File No. 35246

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

AND:

FREDERICK ANDERSON

RESPONDENT
(Respondent)

AND:

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF BRITISH COLUMBIA, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, and ABORIGINAL LEGAL SERVICES OF TORONTO INC.

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FACTUM OF THE INTERVENER
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RULE 37, *Rules of the Supreme Court of Canada*

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Since this Court's decision in *Krieger v. Law Society of Alberta,* [2002] 3 S.C.R. 372, there has been considerable debate in the lower courts on how best to approach complaints that are made about prosecutorial conduct during the course of a criminal proceeding.

2. The Attorney General for British Columbia (AGBC) has intervened in this appeal to place a comprehensive analytic framework before the Court that offers a constructive roadmap for resolving these complaints. The framework establishes three distinct avenues for judicial review.

PART II – INTERVENER AGBC's POSITION ON THE APPELLANT'S QUESTIONS

3. The availability of review, as well as the governing standard, is directly dependent on whether the impugned action by a prosecutor involves: (i) an exercise of discretion on an independent, core power of the Attorney General as Chief Law Officer of the Crown ("prosecutorial discretion"); (ii) a decision that does not engage prosecutorial discretion, but implicates a specific *Charter* right; or (iii) a matter of tactics or conduct before the court.

4. In deciding whether "prosecutorial discretion" is engaged, one must look to the nature of the *power or authority* that was spent on behalf of the Attorney General. "Prosecutorial discretion" is at issue when the prosecutor, as agent, makes a decision or takes a step that uses, employs or gives substantive effect to the Attorney General's independent executive authority.

5. Prosecutorial discretion is reviewable only for abuse of process, now subsumed under s.7 of the *Charter*. Judicial intervention requires proof of ongoing, irremediable impairment to a fair trial interest, oppressive or vexatious proceedings, flagrant impropriety or bad faith: *R. v. Nixon,* [2011] 2 S.C.R. 566; *R. v. Babos,* 2014 SCC 16*.* To protect against second-guessing the Attorney General's executive authority, an "onerous and strict" burden is required: *Nelles v. Ontario,* [1989] 2 S.C.R. 170.

6. Decisions that fall outside the contours of prosecutorial discretion, but implicate a specific *Charter* right, are reviewable in the same way as other alleged *Charter* infringements, with the nature of the right defining the proof requirements. Conduct that engages neither of these two categories is reviewable under the court's inherent jurisdiction to control its own processes. A deferential standard applies; the same as that which governs tactical decisions made on behalf of the defence.

7. The AGBC will explore each avenue for review. The framework put forward in this Factum encourages a trial judge to ask three primary questions upon receipt of a complaint about prosecutorial conduct: (1) what is the nature of the decision, or course of action complained of? (2) what is the governing standard of review? and (3) is an evidentiary inquiry warranted? Each of these questions is fundamental to both framing, and resolving the complaint.

PART III – ARGUMENT

A. Discretionary Decisions on the Attorney General's Core Powers:

(i) The Nature of the Decision:

8. Discretionary decisions made in fulfillment of the independent "powers that constitute the core of the Attorney General's office" are properly characterized as matters of prosecutorial discretion: *Krieger,* para.46. Prosecutors "perform a function inherent in the office of the Attorney General". They too must make their "discretionary decisions…without fear of judicial or political interference": *Miazga v. Kvello Estate,* [2009] 3 S.C.R. 339, para.47.

9. Over time, certain powers have been noted as central to the role of Chief Law Officer. In *R. v. Hauser,* [1979] 1 S.C.R. 984, the Attorney General's scope of authority was defined with reference to "three classifications of powers": per Dickson J., dissenting, pp.1011-1013. These consisted of: "The Power to Intervene"; "The Power to Prefer Indictments and to Control the Mode of Trial"; and "The Power to Control Appeals": pp.1011-1013. In *Nelles,* core powers were held to include the power to detain in custody; to prosecute; negotiate a plea; charge multiple offences; prefer an indictment; elect to proceed summarily or by indictment; withdraw charges; and initiate an appeal: p.192, per Lamer J.

10. In *Krieger,* the discussion about core authority focused on the power to enter a stay of proceedings; accept a guilty plea to a lesser charge; and take control of a private prosecution: para.46.[1] Since *Krieger,* lower courts have held that the Attorney General's independent authority also extends to consent for judicial interim release *(Picha v. Lee Inquest (Coroner of)*, 2009 BCCA 336); preferring a direct indictment *(Sher v. The Queen,* 2012 ONSC 4783); and applications under the long term and dangerous offender regime: *R. v. Manitopyes,* 2013 SKQB 112.

