



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Archambault,  
2024 SCC 35

**APPEAL HEARD:** February 14,  
2024

**JUDGMENT RENDERED:**  
November 1, 2024

**DOCKET:** 40428

**BETWEEN:**

**His Majesty The King**  
Appellant

and

**Agénor Archambault and Gilles Grenier**  
Respondents

- and -

**Attorney General of Canada, Attorney General of Ontario,  
Association québécoise des avocats et avocates de la défense,  
Association des avocats de la défense de Montréal-Laval-Longueuil,  
Criminal Lawyers' Association (Ontario) and  
Canadian Civil Liberties Association**  
Interveners

**OFFICIAL ENGLISH TRANSLATION:**  
Reasons of Côté and Rowe JJ. and reasons of Kasirer J.

**CORAM:** Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,  
O'Bonsawin and Moreau JJ.

**JOINT REASONS:** Côté and Rowe JJ.  
(paras. 1 to 80)

**CONCURRING REASONS:** Kasirer J. (Jamal J. concurring)  
(paras. 81 to 98)

**CONCURRING REASONS:** Martin J.  
(paras. 99 to 147)

**DISSENTING REASONS:** Karakatsanis J. (Wagner C.J. and O'Bonsawin and Moreau JJ. concurring)  
(paras. 148 to 304)

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**His Majesty The King**

*Appellant*

v.

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**2024 SCC 35**

File No.: 40428.

2024: February 14; 2024: November 1.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,  
O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Criminal law — Preliminary inquiry — Right to preliminary inquiry — Accused charged with historical sexual offences which carried maximum term of imprisonment of 10 years at time, but for which maximum penalty was later increased to 14 years — Amendment restricting availability of preliminary inquiries to accused persons charged with offences with maximum penalty of 14 years or more of imprisonment made to Criminal Code after charges laid — Whether accused have right to preliminary inquiry — Criminal Code, R.S.C. 1985, c. C-46, s. 535.*

*Legislation — Interpretation — Legislative amendment — Temporal application — Temporal presumptions — Amendment made to Criminal Code restricting availability of preliminary inquiries to accused persons charged with offences with maximum penalty of 14 years or more of imprisonment — Whether amendment applies to accused persons against whom charges were laid prior to amendment — Whether amendment applies to accused persons who are charged with offences for which current maximum sentence is at least 14 years but who are not personally liable to 14 years or more of imprisonment — Criminal Code, R.S.C. 1985, c. C-46, s. 535 — Interpretation Act, R.S.C. 1985, c. I-21, ss. 43, 44.*

In unrelated cases, A and G were accused of one or more historical sexual offences against a child, which at the time of their commission carried a maximum term of imprisonment of 10 years. After the dates of the alleged offences and before charges were laid, the maximum penalty for the impugned conduct was increased from 10 to 14 years' imprisonment. A and G first appeared in the Court of Québec in the summer

of 2019. At first appearance, they reserved or postponed their right to elect their mode of trial to a later date. Then, in 2020, A and G each requested a preliminary inquiry. However, under an amendment to s. 535 of the *Criminal Code* that came into force on September 19, 2019, the availability of preliminary inquiries was now restricted to accused persons charged with offences with a maximum penalty of 14 years or more of imprisonment. In both matters, the Crown argued that the court lacked jurisdiction under the new s. 535 to hold a preliminary inquiry.

The Court of Québec held that the new s. 535 applied to A and G and that it lacked jurisdiction to preside over the preliminary inquiry. In its view, preliminary inquiries are of a purely procedural nature, and applying the new rule did not impact the substantive rights of A and G. A and G each challenged that interpretation. A Superior Court judge dismissed A's challenge, characterizing the right to a preliminary inquiry as purely procedural and concluding that the new s. 535 required the accused to be charged with an offence for which they could be personally punishable by 14 years' imprisonment or more. A different Superior Court judge dismissed G's challenge, holding that preliminary inquiries affected the substantive right to a discharge but that G's entitlement had not vested by the time the new s. 535 came into force — to get the benefit of the old rule, he should have both elected his mode of trial and asked for a preliminary inquiry before September 19, 2019.

The Court of Appeal concluded that the new rule in s. 535 did not apply to A and G and that they had a vested right to preliminary inquiries. Relying on the

principle of legality, the Court of Appeal held that the right to a preliminary inquiry accrues at two different points in time: it is accruing from the moment the offence is committed, and it is vested or accrued at the date of the first appearance. Given its conclusion on the vested right, the Court of Appeal did not address the question of how the amended version of s. 535 should be interpreted. The Court of Appeal remitted each file to the Court of Québec for a preliminary inquiry.

*Held* (Wagner C.J. and Karakatsanis, O'Bonsawin and Moreau JJ. dissenting): The appeal should be dismissed.

#### 1. Temporal Application of the New Section 535 of the *Criminal Code*

*Per* Wagner C.J. and Karakatsanis, O'Bonsawin and Moreau JJ.: There is no clear basis on which to draw a conclusion about Parliament's specific intention, so the new limitation in s. 535 should apply unless it interferes with a substantive legal interest that had vested before it came into force. The amendment to s. 535 is not purely procedural because it can interfere with a substantive legal interest by depriving an accused of the opportunity to be discharged at a preliminary inquiry. However, that substantive legal interest only vests at the time a request for a preliminary inquiry is made. Accordingly, the new limitation in s. 535 should apply to all persons where a request for a preliminary inquiry was not made before September 19, 2019.

*Per* Kasirer and Jamal JJ.: Because the right to a preliminary inquiry is not purely procedural, the new s. 535 does not apply with immediate effect. Where a

request for a preliminary inquiry was made before September 19, 2019, the right to an inquiry vested. However, this is not the only situation in which the right to request a preliminary inquiry vests; this right also vests each time a court agrees to reserve an accused's right to elect their mode of trial.

*Per Côté and Rowe JJ.:* The amendment made to s. 535 is procedural in nature but affects a substantive right, that is, an accused's right to be discharged of any charge if, on the whole of the evidence adduced during the preliminary inquiry, no sufficient case is made out to put the accused on trial on the charge. Consequently, the presumption that Parliament did not intend to interfere with vested rights or privileges in relation to preliminary inquiries applies. The right to a preliminary inquiry vests at the time charges are laid. The former s. 535 should therefore continue to apply to persons charged prior to September 19, 2019.

*Per Martin J.:* The amendment to s. 535 affects an accused's substantive legal interests. Accordingly, the new s. 535 must apply prospectively only. Persons alleged to have committed an offence before September 19, 2019, that rendered them eligible for a preliminary inquiry should retain that eligibility today.

## 2. Interpretation of the New Section 535 of the *Criminal Code*

*Per Wagner C.J. and Karakatsanis, Martin, O'Bonsawin and Moreau JJ.:*  
The new rule in s. 535 requires that the accused actually be liable to 14 or more years'

imprisonment in respect of the offence with which they are charged for a preliminary inquiry to be available.

*Per Côté and Rowe JJ.:* Under the new s. 535, an accused has the right to a preliminary inquiry if their alleged offence, or its equivalent, is punishable by 14 years or more of imprisonment; this right is not affected by the accused's right to the benefit of the lesser punishment. Where the maximum sentence for an offence was increased to 14 years between the commission of the offence and the laying of charges, a preliminary inquiry can be held even if the accused is not personally facing a maximum sentence of 14 years.

*Per Kasirer and Jamal JJ.:* The question of the interpretation of the new s. 535 is not addressed.

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*Per Côté and Rowe JJ.:* The starting point in analyzing the temporal application of new legislation is always the legislation itself. In the absence of a transitional provision, and where the lawmaker's intention to give the legislation a particular effect does not appear expressly or by necessary implication upon reading the legislation, as is the case with the new s. 535, recourse must be had specifically to the rules laid down in interpretation statutes and court decisions. Three well-established principles of transitional law come into play: (1) the principle of legality; (2) the presumption against interference with vested rights; and (3) the exception based on the



immediate application of purely procedural provisions. The principle of legality is a pillar of the criminal law whose purpose is to preserve the law as it stood at the time an offence was committed. The new legislation cannot make criminal any act or omission that did not constitute an offence at the time it occurred. In addition, the new legislation cannot create more severe punishments for an offence committed before it came into force. Next, the presumption that the lawmaker does not intend to interfere with vested rights or privileges is one of the fundamental principles of transitional law. To ensure the certainty of the legal consequences attaching to facts and conduct predating a legislative amendment, a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction. Legislation that affects substantive rights can only apply prospectively to cases in respect of which these rights have not yet vested. There is one exception to this presumption: purely procedural legislation, which is meant to govern the manner in which rights or privileges are asserted without affecting their substance, is presumed to apply immediately. Sections 43 and 44 of the federal *Interpretation Act* codify the presumption against interference with vested rights and the exception based on the immediate application of purely procedural provisions.

The abolition of the preliminary inquiry for certain offences does not engage the principle of legality. This measure has no impact on the scope of criminal liability. The preliminary inquiry is not a legal rule on which accused persons may rely in adjusting their behaviour or in deciding to accept the consequences of breaking it at the time of committing an offence. However, the absence of any indication from

Parliament as to the temporal application of s. 535 triggers the presumption that the legislative amendment does not affect vested rights or privileges. There is agreement for the most part with Karakatsanis J.'s analysis with respect to the nature of the abolition of the preliminary inquiry for accused persons charged with an indictable offence punishable by less than 14 years of imprisonment: the legislative amendment cannot be considered a purely procedural amendment. It does not affect only the manner of proceeding or of conducting litigation; the limitation on the right to a preliminary inquiry has a direct impact on the liberty and security of accused persons. It is therefore procedural in nature, but it affects a substantive right. Because the amendment is not purely procedural in nature, the new enactment does not apply immediately to all proceedings. Moreover, the fact that new procedural legislation may, through its effects, interfere with a substantive right does not end the analysis: the right or privilege in question must also have been vested at the time that legislation came into force.

An individual claiming a vested right or privilege must satisfy a two-step test. First, the individual's legal situation must be tangible and concrete rather than general and abstract. Second, the individual's legal situation must be sufficiently tangible and constituted at the time the new legislation comes into force; in other words, the situation must have materialized to some degree. In this case, at the first step, the possibility that the accused's right to a preliminary inquiry vests at the time the offence is committed can be excluded: the accused's legal situation is not sufficiently tangible, concrete and distinctive at that time. It is not until charges are laid against the accused

that the criminal court process begins and the accused's legal situation becomes tangible, concrete and distinctive.

Next, under the second step, the accused's situation is sufficiently constituted at the time charges are laid. At that point, the vesting of the right is certain and not conditional on future events, because the accused will inevitably have to appear and choose to exercise or waive their right to a preliminary inquiry, or reserve their election. All of the conditions precedent to the vesting of the right are also fulfilled at that time. The request that the accused must make for a preliminary inquiry has no effect on the crystallization of the vested right. Section 535 opens with the phrase "if an accused who is charged with an indictable offence", which sets the charging of the accused as the condition for entitlement to a preliminary inquiry. The request triggers the justice's duty to conduct a preliminary inquiry, but it is not a condition precedent to the existence of the right to a preliminary inquiry itself; rather, it constitutes the exercise of the right itself.

With regard to the interpretation that the new s. 535 should receive, its text, context and purpose demonstrate that an accused has the right to a preliminary inquiry if their alleged offence, or its equivalent, is punishable by 14 years or more of imprisonment. There is no ambiguity in the wording of s. 535: a preliminary inquiry can be held only in the case of an "accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment". Both the adjective "punishable" in English and its equivalent "*passible*" in the French version relate to the

indictable offence and not to the sentence the accused may receive. This phrasing refers to the seriousness of the alleged offence, and its logic is not directed at the accused personally. Parliament thus intended the right to a preliminary inquiry to be tied to the seriousness of the alleged offence, not to the degree of jeopardy faced by the accused; this is an objective criterion. This interpretation is also reinforced by an examination of the parliamentary debates that led to the amendment in issue.

The jeopardy actually faced by the accused as a result of the time when the offence was committed is part of the accused's individual circumstances and does not go to the seriousness of the alleged offence. An offence is not less serious today because it was committed before a certain date. In determining the right to a preliminary inquiry, Parliament did not intend to draw a distinction between charges of the same nature based on the date of commission of the offence. The objective seriousness of an offence is not confined to the maximum sentence for the offence at the time it was committed. On the contrary, the legislative amendments increasing maximum sentences indicate Parliament's determination that offences are to be treated as more grave than they had been in the past. Accordingly, where the maximum sentence for an offence was increased to 14 years between the commission of the offence and the laying of charges, a preliminary inquiry can be held even if the accused is not personally facing a sentence of 14 years. In such a case, it must be asked whether the seriousness of the alleged offence, as it is defined today, places it within the category of the most serious offences. The fact that the accused is charged and convicted on the basis of the criminal provisions in force at the time the offence was committed changes nothing in this

regard. Although an accused may receive a reduced maximum sentence for a crime committed before the sentence was increased, the accused's right to the benefit of the lesser punishment does not defeat the right to a preliminary inquiry; to conclude otherwise would lead to an absurd result, penalize the accused and disregard the sequence of stages in a criminal trial.

In this case, A and G had a vested right to a preliminary inquiry, since this right crystallizes at the time charges are laid. Moreover, regardless of whether a right vested in A and G before the legislative amendment came into force, they have such a right under the current version of s. 535, because the acts in question would be punishable by a maximum term of imprisonment of 14 years if they were committed today. The appeal should be dismissed.

*Per Kasirer and Jamal JJ.:* There is agreement, in substance, with Karakatsanis J.'s analysis of vested rights with regard to the temporal application of s. 535 and, in particular, with the importance she attaches to the request made by an accused for a preliminary inquiry. There is also agreement with her with that local practices regarding the administration of justice can legitimately vary from one province or territory to another and that this is not necessarily incompatible with the uniform application of substantive criminal law in Canada. However, in light of the practice followed in Quebec and its effect on the right of A and G to request a preliminary inquiry, A and G had vested rights.

In Quebec, accused persons typically reserve their election as to the mode of trial so that they can examine the evidence disclosed. The general understanding among Quebec judges and lawyers is that reserving the election as to the mode of trial with the court's authorization has the effect of preserving the right to make a request for a preliminary inquiry at a later date. All of the conditions precedent to the holding of a preliminary inquiry are indeed fulfilled when the election is reserved: the accused receives the court's assurance that they can make a request at a later date and, by the terms of s. 535, that request must be honoured. The accused's legal situation is therefore tangible, concrete and sufficiently constituted at that time. Parliament's objective of reducing the number of preliminary inquiries should not limit vested rights in the absence of a transitional provision for existing situations.

Because the Court of Québec granted the requests of A and G to reserve their election as to the mode of trial before the amendments to s. 535 came into force, A and G had a vested right to make a request for a preliminary inquiry at a later date. They were therefore governed by the former s. 535. The appeal should be dismissed.

*Per Martin J.:* There is agreement that the amendment at issue is not purely procedural and instead can affect an accused's substantive legal interests. However, there is disagreement as to the point in time for the application of the new s. 535; the date of the offence is the preferable option.

In light of Parliament's failure to legislate on the temporal application of the amendment, the judicial task is to determine when the new s. 535 applies, based on

the principles and presumptions concerning the temporal application of legislation, as well as the values of fairness, rule of law and reasonable reliance they protect. This task must be approached with the interests of justice top of mind. The case law and the *Interpretation Act* provide legal presumptions which guide the interpretation of legislation when Parliament has failed to clearly set out its temporal application. In particular, two presumptions apply to legislation that affects an accused's substantive rights: the presumption against the retrospective application of legislation affecting substantive legal interests, and the presumption against interfering with vested rights. The guiding principle of the first presumption is that new legislation that affects substantive rights is presumed to apply prospectively, absent clear legislative intent otherwise. New legislation that deals with procedure will also not apply immediately if, in its application, it affects substantive rights. As to the second presumption, in criminal cases, the Court's jurisprudence on vested rights has previously required that a right-holder be able to actually exercise the right and that the eventual accrual be certain, and not conditional on future events.

The new s. 535 of the *Criminal Code* should be analyzed based on the approach articulated and applied in *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, the Court's most recent authority concerning the temporal application of legislation which affects substantive interests. *Dineley* makes clear that in order to engage the presumption against retrospectivity, it is sufficient that the legislation affects substantive rights. It stands for two key propositions: either substantive or vested rights

will trigger the presumption against retrospectivity, and if the accused's substantive rights are affected, the date of the offence should govern.

First, the presumption against retrospectivity is engaged when an amendment may affect either or both substantive or vested rights. Either one, standing alone, is sufficient to trigger the presumption of prospective application. Once there has been a finding that the substantive rights of the accused are affected, it is unnecessary to impose the additional requirement that those rights must also have somehow vested or accrued to the accused. There is no general requirement that all substantive rights must have also have vested before legislative amendments must be presumed to apply prospectively — but even if there is, it should be characterized sufficiently broadly to ensure that rigid legal characterizations and formalities are not favoured over fairness and an accused's substantive interests. Any dispute over whether what must vest in the instant case is the right to have a preliminary inquiry or the right to request a preliminary inquiry should be resolved to best respect fairness to an accused. Second, new criminal legislation will apply as of the date of the offence if it affects an accused's substantive legal interests.

The loss of the possibility of being discharged at the close of a preliminary inquiry is significant. It approximates the loss of a legal defence, which affects the substantive and constitutional rights of the accused. Although the accused does not have a constitutional right to a preliminary inquiry, eliminating the possibility of a discharge at the close of the preliminary inquiry may affect an accused's rights to



liberty and security of the person under s. 7 of the *Charter*. Because the new s. 535 affects the accused's substantive rights and must apply prospectively only, the date of the offence should govern its temporal application. It is preferable for many reasons: it is common to all criminal files, it is independent of any given procedure and thus adaptable to potential regional differences in criminal procedure across the country, and it is attuned to the reality of delays or variables that may arise throughout the course of the criminal process at no fault of the accused. Determining the temporal application of the new s. 535 requires a solution that applies consistently across the country. The accused's substantive rights should not be dependent on or shaped by regional differences in procedure, especially when it may result in unfairness. Accordingly, where the alleged offence date is prior to September 19, 2019, an accused who would have been eligible for a preliminary inquiry but for the amendment remains eligible, regardless of the applicable maximum punishment.

With respect to the interpretation of the new s. 535, there is agreement with Karakatsanis J. that, where the new s. 535 applies because the alleged offence date is on or after September 19, 2019, an accused is only eligible for a preliminary inquiry if they personally face a maximum punishment of 14 years or greater.

In the instant case, there is no basis to interfere with the decision of the Court of Appeal holding that the entitlement to the preliminary inquiry attaches to the offence date, and the appeal should be dismissed.

*Per* Wagner C.J. and **Karakatsanis**, O'Bonsawin and Moreau JJ. (dissenting): Despite previous *Criminal Code* amendments that have made the preliminary inquiry available only on request and allowed for the narrowing of its focus, concern has continued to grow over delays in criminal proceedings. In this context, Parliament opted to reform preliminary inquiries to improve the efficiency of criminal proceedings and to avoid the need for witnesses to testify twice. Since the amendment in 2019, s. 535 limits the availability of preliminary inquiries to the most serious cases based on the maximum penalty for the relevant offences.

A predictable approach to determining temporal application must clarify and build on the law interpreting the relevant presumptions developed in the Court's jurisprudence and codified by Parliament. As with any question of statutory interpretation, determining the temporal application of a new rule must be grounded in the text of the legislation read in its full context and in harmony with the legislature's intention. In conducting that analysis, courts must rely on all the principles of statutory interpretation. Where the legislature's intention as to the temporal application of specific legislation can be discerned using principles of interpretation other than those presumptions of temporal application, courts are bound to give effect to that intention. However, absent transitional provisions and where those principles fail to provide a clear answer, the general presumptions governing temporal application become central to the analysis.

The temporal application of the amendment of a *Criminal Code* provision turns on the interpretation and interrelationship between three presumptions: (1) the presumption of immediate application of purely procedural law, (2) the presumption against retrospectivity, and (3) the presumption against interference with vested rights. These presumptions have been in part codified by Parliament in the *Interpretation Act* (ss. 43 and 44). First, according to the presumption of immediate application of purely procedural legislation, where the change in the law is purely procedural, in that applying it would not, in any circumstances, affect a substantive legal interest, the new rule is presumed to apply immediately to all. A substantive legal interest is a right, privilege, obligation or liability that is not merely about how a litigant conducts litigation but has direct implications for the individual outside the courtroom. Whether legislation could be classified as procedural in the abstract is not determinative; all that matters is the presence or absence of an effect on substantive matters. Second, the presumption against retrospectivity means that change to the law is presumed not to attach new prejudicial consequences to events that occurred before the change. Third, the presumption against interference with vested rights provides that legislation is presumed not to interfere with rights held by individuals that were tangible, concrete and distinctive before it came into force. The threshold of “tangible, concrete and distinctive” has two primary facets: (1) the right must be that of the particular individual rather than belonging to a community or general class; and (2) the right must be sufficiently constituted before the coming into force of the legislative change, in that it exists and is possessed by individuals at the relevant time. If a new rule would

interfere with a right with these features, such that it has “vested”, it is presumed not to apply.

Applying the three presumptions at issue together in a principled way starts by asking whether the new rule is purely procedural since, in the affirmative, it is unnecessary to consider the other presumptions. Where it is shown that a new rule is purely procedural, it applies immediately in all circumstances. Where, however, the new rule is not purely procedural, the analysis must continue. The presumptions against retrospectivity and against interference with vested rights can be understood as different sides of the same coin. Interference with a vested right is always retrospective in that rights arise by virtue of facts that fulfil the conditions precedent to the right and subsequently impairing them changes the legal consequences of those facts in a prejudicial way. The combined effect of these presumptions is to look at the facts that had occurred before the new rule came into force and decide whether they establish a legal interest that the law is presumed to protect. Where the legal interest has vested before a new rule came into force, the new rule is presumed not to apply if it would interfere with that legal interest. And because the purely procedural presumption provides that only substantive legal interests can raise a presumption of non-application these legal interests must necessarily be substantive. Thus, in applying these three presumptions, the new rule will presumptively apply unless it interferes with a substantive legal interest that had vested before it came into force.

This inquiry requires understanding when a legal interest is “substantive” and when it has “vested”. Whether a legal interest is substantive is guided by categories settled in the jurisprudence, and the underlying legal values of fairness and the rule of law rather than the abstract procedural nature of the legislation itself. As a legal interest becomes less a means to establish other rights and liabilities through litigation and more as an end in itself independent of that litigation, it becomes more likely that the legal interest will be substantive. A legal interest vests once all the facts necessary to recognize its existence have occurred. While those facts may generally be settled for recurring categories such as criminal liability, in cases involving unique statutory rights, careful attention must be paid to the nature of the right as expressed in the statute in light of how the legislature has balanced the reasonable expectations of interest holders against the democratic evolution of the law. It will be difficult to say a legal interest is vested where it remains contingent on an intervening action or event, such as the favourable exercise of discretion by a third party or actions necessary to acquire it that are more than mere formalities.

There is no clear basis on which to draw a conclusion about Parliament’s specific intention regarding the temporal application of the new s. 535. It therefore falls to be determined using the temporal presumptions. The amendment to s. 535 was not purely procedural, because it can deprive an accused of the opportunity to be discharged at a preliminary inquiry, which is a substantive legal interest. The amendment therefore does not attract immediate application in every circumstance, and it is necessary to determine when the right to a preliminary inquiry vests. It does not

vest when the offence is alleged to have been committed. The opportunity to be discharged at a preliminary inquiry does not form part of the substantive law about criminal liability that is understood to vest at the time of the commission of the offence. Liability vesting at that time protects a person's reliance on the state of the law when they were deciding whether to risk the liability associated with breaking the law. But it strains credulity to imagine that people weigh the availability of a preliminary inquiry in determining how to conduct themselves and whether to risk criminal liability. Conduct is not made legal or illegal, nor made subject to greater or lesser penal consequence because it could be examined at a preliminary inquiry. The availability and exercise of the right to a preliminary inquiry also depends on significant contingencies standing between the commission of the offence and the preliminary inquiry, including whether a charge is actually laid and, in the case of a hybrid offence, whether the Crown will elect to proceed summarily.

The right to a preliminary inquiry vests when the request for a preliminary inquiry is made, not the point in the proceedings at which there are no further conditions outside of the control of the accused to ask for a preliminary inquiry. There is a distinction between the ability to request a preliminary inquiry and the right to a preliminary inquiry itself. Section 535 frames the request as a precondition of the existence of the right and ties the request to the election of mode of trial. Read together, the provisions surrounding the election of the mode of trial make clear that what triggers the holding of a preliminary inquiry is both the election of a mode of trial in which a preliminary inquiry is available and the request for a preliminary inquiry to be

held. Even where the accused is sure to be tried by a mode through which a preliminary inquiry is available, the statute still mandates a request. The text and statutory scheme make clear that Parliament intended to make the availability of a preliminary inquiry conditional on a request actually having been made. Accordingly, the new limitation in s. 535 applies to all accused persons where a request for a preliminary inquiry was not made before it came into force on September 19, 2019. The requirement that a request be made ensures there is a clear rule that can be given a uniform interpretation across Canada.

Whether a request for a preliminary inquiry has been made is a factual question dependent on the circumstances of each individual case. The reserve or postponement of an election of mode of trial does not amount to an actual request for a preliminary inquiry. Assimilating a reserve to a request would effectively mean that the mere possibility of making a request is enough, despite the clear intent of Parliament to make the request an essential prerequisite. In the instant case neither A nor G had made a request for a preliminary inquiry before September 19, 2019. Their proceedings were accordingly governed by the new limitation on the availability of preliminary inquiries.

The question of whether an accused in the circumstances of A and G and subject to the new rule in s. 535 would be eligible for a preliminary inquiry in accordance with its terms turns on whether they qualify as an “accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment”.

The text in s. 535, read in context and in light of the purposes of the provision, requires that the accused actually be liable to 14 or more years' imprisonment in respect of the offence for a preliminary inquiry to be available. Parliament intended for only those accused facing greater maximum jeopardy to retain the benefit of a preliminary inquiry. The focus of the text is on the accused and the accused's proceedings, and not on hypotheticals or the general nature of the offence. This focus on the specific proceedings of the accused also follows the broader context of the new provision, which makes clear that preliminary inquiries are now generally unavailable, and that their availability is restricted only to those accused who meet specific and clear conditions.

