

Uncertainty and Risks: Evidence in Constitutional Litigation*

Danielle PINARD**

INTRODUCTION	99
I. RISK MANAGEMENT BY THE COURTS: TRENDS	103
1. Initial Position: Establishment of Burdens of Proof	103
2. Necessary Strategic Retreats.....	106
2.1 Giving the Legislature Room to Manoeuvre in the Context of Scientific Uncertainty.....	106
2.2 Being Satisfied With a Rational Basis	108
2.3 Resorting to Common Sense.....	112
II. RISK MANAGEMENT BY THE COURT: SPECIFIC EXAMPLES	116
1. Dangerous Offenders: <i>R. v. Lyons</i>, [1987] 2 S.C.R. 309.....	116
2. Sexual Offenders Loitering in Public Parks: <i>R. v. Heywood</i>, [1994] 3 S.C.R. 761.....	117
3. Accused Not Criminally Responsible on Account of Mental Disorder: <i>Winko v. British Columbia (Forensic Psychiatric Institute)</i>, [1999] 2 S.C.R. 625	118
4. Possession of Child Pornography: <i>R. v. Sharpe</i>, (1999) 136 C.C.C. (3d) 97 (B.C.C.A.)	121
CONCLUSION	123

* English translation of this paper was provided with the collaboration of the National Judicial Institute.

** Full Professor, Faculty of Law, Université de Montréal.

This text is intended to be an analysis of constitutional litigation seen as an exercise in risk management. It has been prepared by a non-expert in risk management—which may clearly present drawbacks—but which may also, in the best of scenarios, present advantages, including the advantage of being able to get to the heart of the matter without getting caught up in the subtleties (of which she is oblivious in any case!).

I have endeavoured to think of constitutional law in terms of risks. For me, the exercise has been fascinating. I had to re-examine in another light materials with which I thought I was very familiar. Everything seemed new. Angles that up to now I couldn't see have suddenly become as plain as day. Through this text, I hope I can share the richness of this intellectual experience with you.

As a jurist, I was surprised to discover the wealth of publications on risk management, in the disciplines of psychology, epidemiology, public health, business management, and environmental management. However, it seems that the area of law has not been particularly interested in the question.

A minimal, functional definition of the notion of risk, which seems to serve as a common denominator of all definitions of risk, will be used in this text. Risk will be understood as the potential occurrence of a damage-causing, harmful or undesirable event.¹

¹ Regarding the notion of risk, the *Robert historique* refers to a danger, an adverse event that is difficult to foresee. In addition, we learn that the word was originally feminine and that the masculine gender (1657) took hold in the 17th century. What happened in 1657, then? A number of attempts at defining the notion of risk follow: "If the distinction between reality and possibility is accepted, the term risk denotes the possibility that an undesirable state of reality (adverse effects) may occur as a result of natural events or human activities." See O. Renn, "Concepts of Risk: A Classification" in S. Krimsky & D. Golding, eds., *Social Theories of Risk* (London: Praeger, 1992) at 56; "As I use the term, risk simply means the possibility of injury or loss." See K.S. Abraham, *Distributing Risk, Insurance. Legal Theory and Public Policy* (London:

At first glance, this notion has two components: a factual component and a normative component. The first component concerns the occurrence of an event. Either the event will occur or it will not occur. However, the limited state of our knowledge does not permit us to know for sure whether or not it will occur. A language of possibilities, or at times probabilities, is therefore used to refer to the occurrence of such event. However, the language used is actually a measure of our ignorance and not of a characteristic of the event.² The notion of risk evokes a measure of the distance between reality and our perception. Here we are referring to questions about which scientific uncertainty reigns.³

Scientific uncertainty is thus inherent in the factual component of the notion of risk.⁴

Yale University Press, 1986) at 1-2; "A problem within the risk literature is that the word 'risk' may be used to imply a measurement of the chance of an outcome, the size of that outcome, or the product of both of these factors. A general working definition, however, sees risk as the probability that a particular adverse event will occur during a stated period of time, or result from a particular challenge." See R. Baldwin, "Introduction—Risk: The Legal Contribution" in R. Baldwin, ed., *Law and Uncertainty, Risks and Legal Processes* (London: Kluwer Law International, 1997) at 1-2.

² Regarding this distinction between external reality and the measure of our ignorance, see the enlightening words of B. Robertson and G.A. Vignaux, "Probability—The Logic of Law" (1993) 13 *Oxford J.Legal Stud.* 457, who write, at page 460: "The adoption of any of the definitions of probability other than as a measure of strength of belief can lead to an unfortunate effect known as The Mind Projection Fallacy. This is the fallacy of regarding probability as a property of objects and processes in the real world rather than a measure of our own uncertainty." They add: "[P]robability is simply a measure of our ignorance of the factors that will influence the outcome of a coin toss" (at 461), and: "Things either happen or they don't happen: they don't probably happen. [...] The idea that the sorts of events measured by statistics 'probably happen' is an example of the Mind Projection Fallacy" (at 468).

³ Here, a very flexible notion of "science", including the social sciences, psychology and history, is used. Moreover, this is the conception that is apparently accepted by the Canadian courts. In this way, discussion of the scientific method or the problematic evaluation of whether a study is really scientific is avoided. See, for an illustration of these concerns: D.L. Faigman, "To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy" (1989) 38 *Emory L. J.* 1005.

⁴ Reference is made, in the literature of risk, to the conditions required to make "legitimate decisions under conditions of uncertainty." See Baldwin, *supra* note 1 at 11.

The damage-causing nature or undesirability of the event constitutes the normative component of the notion of risk. The occurrence of the event is not desired. The event is value-judged to be undesirable. We will see that although, in the examination of constitutional litigation from the viewpoint of risk management, this characterization of undesirability is relatively uncontroversial (for example, violence against women or children or the consumption of hazardous products), it is the relative degree of harmfulness of the event that gives rise to controversy and weighting and that will dictate the extent to which we are prepared to act to prevent its occurrence.

Certain risk situations in society may give rise to legislative action and eventually to judicial review on constitutional grounds. Among such risk situations are, for example, the distribution of pornography, which potentially leads to violent behaviour; hate propaganda, which may give rise to unacceptable social consequences; convicted sex offenders loitering in public parks, who may present a danger to children congregated there; and the advertising of a hazardous product, which potentially increases consumption of the product.