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[1] Post-*Krieger,* this Court has confirmed that initiating a prosecution engages "prosecutorial discretion" (*Miazga*), as well as accepting a plea to a lesser and included offence, and the repudiation of a plea agreement (*R. v. Nixon,* [2011] 2 S.C.R. 566).

11. These powers are cast as core because they impact "the nature and extent of the prosecution" and give meaningful effect to the Attorney General's exclusive constitutional right in the administration of criminal law to "deal with the institution and control of prosecutions": *Krieger,* para.47; *R. v. Smythe* (1971), 3 S.C.C. (2d) 97 (Ont. S.C.); affirmed (1971), 3 C.C.C. (2d) 366 (S.C.C.), underlining added. They are also powers that require an independent assessment of public interest factors "within the authority delegated to [the Attorney General] by the sovereign": *Krieger,* para.45. Discretionary decisions made in fulfillment of this authority will be informed by the need to "not only protect the public, but also to honour and express the community's sense of justice": *R. v. Power,* [1994] 1 S.C.R. 601, p.616.

12. As correctly noted in *R. v. Gill,* 2012 ONCA 607, "[o]ne cannot set out an exhaustive list of prosecutorial powers that engage the [Attorney General's] core discretionary powers. The distinction between core discretionary powers and other prosecutorial decisions lies in the nature of the decision being made": para.54. At a minimum, "[c]ore prosecutorial decisions are those that are fundamental to the nature, commencement or continuation of the prosecution": *Gill,* para.54, underlining added.

13. This would include the authority to file a notice to seek greater punishment under s.727(1) of the *Criminal Code,* R.S.C. 1985, c.C-46. On this point, the AGBC agrees with the summary conviction appeal Judge in *R. v. Singh,* 2012 ONSC 30, who ruled that a: "[c]ase-by-case supervision of the reasonableness of a prosecutor's exercise of discretion to prove the s. 727(1) notice...would inevitably plunge the court into second-guessing the assessment of cases by Crown counsel within their public law function. Constitutional separation of powers would be eroded": para.164, underlining added.

14. A notice to seek greater punishment speaks directly to "what the prosecution ought to be for": *R. v. Anderson,* 2013 NLCA 2, paras.25-28, per Welsh J.A. The "decision to seek a mandatory minimum sentence is analogous to choosing, for example, whether to proceed by indictment or summary conviction or to accept a guilty plea to a lesser charge. Those decisions, subject to proof by evidence, provide the parameters within which the judge may act": *Anderson,* para.28.

15. Discretion on a core power constitutes prosecutorial discretion. This is a unique form of discretion because it makes manifest a decision that uses, employs or gives substantive effect to the Attorney General's independent executive authority. For this reason, in deciding whether prosecutorial discretion is engaged, the question to ask is not whether the discretion itself was "core" or "non-core" (an approach that has led to confusion in the lower courts). Rather, one must look to the nature of the *power or authority* that

was spent on behalf of the Attorney General. If the power is central to the Attorney General's independent role as Chief Law Officer, then *any* exercise of discretion that is necessary for, and incidental to fulfillment of that power logically falls within the contours of prosecutorial discretion.

16. A broad definitional approach is warranted. Wide ranging discretion in fulfillment of the Attorney General's authority is integral to the effective administration of justice. A "system that attempted to eliminate discretion would be unworkably complex and rigid": *R. v. T. (V.),* [1992] 1 S.C.R. 749, pp.758-759. The "public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals": *Miazga,* para.47.

(ii) <u>The Standard of Review:</u>

17. Prosecutorial discretion is <u>only</u> reviewable for abuse of process, now subsumed under s.7 of the *Canadian Charter of Rights and Freedoms*: *Power,* pp.615-616; *Miazga,* paras.46-48. Moreover, in the absence of ongoing, irremediable impairment to a fair trial interest, or oppressive or vexatious proceedings, the residual category of the abuse of process doctrine applies and judicial intervention is restricted to circumstances in which there is "conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community such that it would genuinely be unfair and indecent to proceed": *Power,* p.616; *Miazga,* para.48; *Nixon*, paras.40-42; *Babos,* paras.34-40.

18. Even when this test has been met, a stay of proceedings is only appropriate where: (1) there is prejudice to the right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) there is no alternative remedy capable of redressing the prejudice. If uncertainty remains after applying these two factors, a court "is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits: *Babos,* para.32, references omitted; *Nixon,* paras.40-42.