Furthermore, the overall purpose of limiting the availability of the preliminary inquiry was to reduce delays, to alleviate the burden of witnesses and victims, and to improve the efficiency of the criminal justice system. These broader purposes inform the specific objectives of s. 535, which represents an exception for serious offences. While Parliament was seeking to reduce systemic obstacles to the *Charter* right to a trial without unreasonable delay, the exception recognizes that a preliminary inquiry can still be of significant benefit to an accused facing more significant legal jeopardy. Given these purposes, it is difficult to accept that Parliament adopted a threshold meant to invite a hypothetical inquiry into what the maximum sentence for the accused would have been had it occurred at another time. Sentencing principles and current societal values are of little assistance in interpreting s. 535. The proxy for seriousness selected by Parliament is the maximum sentence carried by the



offence charged, not the fit sentence. In the instant case, neither A nor G are eligible for a preliminary inquiry under the new s. 535, as the offences with which they are charged are each punishable by a maximum of 10 years' imprisonment. Accordingly, the appeal should be allowed.

### **Cases Cited**

By Côté and Rowe JJ.

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*Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *R. v. Kelly*, [1992] 2 S.C.R. 170; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *Spooner Oils Ltd. v. Turner Valley Gas Conservation*, [1933] S.C.R. 629; *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *Upper Canada College v. Smith* (1920), 61 S.C.R. 413; *Howard Smith Paper Mills v. The Queen*, [1957] S.C.R. 403; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880; *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732; *R. v. R.S.*, 2019 ONCA 906; *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828; *Re Falconbridge Nickel Mines Ltd. and Minister of Revenue for Ontario* (1981), 32 O.R. (2d) 240; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *R. v. Sheppard*, 2023 ABCA 381, 69 Alta. L.R. (7th) 1; *R. v. S.S.*, 2021 ONCA 479, 493 C.R.R. (2d) 251; *R. v. C.T.B.*, 2021 NSCA 58; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *R. v. Bertrand Marchand*, 2023 SCC 26; *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149; *R. v. McColman*, 2023 SCC 8; *Reference re Impact Assessment Act*, 2023 SCC 23; *MediaQMI inc. v. Kamel*, 2021 SCC 23, [2021] 1 S.C.R. 899; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6,

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APPEAL from a judgment of the Quebec Court of Appeal (Vauclair, Healy and Hamilton JJ.A.), 2022 QCCA 1170, 84 C.R. (7th) 174, [2022] AZ-51877293, [2022] Q.J. No. 8583 (Lexis), 2022 CarswellQue 13108 (WL), setting aside a decision of Charbonneau J., 2021 QCCS 1966, [2021] AZ-51764185, [2021] J.Q. n° 10206 (Lexis), 2021 CarswellQue 7218 (WL), and a decision of Thibault J., 2021 QCCS 1876, [2021] AZ-51764157, [2021] J.Q. n° 34468 (Lexis), 2021 CarswellQue 24134 (WL), and remitting both matters to the Court of Québec for preliminary inquiries. Appeal dismissed, Wagner C.J. and Karakatsanis, O’Bonsawin and Moreau JJ. dissenting.

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English version of the reasons delivered by

CÔTÉ AND ROWE JJ. —

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I.	<u>Overview</u>	

[1] This appeal raises the question of the temporal application of a legislative amendment through which the right of accused persons to a preliminary inquiry, enshrined in s. 535 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), is limited to the most serious cases, as well as the question of how the amended provision should be interpreted going forward. The appeal has become moot as regards the respondents, Agénor Archambault and Gilles Grenier, for whom preliminary inquiries were held in parallel with the appeal that has made its way to this Court. We are nevertheless of the view that it is in the public interest to address the above questions on the merits in order to clear up some continuing uncertainty over the state of the law (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 361-62; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at paras. 49-50; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 2; *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 17).

[2] We agree with our colleague Karakatsanis J. that the amendment made to s. 535 *Cr. C.* is procedural in nature but affects a substantive right, that is, an accused's right under s. 548(1)(b) *Cr. C.* to be discharged of any charge if, on the whole of the evidence adduced during the preliminary inquiry, no sufficient case is made out to put the accused on trial on the charge. With respect, the Court of Appeal erred in holding that the right to a preliminary inquiry is governed by the law in force at the time the offence was committed.

[3] However, unlike our colleague Karakatsanis J., we are of the view that the respondents, Mr. Grenier and Mr. Archambault, had a vested right to a preliminary inquiry. The right to a preliminary inquiry crystallizes at the time charges are laid.

[4] In the absence of a transitional provision, such an interpretation is the one most consistent with both the text of s. 535 *Cr. C.* and the presumption that Parliament does not intend to interfere with the vested rights or privileges of accused persons. This interpretation is also anchored in the notion that criminal trials do not all proceed in the same purely linear fashion and that they each have their own particular features. Indeed, when it comes to the order of the various stages of the proceedings, there are a multitude of possibilities. Finding that the right vests when charges are laid, a stage common to all cases, better acknowledges the flexibility of criminal procedure and the delays that may be caused by the Crown or the delays inherent in the justice system. Such an interpretation has the advantage of preserving fairness and legal certainty in addition

to allowing for the uniform application of the new legislative provision across the country.

[5]           Regardless of whether a right vested in Mr. Grenier and Mr. Archambault before the legislative amendment came into force, we are of the opinion that the respondents have such a right under the current version of s. 535 *Cr. C.* Parliament intended to preserve the preliminary inquiry for all accused persons whose alleged offence, or its equivalent, is punishable by 14 years or more of imprisonment, and not, as the Crown argues, only for accused persons who are personally liable to 14 years or more of imprisonment. This is the interpretation most consistent with the text of the amending provision and the compromise from which it resulted. The Crown's proposed interpretation of this provision, based on an abstract purpose — reducing the number of preliminary inquiries held across the country — is not supported either by the clear text of the new s. 535 *Cr. C.* or by the circumstances in which it was enacted.

[6]           We would therefore dismiss the appeal.

## II. Factual Background and Judicial History

[7]           On the whole, we agree with the summary of the facts and judicial history provided by our colleague Karakatsanis J. However, we will make some additional points that help to circumscribe the issues.

[8] The Court of Appeal held that the right to a preliminary inquiry accrues at two different points in time. First, relying on the principle of legality, the Court of Appeal found that the right to a preliminary inquiry is “‘accruing’ from th[e] moment” the offence is committed (2022 QCCA 1170, 84 C.R. (7th) 174, at para. 11). In Healy J.A.’s view, the classification of offences (indictable, hybrid or summary conviction) and everything that flows from it (election as to mode of trial and preliminary inquiry) are part of the law on which individuals rely in adjusting their behaviour and in assuming risks at the time of committing an offence (paras. 16-17).

[9] Second, the Court of Appeal found that the right to a preliminary inquiry is “vested or accrued at the date” of the first appearance (para. 11). Even when the accused does not request a preliminary inquiry, the first appearance confirms the vesting of the right. This interpretation is based on the importance of the legislative amendment to the rights or interests concerned, not on the characterization of the amendment as procedural or substantive in nature. As long as the accused has not elected trial before a provincial court judge, the accused’s right to request a preliminary inquiry is preserved.

[10] Given its conclusion on this point, the Court of Appeal did not address the question of how the amended version of s. 535 *Cr. C.* should be interpreted.

### III. Legislative Background on the Preliminary Inquiry

[11] An inheritance from English law, the preliminary inquiry was incorporated into Canadian criminal law in 1892, in the first *Criminal Code, 1892*, S.C. 1892, c. 29 (s. 577; see also D. Pomerant and G. Gilmour, *A Survey of the Preliminary Inquiry in Canada* (April 1993), at pp. 1-24). The preliminary inquiry was originally designed as an instrument of the prosecution, for finding the perpetrator of a crime and obtaining evidence of their guilt; it later became “a shield for the defence”, allowing the accused to ascertain what evidence the prosecution had against them and also “relieving [them] from the expense and odium of a trial” if, in the opinion of the justice of the peace or provincial court judge, that evidence was not sufficient to justify holding a trial (*Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 105, quoting P. Devlin, *The Criminal Prosecution in England* (1960), at p. 10).

[12] The preliminary inquiry therefore has two important aspects. Its primary purpose is “to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process” (*Skogman*, at p. 105). It is a “screening mechanism for the purpose of determining whether the Crown has sufficient evidence to commit the accused to trial” (*R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 21, citing *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at para. 30 and *R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635, at paras. 14-16). The preliminary inquiry also plays an “ancillary role as a discovery mechanism” (*Hynes*, at para. 31). In English law, the Crown’s duty to disclose evidence at the preliminary inquiry has evolved in such a way as to make it a very effective discovery mechanism, which has not historically been the

case in Canada (Law Reform Commission of Canada, *Research Paper: Discovery in Criminal Cases* (1974), at pp. 8-9).

[13] While the preliminary inquiry allows an accused to learn more about the prosecution's evidence, the disclosure of evidence is primarily assured, in Canadian law, by the accused's constitutional right to make full answer and defence, a principle of fundamental justice enshrined in s. 7 of the *Canadian Charter of Rights and Freedoms* (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. La*, [1997] 2 S.C.R. 680; *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 22; *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307; *McNeil*, at paras. 17-25; *R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35). This constitutional right to the disclosure of all relevant information is distinct from the right to a preliminary inquiry, which is what led this Court to state in *S.J.L.*, at para. 23, that "the incidental function of the preliminary inquiry as a discovery mechanism has lost much of its relevance" since the enactment of the *Charter*. Parliament's choice to limit or abolish the preliminary inquiry for certain offences therefore does not violate the principles of fundamental justice, because the accused continues to be presumed innocent and retains the right to make full answer and defence (para. 21). There is no constitutional right to a preliminary inquiry.

[14] At the beginning of this century, Parliament considered ways to reduce the number, length and scope of preliminary inquiries in response to an increase in court delays and in light of the impact of this procedure on victims and other witnesses.



However, a radical reform was ruled out (see *R. v. M. (P.)*, 2007 QCCA 414, 222 C.C.C. (3d) 393, at paras. 68-73). The solution favoured by Parliament, a more moderate one, was set out in the *Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13. One purpose of that statute was “reforming and modernizing criminal procedure with respect to . . . procedural aspects of preliminary inquiries” (summary, subpara. (f)(i)). Its provisions, which came into force on June 1, 2004, amended the *Cr. C.* in order to, among other things, make the holding of a preliminary inquiry optional, allow parties to limit the scope of an inquiry or allow a pre-hearing conference to be held, give the justice the power to regulate the course of the inquiry and authorize the justice to end any abusive examinations or cross-examinations. Those amendments maintained the accused’s “unconditional right” to a preliminary inquiry while streamlining the use of this procedure and making it optional (*House of Commons Debates*, vol. 136, No. 124, 2nd Sess., 36th Parl., September 28, 2000, at p. 8829; *Debates of the Senate*, vol. 139, No. 66, 1st Sess., 37th Parl., November 1, 2001, at p. 1612).

[15] Parliament’s intent in making those legislative amendments was to enable parties to choose mechanisms better adapted to their needs; its intent was “not the imposition [on them] of more inflexible procedures” (*S.J.L.*, at para. 24). To allow parties to decide whether a preliminary inquiry was appropriate in their circumstances, Parliament changed the wording of s. 535 *Cr. C.* as follows:

**535.** If an accused who is charged with an indictable offence is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of

the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

*(Criminal Law Amendment Act, 2001, s. 24)*

[16] In a report released in June 2017, the Standing Senate Committee on Legal and Constitutional Affairs observed that the *Criminal Law Amendment Act, 2001* had not succeeded in conclusively reducing the number and length of preliminary inquiries or in alleviating the burden on victims and witnesses. In its report, the Committee recommended eliminating preliminary inquiries or limiting them “to the most serious offences under the *Criminal Code*” in order to reduce delays in criminal cases (*Delaying Justice Is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (2017), at p. 48).

[17] One year earlier, in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, Moldaver, Karakatsanis and Brown JJ., writing for the majority, had invited Parliament to undertake a review of criminal rules and procedures, particularly the preliminary inquiry (at para. 140):

For provincial legislatures and Parliament, this may mean taking a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focusses on what is truly necessary to a fair trial. Legal Aid has a role to play in securing the participation of experienced defence counsel, particularly for long, complex trials. And Parliament may wish to consider the value of preliminary inquiries in light of expanded disclosure obligations. Government will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced. [Emphasis added.]

[18] In response to the invitation extended by this Court in *Jordan* and the observations made by the Standing Senate Committee on Legal and Constitutional Affairs in its report, the government introduced a first version of Bill C-75 in Parliament on March 29, 2018. The original version of the bill limited the availability of preliminary inquiries to adults charged with offences punishable by life imprisonment (Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2018, s. 240 (first reading March 29, 2018); *House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19604 (Hon. J. Wilson-Raybould)).

[19] Given the concerns expressed by the legal community about that approach, and further to an amendment proposal made by the Senate, the wording of the bill was changed to expand access to preliminary inquiries by comparison with what had been set out in the original bill. A choice was made to preserve the right of accused persons to a preliminary inquiry for all of what were considered to be the most serious offences. In this context, Parliament decided to preserve access in the case of offences for which the maximum sentence was 14 years or more. We use the term “most serious offences” below to refer to such offences:

As introduced, Bill C-75 proposed to restrict the availability of preliminary inquiries to indictable offences punishable by life imprisonment, roughly 70 offences. The other place agreed that these offences should automatically include a preliminary inquiry.

However, it also expanded their availability on a discretionary basis to all other indictable offences with a maximum penalty of less than life imprisonment, which would have been an additional 393 offences. As per the other place's amendment, preliminary inquiries would be available in two circumstances: first, where one or both parties requested one; and, second, a justice was satisfied that certain criteria were met, namely that appropriate measures were taken to mitigate the impacts on victims for both approaches and, where it was on the request of one party, that it was also in the best interest of the administration of justice.

The amendment responded to concerns that preliminary inquiries were not available for more and serious offences. However, the expansion of their availability, combined with the new complex criteria, would lead, in our view, to further delays and unnecessary litigation; for example, to interpret the proper application of the criteria.

Recognizing, however, that the other place's amendment was motivated by continuing concerns by the legal community and others, I proposed to not accept the other place's amendments 3 and 4 as drafted, but to revise the bill's original approach to make preliminary inquiries also available for offences with a maximum penalty of 14 years, for example, sexual assault with a weapon.

(*House of Commons Debates*, vol. 148, No. 435, 1st Sess., 42nd Parl., June 17, 2019, at p. 29245 (Hon. D. Lametti))

[20] That version of the bill was assented to on June 21, 2019, and stipulated that the new preliminary inquiry provisions would come into force 90 days later, on September 19, 2019 (see *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 ("2019 Amendments"), s. 406). The wording of s. 535 *Cr. C.* as so amended provides only accused persons who are charged with an indictable offence punishable by 14 years or more of imprisonment with the right to a preliminary inquiry:

**535** If an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a preliminary inquiry under subsection 536(4)

or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

[21] Overall, the purpose of the legislative amendment is to reduce the number and length of preliminary inquiries in order to address the increase in court delays in criminal cases and alleviate the burden on witnesses and victims, who have to testify twice when such a procedure is used (*House of Commons Debates*, May 24, 2018, at pp. 19602-5 (Hon. J. Wilson-Raybould); see also *House of Commons Debates*, June 17, 2019, at pp. 29245-46 (Hon. D. Lametti)). To this end, Parliament has limited the right of accused persons to request a preliminary inquiry to the offences that are considered to be the most serious. In the context of this amendment, the category of the most serious offences is understood by Parliament as consisting of indictable offences punishable by a maximum term of imprisonment of 14 years or more.

#### IV. Analysis

[22] This appeal requires this Court to interpret a new legislative provision and to determine how it applies temporally. Both in matters of transitional law and in statutory interpretation generally, [TRANSLATION] “the legislative intent is paramount” (P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at No. 457; see also *R. v. Ali*, [1980] 1 S.C.R. 221, at p. 235). Our role is therefore limited to discerning the true legislative intent by reading the words of the provision in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of

the legislation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

[23] Our analysis proceeds as follows. First, we discuss how the new s. 535 *Cr. C.* applies temporally. Second, we interpret the scope of s. 535 *Cr. C.* as amended. On the basis of our analysis, we conclude that the respondents, Mr. Grenier and Mr. Archambault, each have the right to a preliminary inquiry both under the former law, whose effects with respect to them survive the legislative amendment, and under the new law.

A. *The Legislative Amendment Does Not Eliminate the Right to a Preliminary Inquiry for Accused Persons Charged Before It Came Into Force*

(1) Principles of Transitional Law Applicable in This Case

[24] The starting point in analyzing the temporal application of new legislation is always the legislation itself. In the absence of a transitional provision, and where the lawmaker's intention to give the legislation a particular effect does not appear expressly or by necessary implication upon reading the legislation, as is the case here, recourse must be had specifically to the rules laid down in interpretation statutes and court decisions.

[25] The Crown argues that the Court of Appeal erred in finding that the right to a preliminary inquiry is governed by the law in force at the time the offence with which the accused is charged was committed. The effect that the new s. 535 *Cr. C.* must be given thus depends rather on the application of the presumption against interference with vested rights. According to the Crown, if there is a vested right to a preliminary inquiry, this right does not vest until a valid request for such an inquiry is made.

[26] In this case, assessing the merits of these arguments brings into play three well-established principles of transitional law, which one must be careful not to conflate: (1) the principle of legality; (2) the presumption against interference with vested rights; and (3) the exception based on the immediate application of purely procedural provisions. On the basis of the first principle, the Court of Appeal held that the right to a preliminary inquiry is accruing from the moment the offence is committed. On the basis of the second principle, it held that this right is vested at the date of the first appearance. None of the parties argues that the third principle applies here, but this principle must still be considered in order to resolve the question of the temporal application of the new s. 535 *Cr. C.*

[27] The principle of legality is a “pillar of the criminal law” whose purpose is to preserve the law as it stood at the time an offence was committed (*R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 59). The principle was helpfully summarized by Iacobucci and Arbour JJ. in *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357: “As a general matter, persons accused of criminal conduct are to be charged and sentenced

under the criminal law provisions in place at the time that the offence allegedly was committed” (para. 41). This rule finds expression in two forms, both of which are embodied in the *Charter* (Côté and Devinat, at Nos. 566-67; G. Côté-Harper, P. Rainville and J. Turgeon, *Traité de droit pénal canadien* (4th ed. rev. 1998), at pp. 99-120). First, the new legislation cannot make criminal any act or omission that did not constitute an offence at the time it occurred; s. 11(g) guarantees to any person charged with an offence the right not to be found guilty under such legislation. Second, the new legislation cannot create more severe punishments for an offence committed before it came into force; s. 11(i) guarantees to any person charged with an offence the right to the benefit of the lesser punishment if the punishment has been varied between the time of commission of the offence and the time of sentencing. The rule of law and the fairness of criminal proceedings depend on this (*R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 203, per McLachlin J.; *Poulin*, at para. 59; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 22-25).

[28] The presumption that Parliament does not intend to interfere with vested rights or privileges is one of the fundamental principles of transitional law. To ensure the certainty of the legal consequences attaching to facts and conduct predating a legislative amendment, “a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction” (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at pp. 282-83, citing *Spooner Oils Ltd. v. Turner Valley Gas Conservation*, [1933] S.C.R. 629, at p. 638; see also *Dikranian v. Quebec*



(*Attorney General*), 2005 SCC 73, [2005] 3 S.C.R. 530, at para. 33). Legislation that affects substantive rights can only apply prospectively to cases in which these rights have not yet vested (*R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at para. 87).

[29] There is just one exception to this presumption, namely that “there is no vested right in procedure”, though this is subject to “a limitation to the effect that the following of the new procedure must be feasible” (*Wildman v. The Queen*, [1984] 2 S.C.R. 311, at p. 331). Purely procedural legislation, which is meant to govern the manner in which rights or privileges are asserted without affecting their substance, is presumed to apply immediately (*R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 10-11; see also *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, at p. 418; *Howard Smith Paper Mills v. The Queen*, [1957] S.C.R. 403, at pp. 419-20; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 265-67; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at paras. 57 and 62). However, this exception is merely a presumption and must therefore yield to a contrary intention expressed by the lawmaker (*Ali*, at p. 235).

[30] The following provisions of the *Interpretation Act*, R.S.C. 1985, c. I-21, codify the presumption against interference with vested rights and the exception based on the immediate application of purely procedural provisions:

**43** Where an enactment is repealed in whole or in part, the repeal does not

...

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

...

**44** Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

...

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

...

(ii) in the enforcement of rights, existing or accruing under the former enactment,

[31] With respect, it is not helpful to address the principle of legality from the perspective of vested rights, as the Court of Appeal did in this case, nor is it appropriate to erase the distinction between non-retroactivity and non-interference with vested rights (see *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880, at p. 906; *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, at pp. 741 and 744; *Gustavson Drilling*, at pp. 279 and 282; *Dikranian*, at para. 31). Such an approach injects more uncertainty and confusion into transitional law than it resolves. We are dealing not with a provision that might change the legal rules applicable at the time the offence was committed, which would engage the principle of legality, but rather with a legislative amendment whose purpose is to limit the use of a criminal procedure for the future.

[32] We therefore propose simply to follow the structure of ss. 43 and 44 of the *Interpretation Act*. The first question to be considered in determining how new legislation applies temporally is whether the legislative amendment is purely procedural in nature. If the amendment in issue may affect a right or privilege that vested under the prior enactment, the time at which that right or privilege vested must be determined. It will be presumed to be preserved only for persons in whom it actually vested before the legislative amendment came into force.

(2) The Abolition of the Preliminary Inquiry for Certain Offences Is Procedural in Nature but Affects a Substantive Right

[33] The absence of any indication from Parliament as to the temporal application of a provision triggers the presumption that the legislative amendment does not affect vested rights or privileges. In this case, the amending statute contains several transitional provisions, but none of them concerns the sections relating to the preliminary inquiry regime. There is nothing in the new enactment that makes it possible to clearly discern Parliament's intent with respect to its temporal application. In such circumstances, it must be concluded that Parliament intended to rely on the presumptions, not to displace them.

[34] Mr. Grenier and Mr. Archambault are asking this Court to affirm, as the Court of Appeal did, that the right to a preliminary inquiry is governed by the substantive law in force at the time the offence was committed. Reaching this conclusion would end the analysis.

[35]            However, with respect for the contrary view, we are of the opinion that the abolition of the preliminary inquiry for certain offences does not engage the principle of legality. This measure has no impact on the scope of criminal liability. The preliminary inquiry is not a legal rule on which an accused may rely in adjusting his behaviour or in deciding to accept the consequences of breaking it at the moment he commits an offence (*Poulin*, at para. 59). It “is not a trial but simply a preliminary review to determine whether there is sufficient evidence to proceed to trial” (*Hynes*, at para. 4; see also A. Stylios, J. Casgrain and M.-É. O’Brien, *Procédure pénale* (2023), at para. 10-3).

[36]            It must therefore be asked whether the abolition of the preliminary inquiry in the case of accused persons charged with an indictable offence punishable by less than 14 years of imprisonment affects a substantive right or whether, the amendment being purely procedural in nature, the new enactment must apply immediately to all proceedings, whether commenced before or after it came into force. Provincial court and superior court judges across the country have expressed conflicting opinions on the matter. Importantly, the Crown does not argue that the legislative amendment is purely procedural in nature, but rather questions when the right to a preliminary inquiry vests.

[37]            On this point, we agree for the most part with the analysis of our colleague Karakatsanis J. It is true that Parliament’s choice to limit or abolish the right to a preliminary inquiry in the case of certain offences does not affect the accused’s right to make full answer and defence, because there is no constitutional right to a

preliminary inquiry (*S.J.L.*, at para. 21). That being said, as Doherty J.A. established in *R. v. R.S.*, 2019 ONCA 906, the limitation on the right to a preliminary inquiry affects the accused's right under s. 548(1)(b) *Cr. C.* to be discharged of any charge if, on the whole of the evidence adduced during the preliminary inquiry, no sufficient case is made out to put the accused on trial on the charge (para. 49; see also *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828). The purpose of the preliminary inquiry is in fact to “protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process” (*Hynes*, at para. 30, quoting *Skogman*, at p. 105). It may also happen that, following a preliminary inquiry, an accused will be committed for trial on offences distinct from the one initially charged, a situation that may lead to a review of the decision then in effect on the accused's interim release, pursuant to s. 523(2)(b) *Cr. C.*

[38] This is not a case in which the legislative amendment would affect only the manner of proceeding or of conducting litigation. Any limitation on the right to a preliminary inquiry therefore has a direct impact on the liberty and security of accused persons (*R.S.*, at paras. 52 and 57-58). The legislative amendment, whose purpose is to limit the preliminary inquiry to the most serious offences, cannot be considered a purely procedural amendment.

[39] We also agree with our colleague Karakatsanis J. that simply concluding that procedural legislation may affect vested or substantive rights is not sufficient to

determine the temporal application of a legislative amendment where the vesting of these rights may be questioned. In *Dineley*, this Court cautioned against categorizing the nature of a legislative amendment in an overly rigid manner without considering its effects on “vested or substantive rights” (para. 10). The use of the word “or” in the expression “vested or substantive rights” cannot be interpreted as creating two distinct classes of rights, one that protects rights from any retrospective effect and the other providing protection only if the rights in question have vested. This would amount to nullifying the presumption against interference with vested rights. Therefore, with due respect for the approach adopted by our colleague Martin J., the fact that new procedural legislation may, through its effects, interfere with a substantive right does not end the analysis. The right or privilege in question must also have been vested at the time that legislation came into force.

[40] We would add that the fact that a legislative amendment affects “interests” of a constitutional nature is not in itself determinative of how the legislative amendment applies temporally (Martin J.’s reasons, at para. 110). That would be a considerable extension of the constitutional sphere, which would have the effect of unjustifiably broadening the scope of the presumption against interference with vested rights, especially given that the constitutionality of the amendment in issue is not being challenged. In *Dineley*, it was unnecessary for this Court to consider when the right had vested, because the legislative amendment had come into force during the trial. Holding that the presumption on vested rights applied and that it was impossible for proceedings

commenced under the former enactment to be continued in conformity with the new enactment, as contemplated by *Ali*, was sufficient to dispose of the appeal.