Confronted with such risks as are present in a free, unregulated society, the legislature in principle may elect to intervene or not. It benefits from democratic legitimacy. Hence, it will make a political decision, and not a scientific decision. In accordance with its perception of the extent and seriousness of the risk, as well as society's tolerance in this regard, it may elect to do nothing. Or, it may decide to act, most often by regulating or quite simply by prohibiting the potential risk-causing factor. It may prohibit the distribution of pornography, hate propaganda, loitering in a public park, or the advertising of certain products. Hence, it is diffusing the negative aspects by imposing a clear limit on the freedom of action of certain individuals, to prevent potentially damage-causing results.⁵

⁵ It can also be claimed that the legislature is thus creating another risk, that of inappropriately restricting the freedom of individuals, if the supposed relationship of causality between a behaviour and a damage-causing result does not exist.

This legislative intervention will give rise to the judicial review of constitutionality, most often following a contestation alleging breach of the freedom of expression.⁶ The judges must re-examine this balancing, this risk management, in light of new parameters, namely constitutionally protected rights.⁷

Beyond questions of law as such, the aspect of the judicial decision that deals with risk management is therefore the factual aspect, especially as regards social facts which are not easily definable and about which our knowledge is uncertain, and which are increasingly seen in constitutional litigations.⁸

However, the concept of risk management is relatively absent from the judicial vocabulary, perhaps in part because it would oblige the courts to reveal their own power and admit that they also are participating in this governmental distribution of risks. This represents an undesirable aspect of visibility. Discussion of the legitimacy of judicial review of constitutionality has already received a lot of coverage.

Thus, the challenge will consist, to the extent possible, of extracting the strictly legal arguments from the judicial decisions in order to concentrate on the factual component and to conceive such decisions as exercises in risk management.

⁶ Thus, legislative action and not inaction gives rise to judicial review. However, we know very well that in the case of certain risks present in social life, the state's inaction entails the greatest danger for the community.

⁷ It is increasingly probable that the legislature has already integrated a consideration of constitutionally protected rights and freedoms in its decision to intervene in respect of certain risk situations. In this respect, although it has been maintained that legislators have been the least limited by the facts (“[L]egislators have more freedom than either judges or administrators to ignore facts or to use untested or erroneous facts [...]”) See K.C. Davis, *Administrative Law Treatise*, vol. 3, 2nd ed. (University of San Diego: K.C. Davis Pub. Co., 1980) at 160, para. 15:8, and can intervene “with a bull in a China shop ignorance”, the anticipation of judicial review, with its requirements pursuant to section 1 of the Charter, can now be supposed to form an integral part of the fundamental legislative strategy (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11 [hereinafter, *Charter*]).

⁸ Reference can also be made to facts pertaining to the state of world, rather than facts pertaining to the parties. See, for example, R.E. Keeton, “Legislative Facts and Similar Things: Deciding Disputed Premise Facts” (1988) 73 *Minnesota L.Rev.* 1 at 19, footnote 50: “The distinction between facts about the particular case and facts about the state of the world is an underlying theme of the contrasts between adjudicative and premise facts.”

The first part of this paper will be devoted to the study of judicial risk-management strategies developed in constitutional matters. In this first part, the fundamental question of the initial distribution of the burdens of proof, and certain qualifications, such as the acknowledgement of necessary legislative room to manoeuvre, the acceptance of a single rational basis or the recourse to common sense to complete factual reasoning will be discussed. The second part of the text will examine certain examples of the judicial treatment of risk, particularly with respect to dangerous persons.

I. RISK MANAGEMENT BY THE COURTS: TRENDS

The review of statutory decisions, inherent in the judicial control of constitutionality, involves the review of risk management enforced by law.

In the context of risk management, the paradigm of constitutional control consists of the contestation of legislative action in the name of constitutionally protected individual freedom.

The courts do not proceed explicitly to a weighting of the negative aspects in terms of risks. But if we go beyond legal rhetoric, it is possible to conceive of constitutional control as an exercise in risk management.

1. Initial Position: Establishment of the Burdens of Proof

Formalism has long characterized Canadian constitutional litigation, which essentially involved an exercise in interpretation, of both the relevant constitutional provisions and the law whose constitutionality was contested.⁹ To reiterate the terms of a classic distinction, constitutional litigation was more concerned with questions of law than with questions of fact.

Owing to a number of factors, whose evaluation certainly exceeds the scope of this text, the social facts are increasingly visible and expressly discussed in constitutional litigation. The analysis of constitutional caselaw from the viewpoint of risk management obliges us to consider those same social facts. The notion of risk is associated with the factual component of judicial decisions and, in particular, the question of burdens of proof.

⁹ See D. Pinard, “La rationalité législative, une question de possibilités ou de probabilités? Commentaire à l’occasion de l’affaire du tabac” (1994) 39 *McGill L. J.* 401.

The initial distribution of burdens of proof arises from the application of a judicial policy that is at first glance logical: innocence, normality, good faith, and constitutionality are presumed, and it is up to the party contesting such fundamental premises to demonstrate the grounds of its contestation.¹⁰

Actually, a cost/benefit calculation immediately precedes the distribution of burdens of proof. The burden is imposed on a party when it is determined that a potential judicial error in respect of such party would be less serious than an error in respect of the other party.¹¹

Even though the distribution of burdens is never set out in the language of risks and uncertainty, it still has an impact on the question. Such distribution of burdens of proof actually and directly determines who should bear the costs of scientific uncertainty. If the facts underlying a contestation cannot be established with relative certainty, the contestation will fail, and the party to whom the burden of proof is attributed will assume the cost of the uncertainty. In the best of hypotheses, such party will be able to provide scientific studies to the court, which may, however, commit certain errors in dealing with it, namely refusing the admission of a study that is nonetheless valid or permitting the admission of an inadequate study.¹² In a worst-case scenario, these studies would not be available or would be available only at a prohibitive cost.

¹⁰ See, for example, *R. v. Oakes*, [1986] 1 S.C.R. 103 at 120 [hereinafter *Oakes*], regarding the presumption of innocence: "In light of the gravity of these consequences [a charge of a criminal offence], the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."

¹¹ See, for a similar analysis, S.O. Funtowicz & J.R. Ravetz, "Three Types of Risk Assessment and the Emergence of Post-Normal Science" in Krimsky & Golding, eds., *supra* note 1 at 265.