19. A rigorous threshold for intervention ensures that the courts do not interfere with matters within the exclusive domain of the Attorney General's independent authority. The "principle of Crown independence means that decisions taken by a Crown attorney pursuant to his or her prosecutorial discretion are generally immune from judicial review under principles of public law, subject only to the strict application of the doctrine of abuse of process": *Miazga,* para.6. Independence "finds form in the principle that courts will not interfere with [the Attorney General's] exercise of executive authority, as reflected in the prosecutorial

decision-making process": *Krieger,* para.31. To "subject [prosecutorial discretion] to political interference, <u>or to judicial supervision</u>, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict": *Krieger,* para.32, underlining added.

20. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement policies and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake": *T. (V.),* [1992] 1 S.C.R. 749, p.761, endorsing Powell J. in *Wayte v. United States,* 470 U.S. 598 (1985), pp.607-8.

(iii) <u>The Judge's Inquiry</u>:

21. A trial court should not proceed with a challenge to prosecutorial discretion unless the applicant has first shown a reasonable likelihood of establishing, with reference to an anticipated evidentiary foundation, irremediable impairment to a fair trial interest, oppressive or vexatious proceedings, flagrant impropriety or bad faith. *Nixon,* para.59. In the absence of meeting this threshold, there is no principled basis for an evidentiary inquiry: *Nixon,* para.60; *Manitopyes.*

22. This approach respects the interdependent constitutional and policy rationale underlying the restricted scope of review. It also recognizes that prosecutorial discretion is presumed to be exercised in good faith: *Application under 83.28 of the Criminal Code (Re),* [2004] 2 S.C.R. 248, para.95. Prosecutors are not "bound to provide reasons for their decisions, absent evidence of bad faith or improper motives": *Sriskandarajah v. United States of America,* 2012 SCC 70, para.27.

23. To meet the preliminary threshold, an allegation of abuse of process "must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof": *R. v. Durette* (1992), 72 C.C.C. (3d) 421, pp.437-438; reversed on other grounds [1994], 1 S.C.R. 479. See also: *United States v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont.C.A.), para.78; and *R. v. N.(D.)* (2004), 188 C.C.C. (3d) 89 (Nfld. C.A.), para.26. Procedurally, the applicant may satisfy the threshold through "counsel's statements, possibly supported by an affidavit...If these are found to be insufficient, a more formal approach, involving affidavits and possibly an undertaking to adduce evidence…may be required": *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193; leave to appeal refused, [1997] 2 S.C.R. xvi para.23.

B. Decisions that Implicate a Specific *Charter* Right:

(i) The Nature of the Decision:

24. Decisions that fall outside the contours of prosecutorial discretion may directly implicate a specific *Charter* right and, within that context, open themselves to judicial review: *Singh*, para.157. These are decisions that, although integral to the criminal litigation process, do not use, employ or give substantive effect to the Attorney General's independent executive authority. Instead, they consist of common law, statutory or constitutional obligations that are imposed on the state as a criminal litigant, and come under review when shown to prejudice the substantive and procedural rights of the accused.

25. For example, decisions to withhold disclosure can prejudice the right to make full answer and defence under s.7 of the *Charter*: *Krieger*, para.54. Delaying proceedings, or the manner in which a significant prosecution is managed, might impact the right to be tried with a reasonable time under s.11(b): *R. v. Auclair,* 2014 SCC 6; affirming 2013 QCCA 671. Appearing as both prosecutor and witness in the same case may offend s.11(d): *R. v. Cooper,* 2005 BCCA 256; leave to appeal refused, [2005] S.C.C.A. No.321. Decisions that do not engage prosecutorial discretion might individually, or in their cumulative effect, bring about an abuse of process within the meaning of the *Charter*: *R. v. R.(J.S.),* 2012 ONCA 568; leave to appeal refused, [2012] S.C.C.A. No.456.

(ii) The Standard of Review:

26. Non-prosecutorial discretion that directly implicates a *Charter* right is reviewable in the same way as other alleged *Charter* infringements, with the nature of the right defining the proof requirements for intervention. For instance, if a claim is grounded in abuse of process, the applicant will need to show that the prosecutor's actions have "tainted [the prosecution] to such a degree that to allow it to proceed would tarnish the integrity of the court": *R. v. Conway,* [1989] 1 S.C.R. 1659, p.1667; *Nixon,* para.27. This might include conduct that is proved, on a balance of probabilities, to undermine the integrity of the administration of justice; operate in a manner that renders a proceeding fundamentally unfair; is arbitrary; or results in a liberty deprivation that is grossly disproportionate to the relevant state interest: *Gill,* para.7.

