EB-2008-0411

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O. 1998, c.15, (Schedule B) (the "*Act*");

AND IN THE MATTER OF an Application by Union Gas Limited pursuant to section 43(1) of the *Act*, for an Order or Orders granting leave to sell 11.7 kilometers of natural gas pipeline between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair, all I the Province of Ontario.

BRIEF OF AUTHORITIES OF

CANADIAN MANUFACTURERS & EXPORTERS ("CME")

July 17, 2009

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ONTARIO CIVIL PRACTICE 2009

by

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Questions for Jury and Jury Verdicts — s. 108(5)

Teskey v. Toronto Transit Commission (2003), 2003 CarswellOnt 4452, [2003] O.J. No. 4546, 3 C.P.C. (6th) 181 (S.C.J.)

The trial judge rejected the jury's finding on quantum of damages as being devoid of evidentiary support. The trial judge then assessed the damages.

Adu-Gyamfi v. Kingsway General Insurance Co. (1996), 8 C.P.C. (4th) 294 (Ont. Gen. Div.)

The court tailored questions to the jury to avoid the risk the jury would take into account the appearance of double recovery.

Smith v. Foussias (January 31, 1996), Doc. Toronto 89-CU-356998 (Ont. Gen. Div.)

The trial judge ordered a new trial where the jury's answers to questions were grossly inconsistent and it was not possible to reinstruct the jury.

Rose v. Sabourin (1994), 31 C.P.C. (3d) 309, 118 D.L.R. (4th) 729 (Ont. Gen. Div.)

Once a jury verdict is recorded and the jury discharged, the jury may not be recalled to reconsider the verdict except to rectify errors made in the transmission or recording of the verdict.

Maliewski v. Pastushok (No. 2), [1966] 1 O.R. 612, 54 D.L.R. (2d) 482 (C.A.)

Questions of fact put to the jury may relate to both liability and damages.

St. Amour v. Ottawa Transportation Comm., [1957] O.W.N. 367 (C.A.)

Where a jury finds a defendant negligent but is unable to give any particulars of such negligence, the action should be dismissed rather than ordering a new trial.

Judd v. Frost, [1957] O.W.N. 539 (C.A.)

Where inconsistencies appear on the face of the jury's answers, the judge should send them back to clarify the answers. The trial judge allowed the jury to be polled although this practice was questioned by the Court of Appeal.

Walkinshaw v. Drew, [1936] O.W.N. 539, 67 C.C.C. 152, [1936] 4 D.L.R. 685 (C.A.)

Libel actions are governed by the provisions of the *Libel and Slander Act*.

Discharge of Juror — s. 108(7)

Thomas-Robinson v. Song (1997), 34 O.R. (3d) 62 (Gen. Div.)

This provision does not contemplate a challenge of potential jurors for cause.

Sauve v. Pokorny (1997), 35 O.R. (3d) 752, 149 D.L.R. (4th) 655, 13 C.P.C. (4th) 43, 102 O.A.C. 256 (C.A.); leave to appeal refused (1998), 227 N.R. 89 (note), 112 O.A.C. 397 (note) (S.C.C.)

Where a trial judge discharged a juror after the trial had commenced, the trial judge had the power to direct that the trial carry on with the five remaining jurors.

Harris (Litigation Guardian of) v. Lambton (County) Roman Catholic School Board (1994), 39 C.P.C. (3d) 396 (Ont. Gen. Div.)

Where a juror was discharged after it was discovered during the trial that he was serving a jail sentence on the weekend, the court declared a mistrial and adjourned the action to the next jury settings.

Section 109

Notice of constitutional question

109. (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise.

Notice of appeal

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

Boards and tribunals

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings.

1994, c. 12, s. 42

Ministry Comment

Original Act

Subsection (1) is derived from s. 35(1) of the *Judicature Act*. The new provision requires notice whenever the constitutional applicability of a statute, as well as the constitutional validity of a statute, is questioned.

Subsection (2) replaces s. 35(2) and (3) of the *Judicature Act*. The rules of court provide a form (*e.g.* Form 4F of the Rules of Civil Procedure) for the notice which gives more detail concerning the content of the notice. The new subsection also extends the period of notice from six days to ten days, subject to the court permitting a different period.