¹² See, for example, regarding type I errors (admitting invalid scientific evidence) or type II errors (excluding valid scientific evidence), R. Baldwin, *supra* note 1, who writes at 11-12 "[A] key question is whether risk managers, if they are to err, should choose, where possible to err by rejecting true hypotheses rather than by accepting false hypotheses." Faigman writes: "There is no functional difference, however, between making a mistake to admit evidence and making a mistake to exclude evidence. Only the identity of the injured party changes. The costs associated with making these errors depends on the circumstances of the particular context. This is a subtle judgment that presents a substantial challenge if faithfully carried out. It means

Constitutional case law based on the *Charter*¹³ has quickly defined the burdens of proof: the party that alleges the violation of rights and freedoms must demonstrate such allegation, and it is up to the party that wishes to invoke the reasonableness of the breach, within the meaning of section 1 of the *Charter*—generally the government—to prove the facts required in support of its claim.¹⁴ In the latter case, the Supreme Court has clearly set out the elements to be established: the State must demonstrate the importance of the objective sought, the rational connection between the objective sought and the means used, the absence of less prejudicial means, and the proportionality between the means and the objective.¹⁵

The structure of the test so developed seems to be based on the assumption that the government acts only with full understanding of the facts, where both the mischief to be prevented and the effectiveness of the means chosen are certain. The test appears to be incompatible with the very essence of any intervention in a risk context, where, both the undesirable thing to be prevented and the causality between the prohibited act and the potential damage cannot be established with certainty.¹⁶ Rigidly applied, this test of reasonable limits prevents the government from intervening in a risk context and hence protects liberalism, imposing on the community as a whole the risk produced in the free (*i.e.*, unregulated) world by the damage-causing outcome which the government, through its intervention, wished to prevent.

that judges would do an explicit evaluation of the costs associated with making a mistake in the legal context in which the science is offered", in D.L. Faigman, "The Evidentiary Status of Social Science under *Daubert*: Is It 'Scientific', or 'Other' Knowledge?" (1995) *Psychology, Public Policy and Law* 960 at 973.

¹³ *Supra* note 7.

¹⁴ See *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-137: "The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation" and at 138: "Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit."

¹⁵ *R. v. Oakes*, *supra* note 14.

¹⁶ However, this requirement of certainty was also imposed at the initial stage of the constitutional dispute based on rights and freedoms, when the party who alleged the possibility of a violation of rights and freedoms was asked to demonstrate more than mere and improvable conjectures. See *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441.

Here, it is interesting to note an analogy with the world of civil liability in risk situations, where, for example, environmental-damage claimants denounce the fact that court-imposed scientific certainty requirements regarding the causal link between certain damage and the emission of products into the environment are equivalent to denying any entitlement to relief and to ensuring safe conduct to business corporations, which may hence and with impunity cause the risk of environmental damage for which they are allegedly responsible to be assumed by the community.

In the area of environmental liability and in the constitutional context, the court-imposed requirement of scientific certainty protects private enterprise and imposes the costs of the risk on the community, in the first case by dismissing civil suits and in the second by leading to a pronouncement of the unconstitutionality of governmental regulation.

2. Necessary Strategic Retreats

This form of risk management, provided for by the initial conception of burdens of proof, could not survive the test of time. The Supreme Court of Canada quickly realized that the net proceeds of this initial distribution of burdens had the effect of preventing any legislative intervention in risk situations. The Court, therefore relaxed certain requirements. It acknowledged the required legislative room to manoeuvre in contexts of uncertainty (2.1), was satisfied from time to time with the demonstration of a “rational basis” to legislative action (2.2) and at times resorted to common-sense arguments (2.3).¹⁷ Certain examples of such relaxation techniques will be presented here.

2.1 Giving the Legislature Room to Manoeuvre in the Context of Scientific Uncertainty

Fairly early in the case-law history of the *Charter*, the Supreme Court recognized the impossibility of satisfying the evidentiary requirements set out in *Oakes* in cases where the legislature intervenes in a context of scientific uncertainty. The necessity of leaving a margin of discretion to legislative action has quickly been acknowledged, although sporadically. Today, this contextual factor must incontestably be

¹⁷ Recourse to judicial notice as a judicial strategy for relaxing judicial review in risk inventions could also be examined. See D. Pinard, “La connaissance d’office des faits sociaux en contexte constitutionnel” (1997) 31 R.J.T. 315.

considered in the evaluation of the reasonableness of limits imposed on rights and freedoms.¹⁸

Hence, as early as in *Irwin Toy*,¹⁹ with respect to the statutory determination of the age of 13 as the childhood criterion, the Court pointed out in the following terms the required judicial respect of legislative decisions made in the context of scientific uncertainty:

“If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.”²⁰

In the same case, the Court pointed out the importance of the decision-maker’s democratic legitimacy when the public-policy decision requires the assessment of contradictory scientific evidence:

“When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices.”²¹

In *Keegstra*,²² flexibility was also demonstrated through recognition of the difficulty of scientifically establishing the damage-causing effects resulting directly from a hate-propaganda speech.²³

¹⁸ According to Mr Justice Bastarache, writing for the majority in *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877 at para. 90: “the inability to measure scientifically a particular harm in question, or the efficaciousness of a remedy are all factors of which the court must take account in assessing whether a limit has been demonstrably justified according to the civil standard of proof.”

¹⁹ *Irwin Toy Ltd v. Quebec (A.G.)*, [1989] 1 S.C.R. 927.

²⁰ *Id.* at 990.

²¹ *Id.* at 993.

²² *R. v. Keegstra*, [1990] 3 S.C.R. 697.

²³ See the opinion of Mr Justice Dickson, *ibid.* at 776: “[I]t is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group” and the dissenting opinion of Madam Justice McLachlin, at 857: “[I]t is simply not

Finally, we should note the words of Mr Justice Gonthier, speaking for the minority, in *Winko*,²⁴ who, in discussing the inherent uncertainty of the prediction of future dangerousness, affirmed in the following terms that it is impossible to claim constitutional entitlement to something that science does not offer:

“Section 7 of the Charter simply cannot provide NCR [non criminally responsible] accused with a constitutional entitlement to something medical science does not offer.”²⁵

In other words, we cannot impose on the legislature a constitutional obligation that would be impossible to perform by reason of the uncertainty of our knowledge.

Once this necessity to demonstrate flexibility in the judicial control of a legislative intervention devised in a context of scientific uncertainty was accepted, the way was paved for the following step: the development of a different object of proof, which takes this context into account.

2.2 Being Satisfied With a Rational Basis

The impossibility of meeting the requirements of the *Oakes* test in risk situations results from the fact that the legislature cannot establish with certainty either the future occurrence of an undesired event or the fact that the regulated or prohibited behaviour is the cause of such event.²⁶

However, in constitutional matters, the courts have at times been satisfied with a different object of proof, namely the reasonableness of the legislative assessment of the existence of certain possibilities, as opposed to the evidence of actual facts *per se*.²⁷ This was the case, for example, in

possible to assess with any precision the effects that expression of a particular message will have on all those who are ultimately exposed to it.”