[41] There is more. In a criminal context, the conclusion that new procedural legislation affects vested or substantive rights does not necessarily engage the principle of legality. Vested or substantive rights within the meaning of *Dineley* must not be confused with the substantive law in force at the time the offence was committed within the meaning of *Poulin*. A right may be vested or substantive without having any impact on the scope of criminal liability, that is, the nature or consequences of the commission of an offence. The reverse is also true. It is possible for an accused not to have a vested right to the rules in force at the time the offence was committed. With respect, the approach adopted by the Court of Appeal in this case creates such confusion.

[42] In light of our conclusion on this question, and in the absence of any indication that justifies concluding otherwise, the presumption that Parliament did not intend to interfere with vested rights or privileges in relation to preliminary inquiries applies. What must now be determined is when this right vests in order to decide whether Mr. Grenier and Mr. Archambault were entitled to the preliminary inquiries they obtained following an agreement with the Crown.

(3) The Right to a Preliminary Inquiry Vests at the Time Charges Are Laid

[43] The core issue in this appeal is when the right to a preliminary inquiry vests for the purposes of s. 43(c) of the *Interpretation Act*. If an amendment may affect a

right existing under the former law, the right in question will be presumed to be preserved only for accused persons in whom it actually vested before the amendment came into force.

[44] The determination of what constitutes a vested right or privilege is a delicate matter. In *Dikranian*, this Court set out two conditions to be met by an individual claiming a vested right or privilege. First, the individual's legal situation must be "tangible and concrete rather than general and abstract" (para. 37). The mere possibility of availing oneself of a statute is not a basis for arguing that a vested right exists; "the right must be vested in a specific individual" (para. 39). Second, the individual's legal situation must be sufficiently tangible and constituted at the time the new legislation comes into force; in other words, the situation must have materialized to some degree (paras. 37 and 40).

[45] For the legal situation to be sufficiently constituted, the conditions precedent to the exercise of a right must have been fulfilled. Only then can the right be vested (*R. v. Puskas*, [1998] 1 S.C.R. 1207, at para. 14). However, the right can still vest in time even if not all procedural steps required to exercise the right were taken before a legislative amendment came into force (see, e.g., *Re Falconbridge Nickel Mines Ltd. and Minister of Revenue for Ontario* (1981), 32 O.R. (2d) 240 (C.A.), at pp. 248-50; see also Côté and Devinat, at No. 638; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 729-30). The difficulty therefore lies in distinguishing, on the one hand, what are simply the necessary procedural steps for exercising the right



from, on the other, the conditions precedent to the exercise of the right. Only the latter must be fulfilled for the right to vest.

[46] Mr. Grenier and Mr. Archambault, echoing in part the Court of Appeal's conclusions in this regard, argue principally that the right to a preliminary inquiry vests at the time the offence is committed and, in the alternative, that the right vests at the time of the first appearance. It is relevant to note that the Ontario Court of Appeal, unlike its Quebec counterpart, has found that the right to a preliminary inquiry does not vest until the date the accused requests such an inquiry (see *R.S.*, at para. 4). In the present case, the Crown is asking this Court to adopt this latter approach and to reject the one favoured by the Court of Appeal of Quebec.

[47] The Crown correctly submits that a right or a privilege cannot vest at several different points in time. It is true that there is a notable difference in formulation between the French and English versions of s. 43(c) of the *Interpretation Act*. The French version refers first to “*droits ou avantages acquis*”, and then to “*obligations contractées*” and “*responsabilités encourues*”. The English version does not use specific language for rights and privileges, referring rather to “any right, privilege, obligation or liability acquired, accrued, accruing or incurred.” In principle, the words “acquired, accrued, accruing” should have different meanings, because Parliament does not speak in vain (*Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 87; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3,

at para. 89). However, as Professor Ruth Sullivan noted, “the prolix style in which the provision is drafted (typical of the nineteenth and early twentieth centuries) blunts the force of this presumption” (p. 768). This Court therefore stated in *Puskas* that the words “acquired”, “accrued” and “accruing” used in s. 43(c) of the *Interpretation Act* essentially refer to the same idea: “. . . something can only be said to be ‘accruing’ if its eventual accrual is certain, and not conditional on future events” (para. 14 (emphasis added)).

[48] Under the first step of the test laid down in *Dikranian*, the possibility that the accused’s right to a preliminary inquiry vests at the time the offence is committed can be excluded. The time of the offence cannot be the point at which the right to a preliminary inquiry vests, since the accused’s legal situation is not sufficiently tangible, concrete and distinctive at that time. It is not until the accused is charged that their legal situation becomes tangible, concrete and distinctive. At the time charges are laid, the criminal court process begins and the accused actually faces criminal jeopardy.

[49] We are also of the view that, under the second step of the test laid down in *Dikranian*, the accused’s situation is sufficiently constituted at the time charges are laid. At that point, the vesting of the right is certain and not conditional on future events, because the accused will inevitably have to appear and choose to exercise or waive their right to a preliminary inquiry, or to reserve their election. All of the conditions precedent to the vesting of the right are also fulfilled at that time. In our opinion, the request that the accused must make to a justice is a necessary procedural step for

exercising the right to a preliminary inquiry, but it has no effect on its crystallization. This can be confirmed simply by looking at the wording of s. 535 *Cr. C.*, bearing in mind the purpose of the legislative amendments that came into force in 2004 and 2019.

[50] Section 535 *Cr. C.* opens with the phrase “[i]f an accused who is charged with an indictable offence”, which sets the charging of the accused as the condition for entitlement to a preliminary inquiry. The Court of Appeal correctly noted that “[t]hese words point unmistakably to the moment of charging as the moment at which the entitlement to a preliminary inquiry . . . is fully vested in the accused” (para. 37). It is true that s. 535 *Cr. C.* states that an accused must be “charged with an indictable offence” (“*inculpé d’un acte criminel*”). In the case of a hybrid offence, the Crown may not yet have decided on the mode of prosecution at the time charges are laid. However, this is not a consideration that makes the right less certain or concrete. There is a fundamental distinction between a right that has vested but can be challenged and a right that has not vested because the conditions precedent to its crystallization have not been fulfilled. Therefore, neither the fact that the Crown may elect to proceed summarily or by direct indictment under s. 577 *Cr. C.* nor the possibility that the accused will elect to be tried in provincial court prevents the right to a preliminary inquiry from being acquired by the accused (*R.S.*, at para. 40).

[51] The accused must make a request before a justice in order for a preliminary inquiry to be held, but the vesting of the accused’s right is not conditional on the making of such a request. Section 535 *Cr. C.* is under the heading “Jurisdiction” and concerns

the justice's duty to conduct a preliminary inquiry. This duty is separate from the accused's right to a preliminary inquiry. From a procedural standpoint, a preliminary inquiry is held only if a request to this effect is made by one of the parties (ss. 535, 536(2) and (4) and 536.1(2) and (3) *Cr. C.*); this is why *the justice's duty* to conduct an inquiry arises only if one is requested. In this context, the request for a preliminary inquiry triggers the justice's duty but is not a condition precedent to the existence of the right to a preliminary inquiry itself.

[52] In this regard, we cannot agree with our colleague Karakatsanis J.'s reading of *Puskas*. That case dealt with amendments to s. 691(2) *Cr. C.* that abolished appeals as of right to this Court for accused persons whose acquittal had been overturned by a court of appeal, where a new trial had been ordered. The right to appeal to this Court without leave was accompanied by a procedural requirement, namely the filing of a notice of appeal within the statutory time limits (see *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 58 to 60). In *Puskas*, this Court did not include the filing of the notice of appeal in the set of conditions to be met for the vesting of the right in question (para. 15). In the same way, the making of a request for a preliminary inquiry is not a *condition precedent* to the existence of the right to a preliminary inquiry, but rather constitutes *the exercise of the right itself*.

[53] To conclude otherwise would be to give the 2004 legislative amendments a scope they were not intended to have. As this Court noted in *S.J.L.*, the purpose of those amendments was to enable parties to choose a mechanism adapted to their needs,

not to impose a condition to be met for their right to materialize. The right to a preliminary inquiry remained “unconditional” (*House of Commons Debates*, September 28, 2000, at pp. 8828-29; *Debates of the Senate*, November 1, 2001, at p. 1612; see also D. M. Paciocco, “A Voyage of Discovery: Examining the Precarious Condition of the Preliminary Inquiry” (2004), 48 *Crim. L.Q.* 151, at p. 162). The addition of procedural steps that had to be taken in order to exercise the right to a preliminary inquiry did not change the scope of this right, unlike the 2019 legislative amendment, whose purpose was precisely to limit the number of such inquiries. The effects of these two amendments must not be conflated.

[54] The Court of Appeal of Quebec properly noted that accused persons regularly reserve their election as to mode of trial at the first appearance in order to avoid making a premature decision on the exercise of their right to a preliminary inquiry (paras. 40-43). This practice provides a concrete illustration of the fact that the right to a preliminary inquiry crystallizes as soon as criminal charges are laid. As our colleague Kasirer J. suggests, if an accused can in practice reserve the exercise of their right, this means that their legal situation is (1) tangible, concrete and distinctive and (2) sufficiently constituted, that is, not uncertain and not conditional on future events. As we explain, however, these conditions are already met the moment criminal charges are laid. As long as the accused has not waived the right to a preliminary inquiry by electing to be tried in provincial court and the Crown has not defeated this right by electing an incompatible mode of prosecution or by proceeding by direct indictment, the accused continues to have a right to a preliminary inquiry.

[55] In our view, there is no need in this case to decide on the appropriateness of reforming this practice. Parliament has already made the choice to limit the preliminary inquiry to the most serious cases in order to address the increase in court delays in criminal cases. Arguably, the making of informed decisions also helps to reduce delays, by comparison with the making of premature decisions that might entail higher costs. It must be kept in mind that, when an accused expresses his wish to re-elect mode of trial, consent from the prosecutor must generally be obtained (s. 561(1)(a) *Cr. C.*; *Jordan*, at para. 62). In this context, and in light of the importance of this election by an accused, we would refrain from concluding that the practice of reserving elections is a dilatory mechanism.

[56] In addition to being supported by the new enactment, the interpretation we adopt has the advantage of preserving fairness and legal certainty. Criminal trials do not all proceed in a purely linear fashion, and they each have their own particular features. When it comes to the order of the various stages of the proceedings, there are a multitude of possibilities. The flexibility of criminal procedure and the possible delays that may occur are better acknowledged by finding that the right vests when charges are laid, a stage common to all cases. Such delays may be attributable to the Crown, for example where it is slow to elect the mode of prosecution, or to the delays inherent in the justice system. Nothing suggests that Parliament intended to subject the vesting of a right as important as that to a preliminary inquiry to such contingencies. The expectation of the accused crystallizes into a right to a preliminary inquiry once charges are laid, because the accused's freedom and security are then at risk.

[57] Such an interpretation also has the advantage of allowing for the uniform application of criminal procedure across the country, without affecting the particularities of the administration of justice in certain provinces. Such particularities are permitted by Parliament in matters of criminal procedure (see ss. 482 and 482.1 *Cr. C.*). We believe that it is important for justice to be administered in a manner adapted to local circumstances and, for this reason, we consider it inappropriate to adopt an interpretation of the new text of s. 535 *Cr. C.* that would exclude such a possibility outright. Nothing in the wording of this provision is inherently incompatible with the election being reserved and the preauthorization or not of prosecutions. To conclude that the right to a preliminary inquiry only vests when an accused makes such a request risks creating situations in which accused persons in different provinces, despite being charged on the same date, would not all be vested with the right to a preliminary inquiry.

[58] The respondents, Mr. Grenier and Mr. Archambault, were charged prior to September 19, 2019. We therefore conclude that they each had a vested right to a preliminary inquiry before the legislative amendment came into force. The former s. 535 *Cr. C.* continues to apply to them by operation of the presumption against interference with vested rights, and it is unnecessary to determine whether the offences they were charged with fall within the category of the most serious offences. The Crown chose to prioritize the holding of the trials for Mr. Grenier and Mr. Archambault within a reasonable time, as well as the right of the victims to finally be heard in court, by allowing a preliminary inquiry to be held in each of the two cases. With respect for

the contrary view, we conclude that this choice was consistent in every respect with the temporal application of the legislative amendment.

B. *An Accused Whose Alleged Offence, or Its Equivalent, Is Punishable by 14 Years or More of Imprisonment Has the Right to a Preliminary Inquiry*

[59] Although our conclusion on the question of the temporal application of the new text of s. 535 *Cr. C.* is sufficient to dispose of this appeal, we shall now examine the interpretation this provision should receive.

[60] To date, appellate courts that have considered the matter have found that a preliminary inquiry is available only to accused persons who *personally* face a term of imprisonment of 14 years or more (see *R. v. Sheppard*, 2023 ABCA 381, 69 Alta. L.R. (7th) 1; *R. v. S.S.*, 2021 ONCA 479, 493 C.R.R. (2d) 251; *R. v. C.T.B.*, 2021 NSCA 58). In the same vein, the Crown submits that the legislative amendment to s. 535 *Cr. C.* has the effect of eliminating the right to a preliminary inquiry for accused persons charged with so-called historical offences for which the term of imprisonment was not 14 years or more at the time the offence was committed.

[61] With respect, we are of the view that this interpretation is incorrect. The text, context and purpose of s. 535 *Cr. C.* demonstrate that an accused has the right to a preliminary inquiry if their alleged offence, or its equivalent, is punishable by 14 years or more of imprisonment. Section 535 *Cr. C.* must be interpreted in a manner consistent with the intent expressed by Parliament to increase the sentences applicable



to certain offences, where necessary. The right to a preliminary inquiry is therefore not affected by the accused's right to the benefit of the lesser punishment.

(1) Parliament Intended the Right to a Preliminary Inquiry To Be Tied to the Seriousness of the Offence

[62] There is no ambiguity in the wording of s. 535 *Cr. C.* A preliminary inquiry can be held only “[i]f an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for [an] inquiry”. Both the adjective “punishable” in English and its equivalent “*passible*” in the French version, which states “[l]orsqu’un prévenu inculpé d’un acte criminel passible d’un emprisonnement de quatorze ans ou plus”, relate to the indictable offence and not to the sentence the accused may receive. In addition, the English version of the provision is enlightening in this regard, since the word “that” very clearly links the adjective “punishable” to the term “indictable offence”. This phrasing refers to the seriousness of the alleged offence, and its logic is not directed at the accused personally. Parliament thus intended the right to a preliminary inquiry to be tied to the seriousness of the alleged offence, not to the degree of jeopardy faced by the accused. This is an objective criterion.

[63] The expression “*acte criminel passible d’un emprisonnement maximal de*” is used more than a hundred times in the French version of the *Cr. C.* to establish the maximum sentence that applies and thus to define the objective seriousness of offences. As this Court stated in *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 96, the

maximum sentence established by Parliament for an offence determines the objective seriousness of the offence (see also *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 36; H. Parent and J. Desrosiers, *Traité de droit criminel*, t. III, *La peine* (3rd ed. 2020), at p. 53; C. C. Ruby, *Sentencing* (10th ed. 2020), at §2.19). According to the presumption of consistent expression, the meaning of the words used in statutes remains consistent, because “the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes” (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 44, citing R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217). There is therefore no reason, in interpreting the text of s. 535 *Cr. C.*, to depart from the usual meaning of this expression, which refers to the objective seriousness of the offence.

[64] This interpretation is not only supported by the text of s. 535 *Cr. C.* but is also reinforced by an examination of the parliamentary debates that led to the amendment in issue. It must be kept in mind that Parliament has always understood the category of the “most serious offences” by reference to the maximum sentence specified for the offence, which, here again, is reflected in the provision as enacted. The first version of the amendment at issue would have maintained the right to a preliminary inquiry only for accused persons charged with offences punishable by life imprisonment. As a result of a public outcry and a compromise that followed, Parliament instead chose to preserve the right to a preliminary inquiry for “the most serious offences”, meaning those punishable by a maximum term of imprisonment of

14 years or more. In doing so, Parliament presumably had in mind offences in the nature of those Mr. Grenier and Mr. Archambault were charged with, which today fall within the category of the most serious offences. Parliament made the choice to increase the maximum sentences for such offences “to convey its view of the gravity of a particular offence” (*R. v. Bertrand Marchand*, 2023 SCC 26, at para. 168).

[65] While it is not in dispute that Parliament intended to limit the right to a preliminary inquiry to the *most serious offences*, it strikes us as contradictory to adopt an approach based on the severity of the maximum sentence to which the accused is *personally* liable (or the jeopardy *actually* faced by the accused), as the Crown does in this case.

[66] In reality, the Crown’s interpretation does not rest on the text or context of s. 535 *Cr. C.*, but rather on the abstract purpose of reducing the number of offences for which a preliminary inquiry is available. With respect, such an interpretation disregards the new wording of the provision and the compromise from which it resulted. While the purpose of the amendment plays an important role in the interpretation of the new provision, it cannot serve as a basis for rewriting the provision so amended or for ignoring the clear meaning it conveys (see *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 26; *R. v. McColman*, 2023 SCC 8, at para. 36; *Reference re Impact Assessment Act*, 2023 SCC 23, at para. 193; see also Côté and Devinat, at No. 1366; Sullivan, at p. 293; M. Mancini, “The Purpose Error in the Modern Approach to Statutory Interpretation” (2022), 59 *Alta. L. Rev.* 919, at pp. 920-22). In construing a

legislative provision, “courts do not have to interpret — let alone implement — the objective underlying a legislative scheme or provision; what they must interpret is the text through which the legislature seeks to achieve [its] objective” (*MediaQMI inc. v. Kamel*, 2021 SCC 23, [2021] 1 S.C.R. 899, at para. 39). It is clear that Parliament did not seek to achieve at any cost its purpose of reducing the number of offences for which a preliminary inquiry is available, but rather confined itself to a very specific compromise, which is reflected in the wording of the provision (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 174; see also Mancini, at pp. 920-21).

[67] The Crown relies in part on *R. v. Windebank*, 2021 ONCA 157, 154 O.R. (3d) 573, to argue that any interpretation of s. 535 *Cr. C.* that increased the number of offences for which a preliminary inquiry is available would be contrary to Parliament’s purpose. In that case, the accused was charged with assault causing bodily harm and assault by choking, suffocation or strangulation, offences punishable by imprisonment for a term of 10 years (s. 267(b) and (c) *Cr. C.*). The Crown advised the accused that it intended to apply to have him remanded for an assessment under s. 752.1 *Cr. C.* if he was convicted. In response, the accused requested a preliminary inquiry, alleging that he was now at risk of indefinite detention (s. 753(4) *Cr. C.*). The Ontario Court of Appeal, per Nordheimer J.A., rightly rejected that argument on the ground that the language and legislative history of s. 535 *Cr. C.* point to an emphasis on the seriousness of the offence, not on the jeopardy faced by the accused:

There is nothing ambiguous about the language used in s. 535. The words used are plain. An offender is entitled to a preliminary inquiry if “charged with an indictable offence that is punishable by 14 years or more of imprisonment”. The respondent is not charged with any such offence.

In my view, the flaw, both in the respondent’s argument and in the decisions below, is that they confuse the seriousness of the offence with the seriousness of the offender, that is, their individual circumstances. Proceedings by way of a dangerous offender designation are separate and apart from the proceedings leading to a conviction for the offence. It is a proceeding that may only be invoked *after* a finding of guilt has been made on the offence charged. It requires a separate process where separate factual findings are made, and its determination turns on the nature of the offender, not the nature of the offence. While a specific offence may trigger the dangerous offender proceeding, its determination goes well beyond the originating offence: *R. v. Wilson*, [2020] O.J. No. 30, 2020 ONCA 3, 384 C.C.C. (3d) 355, at para. 66.

As s. 535 makes clear, it is the seriousness of the offence that dictates the entitlement to a preliminary inquiry. This conclusion is reinforced by the legislative history leading to the changes to s. 535, including the change from offences carrying a maximum sentence of life imprisonment to offences carrying a maximum sentence of 14 years. It is also reinforced by the various speeches made in Parliament regarding the purpose behind the amendments. [Underlining added; paras. 35-37.]

[68] Clearly, and with respect for the distinction drawn by the Ontario Court of Appeal in *S.S.*, the jeopardy actually faced by the accused as a result of the time when the offence was committed is part of the accused’s individual circumstances and does not go to the seriousness of the alleged offence. An offence is not less serious today because it was committed before a certain date. In determining the right to a preliminary inquiry, Parliament did not intend to draw a distinction between charges of the same nature based on the date of commission of the offence. To conclude otherwise would only create more complexity and uncertainty, which would be contrary to Parliament’s intent (*Windebank*, at para. 31).

[69] The objective seriousness of an offence is not confined to the maximum sentence for the offence *at the time it was committed*. On the contrary, the legislative amendments increasing maximum sentences “indicate Parliament’s determination that . . . offences . . . are to be treated as more grave than they had been in the past” (*Friesen*, at para. 99; see also *Bertrand Marchand*, at para. 168). The jeopardy faced by an accused who is not personally liable to a maximum sentence of 14 years is similar to that faced by an accused who is personally liable to that maximum sentence. In applying the principles of sentencing, courts are required to impose sentences higher than those imposed prior to the increases, in accordance with the will of Parliament (*Friesen*, at para. 100; see, e.g., *R. v. Fruitier*, 2022 QCCA 1225, at paras. 32-40). Parliament did not intend to exclude historical offences from the category of the most serious offences.

[70] Finally, like the appellate courts that have considered the matter (see *S.S.*, at paras. 17-20; *C.T.B.*, at paras. 21 and 42-43), the Crown supports its interpretation of the new s. 535 *Cr. C.* by drawing an analogy between this provision and the one in dispute in *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289. With respect, that analogy does not hold up. In *Tran*, the accused had committed an offence that was punishable by a maximum sentence of seven years at the time it was committed. After the accused was charged, but before he was convicted, a legislative amendment increased the maximum sentence for that offence to imprisonment for 14 years. Under s. 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, the accused was inadmissible to Canada on

grounds of serious criminality for having been convicted in Canada of a federal offence punishable by a maximum term of imprisonment of at least 10 years. That provision, which has since been amended, was worded as follows:

**36 (1)** A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

[71] On the basis of this wording, the parties were divided on the question of whether the maximum sentence should be assessed by reference to the Act of Parliament defining the offence or the maximum sentence that could be imposed on the person. In that particular context, this Court departed from the usual meaning of the words “punishable by a maximum term of imprisonment of at least 10 years”. Such an interpretation was justified by the context of the provision, given the temporal marker (set at the time of conviction) and the disjunctive clauses (the maximum term of imprisonment and the actual term imposed), as well as by the purpose of the *Immigration and Refugee Protection Act* (*Tran*, at paras. 36-40). The opposite interpretation would have led to the conclusion that one and the same conviction could both entitle a permanent resident to remain in the country at the time the conviction was entered and lead to their deportation later, without any indication from Parliament that such a retroactive effect was intended (paras. 43-53). In light of all of these considerations, this Court held that the provision could refer only to the maximum

sentence that could have been imposed on the accused at the time the offence was committed (para. 36).

[72] Uniformly transposing the interpretation of s. 36(1)(a) of the *Immigration and Refugee Protection Act* to s. 535 *Cr. C.* disregards the text, context and purpose of each of the two provisions. Statutory interpretation is meant to determine the intent reflected in a particular enactment and cannot be reduced to an artificial comparative exercise that does not take account of the context in which the words are used.

[73] Where the maximum sentence for an offence was increased to 14 years between the commission of the offence and the laying of charges, a preliminary inquiry can be held even if the accused is not personally facing a maximum sentence of 14 years. In such a case, it must be asked whether the seriousness of the alleged offence, as it is defined today, places it within the category of the most serious offences. The fact that the accused is charged and convicted on the basis of the criminal provisions in force at the time the offence was committed changes nothing in this regard.

(2) An Accused's Right to the Benefit of the Lesser Punishment Does Not Affect the Determination of the Right to a Preliminary Inquiry

[74] Although an accused may receive a reduced maximum sentence for a crime committed before the sentence was increased, the accused's right to the benefit of the lesser punishment does not defeat the right to a preliminary inquiry. To conclude



otherwise would lead to an absurd result, in addition to penalizing the accused and disregarding the sequence of the various stages of a trial.

[75] In establishing an accused's right to a preliminary inquiry, s. 535 *Cr. C.* is closely linked to the right set out in s. 548(1)(b) *Cr. C.*, that is, the right to be discharged of any charge if, on the whole of the evidence adduced during the preliminary inquiry, no sufficient case is made out to put the accused on trial on the charge. In this sense, it is a provision favourable to the accused. Section 535 *Cr. C.* cannot be interpreted narrowly in light of other provisions that are equally favourable to the accused, such as s. 11(i) of the *Charter* and ss. 43(d) and 44(e) of the *Interpretation Act*, which establish the accused's right to the benefit of the lesser punishment. Concluding that accused persons who enjoy such protection have no right to a preliminary inquiry leads to an absurdity, which results from the application of provisions whose purpose is precisely to preserve their interests.

[76] We are also unable to agree with the conclusion of our colleague Karakatsanis J. that Mr. Grenier and Mr. Archambault would not be penalized by such an interpretation. While an accused's right to the benefit of the lesser punishment guarantees a maximum sentence of 10 years' imprisonment because of the date of the alleged offence for which the statutory sentence has since been increased, the accused can be given a sentence heavier than the one that would have been imposed at the time, as we explained above (*Friesen*, at paras. 3, 5 and 107; *Bertrand Marchand*, at para. 31). There is therefore a significant difference between the situation of an accused

charged with an offence punishable by imprisonment for a term of 10 years and that of an accused charged with a historical offence for which the statutory sentence has since been increased.

