to breed standards, is permissive rather than mandatory and as it does not require a judge to have regard to the listed breeds, it fails to provide sufficient guidance.

- The application judge misapplied expert evidence indicating that it was impossible to identify a pit bull.

[41] I agree with the application judge's conclusion that the definition of "pit bull" in ss. 1(1)(b)-(e) and 1(2) sufficiently delineates an area of risk and provides a basis for intelligible debate and interpretation. The core of the definition is the reference in ss. 1(1)(b)-(d) to the three named breeds that have defined physical characteristics that are accepted by kennel clubs and dog breeder associations. That well-defined core is not exhaustive, but it provides a point of reference that identifies the essential physical characteristics for pit bulls. The phrase "substantially similar" is commonly used in statutes to embrace a somewhat broader class than that captured by an enumerated list of referents. To the extent that the definition of "pit bull" extends beyond the specified breeds, the substantially similar clause is capable of controlling or limiting the reach of the law within constitutionally acceptable limits.

[42] As the application judge stated at para. 176, the breed standards "provide guidance to dog owners and others to assist them in determining whether a particular dog falls within the definition." While s. 1(2) permits rather than mandates reference to breed standards, the application judge correctly observed at para. 177 that the court "is required to exhaust its interpretative function before it can be said that a law is vague." I agree with her conclusion at para. 177 that the reference to the identified breeds "provides an interpretive guide and is sufficient… to provide the necessary guidance or benchmarks."

[43] The appellant's arguments must be considered in light of the established jurisprudence dealing with vagueness. In my view, the appellant's submissions assume that a higher degree of precision is required for a law to survive s. 7 vagueness scrutiny than is warranted by the case law. As the Attorney General points out in its factum, the Supreme Court of Canada has upheld a long list of laws that are arguably more vague and uncertain in their application than the pit bull provisions. The statutory provisions upheld by the Supreme Court include:

- A *Criminal Code* provision creating a defence to assault where the force used is "reasonable under the circumstances": *Canadian Foundation for Children, Youth and the Law v. Canada* , [2004] 1 S.C.R. 76.

- A *Competition Act* offence of entering into an agreement to "unduly" lessen competition: *Nova Scotia Pharmaceutical Society*.

- A *Divorce Act* provision requiring the judge making a custody order to take into account only "the best interests of the child": *Young v. Young*, [1993] 4 S.C.R. 3.

- A *Criminal Code* prohibition against publishing material where a dominant characteristic is "the undue exploitation of sex": *Butler*.

- *Immigration Act* provisions allowing for the deportation of persons who pose a "danger to the security of Canada " or who are members of organizations who have engaged in "terrorism": *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3.

- A *Canada Elections Act* provision limiting the ability of third parties to promote one or more candidates by taking a position on an issue with which they are particularly "associated": *Harper*.

- An *Environmental Protection Act* prohibition against the discharge of a "contaminant" that "causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it": *Canadian Pacific*.

- A *Tobacco Act* prohibition on the promotion of tobacco products by means that are "likely to create an erroneous impression about the characteristics, health effects or health hazards of the… product or its emissions": *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610.

[44] These cases demonstrate that a law will not be struck down as being vague simply because reasonable people might disagree as to its application to particular facts. No doubt individuals, even experts, may disagree about what is in the "best interests of the child", whether a particular contract would "unduly" lessen competition, whether a specific political issue is "particularly associated" with a given political party, or whether a dominant characteristic of a publication is the "undue exploitation of sex". Yet each one of those phrases has been held to have sufficient precision to survive s. 7 scrutiny. In these and other areas of social or regulatory policy, the fact that identification and classification does not lend itself to linguistic certainty will not defeat laws which provide a degree of clarity capable of supporting intelligible debate. In my view, given the nature of the subject-matter and the importance of the objective, the Attorney General's submission that the impugned provision gives sufficient guidance is well supported by the authorities cited.

[45] It is worth noting that while not directly applicable to a *Charter* challenge, vagueness challenges to similar definitions in municipal by-laws restricting pit bulls have failed in Canada: *Madronero v. Lachine (Ville),* [1990] Q.J. No. 307 (S.C.); *Manitoba Assn. of Dog Owners v. Winnipeg (City),* [1993] M.J. No. 661 (Q.B.), at paras. 11-13, aff'd [1994] M.J. No. 643 (C.A.).