²⁴ *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625. This case involved determining the constitutionality of legislative provisions setting out conditions for discharging persons declared not criminally responsible on account of mental disorder.

²⁵ *Id.* at para. 130.

²⁶ Obviously, there are various approaches to causality. See, for example, the following statement: “It [the concept of risk] includes the analysis of cause–effect relationships, which may be scientific, anecdotal, religious or magical.” See Renn, *supra* note 1 at 56–58.

²⁷ See D. Pinard, *supra* note 9.

the celebrated *Anti-inflation*²⁸ case regarding the legislative determination of the existence of a serious economic crisis.

This object of proof seems well suited to judicial review in the context of risk. In fact, it appears that all that can be established, as far as risk is concerned, is the rationality or reasonableness of the legislature’s assessment of the existence of risk, which consists of the possibility of damage resulting from a type of activity that will henceforth be regulated or prohibited. This object of proof has been used in more than one case, in which courts have been satisfied with the proof, not of the reality of damage to be avoided, but of the existence of a risk, namely of the rationality of the legislative assessment of the possible existence of damage.

However, the fact that a court is satisfied with the demonstration of the reasonableness of the legislative assessment in a risk context has a direct impact on the distribution of risks. In this respect, the court has a strong likelihood of confirming the legislative decision and accepting that the price of scientific uncertainty be assumed by those of whom certain behaviours are regulated or prohibited to avoid the possible achievement of results deemed undesirable.

The case in point here is *Butler*,²⁹ in which the criminalization of the sale, or the possession for purposes of distribution or sale, of obscene materials was contested.³⁰ The risk concerned was that of the prejudice caused to society by pornography. The government having no decisive study on the matter at its disposal,³¹ the Court stated that it was satisfied

²⁸ *Anti-inflation Act Reference*, [1976] 2 S.C.R. 373.

²⁹ *R. v. Butler*, [1992] 1 S.C.R. 452. The Court had previously, in other cases, been satisfied with evidence of the reasonableness of legislative action. See, for example, *Irwin Toy v. Quebec (A.G.)*, *supra* note 19 at 994: “In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children’s advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government’s pressing and substantial objective.”

³⁰ The definition of obscenity reads as follows: “For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.” (para. 163(8) of the *Criminal Code*, R.S.C. (1985) c. C-46).

³¹ In this regard, the Court notes that “it is clear that the literature of the social sciences remains subject to controversy.” See *R. v. Butler*, cited *supra*, note 29, 501.

with the demonstration of a “reasoned apprehension of prejudice”, Mr Justice Sopinka writing for the majority:

“While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs [...]”³²

“[P]arliament was entitled to have a ‘reasoned apprehension of harm’ resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations.”³³

Mr Justice La Forest, partially dissenting in *RJR-MacDonald*,³⁴ probably wrote the most eloquent opinion on the necessity for the courts to be satisfied at times with the demonstration of the reasonableness of legislative action. In this case, in which the constitutionality of a legislative prohibition of tobacco-product advertising was challenged, he deemed that the limit placed on the freedom of expression was reasonable, considering that Parliament had established the rational basis of its law.³⁵

³² *Id.* at 502.

³³ *Id.* at 504. Another aspect of the *Butler* ruling raises interesting questions regarding risk management by the courts. In this regard, the Court indicates, concerning the community standard of tolerance, which constitutes one of the tests of obscenity, that: “[w]ith respect to expert evidence, it is not necessary and is not a fact which the Crown is obliged to prove as part of its case” (at 476 and 477). However, regardless of what is said, the community standard of tolerance is a fact, a societal fact, over which the Court has full control and determination. Hence, deciding that an essentially factual question is not a question of fact, in order to maintain the authority to determine freely and legitimately, regardless of the status of empirical knowledge regarding the question, is perhaps another form of court management of scientific uncertainty.

³⁴ *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199. Reference is made here to the dissenting opinion of Mr Justice La Forest, Madam Justice L’Heureux-Dubé and Mr Justice Gonthier concurring.

³⁵ He writes the following, regarding the object to be proven: “I conclude, therefore, that an attenuated level of s. 1 justification is appropriate in these cases. [...] [T]he Attorney General need only demonstrate that Parliament had a rational basis for introducing the measures contained in this Act” *ibid.* at para. 77.

Initially, he pointed out the uncertainty that still reigns regarding tobacco dependency, stating:

“In this respect, it is essential to keep in mind that tobacco addiction is a unique, and somewhat perplexing, phenomenon. Despite the growing recognition of the detrimental health effects of tobacco use, close to a third of the population continues to use tobacco products on a regular basis. At this point, there is no definitive scientific explanation for tobacco addiction, nor is there a clearly understood causal connection between advertising, or any other environmental factor, and tobacco consumption. This is not surprising. One cannot understand the causal connection between advertising and consumption, or between tobacco and addiction, without probing deeply into the mysteries of human psychology. Many of the workings of the human mind, and the causes of human behaviour, remain hidden to our understanding and will no doubt remain so for quite some time.”³⁶

He then stresses the problem of institutional relationships between legislative and judicial powers when the first wishes to intervene in such a context of uncertainty, and the dangers of parliamentary paralysis that would result from the requirement of too rigorous a proof by the second:

“It appears, then, that there is a significant gap between our understanding of the health effects of tobacco consumption and of the root causes of tobacco consumption. In my view, this gap raises a fundamental institutional problem that must be taken into account in undertaking the s. 1 balancing. Simply put, a strict application of the proportionality analysis in cases of this nature would place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing area of social concern every time it wishes to address its effects. This could have the effect of virtually paralyzing the operation of government in the socio-economic sphere. [...] To require Parliament to wait for definitive social science conclusions every time it wishes to make social policy would impose an unjustifiable limit on legislative power by attributing a degree of scientific accuracy to the art of government which, in my view, is simply not consonant with reality.”³⁷

³⁶ *Ibid.* at para. 66.

³⁷ *Ibid.* at para. 67.

In terms of risk management, it is understood that the immediate result of the flexibility approach advocated by Mr Justice La Forest would have been to cause tobacco manufacturers to assume the cost of scientific uncertainty—a cost consisting in this case of the impossibility of advertising because of the risk of increasing the public-health problem related to tobacco use.