[77] We reiterate that *Tran* does not support the conclusion that the accused must be personally facing a maximum term of imprisonment of 14 years in order to have the right to a preliminary inquiry. Drawing an analogy with s. 36(1)(a) of the *Immigration and Refugee Protection Act*, as our colleague Karakatsanis J. does, overlooks the sequence of stages in criminal trials. The preliminary inquiry and sentencing occur at different times and are separated by the trial. The order in which these stages proceed plays an important role, because the preliminary inquiry takes place well before sentencing. To hold otherwise could lead to results that are absurd in practice, if not harmful. There are circumstances in which the justice cannot say with certainty that the accused will have the rights set out in s. 11(i) of the *Charter*. Adopting the reasoning proposed by our colleague would create the risk of denying a preliminary inquiry to an accused who should be entitled to one. The application of s. 11(i) of the *Charter* is a question of law, which a judge decides only at the sentencing stage.

(3) Application to the Facts

[78] It must be kept in mind that, since 2015, offences in the nature of those with which Mr. Grenier and Mr. Archambault were charged, or the equivalent offences, have been punishable by a maximum term of imprisonment of 14 years. Under s. 11(i) of the *Charter*, the respondents are entitled to the benefit of the lesser maximum

punishment in effect at the time the alleged acts were committed, that is, a maximum of 10 years' imprisonment. The fact remains that the intent expressed by Parliament is to toughen the sentences applicable to the offences charged against Mr. Grenier and Mr. Archambault. Section 535 *Cr. C.* must be interpreted in a manner consistent with that intent.

[79] The offences with which Mr. Grenier and Mr. Archambault were charged fall within the category of the most serious offences, because if the acts in question were committed today, they would be punishable by a maximum term of imprisonment of 14 years. This is not in dispute. They therefore have the right, under the new s. 535 *Cr. C.*, to request a preliminary inquiry.

#### V. Conclusion

[80] For these reasons, we would dismiss the appeal.

English version of the reasons of Kasirer and Jamal JJ. delivered by

KASIRER J. —

[81] I have had the advantage of reading the reasons prepared by my colleagues, but, with respect, I do not share their views. In my opinion, given the respondents' particular circumstances, their right to request a preliminary inquiry vested prior to the coming into force of the new s. 535 of the *Criminal Code*, R.S.C. 1985, c. C-46

(“*Cr. C.*”), on September 19, 2019. This allowed for their preliminary inquiries to be held at a later date. I would therefore dismiss the Crown’s appeal, but, again with respect, for reasons that differ from those of the Court of Appeal.

[82] In substance, I agree with Karakatsanis J.’s analysis of vested rights with regard to the temporal application of s. 535 *Cr. C.* In particular, I agree with the importance my colleague attaches to the request made by an accused for a preliminary inquiry. I also agree with her that local practices regarding the administration of justice can legitimately vary from one province or territory to another and that this is not necessarily incompatible with the uniform application of substantive criminal law in Canada in a context similar to that of this appeal. However, in light of the practice followed in Quebec and its effect on the respondents’ right to request a preliminary inquiry, I am of the view that the respondents had vested rights in the circumstances. This conclusion should not be seen as a way of circumventing the effect of legislation duly passed by Parliament. Given that Parliament did not enact a transitional provision specifying how the new s. 535 *Cr. C.* was to apply to an existing situation, it is for the courts to interpret it to determine whether accused persons had vested rights at the time it came into force. There is no justification for excluding the Quebec practice from the analysis.

[83] The rule governing vested or acquired rights was stated as follows by this Court in *R. v. Puskas*, [1998] 1 S.C.R. 1207: “A right can only be said to have been ‘acquired’ when the right-holder can actually exercise it” (para. 14). As Lamer C.J.

explained, “a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled” (*ibid.*; see also *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at para. 37; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 52).

[84] Both as it read at the time of each respondent’s first appearance before the Court of Québec and in its amended form, s. 535 *Cr. C.* grants certain accused persons what the Superior Court judge in Mr. Grenier’s case rightly called [TRANSLATION] “the right to request a preliminary inquiry” (2021 QCCS 1876, at para. 32 (CanLII)). Once a preliminary inquiry has been requested, the justice “shall” inquire into the charge (s. 535 *Cr. C.*).

[85] I agree with Karakatsanis J. that once an accused requests a preliminary inquiry, “all conditions precedent” to the exercise of the right are then fulfilled within the meaning of *Puskas*. Accordingly, where a request was made before the amendment to s. 535 *Cr. C.* came into force on September 19, 2019, but the inquiry was not held before that date, the right to an inquiry at a later date had vested. In my opinion, however, this is not the only situation in which all of the “conditions precedent” are fulfilled, such that the right to request a preliminary inquiry for the existing situation vests. In my respectful view, to conclude otherwise would undermine the judicially endorsed practice that allows an accused to reserve their right to elect the mode of trial at a later date, a practice that determined the outcome for the two respondents in this case.

[86] In Quebec, by all accounts, accused persons proceed [TRANSLATION] “as is customary” in that province, that is, by “reserv[ing] their election . . . so that they [can] examine the evidence disclosed” (*R. v. Chrétien-Barrette*, 2023 QCCQ 5857, at para. 27 (CanLII)). It is also [TRANSLATION] “customary for judges to agree to requests made by accused persons to reserve their election” as to the mode of trial, a practice recognized both by the courts and in legal scholarship (para. 29; see also *Aucoin v. R.*, 2023 QCCS 3024, at paras. 41 and 43 (CanLII); A. Stylios, J. Casgrain and M.-É. O’Brien, *Procédure pénale* (2023), at pp. 704-5; author Nicolas Bellemare uses the term [TRANSLATION] “postpone” to refer to the same practice: “Les procédures précédant le procès en matière criminelle”, in *Collection de droit de l’École du Barreau du Québec 2024-2025*, vol. 12, *Droit pénal – Procédure et preuve* (2024), 39, at pp. 70-71). It is therefore not surprising in this case that the Crown and Mr. Archambault both point to this practice in their submissions to the Court, by referring to [TRANSLATION] “reserv[ing] [the] election as to the mode of trial” (A.F., at para. 8) and [TRANSLATION] “reservation of [the] election” (R.F. (Archambault), at paras. 68-71), and do not dispute its existence. Healy J.A., writing for the unanimous panel of the Court of Appeal, made the same observation when noting that “[a]t the first appearance, at least in Quebec, the accused typically reserves the right of election to a future date” and that, in doing so, “the accused has effectively preserved the entitlement to request a preliminary inquiry” (2022 QCCA 1170, 84 C.R. (7th) 174, at paras. 40 and 43).

[87] This is what occurred in respect of the two respondents. When they first appeared before the Court of Québec, the accused each asked the court to reserve their election as to the mode of trial, and their request was granted (see 2021 QCCS 1966, at paras. 12 and 15; C.Q. reasons (Grenier), reproduced in A.R., vol. I, at pp. 7-8; A.F., at para. 8). All of this happened before the amendments to s. 535 *Cr. C.* came into force, that is, before September 19, 2019. The respondents' understanding — which is generally shared by Quebec judges and lawyers — was that reserving the election as to the mode of trial had the effect of preserving the right to make a request for a preliminary inquiry at a later date, so that the right could be exercised in an informed manner (see, e.g., C.A. reasons, at para. 42; R.F. (Archambault), at para. 68). By agreeing to their requests, the Court of Québec was thus assuring them that they could request a preliminary inquiry at a later date.

[88] This understanding is clearly reflected in the record, including in the following exchange between a Court of Québec judge and counsel for Mr. Archambault:

[TRANSLATION]

**BRIGITTE MARTIN:**

The time of the request for a preliminary inquiry. And what I wanted to add is that once the accused reserves their election, because that's what he did, in the case of Mr. Agénor [Archambault], not just Mr. Agénor, but in the majority of cases, what's done at the appearance stage is to appear and reserve the election. And the purpose of reserving the election is to make an informed decision . . .

**THE COURT:**

Ah, I understand all of that.

**BRIGITTE MARTIN:**

. . . to examine . . .

**THE COURT:**

Of course.

**BRIGITTE MARTIN:**

. . . to examine the evidence. And what I wanted to put to you is that once that election is reserved, the possibility of making an election that will lead to a preliminary inquiry is reserved for them.

So if the election is reserved, well at that point, it follows that . . .

**THE COURT:**

Well in fact, what you're arguing is a vested right. By reserving the election.

**BRIGITTE MARTIN:**

It's . . . you're ahead of me. It's a vested right.

**THE COURT:**

Exactly.

**BRIGITTE MARTIN:**

And that was Mr. Archambault's position, through what you were able to read in the arguments. But I still wanted to come back to this concept of reserving the right . . . [Emphasis added.]

(A.R., vol. I, at pp. 17-18)

[89] To be clear, I am not quoting this exchange as evidence of what actually occurred earlier, when Mr. Archambault reserved his election as to the mode of trial. Moreover, there is no disputing the fact that such exchanges between a judge and counsel are not binding on the court and do not constitute evidence in the strict sense. However, this exchange is an indication, drawn from the record before us, that at the time, the parties, counsel and the judge concerned all understood that the reservation had been approved by the court in keeping with the established practice.



[90] It is true that the judge did not accept Mr. Archambault's argument, but this was because he was of the view that even an accused with a vested right lost their right to a preliminary inquiry when s. 535 *Cr. C.* came into force, given that the judge had held that the provision applied with immediate effect. Indeed, while the Court of Québec judge recognized that reserving the right to elect the mode of trial could result in a vested right to request a preliminary inquiry, he adopted an interpretation of s. 535 *Cr. C.* that denied Mr. Archambault the benefit of such an inquiry. According to the judge, who relied on *R. v. Lamoureux*, 2019 QCCQ 6616, the right to request a preliminary inquiry is purely procedural, such that the new s. 535 *Cr. C.* applied with immediate effect, an interpretation that Karakatsanis J. rightly rejects. That being so, the question of whether a vested right exists, in accordance with *Puskas* and on the basis of Mr. Archambault's decision to reserve his election, remains an open one. Although the question has become factually moot in this case, this does not alter the importance of answering it for the benefit of other individuals who might find themselves in the same situation as the respondents.

[91] According to this understanding of reserving the election as to the mode of trial, which is an understanding I adopt, the effect of a reservation authorized by the court is to preserve the accused's rights pursuant to the rule stated in *Puskas*. All of the conditions precedent to the holding of a preliminary inquiry are indeed fulfilled when the election is reserved: the accused receives the court's assurance that they can make a request at a later date and, by the terms of s. 535 *Cr. C.*, that request *must* be honoured. The accused's legal situation is therefore tangible, concrete and sufficiently constituted

at that time (P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at Nos. 619-20, citing, among others, *Dikranian*, at paras. 37 et seq.). These criteria serve to distinguish the vested rights of the respondents in this case from what would be mere expectations. Reserving the right to elect the mode of trial is thus different from where the accused simply puts off their election without a judicial undertaking that entails the preservation of their rights. Moreover, the effectiveness of reserving the election as to the mode of trial does not turn on the fact that certain accused persons, having received this assurance from the court, were or were not represented by counsel at the time, which could create an injustice for a class of accused persons who nevertheless face the same potential deprivation of liberty.

[92] It remains true that, by assuring the accused that a request for a preliminary inquiry can be made at a later date, the fact of reserving the right to elect the mode of trial ensures that all of the conditions precedent are fulfilled within the meaning of *Puskas*. It may well be that other local practices have the same effect. It is equally possible that the Court of Appeal for Ontario was correct to find in *R. v. R.S.*, 2019 ONCA 906, that the right to a preliminary inquiry cannot vest until the accused has made a request to that effect in that province. However, this does not take away from the fact that, in Quebec, this right vests each time a court agrees to reserve an accused's right to elect their mode of trial, in keeping with the standard practices. I wish to make clear that this must not be seen as a special rule for Quebec, but only as a reflection of the application of *Puskas* to a legitimate procedure used in part of the country.

[93] I would add that to conclude otherwise could lead to injustices and undermine public confidence in the administration of justice. The respondents relied on the assurance that they each obtained from the court on the basis of a well-established local practice. The respondents relied — to their detriment — on the local practice of reserving their rights, with the court’s approval. It is true that the respondents will not actually suffer any injustice, since the appeal is moot as far as they are concerned. However, I am mindful that other individuals — the numbers are of course uncertain — could find themselves in the same situation. In my opinion, public confidence in the administration of justice and in the rule of law might well be undermined if accused persons — especially those whose liberty is at stake — cannot rely on the assurances they receive from the very court that administers the proceedings brought against them. The Crown may be right in arguing that the amendment of s. 535 *Cr. C.* is a change that [TRANSLATION] “should have been anticipated” and “caught no one by surprise” (A.F., at para. 88), but accused persons in Quebec who believed that their right was reserved will surely be caught by surprise if they later discover that this right has been taken away from them despite the assurances they received. Nonetheless, I would add that my interpretation of s. 535 *Cr. C.* and of its impact on vested rights is based on the application of *Puskas* and not solely on the observation that an injustice could result from a contrary interpretation. In other words, the question at the heart of this appeal remains the interpretation of what constitutes a vested right following the amendment to s. 535 *Cr. C.*, a question that was settled in *Puskas*.

[94] However, I also hasten to note that, given Parliament’s silence regarding the application of s. 535 *Cr. C.* to existing situations, interpreting the new legislation on the basis of presumptions would face a second difficulty. The fact is that authors warn the courts against interpreting new legislation in a manner that may cause injustice. Pierre-André Côté has written that [TRANSLATION] “the courts try to reserve protection from the application of the new legislation for those who would actually be prejudiced by its application, that is, those whose expectations based on the former legislation have had practical consequences, have led them to take specific actions, to compromise themselves, to change their situation” (“Le juge et les droits acquis en droit public canadien” (1989), 30 *C. de D.* 359, at p. 419).

[95] Here, the purpose of reducing the number of preliminary inquiries that Parliament seeks to advance should not have a disproportionately unjust impact on accused persons like Mr. Grenier and Mr. Archambault, given the absence of a transitional provision for existing situations. In a context analogous to that of this case, authors Côté and Devinat explain as follows:

[TRANSLATION] However, denying the existence of vested rights and opting for the immediate application of the new legislation also has its share of disadvantages for individuals or, to state matters otherwise, involves individual costs that may be very high. The life of the law needs a degree of stability in order to develop: legal reform, if not carried out gradually, can entail serious prejudice for individuals. The perception of injustice in relation to affected individuals weighs heavily in the judicial determination of whether it is appropriate for the former legislation to survive.

(No. 614, quoting *Ciecierski v. Fenning*, 2005 MBCA 52, 258 D.L.R. (4th) 103, at para. 31, per Steel J.A. (“The presumption against interference with

vested rights is not as weighty as the presumption against retroactivity and the question of unfairness is a critical component”); see also R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 25.13.)

[96] In this case, both of the accused reserved their right at the time of their respective first appearance before the Court of Québec, and thus before September 19, 2019, when the new s. 535 *Cr. C.* came into force. They were therefore governed by the former s. 535 *Cr. C.*, which recognized their right to request a preliminary inquiry. In the circumstances, I am of the view that they could request a preliminary inquiry.

[97] Before concluding, I would add the following. It is apparent that this practice, which was followed in this case by the two respondents, may not be ideal in light of the time limits imposed by *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. As the Crown noted before this Court, [TRANSLATION] “it is a practice that is certainly a source of problems in that it results in significant delays. If you look at the number of times, for example, that these cases here were postponed pro forma without any decision having been made, without the judge putting the accused to an election, it can be seen here that there was a postponement, a postponement and no decision that was made in each instance” (transcript, at p. 18). Given its impact on court delays, it might be appropriate to rethink the wisdom of the practice of reserving the right to elect the mode of trial in the future.

[98] For these reasons, I would dismiss the appeal.

The following are the reasons delivered by

I. Overview

[99] Parliament’s decision to remain silent about when many provisions in former Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 (“2019 Amendments”), apply has created considerable legal uncertainty across all levels of court (see *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at paras. 86-87). This is the second time this Court has been asked to provide clarity on the temporal application of amendments introduced by this Act. The first time, in *Chouhan*, a majority of this Court determined that the Act’s changes to the jury selection process were procedural in nature and could therefore apply retrospectively (paras. 103, 109 and 124).

[100] However, in this case, my colleagues and I agree that the amendments at issue, which restrict preliminary inquiry eligibility only to offences attracting a maximum punishment of at least 14 years, are not purely procedural and instead can affect an accused’s substantive legal interests. Accused persons no longer entitled to preliminary inquiries under the new s. 535 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), have lost the opportunity to be discharged at the close of a preliminary inquiry should the evidence prove insufficient to order the accused to stand trial. This loss is significant as a discharge usually puts an early end to criminal liability for those charges. A discharge will also often mean that there will be no trial at all, or that the

accused will be released from custody pending trial or relieved from restrictive pre-trial release conditions (Karakatsanis J.'s reasons, at para. 158).

[101] In light of Parliament's failure to legislate on the timing of these amendments, the judicial task is to determine when the new s. 535 applies based on the principles and presumptions concerning the temporal application of legislation, as well as the values of fairness, rule of law and reasonable reliance they protect. This task must be approached with the interests of justice top of mind.

[102] The parties and the courts below proposed different points in time for the application of the new s. 535 of the *Criminal Code*:

- the date of the alleged offence (argued by the respondents Agénor Archambault and Gilles Grenier, and accepted by the Court of Appeal of Quebec);
- the date of the accused's first appearance (an alternative argument raised by Mr. Archambault and Mr. Grenier, and addressed by the Court of Appeal of Quebec); and
- the date the accused requests a preliminary inquiry (argued by the Crown, and adopted by my colleague Karakatsanis J.).

My colleagues Côté and Rowe JJ. prefer the date on which the charge is laid and Kasirer J. suggests that any vesting must take into account if and when the accused reserves their right to request a preliminary inquiry at a future date.

[103] To some extent, all of these possibilities represent reasonable alternatives and have their respective benefits and drawbacks. None of these possibilities offers a perfect answer. In my view, however, the date of the offence is the preferable option.

[104] The date of the offence best protects the accused's ability to have a preliminary inquiry, and in turn, potentially to be discharged, released from pre-trial custody, or relieved from onerous bail conditions. It is a principled choice that is consistent with the time ordinarily used as a reference point for legislative changes made to the availability of ancillary orders, constituent elements of offences, applicable maximum sentences, and legal defences to criminal charges (see *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 1-3; *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 45; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 18-20). It reflects that the accused person's interests at stake are significant and carry great weight in the interpretative exercise. Further, it does not subject these interests to a determination of when, why, or how the Crown decides to prosecute a charge, or the many factors that may influence the timing of an accused's choice as to their mode of trial. It also establishes a bright-line rule that operates fairly and consistently across the country, irrespective of regional differences in procedure.



[105] Accordingly, I see no basis to interfere with the decision of the Court of Appeal of Quebec holding that the entitlement to the preliminary inquiry attaches to the offence date, and I would dismiss the appeal. Accused persons alleged to have committed an offence that rendered them eligible for a preliminary inquiry before September 19, 2019, the date on which the new s. 535 of the *Criminal Code* came into force, should retain that eligibility today. I agree with my colleague Karakatsanis J. that going forward, under s. 535, an accused is only eligible for a preliminary inquiry if they personally face a maximum punishment of 14 years or greater.

## II. Analysis

### A. *The New Section 535 of the Code Impacts Substantive Rights*

[106] I agree that limiting the availability of the preliminary inquiry can interfere with the accused's substantive rights and is not purely procedural. An accused who is no longer entitled to a preliminary inquiry under the new s. 535 loses the substantive right to be discharged at the close of the preliminary inquiry, if the Crown does not meet the required threshold to order the accused to stand trial (*Cr. C.*, s. 548(1)(b); *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at para. 33; *R. v. R.S.*, 2019 ONCA 906, at paras. 47-58).

[107] A discharge will issue following a preliminary inquiry when, “on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction” (*Cr. C.*,

s. 548(1)(b)). A discharge cannot be appealed and is reviewable only for *certiorari*: “. . . the reviewing court should only intervene where the preliminary inquiry judge committed a jurisdictional error” (*R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635, at para. 14). Other than *certiorari*, if the Crown wishes to proceed with the charges against the accused, its only option is to prefer an indictment under s. 577 of the *Criminal Code*, which requires the personal written consent of either the Attorney General or the Deputy Attorney General. Aside from these two narrow avenues to continue the proceedings, being discharged at the close of the preliminary inquiry effectively ends the criminal case against the accused.

[108] In my view, the loss of the possibility of being discharged at the close of a preliminary inquiry is significant. Although not a perfect analogy, it approximates the loss of a legal defence, which the majority in *Dineley* held affected the substantive and constitutional rights of the accused (paras. 18-21; see also *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 266-67). *Dineley* considered a legislative change to the *Criminal Code* that eliminated access to the “*Carter* defence” in impaired driving cases, which had formerly allowed the accused to rely on an expert opinion to argue that the amount of alcohol consumed was inconsistent with the breathalyzer test results. A majority of the Court in *Dineley* held that removing this defence affected the accused’s substantive rights and therefore the legislative change applied prospectively only. Just as mounting a successful *Carter* defence would often have left a trial judge with a reasonable doubt as to the accused’s criminal responsibility prior to the change, being discharged at the close of a preliminary inquiry, in most cases, will end the

criminal case against the accused on those charges (see paras. 17-18; *Arcuri*, at paras. 20-21).

[109] The impact of the amendments on the accused's constitutionally protected interests must also be considered in determining whether the legislation affects the accused's substantive rights. In *Dineley*, this Court considered that "[w]hen constitutional rights are affected, the general rule against the retrospective application of legislation should apply" (para. 21 (emphasis added); see also *Chouhan*, at para. 93). The respondents in this case make no claim that the removal of this screening mechanism violated rights under the *Canadian Charter of Rights and Freedoms*. However, they argue that the impact of its loss on the accused's substantive legal interests, which include constitutionally protected interests, must be considered when interpreting this new legislation to determine when and to whom it applies.

[110] Although this Court in *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, held that the accused does not have a constitutional right to a preliminary inquiry, the question of whether legislation is constitutional is distinct from the question of its temporal application (paras. 21-22; see also *R.S.*, at para. 55). In determining the temporal application of legislation, the lack of a formal finding of unconstitutionality does not prevent a court from considering whether the accused's constitutionally protected interests may be affected by the change in the law. In other words, an amendment to a provision like s. 535 may affect a *Charter* right in the substantive

manner required to give rise to the presumption against retrospectivity without there being an actual infringement of the implicated *Charter* right.

[111] For example, *Dineley* did not involve a constitutional challenge to the legislative changes to the *Carter* defence. It was in the companion case of *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, that the majority of this Court held that the amendments infringed neither s. 7 nor s. 11(c) of the *Charter*. While the Court held that the amendments did infringe s. 11(d) of the *Charter*, it found that the infringement of s. 11(d) was justified under s. 1 (para. 101). Nevertheless, despite not having found a constitutional violation in *St-Onge Lamoureux*, when considering the *temporal application* of the amendments in *Dineley*, the Court emphasized that the amendments intersected with the presumption of innocence and that the constitutional, and therefore “necessarily substantive”, rights of the accused were affected (*Dineley*, at paras. 20-21).

[112] Eliminating the possibility of a discharge at the close of the preliminary inquiry may also affect the accused’s constitutionally protected interests. The opportunity to obtain a timely judicial evaluation of the Crown’s case, and to be discharged should that case prove insufficient, implicates an accused’s rights to liberty and security of the person under s. 7 of the *Charter*, especially for those in custody pending trial or on stringent bail terms (*R.S.*, at para. 52). Even where a discharge is ordered in respect of only some charges, the accused’s jeopardy is reduced accordingly, which may lead to loosening their bail conditions or to their pre-trial release from

detention (*R.S.*, at para. 58; *Cr. C.*, s. 523(2)(b)). This, in turn, may cause the Crown to revisit the strength of the remaining case against the accused, thereby opening avenues for plea negotiations or withdrawals of other charges.

[113] Further, the “paramount purpose [of the preliminary inquiry] is to ‘protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process’” (*R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at para. 30, citing *Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 105). A preliminary inquiry is a pre-trial screening mechanism and does not determine guilt (*S.J.L.*, at para. 21). Nevertheless, a case ought not proceed to trial without meeting the low threshold for an order to stand trial — meaning there is *no* evidence “upon which a reasonable jury properly instructed could return a verdict of guilty” (*Arcuri*, at paras. 20-21; see also *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080).

[114] In summary, limiting the availability of the preliminary inquiry is not purely procedural; it affects the accused’s substantive rights.

#### B. *The Proper Interpretive Approach for Legislation That Affects Substantive Rights*

[115] Given “the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional” (*Dineley*, at para. 10). As thoroughly discussed by some of my colleagues, the case law and the *Interpretation Act*, R.S.C.

1985, c. I-21, provide legal presumptions which guide the interpretation of legislation when Parliament has failed to clearly set out its temporal application (see also *Dineley; Chouhan*, at paras. 86-87; *R. v. Puskas*, [1998] 1 S.C.R. 1207, at paras. 5-7; *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at paras. 29-40). I will focus on two presumptions which apply to legislation that affects an accused's substantive rights.

[116] The first is the presumption against the retrospective application of legislation affecting substantive legal interests. This presumption is clearly reflected in this Court's most recent jurisprudence on the temporal application of amendments to the *Criminal Code*. The guiding principle is that new legislation that affects substantive rights is presumed to apply prospectively, absent clear legislative intent otherwise. New legislation that deals with procedure will also not apply immediately if, in its application, it *affects* substantive rights (*Dineley*, at paras. 10-11; *Chouhan*, at paras. 87 and 91).

[117] The second is the presumption against interfering with vested rights. This presumption frequently arises in the civil context, for example, when discussing the inability of legislation to interfere with rights already accrued under contract (see, e.g., *Dikranian*, at para. 32; see also R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 762-63). In criminal cases, this Court's jurisprudence on vested rights has previously required that a right-holder be able to "actually exercise" the right and that

the “eventual accrual [be] certain, and not conditional on future events” (see, e.g., *Puskas*, at para. 14).

[118] There is a difference of opinion as to which pre-amendment criminal cases — and which accused — these two presumptions protect. I analyze the new s. 535 of the *Criminal Code* based on the approach articulated and applied in *Dineley*, this Court’s most recent authority concerning the temporal application of legislation which affects substantive interests. *Dineley* makes clear that in order to engage the presumption against retrospectivity, it is sufficient that the legislation affects substantive rights. While *Chouhan* came later and addressed the changes to the jury selection procedures under the 2019 Amendments, a majority in that case applied the presumption that procedural law applies retrospectively. The majority was not concerned with, and did not address, the framework of analysis for amendments which affect substantive rights (para. 103).