Indexed as:

Northern Telecom Ltd. v. Communications Workers of Canada

Northern Telecom Limited, Appellant; and
Communications Workers of Canada, Respondent; and
David P. Thompson et al., Intervenors; and
The Canada Labour Relations Board, Tribunal.

[1980] 1 S.C.R. 115

Supreme Court of Canada

1978: November 15 / 1979: June 28.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law -- Labour relations -- Jurisdiction of the Canada Labour Relations Board -- Absence of evidence on the constitutional facts -- British North America Act, ss. 91, 92(10)(a) -- Canada Labour Code, R.S.C. c. L-1, ss. 2, 108.

On April 22, 1976, the Canada Labour Relations Board (the "Board") certified the Communications Workers of Canada (the "Union") as bargaining agent for the employees of Northern Telecom Limited ("Telecom") working as supervisors in its Western Region Installation Department. At the proceedings, Telecom did not directly contest the jurisdiction of the Board, stating it reserved its rights on that constitutional issue. Though no evidence was directed to the question of jurisdiction, the Board referred to the long history of the earlier certifications for the installers and held that Telecom's Installation Department at least was excluded by s. 92(10)(a) of the B.N.A. Act from provincial jurisdiction. Therefore, the Board had jurisdiction and the supervisors were employees within the meaning of the Canada Labour Code. Telecom unsuccessfully brought a section 28 application to set aside the order of the Board before the Federal Court of Appeal. Leave to appeal to this Court was granted on the question of whether the employees of Telecom are employed upon or in connection with the operation of any federal work, undertaking or business, within the meaning of the Code.

Held: The appeal should be dismissed.

Even if the Federal Court of Appeal appears to have treated the jurisdictional issue as one of judicial review of an administrative board, the answer to the question posed is found in principles governing the constitutional division of authority over labour relations. By section 108, the Board has jurisdiction with respect to persons employed on federal works, undertakings or businesses, as defined in s. 2 of the Code. To determine the constitutional issues, it is clear that certain kinds of 'constitutional facts' are required. Among these are:

(1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;
(2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;
(3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;
(4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system.

In determining whether a particular subsidiary operation forms an integral part of the federal undertaking, the judgment is functional and practical, emphasizing the factual character of the ongoing undertaking. To ascertain the nature of the operation, one must assess the normal or habitual activities of the business, which calls for a fairly complete set of factual findings. Here, there is some question as to the presence of both federal and provincial undertakings, requiring careful consideration of the connection between this subsidiary operation and the core undertakings. It is clear from the record that there is a near-total absence of relevant and material constitutional facts upon which such a delicate judgment must be made. Absent these facts, this Court would be ill-advised to essay to resolve the constitutional issue. Furthermore, Telecom did not apply to the Court, pursuant to Rule 17 of the Supreme Court Rules for the purpose of having a constitutional question stated. As Telecom effectively deprived a reviewing court of the necessary constitutional facts upon which to reach any valid conclusion on the constitutional issue, the matter will not be referred back to the Board to hear evidence. This Court being in no position to give a definite answer to the constitutional issue, that question awaits another day and the appeal is dismissed simply on the basis that the appellant Telecom has failed to show reversible error on the part of the Board.

Cases Cited

R. v. Ontario Labour Relations Board, Ex parte Northern Electric Co. Ltd., [1970] 2 O.R. 654, appeal quashed [1971] 1 O.R. 121; Jacmain v. Attorney General of Canada et al., [1978] 2 S.C.R. 15; Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754; Arrow Transfer Co. Ltd., [1974] 1 Can. L.R.B.R. 29; Capital Cities Communications Inc. v. C.R.T.C., [1978] 2 S.C.R. 141; Public Service Board v. Dionne, [1978] 2 S.C.R. 191; City of Toronto v. Bell Telephone Co. of Canada, [1905] A.C. 52; Quebec Minimum Wage Commission v. Bell Telephone Co. of Canada, [1966] S.C.R. 767; Canadian Pacific Railway Co. v. Attorney-General for British Columbia, [1950], A.C. 122; In re the validity of the Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529; Letter Carriers' Union of Canada v. Canadian Union of Postal Workers, [1975] 1 S.C.R. 178 referred to.