2.3 Resorting to Common Sense³⁸

Resorting to common sense constitutes another of the fallback positions used to relax the strict review of constitutionality in the context of risk.

Common-sense arguments actually serve to complete factual reasoning, when the uncertainty of scientific knowledge does not permit the development of complete factual reasoning.

When it is unknown whether damage is actually caused, or whether damage may be directly connected to the activity prohibited by the legislature, common-sense arguments can sometimes complete the factual reasoning.

In the tobacco case, concerning the contestation of the federal prohibition of tobacco advertising,³⁹ several justices of the Supreme Court of Canada applied common-sense arguments to justify their conclusion regarding the existence of a rational connection between the prohibition of tobacco-product advertising and the protection of public health. Scientific evidence had apparently not succeeded in establishing this link. However, it is noteworthy that it was necessary to resort to such a palliative in a case where considerable scientific evidence had been presented to the trial judge.⁴⁰

³⁸ See D. Pinard, “Le recours à des arguments de sens commun dans le raisonnement judiciaire en contexte constitutionnel” in *Gérard V. La Forest at the Supreme Court of Canada 1985-1997*, the second volume of a series published by the Canadian Legal History Project of the Supreme Court of Canada Historical Society, Winnipeg, 2000, at 381-398.

³⁹ *RJR-MacDonald Inc. v. Canada (A.G.)*, *supra* note 34.

⁴⁰ The trial judge in fact referred in the following terms to the amount of evidence presented to him: [TRANSLATION] “[T]his trial has gone on for over a year. Twenty-eight witnesses have been heard, a very great majority of whom were experts in areas as broad as advertising and marketing, epidemiology, public health, oncology, cardio-respiratory illnesses, pre/post-natal care, psychology, neurology, statistics, and econometrics. Five hundred and sixty exhibits were filed by both sides, totalling tens

Here, the completion of the factual reasoning by these common-sense arguments had the immediate and temporary effect of causing the tobacco companies to assume the cost of the scientific uncertainty, in that they would have to abandon the possibility of advertising because it might accentuate a major public-health problem, namely, tobacco consumption. Of course, only the rationality component is being referred to here, the Court having stated that the legislative measures had failed the test of a reasonable limit on the freedom of expression at the stage of minimal impairment.

Mr Justice La Forest stated expressly that he was satisfied with the existence of a rational connection between advertising and consumption, on the basis of “common sense.”

“[T]he power of the common-sense connection between advertising and consumption is sufficient to satisfy the rational connection requirement.”⁴¹

He had in effect stated that common sense suggested that the tobacco companies would not be spending as much on advertising if doing so did not increase their profits. He wrote:

“I begin with what I consider to be a powerful common sense observation. Simply put, it is difficult to believe that Canadian tobacco companies would spend over 75 million dollars every year on advertising if they did not know that advertising increases the consumption of their product.”⁴²

Madam Justice McLachlin, who wrote the majority opinion in this respect, also accepted the application of common sense to establish a rational connection in certain cases of scientific uncertainty, stating:

“I agree with La Forest J. that proof to the standard required by science is not required. [...] Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is

of thousands of pages, on all imaginable and unimaginable facets of the problem” *Imperial Tobacco Ltd v. Canada (P.G.)*, [1991] R.J.Q. 2261 (S.C.) at 2265. However, the trial judge may have formally set out only a very few factual conclusions: see the opinion of Mr Justice La Forest, in the Supreme Court decision, at 294-295.

⁴¹ *RJR-MacDonald*, *supra* note 34 at para. 86.

⁴² *Ibid.* at para. 84.

known, even though what is known may be deficient from a scientific point of view [...].”⁴³

“The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective.”⁴⁴

Mr Justice Iacobucci also referred to common sense in a statement that went relatively unnoticed, but was perhaps the most extreme regarding the role of this type of argument. In effect, according to him, reason, logic or common sense are the ingredients of reasoning concerning the existence of a rational connection. Scientific proof in this regard would have only a secondary, supportive role. He wrote:

“Rational connection is to be established, upon a civil standard, through reason, logic or simply common sense. The existence of scientific proof is simply of probative value in demonstrating this reason, logic or common sense. It is by no means dispositive or determinative.”⁴⁵

In *Thomson Newspapers*,⁴⁶ Mr Justice Bastarache referred to the legitimacy of applying common-sense arguments in the analysis of reasonable limits on rights and freedoms, by pointing out that common sense actually lies midway between questions of fact and questions of values. He wrote:

“While courts should not use common sense as a cover for unfounded or controversial assumptions, it may be appropriately employed in judicial reasoning where the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap. [...]

⁴³ *Ibid.* at para. 137.

⁴⁴ *Ibid.* at para. 154.

⁴⁵ *Ibid.* at para. 184.

⁴⁶ *Thomson Newspapers Co. v. Canada (A.G.)*, *supra* note 18.

Common sense reflects common understandings. In these cases dealing with pornography and hate speech, common understandings were accepted by the Court because they are widely accepted by Canadians as facts, and because they are integrally related to our values, which are the bedrock of any s. 1 justification.”⁴⁷

However, the application of common-sense arguments has certain limits. Common sense is an indispensable tool, but it is also a social construct that is not beyond abusive generalizations, myths or stereotypes.⁴⁸

As an example of this, I will take the following affirmation of Mr Justice La Forest in *Lyons*,⁴⁹ a case in which the former provisions of the Criminal Code pertaining to so-called dangerous offenders were contested:

“Part XXI merely enables the Court to accommodate its sentence to the common sense reality that the *present* condition of the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that *future* violent acts can quite confidently be expected of that person.”⁵⁰

Here, Mr Justice La Forest bases himself on what he considers to be incontestable common sense to affirm “quite confidently” the future dangerousness of such individuals, in a context where scientific studies are virtually unanimous in deploring the impossibility of predicting dangerousness. Although common-sense arguments may be able to complete factual reasoning in a context of scientific uncertainty, they can contradict the state of objective knowledge only at the price of the legitimacy of the decision to which they gave rise.

⁴⁷ *Ibid.* at para. 116.

⁴⁸ The following enlightening remark was made regarding the imperfections inherent in common sense: “Common sense is frequently wrong. [...] Our everyday experience of the world comes in crude, unrepresentative chunks, with causal relations hopelessly obscured, and with prejudice, superstition, and self-interest inextricably intertwined in perception.” See Bitterman, “The evaluation of Psychological Propositions” in A.L. Levin, *Evidence and the Behavioural Sciences* A-16 [mimeo 1956], cited in A.L. Levin and R.J. Levy, “Persuading the Jury with Facts not in Evidence: The Fiction—Science Spectrum” (1956) 105 U.Pa.L.Rev. 139 at 141.