27. Again, intervention through a stay of proceedings, even in the face of an abuse of process, is only appropriate where: (1) there is prejudice to the right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) there is no alternative remedy capable of redressing the prejudice: *Babos,* para.32, references omitted; *Nixon,* paras.40-42.

28. If a new principle of fundamental justice is asserted as the basis for intervention under s.7, settled criteria must be applied. The applicant bears the onus of showing: (1) it is a legal principle; (2) there is sufficient consensus that it is "vital or fundamental to our societal notion of justice"; and (3) the principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76, pp.92-93.

29. In the case at bar, the notice to seek greater punishment was held to violate s.7 because the prosecution did not show that in filing the notice, the prosecutor considered the Respondent's aboriginal status: *R. v. Anderson,* 2013 NLCA 2. Yet, neither of the lower Courts asked whether "fundamental justice" actually requires or mandates that this occur. Instead, s.718.2(e), as informed by this Court's discussion in *R. v. Gladue,* [1999] 1 S.C.R. 688, was summarily transformed into a principle of fundamental justice and held to constitutionally circumscribe the decision making of the Attorney General: 2013 NLCA 2, paras.15, 36, 40, 43, 44 and 51. In *R. v. Ipeelee,* [2012] 1 S.C.R. 433, section 718.2(e) was described as a "remedial provision" that gives rise to a "statutory duty" on the part of sentencing judges, not a principle of fundamental justice within the meaning of the *Charter*: paras.59, 68, 75 and 87. These are fundamentally different concepts.

30. As stated, it is the AGBC's position that a notice under s.727(1) speaks directly to the "nature, commencement or continuation of the prosecution" (paras.13-14, *infra*). As such, it is reviewable only for abuse of process on the bases specific to prosecutorial discretion (para.17, *infra*). If this Court disagrees, the AGBC says that the process by which the Court of Appeal below reached its constitutional ruling was nonetheless fatally flawed. It did not engage in the analysis required of it by *Canadian Foundation.* It did not ask whether the Respondent established, on a balance of probabilities, that Parliament's statutory direction to judges in s.718.2(e) meets the test for fundamental justice and, more importantly, that it constitutionally attaches to the exercise of discretion by a prosecutor under s.727(1). The AGBC knows of no authority in support of this proposition. As noted by the majority in *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519, "principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute": p. 607.

31. The approach to s.7 that was adopted in this case must be avoided. Summarily elevating a legislative policy choice to the status of fundamental justice, without a proper analytic or evidentiary record, has far-reaching implications. The Respondent argues, for example, that the mere fact of not referencing

aboriginal status as a factor for consideration in a prosecution policy on sentencing will violate s.7 and constitute a "flagrant impropriety": Factum, para.1. In *R. v. Stone,* 2013 ONCJ 490, which relied upon the presumptive approach taken in the case at bar, s.7 was held to not only mandate that aboriginal status be considered under s.727(1), but that "the *Gladue* principles <u>in their entirety</u> be understood and applied": paras.20-21, underlining added. Anything short of that will result in a *Charter* breach. Prosecutors make myriad discretionary decisions on a daily basis, many of which impact aboriginal persons who may be accused of a crime. The practical implications of the Court of Appeal's ruling are profound.

(iii) <u>The Judge's Inquiry:</u>

32. A trial judge should not proceed with an evidentiary inquiry into decisions that directly implicate a *Charter* right unless the applicant has first shown a reasonable likelihood of establishing, with reference to an anticipated evidentiary foundation, that the inquiry will assist in determining the issue before the court.

33. "Mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new": *Nixon,* para.61. As held in *R. v. Pires; R. v. Lising,* [2005] 3 S.C.R. 343: "For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court": para.35.

34. What is necessary to meet the threshold will be informed by the circumstances of each case, recognizing that no two factual matrices will ever be identical. However, the proof requirements for showing a *Charter* violation are informative. The applicant for *Charter* relief bears the onus of articulating the nature of the alleged infringement; must establish a violation of the identified right on a balance of probabilities; and must satisfy the trial court that a remedy is warranted under s.24: *Canadian Foundation*, p.91.