[46] I note as well that laws banning or restricting pit bulls have been enacted in many American jurisdictions and American courts have overwhelmingly rejected vagueness challenges to pit bull laws containing definitions similar to the one at issue here. Included in the long list of cases to this effect cited by the Attorney General are: *Hearn v. Overland Park*, 244 Kan. 638, 772 P.2d 758 (1989), *cert. denied*, 493 U.S. 976 (1989); *State of Ohio v. Anderson*, 57 Ohio St. 3d 168, 566 N.E.2d 1224 (1991), *cert. denied*, 501 U.S. 1257 (1991); *American Dog Owners Asso. v. Yakima*, 13 Wn.2d 213, 777 P.2d 1046 (1991); *Colorado Dog Fanciers, Inc. v. City and County of Denver*, 820 P.2d 644 (Colo. 1991); *American Dog Owners Assn. v. Des Moines*, 469 N.W.2d 416 (Iowa 1991); *Greenwood v. North Salt Lake*, 817 P.2d 816 (Utah 1991).

[47] I turn now to the issue raised by the Attorney General's cross-appeal: did the application judge err in holding that the word "includes" in the opening of s. 1(1) and the inclusion of the phrase "a pit bull terrier" in s. 1(1)(a) render the definition of "pit bull" unconstitutionally vague?

[48] The application judge held that it should be presumed that by adding the phrase "a pit bull terrier", the legislature must have meant to add something to the definition not captured by the balance of s. 1. She found that there is no recognized breed of pit bull terrier and no agreement among the experts as to what dogs are or are not pit bull terriers. At para. 185 of her reasons, she concluded as follows:

> [T]he phrases "pit bull includes" and "pit bull terriers" are problematic in so far as they appear to include an undefined number of dogs that fall beyond the three specified breeds and dogs substantially similar to those three breeds. In so far as these terms go beyond the three breeds, they

do not, in my opinion, provide sufficient guidance to courts or to those who have to enforce the legislation. They also do not define an "area of risk" for dog owners.

[49] For the following reasons, I respectfully disagree with this conclusion. In my opinion, the definition of "pit bull" as enacted by the legislature survives s. 7 vagueness scrutiny.

[50] There is ample evidence in the record to demonstrate that the terms "pit bull" and "pit bull terrier" are generic, dictionary terms commonly used by members of the public, scholars, veterinarians, animal control officers and humane societies to describe American Staffordshire terriers, American pit bull terriers, Staffordshire bull terriers, and dogs that are hybrids or mixes of these breeds or that have substantially similar characteristics. The terms "pit bull" and "pit bull terrier" are found in many of the articles and the professional literature cited in the record as well as in the testimony of most of the witnesses. The *Canadian Oxford Dictionary*, 2001 ed., defines a "pit bull" or "pit bull terrier" as "a dog of an American variety of bull terrier, noted for its ferocity". The legislature cannot be faulted for using vernacular or generic terms to alert the public to the nature of a prohibition also described in more precise scientific or technical language: *Canadian Pacific*, at para. 53.

[51] The terms "pit bull" and "pit bull terrier" must also be read in their context as elements of a more comprehensive definition. I do not agree with the application judge that by enacting the phrase "pit bull includes" and including the phrase "a pit bull terrier", the legislature must have intended to add to the reach of the definition of "pit bull" to include a broader class than captured by ss. 1(1)(b)-(e). Legislatures commonly use repetitive and redundant language, repeating commonly used synonymous words out of an abundance of caution to ensure that the terms of a statute are given a compendious meaning. The test for vagueness is unintelligibility, not redundancy, and the inclusion of repetitive language does not render the definition constitutionally infirm.

[52] In addition, the word "includes" does not necessarily require an expansive interpretation extending the definition beyond the itemized list contained in ss. 1(1)(a)-(e). The word "includes" "may… depending on the context, precede a list that exhausts the definition": *Re Canada 3000 Inc. (Re)*, [2006] 1 S.C.R. 865, at para. 47. Where possible, legislation should be interpreted in a manner that corresponds to constitutional rights and values. To the extent the word "includes" is susceptible of importing an unacceptably vague definition, giving it narrow import as exhausting the definition is preferable to striking it down.