⁴⁹ *R. v. Lyons*, [1987] 2 S.C.R. 309.

⁵⁰ *Ibid.* at 329.

II. RISK MANAGEMENT BY THE COURT: SPECIFIC EXAMPLES

With regard to constitutional case law as a risk-management exercise, it may be useful to consider, in addition to what have been identified as trends or mechanisms, certain judicial decisions, as specific examples.

1. Dangerous Offenders: *R. v. Lyons*, [1987] 2 S.C.R. 309

Lyons constitutes one of the rare constitutional cases in which the notion of risk was expressly discussed. The case involved the contestation of the provisions of the Criminal Code, which at the time set out the detention for an indeterminate period of persons determined to be dangerous offenders. Here, the risk consisted of the potential dangerousness of such persons, and the legislative decision had imposed on so-called dangerous offenders, as opposed to the community in general, the cost of the uncertainty in this regard. The Supreme Court of Canada confirmed this legislative distribution of risks.

Speaking for the majority, Mr Justice La Forest referred on a few occasions to the issue of risks, writing, in particular that “the most that can be established in a future context is a likelihood of certain events occurring”⁵¹, that “inherent in the notion of dangerousness is the risk, not the certainty of harm”⁵², or that “to require certainty in such matters would be tantamount to rendering the entire process ineffective.”⁵³

With approval, he cited a doctrine that dealt in the following terms with the notion of dangerousness, from the angle of risk distribution:

“The question is [...] ‘what is the moral choice between the alternative risks: the risk of harm to potential victims or the risk of unnecessarily detaining offenders judged to be dangerous?’”⁵⁴

“The problem [of preventing wilful harm] is to make a just redistribution of risk in circumstances that do not permit of its being reduced. There is a risk of harm to innocent persons at the hands of an offender who is judged likely to inflict it intentionally

⁵¹ *Ibid.* at para. 59.

⁵² *Ibid.* at para. 92.

⁵³ *Ibid.* at para. 93.

⁵⁴ *Ibid.* at para. 100, citing J. Floud & W. Young, *Dangerousness and Criminal Justice*, (London: Heinemann, 1981) at 48-49.

or recklessly—in any case culpably—in defiance or disregard of the usual constraints. His being in the wrong by virtue of the risk he represents is what entitles us to consider imposing on him the risk of unnecessary measures to save the risk of harm to innocent victims.”⁵⁵

Here, Mr Justice La Forest endorsed a reflection on a distribution of risks in public policy choices. However, it must be noted that the enshrining of rights and freedoms in theory demands more than this type of demonstration to justify violations of rights and freedoms. In effect, imposing the costs of the risks on the individuals concerned, as opposed to the community in general, now requires justification within the meaning of the *Charter*. The community does not in theory benefit from constitutional rights. As the case law currently stands, government inaction in risk situations therefore does not seem to raise constitutional problems.

2. Sexual Offenders Loitering in Public Parks: *R. v. Heywood*, [1994] 3 S.C.R. 761

Do sex offenders who loiter in parks constitute a danger to the safety of children found there? This risk is discussed in *Heywood*, which contests the constitutionality of the legislative provision that imposed on the accused the costs of the uncertainty connected with this risk, by criminalizing the fact that these persons were loitering in a public park.

The Supreme Court of Canada, in a majority decision, declared unconstitutional the provisions it deemed overly broad, in particular regarding the persons concerned.⁵⁶ However, the Court acknowledged in the following terms the rationality of the legislative decision regarding the risk management concerned:

“The section is aimed at protecting children from becoming victims of sexual offences [...]. The purpose of the prohibition on loitering is to keep *people who are likely to pose a risk to children* away from places where they are likely to be found. Prohibiting any prolonged attendance in these areas, which is what the ordinary definition of ‘loiter’ does, achieves this goal.”⁵⁷

⁵⁵ *Ibid.*

⁵⁶ *R. v. Heywood*, [1994] 3 S.C.R. 761 at para. 61.

⁵⁷ *Ibid.* at para. 37 [my emphasis].

In declaring the provision unconstitutional, the Court revised the distribution of risks initially set out by the legislature by imposing the cost of the uncertainty regarding the dangerousness of sexual offenders on the community in general, rather than on such sexual offenders. However, it should be noted that in this case the Court was able to judge freely, without having to worry about the impact of its decision on public safety, since Parliament had already, during the trial, amended the legislative provision in order to limit the scope of the prohibition.⁵⁸

In the case at bar, Mr Justice Gonthier wrote a dissenting opinion in which, interpreting the criminal prohibition as requiring the proof of a malevolent or ulterior purpose,⁵⁹ he would have pronounced its constitutional validity. After noting the risk situation, namely the uncertainty regarding the dangerousness of sexual offenders,⁶⁰ he hence expressly confirmed the distribution of risks determined by the legislature, considering “our current state of knowledge”:

“The evidence on cross-offending and the difficulty of predicting who will cross-offend [para. 80: the situation where a repeat sex offender commits another type of offence] or repeat offend would thus seem to justify some form of restriction on the liberty of persons convicted of sexual offences given our current state of knowledge.”⁶¹

3. Accuseds Not Criminally Responsible on Account of Mental Disorder: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625

The *Winko* case also raises the problem of assessing the dangerousness of certain persons, in the case at bar accused persons who are not criminally responsible on account of mental disorder.⁶²

⁵⁸ See, in particular, paragraph 31.

⁵⁹ He in fact interprets the prohibition as integrating the requirement to be at the prohibited location “for a malevolent or ulterior purpose related to the predicate offences” (*ibid.* at para. 75).

⁶⁰ He writes, for example: “The current state of knowledge therefore suggests that a person who demonstrates one form of sexually deviant behaviour may present a more general risk.” (*ibid.* at para. 80 *in fine*).

⁶¹ *Ibid.* at para. 81 *in fine*.

⁶² For a more detailed analysis of this case, see D. Pinard, “Activisme ou retenue dans la méthode: démarche en quête de points de repères” in G. Otis & M.J. Mossman, eds.,

In the judgment, all Supreme Court justices acknowledged the uncertainty inherent in the question of dangerousness, qualifying it as concerning probabilities and not facts,⁶³ or as an unavoidable element of risk itself.⁶⁴

Confronted with the risk concerned, Parliament had adopted a provision setting out the absolute discharge of anyone not criminally responsible on account of a mental disorder, only “where [...] in the opinion of the court [...], the accused is not a significant threat to the safety of the public.”⁶⁵ According to this provision, the accused will therefore not be discharged absolutely until after a positive finding that he does not represent a significant threat to public safety. In case of doubt as to the existence of a significant threat to the public, he will not be discharged absolutely. If the court concludes that the accused represents a threat but not a significant threat, he will be discharged absolutely.