C. <u>Tactics or Conduct Before the Court</u>

(i) <u>Nature of the Decision:</u>

35. Decisions that do not engage prosecutorial discretion, and do not (either individually or cumulatively) implicate a specific *Charter* right, are properly characterized as "tactics or conduct before the court": *Krieger,* paras.43 and 46-47. This might include a decision to not call a particular witness: *R. v. Jolivet,* 2000 SCC 29, para.21. The order in which the prosecution desires to call its evidence has also been considered a matter of trial tactics: *R. v. Felderhof,* [2003] O.J. No.4819 (Ont. C.A.).

(ii) Standard of Review:

36. Tactics are reviewable under the court's inherent jurisdiction to control its own processes. Inherent jurisdiction consists of "those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner – subject to any statutory provisions": *Ontario v. Criminal Lawyer's Association of Ontario,* 2013 SCC 43, para.26. This includes what is commonly referred to as the "trial management power": *Felderhof,* para.40.

37. In exercising an inherent power, a deferential standard of review is applied. In "an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel": *R. v. S.G.T.,* 2010 SCC 20, paras.36-37, underlining added, referencing *R. v. Lomage* (1991), 2 O.R. (3d) 621 (C.A.), pp. 629-30. Judges "are expected to be impartial arbiters of the dispute before them; the more a trial judge second-guesses or overrides the decisions of counsel, the greater is the risk that the trial judge will, in either appearance or reality, cease being a neutral arbiter and instead become an advocate for one party": *S.G.T.,* paras.36-37.

38. Like defence counsel, prosecutors are entitled to "have a trial strategy and to modify it as the trial unfolds, *provided that the modification does not result in unfairness to the accused*": *Jolivet,* para.21, italics in the original. Judges must "make sure that [the trial] remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice": *S.G.T.,* paras.36-37, referencing *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 68.

39. At the same time, "the operation of the system is predicated upon the presence of opposing counsel. They are expected to advance often sharply conflicting views. They are also responsible for introducing evidence and presenting argument to the court, in a spirit of sometimes vigorous confrontation. Within limits, when the fairness and fundamental legality of the process may be at stake, courts do not attempt to second-guess the tactical decisions of lawyers": *Lavallee,* per Lebel J., dissenting in part, para.68. As previously noted, the law *presumes* that prosecutors act in good faith: *Application under 83.28*, para.95. The AGBC submits that this presumption applies to all decision making on the part of the prosecution – whether it engages an exercise of prosecutorial discretion, implicates a specific *Charter* right or otherwise.

(iii) <u>The Judge's Inquiry</u>:

40. A trial judge should not proceed with a review of prosecutorial tactics or conduct before the court unless the applicant has first shown a reasonable likelihood of establishing prejudice. A judge who is asked "to interfere with a prosecutor's tactics...must move cautiously to avoid any appearance of partiality": *Felderhof,* para.45. A decision to interfere with tactical decisions "should only be taken because the trial judge is convinced that the prosecution's proposed way of proceeding will interfere with the orderly management of the trial", or has been determined to result in actual prejudice: *Felderhof,* para.45; *Jolivet; S.G.T.,* paras.36-37.

41. When assessing whether review and intervention is warranted, it must be remembered that the accused is not entitled to the most favourable procedures that could possibly be imagined: *R. v. Lyons,* [1987] 2 S.C.R. 309, pp.361-362. A fair trial is one that satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused: *R. v. Harrer,* [1995] 3 S.C.R. 562, para.45.

<u>PART IV – SUBMISSIONS ON COSTS</u>

42. The AGBC makes no submissions on costs.

<u>PART V – NATURE OF ORDER REQUESTED</u>

43. The AGBC makes no submissions on the specific outcome of this appeal. The AGBC has intervened in this appeal to place a comprehensive analytic framework before the Court for resolving complaints about prosecutorial conduct. Among other things, the framework affirms that "prosecutorial discretion" encompasses any discretion that is necessary for, and incidental to an exercise of the Attorney General's independent executive authority as Chief Law Officer of the Crown.

44. Furthermore, this form of discretion is reviewable only for abuse of process under s.7 of the *Charter*. Judicial intervention is not available in the absence of ongoing, irremediable impairment of a fair trial interest, oppressive or vexatious proceedings, flagrant impropriety or bad faith. The AGBC requests an opportunity to present its framework in oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

M. Joyce DeWitt-Van Oosten, Q.C.
Counsel for the Intervener, Attorney General for British Columbia
Victoria, British Columbia
Dated this 3rd day of March, 2014.

PART VI – TABLE OF AUTHORITIES

Paragraph

PART VII – STATUTES

None