[53] Accordingly, I would allow this part of the cross-appeal, set aside paragraph 1 of the judgment and restore s. 1 as enacted.

Issue 3. Does s. 19, providing for proof that the dog is a pit bull through a veterinarian's certificate, violate s. 11(d) of the Charter?

[54] Before the application judge, the appellant made two arguments in relation to s. 19:

> (i) the lack of a provision for cross-examination in respect of the document from the veterinarian contravenes the right to a fair trial guaranteed by s. 11(d) of the *Charter*, and
>
> (ii) the fact that the document is proof that the dog is a pit bull, in the absence of evidence to the contrary, infringes the defendant's right to be presumed innocent contrary to s. 11(d) of the *Charter*.

[55] On the first issue, the application judge concluded that ss. 39 and 46 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 give trial judges a discretion to allow for cross-examination of the veterinarian who signed the certificate. She held at para. 215 of her reasons that "it should be assumed that the discretion of the court to give leave to a defendant to cross-examine will be exercised in a way that is consistent with *Charter* rights and, in particular, with the right to trial fairness and the due administration of justice."

[56] We agree. This ruling, from which no appeal was taken, is a full answer to the appellant's first ground of attack on s.19. A trial judge's discretion to permit cross-examination of the veterinarian is an important safeguard of an accused's s. 11(d) rights. There is no reason to suppose that leave to cross-examine, if sought, will be improperly or lightly denied.

[57] On the second issue, the application judge concluded that by providing for proof by veterinarian's certificate, s. 19 creates a mandatory evidentiary presumption that violates the s. 11(d) *Charter* right "to be presumed innocent until proven guilty". The

Attorney General cross-appeals on this issue. For the following reasons, I conclude that, properly interpreted, s. 19 does not create a situation where the accused is liable to be convicted in spite of a reasonable doubt and therefore does not violate the right to be presumed innocent until proven guilty. I would therefore allow the Attorney General's cross-appeal on this issue.

[58] As I read s. 19, it simply provides that as proof of the fact that a dog falls within the definition of "pit bull", the Crown may introduce a certificate to that effect purporting to be signed by a member of the College of Veterinarians of Ontario. Despite the rather complicated wording of s. 19, in the end, when properly interpreted, its legal effect is to overcome the effect of the hearsay evidence rule that would make a veterinarian's certificate inadmissible. Allowing for proof by way of veterinarian's certificate does not create a presumption, nor does it violate the presumption of innocence. Rather, s. 19 is an enabling provision that merely affords the prosecution a more expedient method of proving a fact necessary to sustain a conviction.

[59] In *R. v. Downey*, [1992] 2 S.C.R. 10, at p. 21, Cory J. referred to the landmark case of *R. v. Oakes* [1986] 1 S.C.R. 103, at p. 115, where Dickson C.J. identified two types of presumptions:

> Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact. [Citations omitted.]

[60] Presumptions *without* basic facts are the legal starting point for the determination of a factual issue. Presumptions without basic facts relate to placement of the legal or evidentiary burden of proof as a matter of law. The presumption of innocence is the classic example. Until the Crown proves the guilt of the accused beyond a reasonable doubt, the accused is presumed to be innocent.

[61] Presumptions *with* basic facts operate by either permitting (a permissive presumption) or requiring (a mandatory presumption) the trier of fact to find the presumed fact upon proof of some other "basic fact". For example, the provision in the *Narcotics Control Act* at issue in *Oakes* required the trier of fact to find an intention to traffic drugs (the presumed fact) upon proof of possession of drugs (the basic fact). Similarly, the provision at issue in *Downey* involved a presumption from basic facts: s. 212(3) of the *Criminal Code* provided that "[e]vidence that a person lives with or is habitually in the company of prostitutes… is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution".

[62] As *Downey* and *Oakes* make clear, the focus for inquiry in relation to the presumption of innocence guaranteed by s. 11(d) is this: does the legislative provision create a situation where the accused is liable to be convicted despite the existence of a reasonable doubt?

[63] In *Downey*, Cory J. explained at p. 29 how this concern may or may not arise in the case of presumptions *with* basic facts:

> Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11(d) if it requires the trier of fact to convict in spite of a reasonable doubt.