From the outset, in accordance with the distribution of risks implemented by Parliament, it therefore seems that minor risk to public safety should be assumed by the community, whereas significant risk or doubt in such regard should be assumed by the not criminally responsible accused.

La montée en puissance des juges : ses manifestations, sa contestation, Canadian Institute for the Administration of Justice, Proceedings of the 1999 Annual Conference, Montreal, Éditions Thémis, 1999.

⁶³ Madam Justice McLachlin writes, at paragraph 56: “It [dangerousness] concerns probabilities, not facts, and involves estimations based on moral, interpersonal, political and sometimes arbitrary criteria.” See *Winko v. British Columbia (Forensic Psychiatric Institute)*, *supra* note 24 at 625.

⁶⁴ “Uncertainties in assessment of risk are an unavoidable element of risk itself.” See Mr Justice Gonthier, *ibid.* at para. 190.

⁶⁵ The text of the provision is as follows: “Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused: (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely; (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.” (s. 672.54 of the *Criminal Code*).

In a divided judgment, the Supreme Court unanimously confirmed the constitutional validity of the contested provisions. However, the judges did not interpret them in the same manner. On first impression, one would be tempted to believe that the Court had thus confirmed the distribution of risks implemented by Parliament. However, this does not seem to be exactly the case.

Madam Justice McLachlin, with the support of the majority, interpreted the provisions as requiring absolute discharge, barring a positive finding of significant threat to the safety of the public.⁶⁶ Hence, according to the Court, the community must assume the significant risk of danger to public safety since only a positive finding in this regard would have the effect of transferring the burden to the accused, in the form of a restriction of his or her liberty. The Court is therefore responding in law to a factual question of risk. It is interpreting law in order to prevent the alleged constitutional problem—that of imposing on an accused the burden of proving a scientifically unprovable fact, namely his or her lack of dangerousness. The cost of the scientific uncertainty is transferred to the community, which in theory has no constitutional right to invoke. Madam Justice McLachlin stated that, in her opinion, this interpretation “does not expose the community to undue threats to its safety and well-being.”⁶⁷

Mr Justice Gonthier wrote separate reasons in support of the same finding of constitutional validity. Adhering more strictly to the letter of the law, however, he interpreted the provision as authorizing absolute discharge only after the finding of a lack of significant threat to public safety.⁶⁸ Hence, Mr Justice Gonthier’s interpretation confirms the initial risk distribution apparent on reading the provision. He then had to explain himself regarding the alleged constitutional problem, given the difficulty of demonstrating that an accused is not dangerous. He wrote that the problem constituted a “risk-management exercise”,⁶⁹ and that the principles of fundamental justice “allow that uncertainties with respect to the extent of the threat posed by the accused, as opposed to its very existence, be resolved in favour of the safety of the public”⁷⁰ and do not

⁶⁶ *Winko v. British Columbia (Forensic Psychiatric Institute)*, *supra* note 24 at para. 47.

⁶⁷ *Ibid.* at para. 51.

⁶⁸ *Ibid.* at para. 103.

⁶⁹ *Ibid.* at para. 166.

⁷⁰ *Ibid.* at para. 154.

require “that the risks arising from uncertainties in assessing the degrees of dangerousness must be entirely borne by the public.”⁷¹

4. Possession of Child Pornography: *R. v. Sharpe*, (1999) 136 C.C.C. (3d) 97 (B.C.C.A.)⁷²

The risk caused by persons possessing child pornography is the focus of this high-profile case.⁷³ Do these persons pose a danger to the safety of children? Parliament seems to have answered this question in the affirmative, by criminalizing simple possession of child pornography, hence imposing the cost of the uncertainty regarding the question on persons possessing such pornography rather than on the general public. The legislative provisions were impugned as contrary to freedom of expression, and the British Columbia Court of Appeal pronounced their unconstitutionality in a majority decision.

According to the Court, the prohibition was overly broad, covering material produced without involving any child, such as a drawing by the possessor himself. Madam Justice Southin considered that criminalizing the possession of expressive materials could be justified only in the presence of necessity, which she clearly did not find in the case at bar.⁷⁴ Madam Justice Rowles, although she agreed to be satisfied with reasoned apprehension of harm to find the measure rational,⁷⁵ nonetheless concluded that the criminalization of simple possession of expressive material constitutes an extreme intrusion on the values of liberty, autonomy, and privacy protected by the rights and freedoms enshrined in the *Charter*,⁷⁶ to prevent a harm that is highly relative and difficult to

⁷¹ *Ibid.* at para. 175.

⁷² As at January 1, 2001, the Supreme Court of Canada had still not ruled on the case.

⁷³ See, for an express reference to the high-profile nature of the case, the opinions of justices Southin (para. 5) and McEachern (para. 224), in *R. v. Sharpe*, (1999) 136 C.C.C. (3d) 97 (B.C.C.A.).

⁷⁴ *Ibid.* at para. 95.

⁷⁵ She writes, at para. 158: “To use the words of *Butler* [...], what the Crown has succeeded in showing is a ‘reasoned apprehension of harm’ to children resulting both from the potential use of child pornography by paedophiles and from the desensitization of society to the use of children as sexual objects. Having a reasoned apprehension of harm based on the available social science evidence, Parliament is not constitutionally obligated to await exact proof on these issues before taking legislative action to protect children from these risks.”

⁷⁶ *Ibid.* at para. 171.

assess.⁷⁷ Madam Justice Rowles in effect pointed out the controversy that reigns in the social sciences regarding indirect harm caused to children by simple possession of child pornography, such as its potential use by pedophiles, or the desensitization of society to the idea of children as sex objects.⁷⁸ Hence, in essence, the majority judgment seems to be founded on a comparative assessment of a significant violation of rights and the prevention of a harm deemed to be limited. The judgment imposed on the community the cost of the uncertainty of our knowledge regarding the risks engendered by the simple possession of child pornography.