APPEAL from a decision of the Federal Court of Appeal [[1977] 2 F.C. 406] dismissing an application to set aside an order of the Canada Labour Relations Board. Appeal dismissed.

William S. Tyndale, Q.C., and Robert Monette, for the appellant.
Aubrey E. Golden and Maurice Green, for the respondent, Communications Workers of Canada.
George Hynna, for the Canada Labour Relations Board.

Solicitors for the appellant: Ogilvy, Montgomery, Renault, Clarke, Kirkpatrick, Hannon & Howard, Montreal.
Solicitors for the respondent: Golden, Levinson, Toronto.
Solicitor for the Canada Labour Relations Board: L.M. Huart, Ottawa.

The judgment of the Court was delivered by

DICKSON J.:-- On April 22, 1974, over five years ago, the Communications Workers of Canada (the "Union") applied to the Canada Labour Relations Board (the "Board") for certification in respect of a unit comprising some 148 employees of Northern Telecom Limited (formerly Northern Electric Company Limited) ("Telecom"). The proposed bargaining unit comprised:

> all employees of Northern Telecom Limited working in its Western Region Installation Department as supervisors.

The Board found that the supervisors were employees within the meaning of the Canada Labour Code, that the proposed unit was appropriate for collective bargaining and that the majority of the employees constituting the unit wished to have the Union

represent them as their bargaining agent. By an order of the Board, dated April 22, 1976, the Union was certified as bargaining agent for the employees in the unit.

At first glance, this would appear to be a routine application for certification. But the subsequent judicial history of this appeal has proven to be far from routine and its resolution puts the Court in an unusual and difficult dilemma. In no small part, this can be attributed to the strange position taken by Telecom in the proceedings. In order to understand how the situation arose, it is necessary to recount the history of this case--the positions of the parties before the Board, the proceedings before the Board, the Board's decision and the disposition of the section 28 application to the Federal Court of Appeal.

THE POSITIONS OF THE PARTIES BEFORE THE BOARD

All of the employees in the proposed bargaining unit work in that part of Canada lying to the west of Telecom's "Brighton Line", a line drawn north from the town of Brighton in the province of Ontario, which Telecom employs to divide the country into two regions for internal administrative purposes. The installers in this Western Region are covered by a collective agreement in which Telecom voluntarily recognized the same union, the Communications Workers of Canada, as bargaining agent for the installers. By the application which is the subject of the present proceedings, the Union sought certification as bargaining agent for the supervisors of these installers.

In its reply to the Union's application, the employer, then known as The Northern Electric Company Limited, stated that its business was that of designing, manufacturing and selling communications systems and equipments and of installing communications systems and equipments, throughout Canada and other parts of the world. The application was opposed principally on the ground that the proposed bargaining unit was not an appropriate unit for purposes of collective bargaining and further, that the supervisors performed management functions and were not "employees" within the meaning of the Canada Labour Code. Paragraph 15 of Telecom's reply reads in part:

> 15. The present application has been filed with your Honourable Board only because the applicant knows that it cannot be certified for this group by a provincial Board ...

In his opening statement before the Board Mr. Golden, counsel for the Union, alluded to paragraph 15 of the reply which, he said, raised inferentially, but not directly, a constitutional issue. He said:

> I would like to dispose of that to know whether, in fact, the respondent accepts

> the jurisdiction of this Board to here entertain this application on the basis of the constitution governing this country and if so, we will not have to deal with that any further. As I say, it has not been raised directly.

At the conclusion of his preliminary statement Mr. Golden returned again to the question whether the employer was advancing any constitutional challenge to the jurisdiction of the Board.

> First and of course, the most important area is whether to know or not the respondent challenges the constitutional jurisdiction because without that unless that is beside it I don't think we can go very much further.