[119] Conversely, in *Dineley*, which involved a substantive right and not a purely procedural one, a majority of this Court held that legislative amendments that eliminated the availability of the *Carter* defence in impaired driving cases applied prospectively, as of the date of the offence. In doing so, the majority explicitly set out the governing test for legislation that affects substantive rights. In describing the rules of interpretation that can be helpful in identifying the situations to which new legislation applies, the Court explained at para. 10 that:

More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively. However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases. [Citations omitted.]

[120] The above represents this Court’s most recent statement concerning the timing of amendments that affect substantive rights. Overall, *Dineley* stands for two key propositions that directly impact my conclusion on the outcome of this appeal.

- (1) Either Substantive or Vested Rights Will Trigger the Presumption Against Retrospectivity

[121] Writing for the majority in *Dineley*, Deschamps J. stated there would be no retrospectivity when the legislative provisions affect “either” vested or substantive rights (para. 10). On its face, this is a disjunctive requirement built upon the separate existence of the two presumptions noted above. The express inclusion of the word “either” can only mean that the presence of one *or* the other engages the presumption against retrospectivity. This either-or formulation is based upon, reflects, and best respects the separate existence of these two presumptions. While some amendments may affect *both* substantive and vested rights, in employing this clear language, the Court in *Dineley* conveyed that either of these two avenues is available to a claimant seeking to have legislation apply prospectively only.



[122] Dissenting in *Dineley*, Cromwell J. was of the view that the amendments were purely procedural and therefore applied retrospectively. Nevertheless, his reasons also identify the two presumptions as “distinct” and refer to them as “substantive or vested rights”, effectively positioning them as two alternative paths to reaching the same result (see, e.g., paras. 46, 52 and 54-55).

[123] Further, the majority in *Dineley* treated its conclusion that the amendments affected substantive rights as fully dispositive of the appeal. Paragraph 10 of *Dineley*, cited above, largely references legislation that affects substantive rights, with little discussion of the second presumption relating to vested rights. Once Deschamps J. found that the elimination of a defence affected the accused’s substantive rights, she did not consider it necessary to conduct a subsequent, separate analysis of whether the defence had somehow “vested” or “accrued” in the accused (*Puskas*, at paras. 6 and 14). The majority canvassed other relevant decisions on the temporal application of legislation without ever referencing the need for vesting. The majority did not even cite to *Puskas* and it cannot simply be assumed that they somehow neglected to do so. A more compelling explanation is that the majority did not need to refer to *Puskas*, because the impact on substantive interests alone was sufficient to allow the Court to conclude that the legislation could not apply retrospectively.

[124] Thus, in my view, *Dineley* makes clear that legislation which affects “either vested or substantive rights” offers two alternative routes to the presumption of prospective application (para. 10 (emphasis added); see also I.F. (Canadian Civil

Liberties Association), at paras. 23-28). As a result, once there has been a finding that the substantive rights of the accused are affected, it is unnecessary to impose the additional requirement that those rights must also have somehow vested or accrued to the accused.

[125] The majority's approach in *Dineley* is also complementary and consistent with this Court's decision in *Dikranian*, in which the Court held that new legislation modifying certain rules concerning interest for student loan payments did not apply retrospectively based on the presumption against interfering with vested rights (*Dikranian*, at paras. 32-40 and 49-54). Just as the majority in *Dineley* did not consider whether the substantive right to a legal defence had also vested in the accused, the Court in *Dikranian* did not consider whether the interest rate entitlement under the old regime was a substantive right or a procedural one. The simple explanation for why the Court did not analyze both presumptions in either case is that it did not have to: either one, standing alone, was sufficient to trigger the presumption of prospective application, which was not rebutted in either case.

[126] I therefore do not think it is necessary to also show that any substantive interest the legislation affects must *also* have vested in the accused before the presumption against retrospectivity can apply. There is no need to combine or collapse the presumption against retrospectivity where substantive rights are affected and the presumption against interfering with vested rights because they have distinct purposes and separate spheres of application. They may share the goal of protecting people who

have relied on the state of law prior to the amendments, but in my view, courts should preserve the independent integrity of each. Although in some cases these presumptions may arise together, there will equally be some interferences with substantive interests that do not qualify as interference with a vested right, or for which the idea of vesting may create theoretical or practical problems, or even generate unfairness. The separate definitions and distinct roles of the presumption against retrospectivity and the presumption against interference with vested rights has been recognized in the jurisprudence, in legislation and by legal scholars (see, e.g., *Interpretation Act*, s. 43(b) to (e); R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 342; see also pp. 357-61 and 363; Sullivan (2022), at pp. 726-27 and 729-30).

[127] In my view, *Dineley* is most closely analogous to the case before us. Both the repeal of the “*Carter* defence” in *Dineley* and the amendments to preliminary inquiry eligibility in this case eliminated one way in which the criminal charges could be resolved in the accused’s favour and implicated the accused’s constitutionally protected interests. *Puskas*, which concerned the elimination of the accused’s right of appeal to this Court without leave after a lower court of appeal had overturned their acquittal at trial, is a different type of case (para. 1). While the amendment in *Puskas* affected the accused’s substantive rights, it did not implicate the accused’s constitutionally protected interests. Removing a right to appeal at the last possible stage in a criminal case is not the same as taking away a substantive legal defence at trial (*Dineley*) or the choice of whether to have a preliminary inquiry — matters which are not only substantive but also implicate the accused’s constitutional rights.

[128] The nature of the entitlement in *Puskas* depended upon four preconditions. The specificity of these preconditions is perhaps one reason why it has only been cited twice by this Court (see *Dineley*, at para. 72, per Cromwell J., dissenting; *R. v. R.V.*, 2021 SCC 10, [2021] 1 S.C.R. 131, at para. 76). The right to appeal to this Court, which the amendments limited in *Puskas*, could only have arisen *after*: (1) the accused had been charged with an indictable offence; (2) the accused had been acquitted at trial; (3) the accused's conviction had been reversed on appeal; and (4) a new trial had been ordered (para. 15). In that particular context, where there were legal preconditions necessary before the particular right to appeal could even arise, it made some sense for the Court to focus on vesting and ensuring that all "conditions precedent" had been met (para. 15). I do not read dicta from that case as creating a general requirement that all substantive rights must also have vested before legislative amendments must be presumed to apply prospectively.

[129] In any event, if a vesting of the substantive right is also required, it should be characterized sufficiently broadly to ensure that rigid legal characterizations and formalities are not favoured over fairness and an accused's substantive interests (see Sullivan (2016), at p. 365; Sullivan (2022), at pp. 735-36). Any dispute over whether what must vest in this case is the right to a preliminary inquiry or the right to request to have a preliminary inquiry should be resolved to best respect fairness to an accused. A substantive legal interest that intersects with, implicates or affects constitutional rights, does not depend on the fulfilment of future conditions precedent in order to bear on the analysis. In respect of the constitutional rights at play in this matter, s. 7 *Charter*

rights are held by “[e]veryone” and s. 11 protects “[a]ny person charged with an offence”.

[130] Given the significance of the preliminary inquiry and the possibility of a discharge to the accused, it appears unjust to require the fulfilment of all statutory prerequisites to render the accrual of that right certain, including to require that the accused actually have exercised that choice themselves. As noted by my colleague Kasirer J., public confidence in the administration of justice should not be compromised (para. 93).

[131] In sum, where Parliament is silent as to the temporal application of an amendment to criminal legislation, a determination that such an amendment affects the substantive rights of the accused will normally be sufficient to conclude that the legislation applies prospectively. This conclusion considers the actual impact of the impugned legislation on the accused’s interests and underscores how courts should protect as fully as possible both the substantive and vested rights of those affected by changes in legislation. It also reflects the animating principles behind the presumption against retrospectivity — fairness and the rule of law — and is consistent with the rule that cases departing from such a presumption “must be exceptional” (*Dineley*, at para. 10; see also *K.R.J.*, at para. 25; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 45). Treating substantive rights and vested rights as two distinct concepts and giving full effect to each presumption in no way limits Parliament’s capacity to legislate. Subject to

constitutional challenges to the legislation itself, rebutting the presumption of prospective application of new legislation that affects substantive or vested rights will often simply require Parliament to stipulate its intent in express terms. When Parliament does not do so, it also understands that the courts will rely upon the jurisprudence on temporal application to aid in the interpretation of its legislation.

(2) If the Accused's Substantive Rights Are Affected, the Date of the Offence Should Govern

[132] Second, I also rely on *Dineley* for the proposition that new criminal legislation will apply as of the date of the offence if it affects an accused's substantive legal interests (para. 18). The question before the Court in *Dineley* was whether the amendments at issue applied "retrospectively, that is, to conduct which occurred before the Amendments came into force" (para. 3 (emphasis added)). The Court held that the amendments did *not* apply retrospectively and instead applied prospectively only, meaning to conduct occurring only after the amendments came into force (*Dineley*, at paras. 3 and 25). The temporal application of amendments therefore hinged on the date of the impugned "conduct" — or the date of the alleged offence.

[133] Similarly, because the new s. 535 of the *Criminal Code* affects the accused's substantive rights, and in turn because it must apply prospectively only, the date of the offence should govern its temporal application. Although the Court of Appeal of Quebec took a somewhat different reasoning path, it ultimately decided that

the entitlement to the preliminary inquiry attaches to the date of the offence, and I see no reason to interfere with that conclusion.

[134] The court below duly focused on the impact on the accused in determining the temporal application of the new s. 535 of the *Criminal Code* (2022 QCCA 1170, 84 C.R. (7th) 174, at para. 11). With reference to this Court's decision in *Dineley*, as well as the Ontario Court of Appeal's decision in *R.S.*, the court considered that the temporal application of a legislative amendment depends not "on a formal and categorical distinction between procedural and substantive law but on a functional assessment [of] whether the amendment affects an acquired right or interest" (para. 26, citing *Dineley* and *R.S.*). The key question to be determined, in its view, was "whether the effect of an amendment is to create a negligible or significant risk to a party in the range of possible outcomes in a proceeding as a result of forced compliance with the amendment or voluntary reliance upon it" (C.A. reasons, at para. 29). In other words, the more significant the impact on the party affected, the stronger the argument for prospective application. This reasoning is sound, well supported by this Court's jurisprudence, and properly reflective of the concrete impact of the legislation on the individuals most affected by it (see also *Sullivan* (2016), at p. 365; *Sullivan* (2022), at pp. 735-36).

[135] To the extent I would depart from the reasoning of the court below, it is with respect to its finding that the entitlement to a preliminary inquiry "vested or accrued" as of the date of the accused's first appearance (paras. 11 and 39-40). For the

reasons discussed above, having found that the offence date was the appropriate reference point in light of the impact of the amendment on the accused, in my respectful view, it was unnecessary to turn to a further assessment of whether and when the right vested. In any event, the right to have a preliminary inquiry could be said to have also vested on the date of the offence.

[136] I add that the offence date remains preferable for a variety of reasons. It is a feature common to all criminal files. It is independent of any given procedure such as the accused's first appearance, and thus adaptable to potential regional differences in criminal procedure across the country. It is also attuned to the reality of delays or variables that may arise throughout the course of the criminal process, at no fault of the accused.

[137] Importantly, the date of the offence is the same across Canada and is not subject to significant variations in procedure, at the first appearance or otherwise, depending on the province or territory. For example, while the respondents before us were able to formally reserve their right to a preliminary inquiry at their first appearances given local practice in Quebec, in other jurisdictions, the first appearance may allow for no such option (I.F. (Attorney General of Ontario), at paras. 13-14; see also oral submissions of the Criminal Lawyers' Association (Ontario), transcript, at p. 115). Determining the temporal application of the new s. 535 of the *Criminal Code* requires a solution that applies consistently across the country. The accused's



substantive rights should not be dependent on or shaped by regional differences in procedure, especially when it may result in unfairness.

[138] In my view, the accused's request is not the preferable time as it is, under recent versions of the *Criminal Code*, the final procedural step that must take place to ensure they can *exercise* their right to a preliminary inquiry. However, that does not mean such a request is necessary for that right to have been initially acquired by the accused, with the *choice* to exercise it at a later stage in the proceedings. Furthermore, such an analysis would not align well with some of s. 535's pre-2004 iterations, which imposed a mandatory preliminary inquiry. For certain historical offences committed under previous versions of the *Criminal Code*, there may be no *request* to mark the time the right was acquired. Additionally, the possibility that the Crown may proceed summarily on a hybrid charge, or that the accused may ultimately elect trial in the provincial court, does not mean the accused never acquired the right to a preliminary inquiry. The right may no longer exist from that point forward, but this does not make its existence in the first place conditional on the accused's request. I note that this rationale is in fact consistent with *Puskas*, in which the final condition precedent associated with the accused's right to appeal was that the court of appeal below had ordered a new trial. The accused was not required to actually exercise his right — i.e., by filing a notice of appeal — in order to have acquired it (para. 15).

[139] I would add this: in my respectful view, when a change in the law deprives the accused of a substantive right and Parliament is silent as to the temporal application

of that change, it is hard to see why a court should insist that accused persons must act in a particular manner to preserve that right. In this case, requiring an actual request for a preliminary inquiry in order to remain entitled to one after September 19, 2019, has significant consequences for the accused, which run against the animating principle of fairness that guides the presumption against retrospectivity (*K.R.J.*, at para. 25; *Tran*, at para. 45). Namely, there is a risk that the accused will be forced to choose between their right to a preliminary inquiry, and their right to make a free and fully informed election.

[140] The accused’s ability to request a preliminary inquiry is, in all provinces and territories other than Nunavut, intrinsically linked to their election as to mode of trial. An accused who elects trial in the superior court, either by judge alone or by judge and jury, may be eligible for a preliminary inquiry, whereas an accused who elects trial in the provincial court is not (see *Cr. C.*, ss. 536(2) and 536.1(2)). In turn, the accused’s election as to mode of trial has been recognized as one of the most fundamental decisions they can make in their case — often considered, along with how to plead and whether to testify, as one of few decisions so important that the accused’s counsel cannot make it on their behalf (*R. v. White*, 2022 SCC 7, at para. 5; *R. v. W. (R.)*, 2023 ONCA 250, 167 O.R. (3d) 1, at paras. 20-21, citing G. A. Martin, “The Role and Responsibility of the Defence Advocate” (1970), 12 *Crim. L.Q.* 376, at pp. 387-88).

[141] Given the significance of the election, the accused should be free to make it without fear of potentially jeopardizing other rights. As the Court of Appeal of

Quebec held, to suggest that a failure to formalize an election or request until after September 19, 2019, diminishes the accused’s entitlement to a preliminary inquiry would “eviscerate the election of its content [and imperil] a variety of entitlements”, including the right to choose trial by judge and jury or judge alone and, if the latter, at which level of court that trial will occur (para. 37). The accused should also, within the limits expressly set out in the *Criminal Code*, in rules of court and by individual justices, remain in control of the *timing* of their own election, which in turn may be subject to a range of considerations. For example, in the context of s. 11(b) of the *Charter*, accused persons may be entitled to hold off on electing the mode of trial if they have not yet received sufficient disclosure to enable them to make a fully informed decision — a problem that, at its core, may in fact overlap with the same delay-related concerns Parliament intended to address with the amendment to s. 535 (see, e.g., *R. v. L. (L.)*, 2023 ONCA 52, 166 O.R. (3d) 561, at paras. 15-18). Indeed, this Court in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, noted that timely requests for initial disclosure should be complied with “so as to enable the accused sufficient time before election . . . to consider the information” (p. 343 (emphasis added)).

[142] If the accused, at first, elects a mode of trial that allows them to preserve their right to request a preliminary inquiry within a limited time, and then later wishes to *re-elect* to be tried by provincial court judge, in many cases their ability to do so is subject to the written consent of the Crown (*Cr. C.*, s. 561(1)(a); *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 62). If the Crown refuses to consent, as the *Criminal Code* allows, a court may only review the scope of prosecutorial discretion

when there is an abuse of process (see *R.W.*, at para. 31, and references cited therein). Because the Crown is not required to provide reasons for its refusal, an abuse of process claim on this basis often proves “extraordinarily difficult” (para. 32, citing S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at §9.02). Therefore, an accused seeking to preserve their right to a preliminary inquiry by electing early risks locking themselves into that decision should the Crown refuse to consent to a re-election down the road. The unfairness of this situation, which is to the accused’s detriment, give me great pause about grounding the entitlement to a preliminary inquiry on the accused having made a request prior to September 19, 2019. Nor does the 90-day notice period between when the amendments received royal assent and when they came into effect alleviate these concerns. Without suggesting that, in some cases, ignorance of the law should be an excuse or defence, the reality is that despite efforts by Parliament and the government to publicize the amendments, many accused persons may not actually have learned of the change, particularly if they were self-represented. Mere knowledge that the law will be changing is also of little assistance to an accused holding off on their election for valid, unrelated reasons. Such an accused would remain in the same undesirable position described above of having to choose between preserving their entitlement to a preliminary inquiry, and making a free and fully informed election as to mode of trial. Finally, the notice provided would simply have communicated that the law *would be changing* on September 19, 2019. It would not have specifically communicated that the accused had to *request* a preliminary inquiry before that date in order to claim the protections of the old regime.

[143] The offence date is neither insufficiently concrete nor overly speculative as a reference point. The fact that the accused may not ultimately be charged with the offence does not prevent other substantive entitlements from attaching to the offence date. For example, in addition to defences to criminal charges as this Court determined in *Dineley*, the applicable maximum punishment is also determined with reference to the offence date, subject to the entitlement to the lesser punishment if it has changed between the date of the offence and sentencing under s. 11(i) of the *Charter* (see, e.g., *R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752, at para. 93; *R. v. Fones*, 2012 MBCA 110, 288 Man. R. (2d) 86, at para. 60; *L.L. v. R.*, 2016 QCCA 1367, at paras. 134 and 150 (CanLII); *K.R.J.*, at para. 25). Furthermore, by the time a court is in a position to determine whether an accused is eligible for a preliminary inquiry, the accused has *indeed* been charged — transforming what was once a mere possibility into a concrete reality, with plain consequences for an accused who is deemed ineligible.

### C. *Summary*

[144] Preliminary inquiry eligibility following the 2019 Amendments should be determined based on the date of the alleged offence. Where the alleged offence date is prior to September 19, 2019, an accused who would have been eligible for a preliminary inquiry but for the amendments remains eligible, regardless of the applicable maximum punishment. As mentioned above, where the alleged offence date is on or after September 19, 2019, the accused must personally be facing a maximum

punishment of at least 14 years' imprisonment in order to be eligible for a preliminary inquiry under the new regime.

[145] Had Parliament intended this amendment to apply retrospectively, it was free to have said so expressly. Because Parliament chose to remain silent on this amendment's temporal application, courts should interpret the amendment based on the relevant presumptions and their animating purposes. In this case, tying preliminary inquiry eligibility to the date of the alleged offence is preferable, both in principle and in practice. The rule this Court sets in respect of offences committed prior to the new s. 535 of the *Criminal Code* will involve a limited number of cases, which will reduce with the passage of time.

[146] As Parliament continues to exercise its exclusive jurisdiction to legislate amendments to the *Criminal Code*, it would be well advised to clearly articulate the intended temporal application of those changes. Absent clear direction, when presented with a range of reasonable options, courts will prefer the one which best protects the accused's substantive rights.

### III. Disposition

[147] I would dismiss the appeal.

The reasons of Wagner C.J. and Karakatsanis, O'Bonsawin and Moreau JJ. were delivered by

I. Overview

[148] Faced with significant delays in criminal proceedings — threatening the right of accused persons to be tried within a reasonable time, and resulting in stays of criminal charges — Parliament sought to improve the efficiency of the justice system by eliminating preliminary inquiries for all but the most serious cases. This appeal raises two interpretative questions about the amendments. First, to which pre-existing criminal proceedings do they apply? Second, what is the scope of cases in which a preliminary inquiry remains available under the new rule?

[149] In 2019, s. 535 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), was changed to restrict the availability of preliminary inquiries to accused persons charged with offences with a maximum penalty of 14 years or more of imprisonment. Before the amendment, there was no condition related to the maximum penalty for the offences. There is no explicit transitional provision governing the temporal application of this amendment. Both immediately before and after the 2019 amendment, a preliminary inquiry was only available upon request by either the accused or the Crown.

[150] Each respondent before this Court was accused of one or more historical sexual offences against a child. After the dates of the alleged offences and before charges were laid, the maximum penalty for the impugned conduct was increased from

10 to 14 years' imprisonment. Because the penalty for a criminal offence is presumed to be that in force when the offence was committed — and because of the guarantee under s. 11(i) of the *Canadian Charter of Rights and Freedoms* to the lesser punishment — they are each liable to a maximum of 10 years' imprisonment.

[151] The amendment of s. 535 came into effect a few months after the charges were laid and after the respondents first appeared in court. At each of their first appearances the respondents reserved their right to elect their mode of trial to a later date, meaning their election was postponed to a future appearance. Neither respondent requested a preliminary inquiry until months after the new s. 535 came into force. If the new rule applies to them, they must meet the condition that they be charged with an offence with a maximum penalty of 14 years or more of imprisonment.

[152] The Crown's position is that because the requests were not made before the new s. 535 came into force, the new rule applies. As the respondents were not charged with offences for which they could be personally liable to 14 years or more of imprisonment, the Crown says a preliminary inquiry was not available under that rule. In separate proceedings, the Court of Québec and the Superior Court agreed and concluded that Mr. Grenier and Mr. Archambault had no right to a preliminary inquiry.

[153] The Court of Appeal allowed the appeals, remitting the files to the Court of Québec for preliminary inquiries. It concluded that the respondents were not subject to the new limitation in s. 535 of the *Criminal Code* as amended because their entitlement to a preliminary inquiry arose on the commission of the alleged offences.



Thus, they were entitled to request a preliminary inquiry under the provision as it read at that time, which did not restrict availability to those charged with offences punishable by 14 or more years' imprisonment. The Court of Appeal declined to consider whether they would have had the right to a preliminary inquiry under s. 535 as it now reads.

[154] The Crown appeals to this Court. My colleagues would dismiss the appeal. They conclude, for different reasons, that the new rule in s. 535 does not apply to the respondents. My colleague Justice Martin concludes, like the Court of Appeal, that the new rule does not apply because it came into force after the time of the alleged offences. My colleagues Justices Côté and Rowe conclude that the new rule does not apply because it came into force after the respondents had been charged with those offences. Finally, my colleague Justice Kasirer concludes that the new rule does not apply because it came into force after the respondents reserved their right to elect their mode of trial at first appearance.

[155] I am unable to agree with any of the positions advanced by my colleagues on the issue of temporal application. In my view, the correct interpretation of the new s. 535, firmly grounded in the applicable provisions of the *Criminal Code*, is that it applies to accused persons where no request for a preliminary inquiry was made prior to its coming into force.

[156] Assuming there are no constitutional constraints, the ultimate question when determining the temporal application of a new rule is whether the legislature

intended it to apply in the circumstances. Ordinary principles of legislative interpretation may disclose legislative intent regarding whether the rule applies — for example where there are explicit transitional provisions. Where legislative intent is not clear, the jurisprudence has developed presumptions, now codified in the *Interpretation Act*, R.S.C. 1985, c. I-21, to guide courts in determining how Parliament has balanced the underlying legal values engaged by applying new law to circumstances that existed before that law's coming into force.

[157] Here, it is not immediately clear whether Parliament intended the amended s. 535 to apply to the respondents. Intent must therefore be determined in reference to the presumptions of temporal application. The relevant inquiry in determining the application of s. 535 can be summarized as follows: new rules are presumed not to apply where they interfere with a substantive legal interest that has vested before their coming into force.

[158] Limiting access to a preliminary inquiry can interfere with an accused's opportunity to obtain a discharge, which is a substantive legal interest. Like the right to an appeal, and unlike merely evidentiary hearings in the criminal trial process, the opportunity to obtain a discharge could put an end to the risk of criminal liability. If successful, an accused person will not face the ordeal of an unjustified criminal trial, and may be freed from custody or restrictive conditions pending trial. These interests are not merely relevant to how an accused person conducts their criminal defence — they exist separately from that litigation and have a direct, immediate impact on the

accused's life outside the courtroom. I conclude this substantive legal interest only vests once a preliminary inquiry has been requested, given the statutory right is expressly conditioned on this request. Absent a request, the accused holds no statutory right to a preliminary inquiry. Thus, where there has been no request before it came into force, the new limitation can apply without interfering with a vested substantive legal interest.

[159] As to the interpretation of the new limitation in s. 535, a preliminary inquiry is available only to “an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment”. In this context, the objective seriousness of the offence is determined by the maximum prison sentence the accused actually faces for the offence as charged, not the maximum penalty for an equivalent offence were it committed today. This interpretation is grounded in the ordinary meaning of the text, the broader context and Parliament's purpose of reducing the number of preliminary inquiries based on a clear criterion limiting eligibility.

[160] For the reasons that follow, I conclude that a preliminary inquiry is only available to an accused person where either: a request was made before the coming into force of the amendment on September 19, 2019; or the accused actually faces criminal liability of 14 years' imprisonment or more in respect of an indictable offence with which they are charged. The respondents had no right to a preliminary inquiry because they do not meet either criterion. I would therefore allow the appeal.

## II. Background

[161] The respondent Agénor Archambault was charged with committing, between the years 1958 and 1960, the historical crime of indecent assault against another male person, an indictable offence carrying a maximum term of imprisonment of 10 years (*Criminal Code*, S.C. 1953-54, c. 51, s. 148). The crime was repealed in 1983 (*An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s. 8).

[162] The respondent Gilles Grenier was charged with committing, between the years 2003 and 2007, the crimes of sexual interference and sexual assault against a person under 14, both hybrid offences which at the time carried a maximum term of imprisonment of 10 years (*Cr. C.*, ss. 151 and 271(1)(a) as they read before August 9, 2012). In 2015, Parliament raised the maximum imprisonment from 10 to 14 years (*Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23, ss. 2 and 14).