Chief Justice McEachern wrote a dissenting opinion expressly founded on a comparative assessment of the same elements, weighted differently, with seemingly a zero-tolerance policy regarding any risk to the safety of children. He wrote:

“[T]he balancing is between the risk of harm to both children and society as a whole by simple possession, against the right of every person, innocent or nefarious, to possess any kind of child pornography for innocent, predatory or commercial purposes. [...] Any real risk of harm to children is enough to tip the scales in favour of the legislation in the context of this case.”⁷⁹

In his opinion, persons possessing child pornography should assume the cost of the uncertainty regarding the risk created by simple possession of such material.

⁷⁷ She writes, at para. 175: “The fact that s. 163.1(4) is directed only to the private possession of expressive material, as opposed to some form of dissemination to others, reduces substantially the likelihood that any potential harm to children will be prevented through the imposition of criminal sanctions.”

⁷⁸ She writes, at para. 157: “While the harm caused to young children who are used in the making of child pornography is undisputed, the social science evidence is inconclusive with regard to some aspects of the indirect harm said to flow from child pornography. As the appellant points out in its factum, the debate on some of these issues has existed among behavioural scientists for many years and is very likely to continue in the future.”

⁷⁹ *Ibid.* at para. 291. Moreover, he had expressed the issue in dispute in comparable terms, at para. 232: “The underlying question on this appeal is whether the simple possession of child pornography (as defined) that may have been created without abusing children and which may never be published, distributed or sold creates a sufficient risk of harm to children that it should be an offence for anyone to possess such material, for any purpose or for no purpose at all.”

In light of the same factual information, or rather the same scientific uncertainty, the majority and dissenting opinions are based on a disagreement regarding a value judgment, the seriousness, or the social acceptability of the risk in this case.

CONCLUSION

Analysis of the constitutional case law as seen from the viewpoint of risk management reveals a very pragmatic judicial approach. The conceptual tools are developed and evolve in accordance with requirements and causes. Coherence seems totally relative, and predictability is very often sacrificed.

The following hypothesis seems plausible: even in a risk context, where the factual question is by definition important, it is in fact value judgments based on implicit factual *a priori* assumptions that structure the judicial decision. In reality, the judgment made on liberty and privacy, the importance of children’s safety, the dangerousness of certain persons, or the acceptable threshold of certain risks forms the basis of the judicial decision.

Notwithstanding a statement to the contrary, factual and even scientific evidence seem to play only a very relative role.

The caselaw illustrates the ambivalent relationship between law and reality.

K.C. Davis wrote very eloquently:

“Law is often contrary to fact [...]. Such law may be desirable law even if it is known to be contrary to fact. Law answers some questions on the basis of science, answers some questions in spite of science, and answers many questions that science cannot answer.”⁸⁰

Truth is certainly a significant value for law, but it is not the only one.

⁸⁰ K.C. Davis, *Administrative Law of the Eighties*, 1989 Supplement to Administrative Law Treatise, (University of San Diego: K.C. Pub. Co., 1989) at 371. See, in the same vein, D.L. Faigman, “Mapping The Labyrinth of Scientific Evidence” (1995) *Hast.L.J.* 555, who writes, at 566: “The law works under extraordinary time pressure and is limited by the ignorance of the age. The law desires truth but realistically settles for justice and fairness.”

The discovery of truth has always been a fundamental purpose of law.⁸¹ Law cannot function on the basis of factual premises that are clearly contradicted by the state of objective knowledge. As a social institution, law must have the same relationship with reality as does the average citizen. Law can be based on lies only at the expense of its legitimacy. If scientists become increasingly interested in the world of law and its factual premises, which some are claiming,⁸² the lies of law will increasingly be uncovered, and the legal institutions will be progressively weakened.

However, access to “reality” and “truth” is limited in many ways. On one hand, we should beware of the wishful thinking according to which science knows everything and can explain all phenomena and inform us of all relationships of causality relevant to the world of law. Others before me have denounced this conception of science, which is based on legend.⁸³ The world of scientific knowledge can in effect only aspire to objectivity on a road strewn with obstacles, subjectivity and errors.⁸⁴

⁸¹ See, for example, in praise of the search for truth in the world of law: R.J. Allen, “Truth And Its Rivals” (1998) 49 *Hast.L.J.* 309, who writes, in particular, at 318: “[T]he truth is an irritant. It brings people up short, makes them justify what they have to say, and shift focus from elegance and creativity to truth and facts. By doing so, it makes it considerably more difficult to argue for certain desired outcomes. This is as it should be. One of the key ingredients to expansion of knowledge is the irritation that comes from the requirements of justification and evidential support.”

⁸² See, for example, R.O. Lempert, “Built On Lies: Preliminary Reflections On Evidence Law As An Autopoietic System” (1998) 49 *Hast.L.J.* 343, who writes (at 343): “The system’s legitimacy is threatened when the spotlight is cast on the lies at its core. Thus, the attention that social scientists are now giving evidence rules is not entirely a good thing from the system’s point of view, because science can undercut the claimed factual basis of an evidentiary rule without offering a substitute basis that articulates well with other evidentiary rules, is politically feasible, and promotes verdict accuracy.”

⁸³ See, for example, G.W. Conk, “Legend *versus* Pragmatism” in C.H. Cwik & J.L. North, eds., *Scientific Evidence Review*, Monograph N° 3, American Bar Association, Section of Science and Technology, 1997, who writes: “According to Legend, science proceeds by universally accepted canons of evaluation. When used to test novel or controversial ideas, science brings a relentless advance toward the complete true story of the observable part of the world, but with an occasional mistake to its credit.” (at 2-3).

⁸⁴ See, for example, Popper’s statement: “Objective knowledge, for example, scientific knowledge [...] consists of conjectural theories, open problems, problem situations and arguments. All work in science is directed towards the growth of objective

On the other hand, once we admit that objective knowledge is not necessarily available, even to scientists, we must also accept that the structures of law are very far from permitting a free search for truth. The process of reconstructing reality before the courts has inherent limits, meaning that the best we can do is reach an approximation.

Finally, and beyond the search for truth, law has other missions to achieve and other outcomes to pursue. In this respect, the protection of the dignity of the person, legal security and the image of the administration of justice sometimes take precedence over any other consideration.

Value judgment is central to the act of judging. For better or worse, scientists cannot help us in this regard.

knowledge. We are workers who are adding to the growth of objective knowledge as masons work on a cathedral. Our work is fallible, like all human work. We constantly make mistakes, and there are objective standards of which we may fall short—standards of truth, of content, of validity, and other standards.” See K. Popper, *Objective Knowledge: An Evolutionary Approach* (rev. ed. 1979), cited in G.W. Conk, *supra* note 83 at 3 footnote 6.