Mr. Monette, counsel for Telecom, at the outset of his preliminary statement said:

> Well, Mr. Chairman and Members of the Board, with your permission I will address myself to one question which has been raised now on two occasions by my learned friend. Which he quotes as a constitutional issue. You will notice, from the reply of the respondent, there is no specific allegation where it is suggested that this Board does not have jurisdiction and if this were to be the respondent's opinion, it would be clearly stated in one or more paragraphs in the reply and there is nothing to that in the reply. May I state the following. Although the respondent does not and will not contest this Board's jurisdiction to hear the case and adjudge on its merits, I still don't want to leave my confrere under the impression and he knows that quite well, as much as I do, that the sole fact of one or more parties agreeing or suggesting that you have jurisdiction entails an immediate jurisdiction on the part of this Board and I just don't want to leave the impression that therefore it is a final and closed case. This respondent will not contest this Board's jurisdiction, but I still want to underline the fact that obviously you have the jurisdiction which is defined in the Act and still it is my suggestion, humble suggestion, that there is going to have to be an assumption on your part of the jurisdiction somehow or another based on facts. The only question I am saying is that even if I were to agree that you have jurisdiction, I don't think that this creates law as far as this board is concerned. So, I hope this answers my confrère's queries, on two occasions, on this. Once again stated we will not contest this Board's jurisdiction.

It will be observed that counsel stated, and repeated, that the employer did not contest the jurisdiction of the Board.

THE PROCEEDINGS BEFORE THE BOARD

The hearing continued for six days. The testimony and exhibits fill thirteen volumes. Most of the evidence was directed to the central issue of whether the supervisors performed management functions. That evidence exposed the internal operating procedures and hierarchy of Telecom, focusing upon the intricacies of the relationships between the supervisors and the installers beneath them, and between the supervisors and the various management personnel from the district managers on up through the departmental establishment. Only a trifle of the evidence could be said to have been directed to constitutional concerns or to be of relevance in resolving any such concerns.

As has been indicated, counsel for the Union attempted at the opening of the hearing to obtain some clarification as to the confusing stance of Telecom, but without success. In final argument, counsel for Telecom only added to the obfuscation when he said:

> The Company has stated its position on the constitutional issue in this case, and it

> only wishes to reiterate that it reserves all its rights to contest eventually with respect to constitutional grounds.

Mr. Golden was driven to make this statement on behalf of the Union at the opening of his argument to the Board:

> Firstly, I was not aware, except from having read the reply, that there was a serious constitutional issue in this case and it is not my opinion that there is now. My friend has reserved the respondent's rights to contest, eventually, with respect to the constitutional area and it's always been my understanding that with administrative law and practice, that the proper procedure is to give the tribunal, whose constitutional authority may be questioned, an opportunity to adjudicate on that question, itself, in order to determine whether or not it will assume jurisdiction. My friend, on a couple of occasions, has been invited to determine, to indicate, whether the matter is going to be raised or not, whether it will be left lying or will be seriously considered. He refused to abandon the position and invites this Board, in effect, to exercise its power to decide that it has jurisdiction, without the benefit of hearing evidence on the question of his jurisdiction and without the benefit of having had argument on its jurisdiction. Now, I point this out because I am, of course, inviting the Board to assume jurisdiction and to go on, hopefully, to certify and if my friend chooses to contest, at that point, I would like it clearly on the record, that the [employer] at no time has presented evidence or legal argument which would indicate that the Board did not have constitutional jurisdiction. I realize that the Board cannot, by its own decision, give itself constitutional jurisdiction where it did not have it.

THE DECISION OF THE BOARD

The Board held against Telecom on all counts. It found that the supervisors were employees within the meaning of the Canada Labour Code, that the proposed unit was appropriate for collective bargaining and that the majority of the employees constituting the unit wished to have the Union represent them as their bargaining agent. None of these matters remains in controversy. The only point of continuing consequence is paragraph (a) of the Board's decision which states that the Board has:

> (a) found that the employer and supervisors concerned are engaged upon a work, undertaking or business to which the Canada Labour Code applies;

The decision of the Board is a lengthy document in which all of the salient points are carefully reviewed. The earlier certification proceedings are also recounted.