[163] The respondents first appeared in the Court of Québec in the summer of 2019. At first appearance, they reserved or postponed their right to elect their mode of trial to a later date, and the matters were adjourned. Regarding Mr. Archambault, he agrees with the Crown that he had not yet elected his mode of trial at first appearance despite contrary findings below.

[164] On September 19, 2019, the amendment to s. 535 came into force (*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 (“2019 Amendments”)),

ss. 238 and 406). While both respondents could have elected their mode of trial and requested a preliminary inquiry before that date, they had not yet done so.

[165] In 2020, each respondent requested a preliminary inquiry. In both matters, the Crown argued that the Court of Québec lacked jurisdiction under s. 535 to hold a preliminary inquiry.

### III. Decisions Below

#### A. *Court of Québec*

[166] On February 4, 2020, the Court of Québec (per Rousseau J.C.Q.) held that it lacked jurisdiction to preside over Mr. Grenier's preliminary inquiry. The court concluded that applying the new rule did not impact Mr. Grenier's substantive rights because it was procedural. Mr. Grenier had no right to a preliminary inquiry under the new rule because the offences with which he was charged were punishable by a maximum of 10 years' imprisonment. The court concluded the new rule therefore denied Mr. Grenier the right to a preliminary inquiry.

[167] On December 21, 2020, the Court of Québec (per Délisle J.C.Q.) dismissed Mr. Archambault's request for a preliminary inquiry for similar reasons. The court concluded that preliminary inquiries were of a purely procedural nature, as they could always be set aside should the prosecution decide to move forward by way of a direct indictment.

B. *Superior Court of Quebec*

[168] Mr. Grenier and Mr. Archambault each challenged these decisions, applying to the Superior Court for *certiorari* and *mandamus* on two grounds. They argued first they had the right to a preliminary inquiry because the new rule in s. 535 did not apply to them. They said it would violate the presumption against retrospective application of legislation. Second, even if the new rule applied to them, they argued they nevertheless had the right to a preliminary inquiry, since the offences with which they were charged *currently* carry a liability of up to 14 years' imprisonment.

[169] On April 29, 2021, the Superior Court (2021 QCCS 1966, per Charbonneau J.) issued reasons for having dismissed Mr. Archambault's application, characterizing the right to a preliminary inquiry as purely procedural. Moreover, the court concluded that the new s. 535 required the accused to be charged with an offence for which they could be personally punishable by 14 years' imprisonment or more. Thus, it did not apply to Mr. Archambault, given he benefited from the *Charter* protection under s. 11(i) that brings the maximum punishment for the offences below 14 years. Section 535 [TRANSLATION] "is unambiguous" in that regard (para. 52 (CanLII)).

[170] On May 4, 2021, the Superior Court (2021 QCCS 1876, per Thibault J.) dismissed Mr. Grenier's application. As for the temporal application of the amendment to s. 535, the court relied on the decision of the Court of Appeal for Ontario in *R. v. R.S.*, 2019 ONCA 906, and held preliminary inquiries affected an accused's substantive

right to a discharge. It concluded, however, that Mr. Grenier's entitlement had not vested by the time the amendment to s. 535 came into force. To get the benefit of the old rule, he should have both elected his mode of trial and asked for a preliminary inquiry before September 19, 2019, the date the amendment came into force.

C. *Court of Appeal of Quebec*

[171] The Court of Appeal released one set of reasons disposing of both appeals (2022 QCCA 1170, 84 C.R. (7th) 174). The court concluded that the new rule in s. 535 of the *Criminal Code* did not apply to Mr. Grenier and Mr. Archambault and that they were therefore each entitled to a preliminary inquiry. It allowed the appeals, finding it unnecessary to address whether they would have the right to preliminary inquiries under the new rule.

[172] Writing for a unanimous court, Healy J.A. (Vauclair and Hamilton JJ.A. concurring) interpreted the jurisprudence, including this Court's decision in *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, as holding that "the temporal application of a legislative amendment does not depend on a formal and categorical distinction between procedural and substantive law but on a functional assessment whether the amendment affects an acquired right or interest" (para. 26).

[173] In his view, the analysis required "an evaluation of the interests at stake as a result of the amendment" (para. 26). The greater their significance, the more likely an amendment would apply on a prospective basis only. Here, the amendment would

deprive the accused of the possibility of a discharge and the opportunity for enhanced disclosure under oath. Given these significant interests, the rights at stake were acquired from the moment of the commission of the offence and that was the relevant date for determining the entitlement to ask for a preliminary inquiry. The Court of Appeal allowed the appeals and remitted each file to the Court of Québec for a preliminary inquiry.

#### IV. Issues

[174] Following the release of the Court of Appeal's judgment, both respondents had the benefit of a preliminary inquiry. Thus, the Crown's appeal is moot (A.F., at para. 20). The Crown, however, obtained leave and asks this Court to address the important issues at stake given conflicting appellate court decisions interpreting s. 535 of the *Criminal Code* (para. 21). This Court has residual discretion to hear a moot appeal on the merits (*R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 26; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). Given the disagreement between appellate courts on these issues of national importance and the fact that the issues raised have been fully argued by adversarial parties both here and in the courts below, it is in the interests of justice to address the appeal on the merits.

[175] The parties raise two questions of law on this appeal, about the proper interpretation of the amended s. 535 of the *Criminal Code*:



1. Are accused persons subject to the new rule, limiting eligibility for a preliminary inquiry, where no request for a preliminary inquiry was made before the coming into force of the new s. 535?

I would answer yes. Accused persons are subject to the new limitation if a request for a preliminary inquiry was not made before its coming into force.

2. Are preliminary inquiries available under the new s. 535 where an accused has been charged with an indictable offence for which they are not personally liable to imprisonment for 14 years or more, even though the offence, if committed today, would carry maximum liability of 14 years' imprisonment?

I would answer no. Under the amended provision, only those who are charged with an offence for which they actually face imprisonment of 14 years or more are entitled to a preliminary inquiry on request.

## V. Analysis

### A. *The History and Availability of Preliminary Inquiries*

[176] Preliminary inquiries have been part of the criminal process in Canada since before Confederation (Department of Justice of Canada, Working Document prepared by D. Pomerant and G. Gilmour, *A Survey of the Preliminary Inquiry in Canada* (April 1993), Annex D, at pp. 19-20). They trace their roots to procedures of criminal investigation in early English law, in which justices of the peace performed investigative or prosecutorial functions (pp. 2-4). Over time, the role of the justice of the peace has evolved considerably to take on judicial characteristics (*Skogman v. The*

*Queen*, [1984] 2 S.C.R. 93, at pp. 105-6, citing Law Reform Commission of Canada, *Study Report: Discovery in Criminal Cases* (1974), at p. 8; see also pp. 64-65).

[177] The preliminary inquiry primarily acts as a procedural safeguard — a screening mechanism to put an end to cases where the evidence is insufficient to order the accused to stand trial (*R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at para. 30, citing *Caccamo v. The Queen*, [1976] 1 S.C.R. 786; see also *Patterson v. The Queen*, [1970] S.C.R. 409, at p. 412, per Judson J.). Where the threshold is not met (*Cr. C.*, s. 548(1)(a); *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at paras. 21-22), the justice must discharge the accused, ending criminal proceedings regarding that offence (*Cr. C.*, s. 548(1)(b); see generally A. D. Gold and J. R. Presser, “Let’s Not Do Away with the Preliminaries: A Case in Favour of Retaining the Preliminary Inquiry” (1996), 1 *Can. Crim. L.R.* 145, at pp. 147-48 and 164).

[178] As this Court noted in *Hynes*, “[o]ver time, the preliminary inquiry has assumed an ancillary role as a discovery mechanism” (para. 31). Preliminary inquiries offer strategic benefits to the defence. They can be useful to test the evidence and gauge the strength of the Crown’s case and to provide testimony on which to test credibility at trial (see, e.g., D. M. Paciocco, “A Voyage of Discovery: Examining the Precarious Condition of the Preliminary Inquiry” (2004), 48 *Crim. L.Q.* 151, at pp. 160-61; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 40). The discovery function has, however, lost some of its significance given the Crown’s constitutional disclosure

obligations, following this Court's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (*R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 23).

[179] It is settled law that there is no constitutional right to a preliminary inquiry (*S.J.L.*, at para. 21). This is because, even without it, the accused keeps the presumption of innocence and the right to make full answer and defence (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 32). The Crown must in all cases prove guilt beyond a reasonable doubt at the eventual trial.

[180] The availability of a preliminary inquiry to an accused is grounded in statute. Before June 2004, the text of s. 535 of the *Criminal Code* read:

**535** Where an accused who is charged with an indictable offence is before a justice, the justice shall, in accordance with this Part, inquire into that charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

[181] Over time, questions about the continuing utility and relevance of the preliminary inquiry (see generally J. A. Epp, "Abolishing Preliminary Inquiries in Canada" (1996), 38 *Crim. L.Q.* 495, at pp. 502-3) resulted in reforms reducing its availability. *Criminal Code* amendments made the preliminary inquiry available only on request and allowed for the narrowing of its focus (*Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13; see also Library of Parliament, *Bill C-15A: An Act to amend the Criminal Code and to amend other Acts*, Legislative Summary LS-410E, October 12, 2001, at pp. 13-15). These amendments have generally reduced the number of

preliminary inquiries and their length (see *S.J.L.*, at para. 24). As of June 2004, s. 535 made clear that the preliminary inquiry would be held only where it has been requested:

**535** If an accused who is charged with an indictable offence is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

[182] Despite these changes, concern continued to grow over delays in criminal proceedings, sparking further consideration of the need for preliminary inquiries. In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, this Court specifically encouraged Parliament to consider “the value of preliminary inquiries in light of expanded disclosure obligations” to ensure the criminal process “focusses on what is truly necessary to a fair trial” (para. 140; see also Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (2017), at pp. 47-48).

[183] In that context, Parliament opted to reform preliminary inquiries to improve the efficiency of criminal proceedings, notably with the desire to “unclog” court resources, reduce delays, and to avoid the need for witnesses to testify twice (*House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19604).

[184] Section 535 was changed in 2019 to eliminate preliminary inquiries except in the most serious cases. Since then, the availability of preliminary inquiries has been subject to an additional limitation related to the maximum penalty for the relevant offences:

**535** If an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

[185] The amendment to s. 535 came into force on September 19, 2019, 90 days after the amending legislation received royal assent (2019 Amendments, ss. 238 and 406). This amendment is the focus of this appeal.

B. *Determining Whether the New Rule Applies*

[186] When Parliament provides no explicit transitional provisions, determining whether the new rules apply to a particular case can be challenging. The principles relating to the temporal application of legislation are sometimes in tension, and relationships between the presumptions that may apply to a situation can be unclear (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 724-25; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at paras. 416-18; *Canada (Attorney General) v. Almallki*, 2016 FCA 195, [2017] 2 F.C.R. 44, at paras. 26-28).

[187] Here, lower courts have come to different solutions as to when the new restrictions apply. The Court of Appeal, citing difficulties in the application of the presumptions governing the temporal application of legislation, adopted an open-textured analysis focused on factors such as the importance of the amendment and the impact on the accused (paras. 26-31). Applying that analysis, it concluded that the “entitlement to a preliminary inquiry is determined with reference to the state of the law at the date of the commission of the alleged offence” (para. 11).

[188] Several courts across the country, including all four judges from the Court of Québec and Superior Court in this case, have differed from the Court of Appeal in how they characterized the effect of the amendments and their temporal application (see, e.g., *R.S.*; *R. v. B.J.M.*, 2021 BCPC 151; *R. v. Lamoureux*, 2019 QCCQ 6616; *R. v. Kozak*, 2019 ONSC 5979, 148 O.R. (3d) 396; *R. v. A.S.*, 2019 ONCJ 655; *R. v. N.F.*, 2019 ONCJ 656, 383 C.C.C. (3d) 550; *R. v. Fraser*, 2019 ONCJ 652; *R. v. Corneillier*, 2019 QCCQ 6028). Some courts have concluded that the s. 535 right to a preliminary inquiry is of a purely procedural nature such that the new limitation applies immediately in all cases (see, e.g., *Lamoureux*). Still others have found that although the amendment is not purely procedural, it only impacts substantive rights where a preliminary inquiry had been requested before the rule came into force, such that it applies where no request had been made (see, e.g., *R.S.*).

[189] As I shall explain, a predictable approach to determining temporal application must clarify and build on the law interpreting the relevant presumptions

developed in this Court's jurisprudence and codified by Parliament (*Interpretation Act*, ss. 43 and 44). I would clarify and summarize the relationship among the three presumptions relevant to the disposition of this appeal in line with the underlying legal values they engage, not abandon them.

(1) Principles Governing the Temporal Application of Legislation

[190] Questions about the temporal application of legislation concern whether new legislative rules apply to a given circumstance or whether the previous state of the law continues to apply (*Côté and Devinat*, at paras. 341-42; see also Sullivan, at p. 770).

[191] Underlying legal values like fairness and the rule of law may militate against applying new rules when to do so would negatively affect people who had reasonably relied on the previous state of the law in governing their affairs (see generally *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paras. 44-45 and 48; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 23-25; *Poulin*, at paras. 59 and 62).

[192] Issues of temporal application are sometimes framed in terms of whether a particular legislative amendment is prospective, retroactive, retrospective or of immediate application in the abstract (see, e.g., C.A. reasons, at paras. 11 and 15). However, this terminology can be confusing and difficult to apply in practice (Sullivan, at p. 735; see also *Côté and Devinat*, at paras. 518-27; *Benner v. Canada (Secretary of*

*State*), [1997] 1 S.C.R. 358, at para. 39; *Almalki*, at paras. 26-28; J. P. Salembier, “Understanding Retroactivity: When the Past Just Ain’t What It Used to Be” (2003), 33 *Hong Kong L.J.* 99, at pp. 99-100). And it is often insufficient to resolve the actual issue before the court. Here the parties agree that the new rule does not apply to all immediately; the disagreement is about the class of accused persons to whom it applies. The better framing in a case like this is to ask in which circumstances the new rule applies.

[193] In the criminal context, some principles of temporal application have constitutional protection (*Charter*, s. 11(g) and (i); *K.R.J.*, at paras. 22-24). Where, as here, constitutional constraints do not arise, the legislature’s intent is paramount (*Côté and Devinat*, at paras. 452-53 and 457). Did Parliament intend the new rule to apply in the circumstances?

[194] As with any question of statutory interpretation, determining the temporal application of a new rule must be grounded in the text of the legislation read in its full context and in harmony with the legislature’s intention (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In conducting that analysis, courts “must rely on all the principles of statutory interpretation” (*Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at para. 36, citing R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 576). Presumptions of temporal application function as “tool[s]” (*Tran*, at para. 48) or “guide[s]” (*R. v. Ali*, [1980] 1 S.C.R. 221, at p. 235) in this interpretative exercise.



[195] Where the legislature's intention as to the temporal application of specific legislation can be discerned using principles of interpretation other than those presumptions of temporal application, courts are bound to give effect to that intention (*R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612, at paras. 10-11; see also *Ali*, at p. 239).

[196] However, absent transitional provisions and where those principles of interpretation fail to provide a clear answer, the general presumptions governing temporal application become central to the analysis. They have been developed in the jurisprudence, drawing on first principles, to guide courts in determining what legislatures must have intended regarding the temporal application of new legislative provisions. These presumptions are themselves expressed in legislation, such as the federal *Interpretation Act* (see, e.g., ss. 43 and 44). Among them are the presumption of immediate application of purely procedural law, the presumption against retrospectivity, and the presumption against interference with vested rights, discussed in further detail below.

[197] Parliament of course remains free to depart from the default rules it prescribes (*Interpretation Act*, s. 3(1)), including by specifying how the temporal presumptions are to be applied in given circumstances (see, e.g., *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880, at p. 909). Throughout the analysis, courts must thus be mindful of indicators of Parliament's contrary intention.

[198] As I will explain, using these presumptions to determine whether the new limitation in s. 535 applies in a given circumstance requires asking the following question: would applying the new rule interfere with a substantive legal interest that has vested before the coming into force of the new rule? If so, the new rule is presumed not to apply in the circumstances. Otherwise, the new rule is presumed to apply.

[199] To answer that question, we must first look to the definition of a “substantive legal interest”; and second, ask whether such an interest has “vested”. As I shall elaborate below, a substantive legal interest is a right, privilege, obligation or liability that is not merely about how a litigant conducts litigation but has direct implications for the individual outside the courtroom (see *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at paras. 91-92). Whether the substantive legal interest has vested before the coming into force of the new rule depends on whether all factual prerequisites to its recognition have occurred (see *R. v. Puskas*, [1998] 1 S.C.R. 1207, at para. 14).

[200] Prior jurisprudence may already provide whether a given rule presumptively applies. Thus, where the new rule bears directly on criminal liability (i.e., offences, defences and sentence), which is clearly substantive, it is presumed not to apply where the alleged criminal offence was committed before the coming into force of the new rule (*Poulin*, at para. 58). Conversely, if jurisprudence establishes that a new rule is purely procedural (e.g., new judicial investigative hearings as in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R.

248), it is presumed to apply immediately in all circumstances (*Chouhan*, at paras. 91-92 and 103).

[201] Otherwise, where the application of the presumptions has not been authoritatively determined, the presumptions must be directly considered (*Puskas*, at para. 14). As explained by this Court in *Tran* and *Poulin*, the presumptions are rooted in the inherent tension between the legal values of fairness and the rule of law.

[202] In the sections that follow, I explain why the question of temporal application before us turns on whether applying the new rule would interfere with a substantive legal interest that vested before it came into force. First, I consider the three relevant presumptions of temporal application as identified in the jurisprudence and in the *Interpretation Act*. I next address the combined effect of these presumptions. Finally, I review the distinction between “substantive” as opposed to “procedural” legal interests and provide guidelines to identify when a substantive legal interest can be said to have “vested”.

(a) *The Presumptions of Temporal Application*

[203] The present case asks this Court to determine the temporal application of the amendment of a *Criminal Code* provision. It turns on the interpretation and interrelationship between three presumptions: (1) the presumption of immediate application of purely procedural legislation; (2) the presumption against retrospective

application of legislation; and (3) the presumption against interference with vested rights.

[204] I turn first to the presumption of immediate application of purely procedural legislation. Where the change in the law is purely procedural, in that applying it would not, in any circumstances, affect a substantive legal interest, such as a substantive right or liability, the new rule is presumed to apply immediately to all (*Dineley*, at paras. 10-11; see also *Application under s. 83.28*, at para. 56; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 331-32; *Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94, at pp. 95-96; *Interpretation Act*, s. 44(c) and (d)). Whether the legislation could be classified as procedural in the abstract is not determinative. As recognized by this Court in *Dineley*, all that matters for this presumption is the presence or absence of an effect on substantive matters (para. 11; see also *Chouhan*, at paras. 91-92; *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 (P.C.), at pp. 562-63, cited in *Martin v. Perrie*, [1986] 1 S.C.R. 41, at pp. 48-49). The corollary of the purely procedural presumption is that only effects on substantive legal interests provide grounds to presume a new rule does not apply.

[205] Although the inquiry has sometimes been expressed in terms of substantive rights (see, e.g., *Dineley*, at paras. 10-11), it also involves other substantive legal interests that may not be commonly understood as rights, such as substantive liabilities and obligations (Sullivan, at p. 786; *R. v. Bourque* (2005), 193 C.C.C. (3d) 485 (Ont. C.A.), at para. 11; *Yew Bon Tew*, at pp. 562-63). Past decisions of this Court make it

clear that the term “right” in this context has a broad meaning and clearly includes, for example, matters touching the accused’s criminal liability, such as available defences or sentence (*Chouhan*, at para. 92, citing *Dineley*, at paras. 52-66, per Cromwell J., dissenting, but not on this point). The term “legal interests” may be more appropriate when describing this broad category of substantive effects, because as Professors Pierre-André Côté and Mathieu Devinat have observed, it may be unnatural to speak of an accused person having a *right* to be tried in accordance with the law as it existed at the time of an alleged offence that has since been repealed, for example (para. 600). As a result, I refer to the more general term substantive “legal interests” rather than substantive “rights”, encompassing the full breadth of this category reflected in this Court’s jurisprudence.

[206] Second, the presumption against retrospectivity means that a change to the law is presumed not to attach “new prejudicial consequences” to events that occurred before the change (*Tran*, at para. 43, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 186; Sullivan, at p. 750, citing E. A. Driedger, “Statutes: Retroactive Retrospective Reflections” (1978), 56 *Can. Bar Rev.* 264, at p. 276). Professor Ruth Sullivan notes that while the presumption is “sometimes invoked . . . in an attempt to protect a common law or statute-based right” it is more often invoked where new prejudicial consequences are attached to “an offence committed before the legislation came into force” (pp. 750-51; see, e.g., *Poulin*, at paras. 58-59; *K.R.J.*, at para. 23). While the presumption is subject to certain exceptions including an exception related to public protection (*Tran*, at paras. 47 and 50, citing *Brosseau v. Alberta*

*Securities Commission*, [1989] 1 S.C.R. 301), they are not relevant here. The presumption is focused on whether the new rule interferes with the legal consequences flowing from events that occurred before the change. If so, the new rule is presumed not to apply.

[207] This Court has said that retrospectivity should not be confused with retroactivity (*Épiciers Unis Métro-Richelieu Inc., division “Éconogros” v. Collin*, 2004 SCC 59, [2004] 3 S.C.R. 257, at para. 46; see also Côté and Devinat, at paras. 519-20; Sullivan, at pp. 728-29). In broad strokes, the retroactive application of law does not merely attach new consequences to past facts (as is the case with retrospective application), but rather deems the law applicable to those facts to have been different from what it actually was (Sullivan, at pp. 737-38; Driedger (1978), at pp. 268-69; *Benner*, at para. 39). Here, the new s. 535 of the *Criminal Code* does not deem the law to have been different than it was in the past and the parties did not argue that it does.

[208] Third, there is the presumption against interference with vested rights. This presumption has a different focus than the presumption against retrospectivity but can be similar in effect. Legislation is presumed not to interfere with rights held by individuals that were “tangible, concrete and distinctive” before it came into force (*Dikranian*, at paras. 32-34 and 39). These rights may arise in private law, such as rights in property, contractual rights or rights to damages, or may be statutory creations, such as certain substantive rights in the litigation process (Sullivan, at pp. 760 and 762). The threshold of “tangible, concrete and distinctive” has two primary facets: (1) the right

must be that of a particular individual rather than belonging to a community or general class; and (2) the right must be sufficiently constituted before the coming into force of the legislative change, in that it exists and is possessed by individuals at the relevant time (*Dikranian*, at paras. 37 and 39). If a new rule would interfere with a right with these features, such that it has “vested”, it is presumed not to apply.

[209] These presumptions of temporal application and others have been in part codified by Parliament in the *Interpretation Act*, which provides:

**3 (1)** Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

...

**43** Where an enactment is repealed in whole or in part, the repeal does not

...

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

(d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.

**44** Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

...

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

(i) in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment,

(ii) in the enforcement of rights, existing or accruing under the former enactment, and

(iii) in a proceeding in relation to matters that have happened before the repeal;

(b) *The Combined Effect of the Presumptions*

[210] How are we to understand the relationship among these three relevant presumptions such that we can apply them together in a principled way? The inquiry starts by asking whether the new rule is purely procedural, since, in the affirmative, it is unnecessary to consider the other temporal presumptions. This is because, as I have said, where it is shown that a new rule is purely procedural, it applies immediately in all circumstances. The longstanding principle that there can be no vested rights in procedure (see *Wright*, at pp. 95-96; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 265-66; *Wildman*, at p. 331; *Application under s. 83.28*, at para. 62; *Chouhan*, at para. 99) means there is no need to ask about vesting where only procedure



is affected. Where, however, the new rule is not purely procedural, the analysis must continue to consider the other presumptions.

[211] Some argue before us, to the contrary, that a finding that an amendment is not purely procedural ends the analysis and renders recourse to other presumptions of temporal application unnecessary. According to this theory, as soon as substantive rights are “engaged”, the new rule presumptively does not apply to any accused alleged to have committed an offence before the change in the law (I.F. (Canadian Civil Liberties Association (“CCLA”)), at para. 30; see also R.F. (Archambault), at para. 41). The CCLA, in particular, relies on the statement in *Dineley*, at para. 10, that “where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable”. This statement means, the CCLA says, that if an amendment affects a substantive right, the amendment does not apply to any accused whether or not the right has vested (I.F., at para. 23).

[212] I do not accept this interpretation of *Dineley*. There is no indication that this Court in *Dineley* intended “vested or substantive rights” to suggest the existence of two distinct types of rights for the purpose of the temporal presumptions, as opposed to offering two adjectives to describe the same class of rights (para. 10). None of the references cited in *Dineley* (*Angus*, at pp. 266-67; *Application under s. 83.28*, at para. 57; *Wildman*, at pp. 331-32) appear to apply that bifurcation. Further, while this Court relied on *Dineley* more recently in *Chouhan*, there is nothing in the reasons of Moldaver and Brown JJ. on this issue that purports to apply “substantive” and “vested”

rights as disjunctive ideas (see paras. 91-92 and 96). That language from *Dineley* is absent from their restatement of the relevant principles (paras. 91-92) and at para. 96 they wrote that “even where a procedure operates more favourably to the accused than its replacement, there is no vested interest, and by extension, no substantive right to a specific procedure”, expressly equating them. This Court in *Dineley* did not have to consider vesting in any detail given, in that case, the amendment at issue was found to affect a criminal defence and only came into force midway through trial.

[213] How then do the other two presumptions described above apply where the new rule is not purely procedural? The relationship between the presumptions against retrospectivity (against a change in the law attaching new prejudicial consequences to events that occurred before the change) and against interference with vested rights (against legislation interfering with an individual’s rights that were vested before it came into force) can be vexing, because while they are framed to focus on different elements of temporal application, they can be understood as overlapping, or as “different sides of the same coin” (Sullivan, at p. 770). They are both invoked in circumstances, as here, where parties seek to protect rights (p. 750). As Ruth Sullivan explains, “[i]nterference with a vested right is always retrospective in that rights arise by virtue of facts that fulfil the conditions precedent to the right and subsequently impairing them changes the legal consequences of those facts in a prejudicial way” (pp. 750-51, fn. 91). The two presumptions both target legislation that “change[s] the future legal consequences of past facts” (p. 770). It is unsurprising that this Court referenced the presumptions in the same breath in *Dineley* (at para. 10) and that other courts have

done the same (see, e.g., *Bell Canada v. Amtelecom Limited Partnership*, 2015 FCA 126, [2016] 1 F.C.R. 29, at paras. 34-35).