[64] Thus, in *Oakes*, proof of possession of drugs did not lead inexorably to proof of an intention to traffic drugs. Similarly, in *Downey*, proof that the accused lived with prostitutes did not lead inexorably to proof that the accused was living off the avails of prostitution. In both cases, the accused were liable to be convicted in spite of a reasonable doubt as to their guilt.

[65] Does s. 19 create a situation where the accused is liable to be convicted in spite of a reasonable doubt, either through the existence of a basic fact presumption or otherwise?

[66] It is clear that s. 19 does not fall into the category of presumptions with basic facts. The veterinarian's certificate does not prove a basic fact from which the trier of fact may or must find the presumed fact, *i.e.* that the dog is a pit bull. The certificate is direct evidence of that fact and its evidentiary force does not depend upon any presumption. Section 19 of the Act simply renders the certificate admissible and capable of being used by the trier of fact as *direct* evidence of the dog's breed, not as proof of some other fact that in turn allows or requires the trier of fact to presume the dog's breed.

[67] Could s. 19 nonetheless give rise to a conviction in spite of a reasonable doubt? By providing that the veterinarian's certificate is "proof, in the absence of evidence to the contrary", s. 19(1) is, on its face, perhaps suggestive of a reverse onus. However, in the end, I am not persuaded that it has that effect. The provision at issue in *Downey* used similar language. However, *Downey* dealt with a presumption *with* a basic fact which clearly gave rise to the possibility of conviction in spite of a reasonable doubt. Section 19 does not operate by creating a presumption from a basic fact. As the appellant candidly acknowledged during oral argument, s. 19 is not analogous to the statutory provision at issue in *Downey*. It follows that the reasoning in *Downey* is therefore distinguishable. Moreover, s. 19(3) explicitly preserves the presumption of innocence and requires the Crown to prove the guilt of the accused beyond a reasonable doubt.

[68] Once the Crown relies on s. 19 to introduce a veterinarian's certificate that a dog is a pit bull, it is true that the accused risks being convicted unless he or she offers something, either through cross-examination of the veterinarian or by adducing other evidence, to suggest that the dog is not a pit bull. The certificate creates a situation where the accused faces a tactical burden to point to some evidence capable of raising a reasonable doubt as to the dog's breed. But to the extent that s. 19 thereby creates what may be described as an evidentiary burden, I do not agree that it violates the presumption of innocence. It is simply the tactical burden that any accused faces once the Crown makes out a *prima facie* case on an essential element of the offence. Unanswered – for the certificate is only "proof" that the dog is a pit bull when it is unanswered – the certificate is proof that the dog is a pit bull. The provision that the certificate is "proof, in the absence of evidence to the contrary" in this context amounts to a statement of the obvious rather than a legal prescription altering the burden of proof.

[69] Finally, to remove any doubt on the matter, I repeat that s. 19(3) explicitly preserves the presumption of innocence, providing that "this section does not remove the onus on the prosecution to prove its case beyond a reasonable doubt." Nothing in s. 19 relieves against the Crown's obligation to prove all elements of an offence under the Act to the requisite criminal standard of proof.

[70] Accordingly, I do not agree that s. 19 violates s. 11(d) of the *Charter* and I would therefore set aside paragraph 2 of the judgment striking down s. 19.

Issue 4. *If there are any violations of the Charter, are they justified pursuant to s. 1?*

Issue 5. *To the extent that the pit bull provisions are unconstitutionally vague, is severance and reading in the appropriate remedy?*

Issue 6. *Did the application judge err by refusing to award the appellant costs?*

[71] As I have concluded that there is no *Charter* breach, and that the appeal should be dismissed and cross-appeal allowed, it is not necessary for me to consider the issues of s. 1 justification, the appropriate remedy or the application judge's disposition as to costs.

CONCLUSION

[72] For these reasons, I would dismiss the appeal and allow the cross-appeal, set aside paragraphs 1 and 2 of the judgment below and dismiss the application. If the parties are unable to agree as to costs, we will receive brief written submissions to be provided by the Attorney General within ten days of the release of these reasons and by the appellant within five days thereafter.

"Robert J. Sharpe J.A."

"I agree John Laskin J.A."

"I agree E.A. Cronk J.A."

RELEASED: October 24, 2008