[214] This overlap is consistent with the codification of the vested rights presumption in the *Interpretation Act*, which makes clear that repeal does not affect “any right, privilege, obligation or liability” arising under the repealed legislation (s. 43(c); see also Sullivan, at p. 761). In all these cases, whether conceived as the presumption against retrospectivity or the presumption against interference with vested rights, the presumption prevents changes to legal interests that have arisen because of past facts. The presumption against retrospectivity says that if the new rule attaches new prejudicial consequences to those facts, for example because it eliminates a right that those facts gave rise to under the previous state of the law, it is presumed not to apply. The presumption against interference with vested rights and the remainder of s. 43(c) of the *Interpretation Act* say that the new rule will also be presumed not to apply if applying it would affect any pre-existing right, privilege, obligation or liability (i.e., legal interest), for example by eliminating a pre-existing right.

[215] The combined effect of these presumptions, therefore, is to look at the facts that had occurred before the new rule came into force and decide whether they establish a legal interest that the law is presumed to protect. If so, the new rule will be presumed not to apply where it would interfere with that interest.

[216] Our jurisprudence refers to a legal interest as “vested” when all the facts, or in the language of *Puskas* “conditions precedent” (para. 14), have occurred for the

law to recognize it. Where the legal interest has vested before a new rule came into force, the new rule is presumed not to apply if it would interfere with that legal interest. And because the purely procedural presumption provides that only substantive legal interests can raise a presumption of non-application — there is no vested substantive legal interest in procedure — these legal interests must necessarily be substantive.

[217] Thus, in applying these three presumptions, the key question is whether the new rule would interfere with a substantive legal interest that had vested before its coming into force.

[218] Answering that question requires understanding when a legal interest is “substantive” and when it has “vested”. These two thresholds are the heart of the presumptions relevant to the disposition of this appeal. Both concepts are thresholds seeking to balance the underlying legal values of fairness and the rule of law (see, e.g., *Tran*, at paras. 44-45; *Poulin*, at para. 62).

(c) *The Substantive Threshold*

[219] It has sometimes proven difficult for courts to identify whether a new rule can interfere with a substantive legal interest or whether it is purely procedural (Côté and Devinat, at para. 707, citing *Dineley*). Reconciling all past precedents may be an “impossible task” (*Dineley*, at para. 15).

[220] The balance of fairness and the rule of law in the presumption of immediate application of purely procedural legislation is reflected in the “substantive” threshold, which starts from the premise that interference with existing legal interests and other unjust results of applying new legislation should be avoided (Sullivan, at p. 786). However, if those legal interests are to be protected, it is necessary to have effective procedural rules that allow them to be vindicated in court. Giving procedural reform immediate effect ensures that courts do not continue to carry out procedures that the legislature has decided are less than ideal for that purpose (see Côté and Devinat, at para. 690; see also P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993), at p. 548; D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed. 2020), at pp. 271-72). In this way, applying new procedural rules immediately to all is “deemed beneficial for all” and protects, rather than interferes with, settled expectations (*Application under s. 83.28*, at para. 62). As a legal interest becomes less a means to establish other rights and liabilities through litigation and more as an end in itself independent of that litigation, it becomes more likely that the legal interest will meet the “substantive” threshold (see *Chouhan*, at para. 92, per Moldaver and Brown JJ.).

[221] The appropriate balance as reflected in the “substantive” threshold should be guided by the case law on temporal application, which shows how it is achieved in particular contexts. The jurisprudence reveals at least three broad categories of recognized interference with substantive legal interests in the criminal litigation context. In the first category are those effects that can be said to bear directly on

criminal liability, specifically the penal consequences the law will attach to impugned conduct (see, e.g., *Poulin*, at paras. 58-59). This group includes material changes to the elements of the offence, applicable defences and sentences, which could leave the accused facing different consequences for the impugned conduct at the close of litigation (*Chouhan*, at para. 92; see, e.g., *Dineley*). The second category are effects on the jurisdiction of courts to hear matters and related appeals (Sullivan, at pp. 788-89; *Puskas*, at paras. 6-7). Changes to the availability of these hearings could also ultimately leave the accused facing different consequences. For example, an accused erroneously convicted at trial may be in a very different position in terms of their criminal record and liberty interest depending on whether they have a right of appeal. The third category includes effects to constitutional protections that attach to the criminal process, given these rights are “necessarily substantive” (*Dineley*, at para. 21).

[222] In determining whether a new rule can interfere with a substantive legal interest, courts should be mindful that substantive law “creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained” (*Sutt v. Sutt*, [1969] 1 O.R. 169 (C.A.), at p. 175, cited in *Chouhan*, at para. 94). As noted in *Chouhan*, procedural amendments will generally “alter the method by which a litigant conducts an action or establishes a defence or asserts a right” (para. 92 (emphasis added)). However, even if a right is dependent on litigation to exist, it may still be substantive. Many of our constitutional rights, including the right to be tried within a reasonable time, depend on litigation. Section

11 of the *Charter* provides explicitly that the rights it protects arise where a person is “charged with an offence”. They remain, however, “necessarily substantive” (*Dineley*, at para. 21), because their protection is not merely instrumental but an end our law seeks to guarantee.

[223] In addition, where a potentially relevant substantive legal interest has been identified, the new rule must “affect [its] content or existence” to establish an interference with that interest for the purpose of the temporal presumptions; a mere impact on “the manner of its enforcement or use” does not amount to interference unless it renders enforcement or use practically impossible (*Angus*, at pp. 265-66 (emphasis in original); see also *Dineley*, at paras. 15-16; *Côté and Devinat*, at para. 707).

(d) *The Vesting Threshold*

[224] The presumptions against retrospectivity and against the interference with vested rights can also be understood in light of the underlying legal values, namely fairness and the rule of law, which the “vesting” threshold seeks to hold in balance (see generally *Côté and Devinat*, at paras. 615-16). On the one hand, the law acknowledges that people have the right to proceed in reliance on their substantive legal interests such that it could be unfair to abruptly change these interests by legislation (*Sullivan*, at p. 761, citing *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, at p. 417). Setting the threshold too high could undermine public confidence in the law’s stability necessary to uphold the rule of law. But the legislature must have the flexibility to

change the law to achieve evolving public policy goals. Setting the threshold too low could frustrate the democratic evolution of the law (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at pp. 282-83). As the affected substantive legal interest becomes one on which people are likely to place greater reasonable reliance in conducting their affairs, the less likely it is that the new rule should apply.

[225] Many different words have been used in our jurisprudence and in the *Interpretation Act* to capture the idea that legal interests must be sufficiently constituted to benefit from a presumptive protection against interference (“acquired”, e.g. *Interpretation Act*, s. 43(c); “accrued”, e.g. *Interpretation Act*, s. 43(c), *Gustavson Drilling*, at p. 284, and *Dikranian*, at para. 39; “vested”, e.g. *Gustavson Drilling*, at p. 282; “crystallize[d]”, e.g. *Benner*, at para. 51, and *Dikranian*, at paras. 30 and 43; “materialized”, e.g. *Dikranian*, at para. 40; “tangible and concrete”, e.g. *Dikranian*, at para. 37). Thus, “vesting”, as the term is used here, must be understood to capture the full breadth of these circumstances.

[226] For some legal interests the jurisprudence will provide clear answers about when it has vested. For example, it is clear from the authorities that criminal liability, that is the substantive law governing elements of the offence, corresponding defences and applicable sentence, vests at the time of the commission of the alleged offence (*Poulin*, at paras. 58-59; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, at para. 41; *K.R.J.*, at para. 1; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*,



[1990] 1 S.C.R. 1123, at pp. 1151-52; *Interpretation Act*, s. 43(c) to (e)). The accused's criminal liability is determined under the law prevailing at the time of the alleged offence and law coming into force after that date is presumed not to interfere with the liability so incurred.

[227] As compared with criminal liability, determining when vesting occurs will be more difficult when dealing with unique statutory rights created to achieve specific legislative goals. As Professor Sullivan has observed, the methods of enforcing such rights and claims "follow no fixed pattern" (p. 762). The legislature has the freedom to craft the features of such a right, including when it can be considered to have vested. A court's task is to identify the conditions precedent to vesting based on the unique right the legislature has created, which requires careful attention to the statutory context and to the purposes of the threshold described above.

[228] The facts that must occur for a statutory legal interest to vest therefore depend on its unique nature (*Dikranian*, at para. 40). In the tax context, for example, it is "imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed" (*Gustavson Drilling*, at pp. 282-83). In contrast, in the immigration law context, it is imperative that permanent residents be able to organize their lives, such that clear "obligations must be communicated to them in advance" (*Tran*, at para. 41). In examining when a legal interest vests under the *Criminal Code*, courts should thus be mindful of the delicate

balancing exercise underlying the threshold in light of the specific context in which the statutory right arises.

[229] That said, it will be difficult to say a legal interest is vested where it remains contingent on an intervening action or event. For example, when the creation of the legal interest requires a third party to exercise discretion in a particular way, and that discretion could lawfully be exercised differently, the threshold is unlikely to be met (Sullivan, at pp. 766-67; see, e.g., *Tuffnail v. Meekes*, 2020 ONCA 340, 449 D.L.R. (4th) 478, at para. 104). In other words, the favourable exercise of that discretion by the third party is likely to be considered a condition precedent for the legal interest to vest. Likewise, if people had the ability to take the action necessary to acquire a certain benefit but failed to do so before the coming into force, it is more difficult to conclude that any reliance placed on that unrealized possibility deserves to be protected (see, e.g., *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, at pp. 742-43; *Abbott v. Minister for Lands*, [1895] A.C. 425 (P.C.), at pp. 430-31). Alternatively, where actions are not required to obtain the interest under the law but are only mere formalities in exercising it, they are unlikely to be preconditions to the vesting of that interest (see, e.g., *Re Falconbridge Nickel Mines Ltd. v. Minister of Revenue for Ontario* (1981), 32 O.R. (2d) 240 (C.A.), at p. 250).

(e) *Conclusion on the Applicable Principles*

[230] The presumptions governing temporal application are tools used to determine the legislature's intent. There may be other bases on which courts will

decline to apply a new rule, in accordance with other principles of interpretation. But where other principles fail to provide a clear answer regarding the temporal application of a new rule, the presumptions become central to the analysis.

[231] The three presumptions at issue all direct careful focus on the effects to an individual's legal interests of applying the new rule. Together, they provide that the new rule will presumptively apply unless it interferes with a substantive legal interest that had vested before it came into force. This inquiry can be understood in two stages.

[232] First, if the new rule is purely procedural, in that applying it could not interfere with *any* substantive legal interest, it is presumed to apply immediately in all circumstances. Whether a legal interest is substantive is guided by categories settled in the jurisprudence, and the underlying legal values of fairness and the rule of law rather than the abstract procedural nature of the legislation itself.

[233] Second, if the new rule *can* interfere with a substantive legal interest, the next question is whether applying it in the circumstances would affect a substantive legal interest that vested before it came into force. A legal interest vests once all the facts necessary to recognize its existence have occurred. While those facts may generally be settled for recurring categories such as criminal liability, in cases involving unique statutory rights, careful attention must be paid to the nature of the right as expressed in the statute in light of how the legislature has balanced the reasonable expectations of interest holders against the democratic evolution of the law.

(2) The Temporal Application of Section 535

[234] To answer the question of which accused are subject to the new limitation on the right to a preliminary inquiry in s. 535 (that the offence charged be punishable by 14 years or more imprisonment), the parties have proposed three possibilities. First, the Crown's position is that the new rule applies immediately, unless a preliminary inquiry was in progress or a request to hold one had been made before it came into force (A.F., at para. 77). It argues that preliminary inquiries are not part of the substantive law that is presumptively determined by the law in force at the time of the commission of the alleged offence (paras. 49-62). In the Crown's view, changes to the availability of preliminary inquiries should not be put on the same footing as the changes to the elements of an offence or contemporaneous defences (paras. 64-65).

[235] Second, the respondents answer that because it is substantive, the right to a preliminary inquiry arose at the time of the alleged commission of the offence (R.F. (Archambault), at para. 41; R.F. (Grenier), at para. 1). Courts are and should be reluctant to apply penal provisions retrospectively. Under the principle of legality, according to the respondents, substantive law includes not only the elements of the offence, any relevant defences and the maximum sentence, but also incidental procedures like the preliminary inquiry. The new limitation therefore only applies to accused persons whose offences were allegedly committed after its coming into force.

[236] And third, the respondents submit in the alternative that the new limitation only applies to accused who had not yet had their first appearance. They submit that

the entitlement to a preliminary inquiry vested at first appearance, because accused persons then have their first possibility to make a request (R.F. (Archambault), at para. 45; R.F. (Grenier), at para. 3). Because there was no impediment to their election as to the mode of trial, and depending on their election, to ask for a preliminary inquiry, their statutory right to a preliminary inquiry was vested (R.F. (Archambault), at paras. 48 and 54-65; transcript, at pp. 91-96). On the facts of this case, the respondents had specifically reserved or deferred their election and request before the coming into force of the new limitation (R.F. (Archambault), at para. 46).

[237] Looking first to the legislation, there are no explicit transitional provisions that apply to s. 535. While Parliament's general purpose of eliminating delay in the criminal justice system is well understood (see, e.g., *House of Commons Debates*, at pp. 19602-4), courts must be careful not to equate the purpose of the new rule with Parliament's specific intention as to temporal application. Regardless of the conclusion as to the class of accused to which it applies, the amendment here would still limit the availability of preliminary inquiries, thus serving Parliament's general purpose.

[238] The delayed coming into force of the amendment by 90 days can, like the rest of the statutory context, be a relevant factor to consider in the broader analysis (Sullivan, at p. 775; *Newton v. Crouch*, 2016 BCCA 115, 384 B.C.A.C. 164, at para. 78). Here, it may be an indication that Parliament intended to provide notice to people that could immediately be impacted by the new rule (i.e., accused persons already in the criminal justice system). However, a delay in coming into force is not on its own

determinative of legislative intent (*Ali*, at pp. 242-43), and it is insufficient here to give a definitive answer as to the circumstances in which Parliament meant the new rule to apply.

[239] The Crown notes that the sponsoring Minister's department later stated that the amendment applied to those who had not asked for a preliminary inquiry by the time of coming into force (Department of Justice, *Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament)* (2019), at p. 24, fn. 68; A.F., at para. 90). This Court cannot, though, put undue weight on these statements made outside of Parliament after enactment, since it is intent of the enacting Parliament that determines the proper interpretation (see *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, at para. 98).

[240] As there is no clear basis on which to draw a conclusion about Parliament's specific intention regarding the temporal application of the new s. 535, the temporal application therefore falls to be determined using the temporal presumptions, in line with the framework set out above.

- (a) *Can the Limitation on the Right to a Preliminary Inquiry Impact a Substantive Legal Interest?*

[241] One of the effects of denying accused persons a preliminary inquiry is the loss of the benefits derived from its discovery function, including the opportunity to cross-examine witnesses before trial, and to test the strength of the case. Even though the discovery function of preliminary inquiries has lost some of its significance over time, in practice, the discovery function still offers important strategic value to accused persons (see, e.g., *N.S.*, at para. 40; *R. v. Rao*, 2012 BCCA 275, 323 B.C.A.C. 165, at para. 95). For many accused, that may be its “real worth” (Paciocco, at p. 160; see also K. Roach, “Preserving Preliminary Inquiries” (1999), 42 *Crim. L.Q.* 161, at p. 162). The preliminary inquiry “enables the defence to flesh out a Crown witness’s story and commit the witness to a specific and detailed account. If a witness’s testimony at trial conflicts with his or her evidence at the preliminary inquiry, such inconsistencies will provide a basis for impeachment” (S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶9.126; see also M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2024* (31st ed. 2024), at pp. 579-80).

[242] An accused has a constitutional right to disclosure under *Stinchcombe* (*R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35, at para. 18), and constitutional protections in the criminal process are “necessarily substantive” (*Dineley*, at para. 21). However, the removal of the preliminary inquiry does not interfere with this constitutional right. Whether a change is said to be strategically important to the accused does not, on its own, establish that it interferes with a substantive legal interest (*Chouhan*, at paras. 96-98, per Moldaver and Brown JJ.). Here, the Crown’s duty to

disclose does not extend to making witnesses available for examination (*R. v. Khela*, [1995] 4 S.C.R. 201, at para. 18). The Crown must meet its duty regarding disclosure despite the availability of the preliminary inquiry. Thus, losing an additional discovery function cannot interfere with the constitutional right to disclosure.

[243] Moreover, although proceeding without a preliminary inquiry may affect how an accused *conducts* their defence, for example by losing the possibility of cross-examining to establish an evidentiary basis for trial (see *R. v. George* (1991), 5 O.R. (3d) 144 (C.A.), at pp. 144-45), changing a purely evidentiary hearing will generally be relevant only to the *means* (or method) by which the related litigation is resolved. Cross-examining witnesses at a preliminary inquiry is simply “not a component of the right to make full answer and defence” (*Bjelland*, at para. 32). Changes to hearings in the criminal context for the purpose of gathering evidence or information have been understood as purely procedural (see, e.g., *Application under s. 83.28*, at para. 61).

[244] Still, I agree with Doherty J.A. in *R.S.* that the rule limiting the right to a preliminary inquiry can interfere with a substantive legal interest when its effect is to eliminate the opportunity for accused persons to be discharged at the close of the inquiry (para. 49). Where the Crown cannot meet its low evidentiary burden for an accused to be ordered to stand trial, the accused must be discharged following the preliminary inquiry (*Cr. C.*, s. 548(1)(b)). In my view, the opportunity available at a preliminary inquiry to be “spare[d] . . . the ordeal of an unjustified criminal trial” (Penney, Rondinelli and Stribopoulos, at ¶9.131) is a substantive legal interest. As



noted by our Court in *Skogman*, the screening function of the preliminary inquiry “is to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process” (p. 105).

[245] This opportunity to be discharged at the preliminary inquiry may also be an opportunity for the accused to remove limits on their liberty, where the accused is remanded to custody or subject to restrictive terms pending trial. When there is no preliminary inquiry, the accused may remain subject to these restrictions on liberty until the proceedings are concluded (Gold and Presser, at pp. 147-48 and 164; C. M. Webster and H. H. Bebbington, “Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Empirical Observations” (2013), 55 *C.J.C.C.J.* 513, at p. 521; see also *R.S.*, at paras. 57-58). These effects cannot be understood only in the litigation; they do not merely change how the accused advances their defence. The opportunity to avoid the stigma and personal stress related to an unresolved criminal charge, to avoid a needless trial where evidence is insufficient, and to be free of any restrictions on liberty, exists apart from the methods or means of conducting the litigation. This opportunity is thus a substantive legal interest that can be interfered with should the availability of a preliminary inquiry be removed.

[246] The right to a preliminary inquiry is analogous in this way to the right to have an appeal heard, which is a substantive right (*Côté and Devinat*, at para. 718, citing *Puskas*). Like the right to an appeal, the right to a preliminary inquiry entitles the

holder to a further opportunity to challenge or mitigate their criminal liability. Although they arise at different times in the proceedings (one before trial and the other after judgment), both may end in a disposition that bears on the accused's (or appellant's) circumstances outside the courtroom. They are in this way distinct from hearings that are merely evidentiary and do not culminate in this kind of determination (see, e.g., *Application under s. 83.28*).

[247] In sum, adding this new limitation on the right to a preliminary inquiry can interfere with a substantive legal interest. It can affect the very existence of the opportunity to obtain a discharge. It is not purely procedural and does not attract immediate application in every circumstance. To determine whether or not the new rule is presumed to apply in a given circumstance, we must ask whether applying it in that circumstance would interfere with a substantive legal interest that had vested before its coming into force.

(b) *When Does the Right to a Preliminary Inquiry Vest?*

[248] Here, the parties disagree as to which preconditions are essential for the right to a preliminary inquiry to have vested. As this is a statutory right that has never been considered by this Court, we must determine the necessary preconditions by looking to the statutory construction of the right, understood in light of the underlying values of fairness and the rule of law that govern this area of the law. In line with the submissions of the parties, I examine three key points in the criminal process: first, the time of the commission of the alleged offence; second, the point in the proceedings at

which there are no further conditions outside the control of the accused to ask for a preliminary inquiry; and third, when the request is made. As I shall explain, I conclude that requesting a preliminary inquiry is a necessary precondition to exercising the right, such that the right only vests at that third point.

[249] First, the right to a preliminary inquiry does not vest when the offence is alleged to have been committed. While the removal of the right to a preliminary inquiry interferes with a substantive legal interest, it does not follow that the opportunity to be discharged at a preliminary inquiry forms part of the “substantive law” about criminal liability that is understood to vest at the time of the commission of the offence. Respectfully, the Court of Appeal erred to the extent it held otherwise (para. 17). It is clear from our jurisprudence that not all substantive legal interests will vest at the time of the commission of the offence. For example, the right to an appeal, while substantive, is determined in reference to the date when the judgment below is issued, not the date the underlying offence was committed (see *Puskas*, at para. 14; see also *Tcheng v. Coopérative d’habitation Chung Hua*, 2016 QCCA 461, at paras. 36-38 and 59-60). The elements of the offence establishing guilt, the existence of a defence and the applicable sentence all determine the criminal liability the law attaches, if any, to the impugned conduct. The availability of an appeal or a preliminary inquiry have no such impact and do not fall within the “substantive law” described in *Poulin*.

[250] In *Poulin*, our Court explained that the substantive law which directly governs criminal liability is generally determined as of the commission of the offence

(paras. 58-59; see also *Tran*, at paras. 43-45). The reasoning outlined in that case is the principle of legality — the idea that we ought to protect a person’s reliance on the state of the law when they were deciding how to conduct themselves and whether to “risk the liability” associated with breaking the law (*Poulin*, at para. 59; see also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, at p. 1152). As I have said, the preliminary inquiry, like an appeal, does not directly affect the criminal liability the law attaches to impugned conduct. Conduct is not made legal or illegal, nor made subject to greater or lesser penal consequence because it could be examined at a preliminary inquiry or on appeal. Thus, it does not implicate the principle of legality in the same way as a change to the substantive law defining whether that conduct is subject to the consequences of criminal liability. It strains credulity to imagine that people weigh the availability of a preliminary inquiry, or of an appeal, in determining how to conduct themselves and whether to risk criminal liability. At the time of the commission of the offence, no expectation is created with which it would be unfair to interfere.

[251] The availability and exercise of the right ultimately depends on significant contingencies standing between the commission of the offence and the holding of a preliminary inquiry, including whether a charge will actually be laid and, in the case of a hybrid offence, whether prosecutorial discretion will be exercised to proceed summarily. The existence of these discretionary steps before a preliminary inquiry could ever be available is fundamentally incompatible with a vested legal interest (*Sullivan*, at pp. 766-67; *Tuffnail*, at para. 104). There is nothing unfair about changing

a person's entitlement to a preliminary inquiry when it is unclear if they will ever have the right to one, depending on the Crown's exercise of discretion on whether to charge or what charge to lay, or how to prosecute the charge that is laid.

[252] I now turn to the respondents' alternative submission, that the first appearance of the accused is the point where there is no additional contingency and the right has vested, given the accused can make a request for a preliminary inquiry at any time (R.F. (Archambault), at paras. 9 and 45; R.F. (Grenier), at para. 3). The respondents say that, in Quebec, an accused generally reserves their election at first appearance (R.F. (Archambault), at para. 68). After that point they may elect their mode of trial, and if they elect to be tried in the Superior Court, they may request a preliminary inquiry.

[253] The *Criminal Code* provides that where an accused does not elect a mode of trial when put to their election they will be deemed to have elected to be tried by judge and jury (ss. 536(2) and (2.1) and 565(1)(b); see also Vauclair, Desjardins and Lachance, at p. 574; *Martin's Annual Criminal Code 2025 (2024)*, by M. Henein and M. R. Gourlay, at pp. 1150-51). The accused may re-elect to another mode of trial where permitted by the *Criminal Code* (s. 561).

[254] It is in this context that the respondents say a practice has developed in Quebec where an accused generally postpones ("*reporte*") their election to a future time. According to Nicolas Bellemare [TRANSLATION] "[i]n practice, at the appearance, the election as to the mode of trial is postponed" ("Les procédures précédant le procès

en matière criminelle”, in Collection de droit de l’École du Barreau du Québec 2024-2025, vol. 12, *Droit pénal - Procédure et preuve* (2024), 39, at p. 70 (emphasis added); see also A. Gagnon-Rocque and J. Héroux, “Arrestation, comparution et mise en liberté”, in *JurisClasseur Québec — Collection Droit pénal — Preuve et procédure pénales* (loose-leaf), fasc. 5, at No. 110). By deferring the election, the accused will obtain the benefit of disclosure and the opportunity to retain and be advised by counsel (*ibid.*; see also Henein and Gourlay, at p. 1150). In that sense, the “reserve” of the election, noted by the court in the indictment, may be taken to confirm the accused can elect and request a preliminary inquiry at any time. From that point on, whether the accused will ultimately have a preliminary inquiry is dependent only on the law and their own actions.

[255] Although this may be true of the first appearance in Quebec, this may not be true of the first appearance across the country. In post-charge screening jurisdictions — which, according to the Attorney General of Ontario, include Ontario, Saskatchewan, Nova Scotia, Newfoundland, and Prince Edward Island (I.F., at para. 15) — the eligibility for a preliminary inquiry remains contingent even after first appearance, as the accused may not yet have the possibility to elect the mode of trial (*ibid.*; see also Penney, Rondinelli and Stribopoulos, at ¶9.43). However, at some point in the pre-trial stage of a criminal proceeding, there may be no impediment to the accused’s election and potential request for a preliminary inquiry.

[256] We must, of course, remain mindful that while criminal procedure is national in scope, there is important variation in the specifics of how that procedure is applied across jurisdictions and levels of court (see, e.g., S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 29). Local practices regarding the administration of justice can vary throughout the country, as long as they remain consistent with the enacted criminal law provisions.

[257] The general issue here is whether the right to a preliminary inquiry vests once the accused is able, through their own choices and actions, such as electing their mode of trial and making a request for a preliminary inquiry, to ensure they have a preliminary inquiry. The respondents submit the right vests when accused persons have their first opportunity to make a request. In Quebec, therefore, this occurs on first appearance because that is when the election as to mode of trial is put to the accused. In other provinces and territories, the manner in which the court acknowledges the accused's deferral of these rights may vary.

[258] There are fewer contingencies here than at earlier points in the criminal process, such as the moment of the commission of the offence or the point at which the accused is charged. In effect, the choice between the Crown's position and the respondents' alternative depends on the answer to the question of whether actually making a request — rather than the ability to make a request — is a precondition of vesting. Not every formal requirement in a proceeding is necessary for a right to vest. Because the right to a preliminary inquiry is a statutory right, the answer turns on the

terms through which Parliament defines that right as seen through the lens of the legal values underlying transitional law.

[259] Under the legislation considered in *Puskas*, the right to appeal was not framed as contingent on a notice of appeal being filed (*Cr. C.*, s. 691(2)), even though an existing right to appeal could be lost if the appellant did not file a notice of appeal within the applicable time limit (see, e.g., *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 58 to 60). It is unsurprising then that the notice of appeal was not identified as a condition precedent to the right of appeal at issue in that case (*Puskas*, at para. 15).

[260] In contrast to the right of appeal in *Puskas*, s. 535 frames the request as a precondition of the existence of the right. Section 535 expressly provides that “[i]f . . . a request has been made for a preliminary inquiry, the justice shall . . . inquire into the charge”. The French version reads: “*Lorsqu’un[e] . . . demande a été présentée en vue de la tenue d’une enquête préliminaire . . . , le juge de paix doit . . . enquêter sur l’accusation . . .*” The *Criminal Code* ties the request to the election of mode of trial (or deemed election). A preliminary inquiry will not be available if the accused elects “to be tried by a provincial court judge without a jury and without having had a preliminary inquiry” (s. 536(2)). Section 536(2) further requires that where an accused is charged with an indictable offence punishable by 14 years or more of imprisonment, other than an offence that is listed in s. 469, the justice put the accused to an election in words that include: “. . . you will have a preliminary inquiry only if you or the prosecutor requests one”.



[261] There is no express requirement of form as to how an accused may make that request other than that it be made under s. 536(4) of the *Criminal Code*. Section 536(4) provides (and provided prior to the 2019 amendments to the *Criminal Code*) that where an accused elects (or is deemed to have elected) to be tried other than before a judge of the provincial court, “the justice shall, . . . on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court . . . or . . . by the justice, hold a preliminary inquiry into the charge”. Under s. 536(4.1) the information must be endorsed to show “whether the accused or the prosecutor has requested that a preliminary inquiry be held”. The request also has concrete legal consequences that go beyond the obligation of the justice to hold the preliminary inquiry. For instance, it may also fix the conditions on which the accused has a right to re-elect the mode of trial (see *Cr. C.*, s. 561). Read together, the provisions surrounding the election of the mode of trial make clear that what triggers the holding of a preliminary inquiry is both the election of the mode of trial in which a preliminary inquiry is available (trial other than before a judge of the provincial court for an offence that is punishable by 14 years or more of imprisonment), and the request for a preliminary inquiry to be held. Indeed, even where the accused is sure to be tried by a mode through which a preliminary inquiry is available, the statute still mandates a request (s. 536(4)). And absent a request, the justice “shall” fix the date for the trial (s. 536(4.3)).

[262] Thus, s. 535 (as well as s. 536(2), (2.1) and (4)) makes clear that there is a distinction between the ability to make a request, and the right to a preliminary inquiry.

The latter can only be sufficiently vested once a request has been made (see also s. 555(1.1) and (1.2)).

[263] In some cases, recourse to the broader statutory context may reveal that explicit textual requirements are only mere formalities, as opposed to preconditions, or reveal more preconditions that may not be directly apparent from the text itself. However, this is a statutory right and the text and statutory scheme make clear that Parliament intended to make the availability of a preliminary inquiry conditional on a request actually having been made. It therefore cannot be dismissed as a mere procedural or formal step required to exercise a right that has already vested. Rather, it defines whether a preliminary inquiry can be held.

[264] Granted, where the contingencies that are dependent on third parties have been removed (i.e., a charge has been laid and the prosecution has decided to proceed by way of indictment), the accused may have a greater expectation that depending on their election of mode of trial, they would be able to eventually request a preliminary inquiry. In Quebec for example, the accused may formally postpone or “reserve” their election. But in my view, whether the accused postpones or “reserves” their election, or merely indicates they are not ready to elect, cannot be determinative of the temporal application of s. 535. This distinction finds no basis in the *Criminal Code*. Whether the accused has the opportunity, based on the jurisdiction in which they find themselves, to reserve their right, or whether they are at a point in the process at which they could elect and make a request at any time, the further steps the accused needs to take to

secure a preliminary inquiry are substantively identical: they must elect, or be deemed to elect, their mode of trial and then make a request for a preliminary inquiry for which they are eligible under the *Criminal Code*. In each case, the accused may have expected that acquiring the right to a preliminary inquiry was entirely within their control. However, the classification of a right as vested is based on the facts as they exist when the new rule comes into force, not on facts that could have existed had the accused chosen to proceed differently. In light of the manner in which Parliament has framed the statutory right to a preliminary inquiry, it is not the ability to make a request, but rather the request itself that acts as a statutory precondition to acquiring the right.

[265] The statutory text of s. 535 makes plain that the request is central to the right to the preliminary inquiry. This has been so since 2004 when the previous amendment came into force transforming the right to a preliminary inquiry as one conditional on a request being made (*Criminal Law Amendment Act, 2001*, s. 24). Because there was a 90-day period before the amendment at issue came into force, the accused had notice of the rule change. In this context, Parliament signaled that any unfairness resulting from depriving the accused of expectations that a request *could* be made would give way in favour of the clear legislative direction that a request *must* be made. There is always an element of unfairness, to a lesser or greater extent depending on the circumstances, when Parliament changes a rule that an accused may have thought would be of benefit. The presumptions of temporal application recognize, however, that only where all the preconditions mandated by Parliament have been met

will an accused have a statutory right with which Parliament presumably wished not to interfere.

[266] There are important rule of law considerations animating the availability of preliminary inquiries in s. 535. The requirement that a request be made ensures there is a clear rule that can be given a uniform interpretation across Canada, and avoids the need for a factual inquiry into whether there are any impediments to a given accused's ability to make a request. Parliament intended to create clear and readily ascertainable conditions limiting the right to a preliminary inquiry in s. 535. And in determining the temporal application of legislation, Parliament's intent remains key. Recognizing the importance of the actual request as a condition to the right to the inquiry therefore follows Parliament's choice of text and its intent. Thus, I conclude that a preliminary inquiry is not available under s. 535 until an actual request has been made.

[267] Whether a request has been made is a factual question dependent on the circumstances of each individual case. As the Crown suggested in its oral arguments, an informal demand made outside of court (as for example during the 90-day period between the new rule's enactment and its coming into force) may be enough to constitute the equivalent of a "request" within the meaning of ss. 535 and 536(4) (transcript, at pp. 10-11; see also *R.S.*, at para. 15). It may depend on the rules of practice of the particular court. In sum, where the accused has not expressed a clear demand for a preliminary inquiry, the right to a preliminary inquiry has not vested. To conclude otherwise would be to ignore the specific way Parliament designed this right

— and its relationship to the rest of the criminal process. The *Criminal Code* permits courts to set out rules that are best suited to the local context, provided they are not inconsistent with the *Criminal Code* itself (ss. 482 and 482.1). Variation in practice across jurisdictions and courts can ensure that justice is administered in a manner responsive to local circumstances.

[268] My colleagues Justices Côté and Rowe advance another possibility, namely that the right to a preliminary inquiry could have vested at the time charges were laid. While the laying of a charge removes one of the most obvious conditions precedent for the exercise of the right, the availability of a preliminary inquiry still remains subject to the numerous contingencies described above. Beyond the need for a request, the Crown will not necessarily have elected how to proceed at the time charges are laid, depending on the jurisdiction. In those circumstances, the accused cannot expect that they will have a preliminary inquiry, given the Crown may either decide to continue to proceed by indictment, where a preliminary inquiry would be possible, or summarily, where it would not.

[269] My colleague Justice Kasirer advances a final possibility, that an accused has a vested right as soon as they reserve the election of their mode of trial, due to the assurance they receive from the court about the future availability of a preliminary inquiry (paras. 91-92). There is no evidence in the record that when an accused reserves their election as to mode of trial, they receive a “judicial undertaking” that they will be provided a preliminary inquiry on request (para. 91), a practice which has no basis in

the legislation. My colleague relies on transcript of the Court of Québec's decision denying Mr. Archambault a preliminary inquiry, which occurred more than a year after he had reserved his election (para. 88). The submissions made on behalf of Mr. Archambault during that hearing are not evidence of what occurred at the time of the reserve. Even if there were evidence that the local practice of courts in Quebec actually creates, in accused persons, some kind of reasonable reliance, the right at issue is conferred by Parliament, not by the courts. Courts do not, through their informal practices and representations, have the power to vest a statutory right in an accused that was never extended to them by the legislation.

(c) *Conclusion on the Temporal Application of Section 535*

[270] The amendment to s. 535 was not purely procedural because it can interfere with a substantive legal interest by depriving an accused of the opportunity to be discharged at a preliminary inquiry. As that right vests only once a request for a preliminary inquiry is made, the new rule is presumed to apply unless the request has been made before the amendment came into force.

[271] Therefore, properly interpreted, the new limitation in s. 535 applies to all accused persons where a request for a preliminary inquiry was not made before the amendment came into force on September 19, 2019.

(3) Application to the Respondents

[272] As of September 19, 2019, no request for a preliminary inquiry had been made by Mr. Archambault, nor by Mr. Grenier. They each eventually made a request, but only months later. Can their reserve or deferral of their election, which occurred before September 19, 2019, amount to a request? In other words, is it possible, to characterize the “reserve” of the election of the mode of trial at first appearance in Quebec as the equivalent of a “request” for a preliminary inquiry as required by s. 535?

[273] As noted above, a “reserve” amounts to delaying the accused’s election to a later date. It does not mean the accused has elected a mode of trial, or made their intention for a preliminary inquiry known. There is no factual basis on which this Court could conclude that a reserve or deferral of the election by the respondents indicated an actual desire to have a preliminary inquiry. In the case of Mr. Grenier, for example, the Court of Québec merely noted on the indictment that at first appearance, he had [TRANSLATION] “postponed his election to a later date” (A.R., vol. I, at pp. 7-8). The “reserve” or postponement of an election does not amount to an actual request for a preliminary inquiry for the purposes of s. 535 *Cr. C.*

[274] Assimilating a reserve to a request would effectively mean that the mere “possibility” of making a request is enough, despite the clear intent of Parliament to make the request an essential prerequisite to the existence of this statutory right. Merely leaving open the possibility that a request may be made in the future is insufficient for this purpose.

[275] The respondents had no vested right at the time the new rule came into force, but merely the possibility of acquiring such a right had they made requests before the ninetieth day after its enactment. As this Court held in *Expropriation Tribunal*, at p. 742: “A vested right . . . does not include a right which could have been exercised but was not, and which is no longer available under the law”.

### C. *Interpreting the New Rule*

[276] Having found that an accused in the circumstances of the respondents is subject to the new rule at s. 535, I turn to whether such an accused would be eligible for a preliminary inquiry in accordance with its terms. This question turns on whether they qualify as “an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment” within the meaning of s. 535. This case raises the issue squarely.

[277] Mr. Grenier is charged with sexual interference and sexual assault, which, where the victim is a person under the age of 16 years, are now punishable by up to 14 years. As for Mr. Archambault, he is charged with indecent assault on another male person (who was under the age of 16 years at the time of the alleged offence), which has no modern equivalent. He argues that the alleged criminal conduct would likely now be charged under either s. 271 or ss. 151 to 153 of the *Criminal Code* (R.F. (Archambault), at para. 76); these offences are all now punishable by up to 14 years’ imprisonment.



[278] In each case, the respondents have the benefit of s. 11(i) of the *Charter* which, consistent with the presumptions discussed above, limits their personal liability to the maximum term of imprisonment in force at the time of the commission of the offences charged. Thus, the respondents face a maximum of 10 years' imprisonment in respect of each offence with which they are charged — although the acts they are alleged to have committed would, if committed today, each be punishable by imprisonment for a maximum of 14 years. None of the offences charged attract a maximum penalty of 14 years or more of imprisonment.

[279] The Crown submits that only an accused facing a *personal liability* of 14 years' imprisonment or more for an offence can ask for a preliminary inquiry (A.F., at para. 120). For this new rule, the yardstick by which the seriousness of an offence is measured is the maximum sentence faced by the accused regarding that offence.

[280] The respondents answer that Parliament's intent was to keep the availability of preliminary inquiries for the most serious offences, as determined by reference to contemporaneous societal values and the current maximum sentence of the offence (R.F. (Archambault), at paras. 82 and 89; R.F. (Grenier), at paras. 35-37). They agree with the intervener the Criminal Lawyers' Association (Ontario) that the focus cannot be the personal liability of the accused, because what matters is the seriousness of the *offence*, not the *offender* (I.F., at para. 8, citing *R. v. Windebank*, 2021 ONCA 157, 154 O.R. (3d) 573, at paras. 36-37). The respondents submit that modern societal views on the seriousness of the offence are reflected in the sentencing principles and

the actual sentences that an accused would receive today. In addition, they say it is not fair to penalize them based on the fact that they benefit from *Charter* rights.

[281] For the reasons that follow, I conclude that the text in s. 535, read in context and in light of the purposes of the provision, requires that the accused actually be liable to 14 or more years' imprisonment in respect of the offence for a preliminary inquiry to be available. Parliament intended for only those accused facing greater maximum jeopardy to retain the benefit of a preliminary inquiry.

(1) The 14-Year Imprisonment Threshold

[282] This issue requires interpreting the scope of the 14-year imprisonment threshold in s. 535 of the *Criminal Code*. While the respondents and the Crown agree that the maximum penalty has been used in s. 535 as a marker of the seriousness of the offences for which preliminary inquiries remain available (A.F., at paras. 108-11; R.F. (Archambault), at para. 77; R.F. (Grenier), at para. 37), the question is whether the maximum penalty is that of the specific offence with which the accused is charged — or whether it is that of the broader class of offence. In undertaking this statutory interpretation exercise, I will consider the text, context and purpose of the provision, and then address specific concerns raised by the parties.

[283] I turn first to the text of s. 535. A preliminary inquiry is only available when “an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a

preliminary inquiry under subsection 536(4)”. The French text similarly centres on “*un prévenu inculpé d’un acte criminel passible d’un emprisonnement de quatorze ans ou plus*”. The focus of the text is on the accused and the accused’s proceedings: the offence with which “an accused . . . is charged”, and whether a request has been made for them to have a preliminary inquiry. It is not focused on hypotheticals or the general nature of the offence. The indictment sets out the particulars (including the date) of the offence that the accused must answer and limits the criminal proceedings. As illustrated in the case of Mr. Archambault, there is no modern equivalent to the offence with which he is charged; he is charged with indecent assault on another male person, which is punishable by 10 years’ imprisonment.

[284] Of course, the seriousness of an offence is not measured in reference to the individual circumstances surrounding the offender, such as the possibility of a dangerous offender designation (*Windebank*, at paras. 35-37). Rather, as Nordheimer J.A. explained in *R. v. S.S.*, 2021 ONCA 479, 493 C.R.R. (2d) 251, the relevance of the accused is that the provision speaks to the specific offence with which that accused actually has been charged (para. 19), as opposed to a hypothetical offence involving the similar alleged actions occurring in the present day.

[285] This interpretation of these words in the *Criminal Code* is also consistent with how those words have been understood in other statutes dealing with similar subject matter. The presumption of consistent expression provides that the meaning of recurring patterns of expression is presumed to remain the same “both within a statute

and across statutes” (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 44).

[286] In *Tran*, this Court was concerned with s. 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which defined the “serious criminality” of a permanent resident or foreign national to include “having been convicted . . . of an offence . . . punishable by a maximum term of imprisonment of at least 10 years”. The maximum penalty for the offence with which Mr. Tran was convicted had been raised from a maximum term of imprisonment of 7 to 14 years between its commission and sentencing. This Court unanimously concluded Mr. Tran’s conviction did not fall under the umbrella of serious criminality, within the meaning of s. 36(1)(a), as the only acceptable interpretation was that the provision referred to the maximum term “that [Mr. Tran] could have received at the time of the commission of the offence” (para. 35). The language of the provision was taken to refer to the circumstances of the offender, i.e., the maximum penalty he had faced, rather than the “abstract maximum penalty” (para. 38).

[287] There is no reason to think Parliament meant something different in s. 535 of the *Criminal Code* by the analogous formulation “an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment”. That s. 36(1)(a) of the *Immigration and Refugee Protection Act* speaks to the relevant offences after conviction, while s. 535 speaks to offences on which persons have been charged but not convicted, is a distinction without a difference. In both contexts Parliament is

distinguishing offences based on their severity in reference to their maximum term of imprisonment. This Court held in *Tran* we must look to the actual offence committed by the person directly referenced in the provision, not a hypothetical offence committed in other circumstances where it would attract a higher maximum sentence.

[288] This focus on the specific proceedings of the accused also follows the broader context of the new provision, which makes clear that preliminary inquiries are now *generally* unavailable. Their availability is now restricted only to those accused who meet specific and clear conditions. The accused's personal jeopardy is usually readily ascertainable. The maximum liability of the offence with which an accused has actually been charged and convicted must be determined in sentencing them. If the accused may be liable for at least 14 years of imprisonment in respect of an offence charged, then a preliminary inquiry should be available if either the accused or the prosecution requests one.

[289] Thus, I disagree with the intervenor the Criminal Lawyers' Association (Ontario) that relying on personal liability would lead to uncertainty or absurd results, for example when the dates of the offence straddle the date of the increase in the maximum penalty (I.F., at paras. 13-17). Rather, it is determining maximum liability by reference to a hypothetical that introduces uncertainty: what would the maximum punishment be for the alleged conduct underlying those offences if that conduct occurred in the present day, or on September 19, 2019, the date s. 535 came into force? Obviously, an accused actually facing 14 years' imprisonment (no matter when s. 535

came into force) should have the right to request a preliminary inquiry. The efficiency and coherence of the scheme is focused on maintaining the benefit of a preliminary inquiry for the accused facing serious jeopardy, where the preliminary inquiry is requested.

[290] Finally, the overall purpose of limiting the availability of the preliminary inquiry was to reduce delays, to alleviate the burden of witnesses and victims of testifying twice, and more generally, to improve the efficiency of the criminal justice system (see *R. v. C.T.B.*, 2021 NSCA 58, at para. 39; *Windebank*, at paras. 19-22; *S.S.*, at para. 14). In limiting the availability of a preliminary inquiry, Parliament decided that it was not a necessary procedural step to a fair trial.

[291] These broader purposes in reducing the availability of the preliminary inquiry inform the specific objectives of s. 535. Although Parliament kept the availability of preliminary inquiries in serious cases, the exception for serious offences must itself be read “in light of the problem [the legislation] was intended to address” (*Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 36).

[292] Thus, s. 535 represents an exception for serious offences. While Parliament was seeking to reduce systemic obstacles to the *Charter* right to a trial without unreasonable delay, the exception recognizes that a preliminary inquiry can still be of significant benefit to an accused facing more significant legal jeopardy. The Parliamentary debates reveal a key concern that the rule limiting access to preliminary inquiries be clear and certain. Other proposed amendments to Bill C-75, which would

have expanded the eligibility for preliminary inquiries based on the opinion of the justice as to the “best interests of the administration of justice”, were ultimately not adopted by Parliament (*Windebank*, at paras. 24-25). In speaking against that proposal, the Minister of Justice expressed the concern that their complex criteria would lead to further litigation and delay (*House of Commons Debates*, vol. 148, No. 435, 1st Sess., 42nd Parl., June 17, 2019, at p. 29245). Given these purposes, it is difficult to accept that Parliament adopted a threshold meant to invite a hypothetical inquiry into what the maximum sentence for the accused would have been had it occurred at another time.

[293] The respondents and the interveners Association québécoise des avocats et avocates de la défense (“AQAAD”) and Association des avocats de la défense de Montréal-Laval-Longueuil (“AADM”) argue those accused of historical child sexual offences, even where they benefit from a lesser *maximum* punishment, actually face the same criminal jeopardy as those accused of more recent offences, since a judge considers the current maximum liability in determining the proper sentence (R.F. (Archambault), at para. 93; I.F. (AQAAD and AADM), at para. 13). The actual sentences imposed — and the associated stigma — will be more severe than they would have been at the time of the commission of the offence (R.F. (Grenier), at para. 37).

[294] Granted, in exercising discretion in sentencing, a sentencing judge must consider the current values of society, as reflected by the maximum sentences in force for the offence (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 100; see also *R. v. Bertrand Marchand*, 2023 SCC 26, at paras. 31, 46-47, 153 and 167-68; *Poulin*,

at paras. 3-5). Sentences must not only be proportionate to an individual's culpability (*Cr. C.*, s. 718.1), they must serve sentencing's fundamental purpose of maintaining a "just, peaceful and safe society" (s. 718). In particular, for sexual offences against children, sentencing serves the primary objectives of denunciation and deterrence (s. 718.01). The principle of parity requires that courts impose similar sentences for similar offenders in similar circumstances (s. 718.2(b)). By nature, the court's role in sentencing includes consideration of "society's legitimate shared values and concerns" (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 49; see also *R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752, at para. 112).

[295] But sentencing principles and societal values are of little assistance in interpreting the intention of Parliament under s. 535. The proxy for seriousness selected by Parliament here is the *maximum* sentence carried by the offence charged — not the fit sentence. The maximum sentence is not determined in reference to the discretionary sentencing regime. Even if the fit sentence would now be more severe than it would have been at the time of the commission of the offence, the maximum sentence the accused faces is the same. To ensure its objective of a clear and predictable standard on which to determine eligibility for a preliminary inquiry, Parliament opted to focus on the maximum sentence. Sentencing principles do not help to interpret this statutory right to a preliminary inquiry which is determined by reference to the *maximum* penalty an accused faces for the conduct that gives rise to the offence with which they are charged.



[296] The respondents argue that it would be unfair to penalize accused persons, by denying them a preliminary inquiry, simply because they benefit from the protection under s. 11(i) of the *Charter* (R.F. (Archambault), at paras. 83-85; R.F. (Grenier), at para. 50). In my view, however, the respondents are not penalized; they are simply in the same position of any accused who faces a maximum sentence of less than 14 years.

[297] Section 11(i) of the *Charter* provides: “Any person charged with an offence has the right . . . if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.” Even setting aside the constitutional protection provided by s. 11(i), there is a common law rule that an accused’s penal consequences must generally be determined in reference to the law in force at the time of the commission of the offence (*Poulin*, at para. 60; *K.R.J.*, at para. 22). An accused would, presumptively, still be liable only for the lesser punishment in force at the time of the commission of the offence (*S.S.*, at para. 16; *C.T.B.*, at paras. 25, 34 and 45-46; *Interpretation Act*, s. 43(d) and (e)), in this case a maximum of 10 years’ imprisonment.

[298] That the same type of alleged criminal conduct would today give rise to the benefit of a preliminary inquiry works no injustice, as contemporaneous offenders face greater jeopardy, as reflected by the current 14-year maximum sentence. The result for both offenders may be different, but they are “treated fairly [and] they each receive protections which are connected to them and their proceedings” (*Poulin*, at para. 96 (emphasis deleted)).

[299] Thus, I cannot accept the interpretation urged by the respondents. It contradicts the ordinary meaning of the text and would blunt Parliament's goals of reducing the number of preliminary inquiries and of creating a clear criterion limiting eligibility for a preliminary inquiry.

[300] The 14-year requirement imposed by s. 535, read in its entire context, leaves room for only one interpretation. Parliament chose to restrict preliminary inquiries based not on the general nature of the conduct underlying the offence, as it could have done, but through the proxy of the maximum jeopardy faced by an accused for the actual offence with which they are charged. I agree with the Nova Scotia Court of Appeal that the requirement imposed by the text of s. 535 is "clear and unequivocal" (*C.T.B.*, at para. 38; see also *S.S.*, at paras. 15-16). As noted in *S.S.*, to achieve its purpose of restricting the entitlement to preliminary inquiries, Parliament "expressly coupled [that] entitlement . . . to the maximum sentence for the offence charged" (para. 15; see also *C.T.B.*, at para. 29).

[301] I conclude that an accused has the right to make a request for a preliminary inquiry if charged with an offence for which their maximum sentence is imprisonment of 14 years or more.

(2) Application to the Respondents

[302] Here, neither respondent's request for a preliminary inquiry met the requirements of the new s. 535, as the offences with which they are charged are each

punishable by a maximum of 10 years' imprisonment. Mr. Grenier, even though the alleged offences with which he is charged would now each be punishable by up to 14 years if they occurred today, benefits from the lesser sentences in force at the time of the alleged commission of the offences. Mr. Archambault is charged under a section of the *Criminal Code* that has been repealed, but the alleged offence with which he is charged remains punishable by 10 years' imprisonment. Even if we were to conclude that the impugned conduct underlying this offence, if it happened today, would be an offence punishable by a term of 14 years, Mr. Archambault is not subject to that jeopardy.

## VI. Conclusion

[303] The respondents had no right to preliminary inquiries. As no request had been made before the coming into force of the new s. 535, their proceedings were governed by the new limitation on the availability of preliminary inquiries. These respondents are not charged with an offence for which they are punishable by 14 years or more of imprisonment and do not meet the requirements for eligibility under the new rule. The Court of Appeal erred in remitting the respondents' files for preliminary inquiries.

[304] I would allow the appeal. As the appeal is moot, I would make no further order.

*Appeal dismissed, WAGNER C.J. and KARAKATSANIS, O'BONSAWIN and MOREAU JJ. dissenting.*

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