As Mr. Monette, counsel for Telecom, noted during his closing argument, there is a long history of certification for the installers, East and West, though not, of course, for the supervisors. Mr. Monette said:

> There is no prior history of organization within the group of supervisors, may (sic) they East or West, however, there is an obvious long history of certification still in existence for the Installers, East and West. Ever since the 1940's, there has been a certification in the Province of Quebec and there has been a certification in the Province of Ontario. There has never emanated a Federal certification on account of lack of jurisdiction. However, in 1970, there were two cases that were brought in front of civil courts, one in the province of Quebec and one in the province of Ontario. And obviously, you know that l am referring to the judgment of Monsieur le

> juge Lacourcière of the Supreme Court of Ontario, 1970, I think Mr. Chairman indicated that there were already copies in the file, in the Board's file, of that decision.

Mr. Monette dealt at length with the judgment of Mr. Justice Lacourcière in R. v. Ontario Labour Relations Board, Ex parte Northern Electric Co. Ltd. [[1970] 2 O.R. 654, appeal quashed [1971] 1 O.R. 121] to which I will later return.

In its decision the Board detailed some of the history of the earlier certifications, which I will summarize:

> 1945--Installers in Eastern Region included in certification granted by Labour Relations Board of the Province of Quebec in a bargaining unit described as:
>
> All non-supervisory hourly-rated employees in the Province of Quebec excluding watchmen and printing trades.
>
> Later--Separate collective agreement negotiated by the employer with installers although they remained in same bargaining unit as all other hourly-rated employees who were, generally speaking, in the manufacturing operations of the Company.
>
> 1958--The Union organized the installers of the Western Region and applied to the Canada Labour Relations Board for certification. The application was contested on constitutional grounds and the Canada Labour Relations Board declined to assume jurisdiction.
>
> 1968--The Union, although they held a collective agreement with the Company covering employees of the Western Region with headquarters in Toronto, save and except installation supervisors, filed an application with the Ontario Labour Relations Board for a unit of employees described as:
>
> All employees in the Installation and Outside Plant Department of the respondent employed in the Province of Ontario except those for whom the applicant already has bargaining rights.

The company contested the constitutional jurisdiction of the Ontario Labour Relations Board and subsequently raised the same question before the Supreme Court of Ontario by way of a writ of certiorari to quash the decision of the Ontario Board. In the judgment of Lacourcière J., referred to above, the Court concluded:

> ... I have therefore reluctantly arrived at the conclusion that the Ontario Labour Relations Board proceeded upon an error of law ... I am satisfied that the ... company's Installation Department at least is excluded by Section 92(10) subparagraph (a) of the British North America Act from provincial jurisdiction. (at p. 672)

At the time of the application for certification now under consideration there was in force the collective agreement earlier mentioned, in which Telecom recognized the Union as sole and exclusive bargaining agent for employees of Western Region Installation having headquarters in Toronto and

employed in connection with the installation of communications and related equipment. The recognition clause of the agreement specifically excludes installation supervisors. It is this group of supervisory employees which the Union in the instant case proposed as an appropriate bargaining unit. Under the heading "(C) Salient Facts adduced in evidence" the Board states:

> Having become aware of the considerable litigation before the Courts as to the constitutional jurisdiction issues surrounding various groups of employees' certifications or attempts to get certified, and having read allegation 15 in the formal Reply of the employer ... the Board invited Company Counsel to comment on this matter in an opening statement. They replied that there was no contestation regarding the jurisdiction of the Board.
>
> Whereupon the Board proceeded to hear evidence and study exhibits produced by the parties.

Later in the decision one reads:

> (A) The Employer
>
> (a) Although Counsel for the employer had stated prior to the evidence being adduced in the instant case that they were not raising the issue of jurisdiction, that position was qualified at the outset of the argument in the following manner:
>
> > The Company has stated its position on the constitutional issue in this case, and it only wishes to reiterate that it reserves all its rights to contest eventually with respect to constitutional grounds.
>
> (B) The Applicant
>
> (a) This Board had jurisdiction. As regards this question, the employer has presented no evidence and/or legal argument to substantiate a contestation.

Later, under the heading "Reasons for Judgment", "(A) General Comments", the Board observed that

> Leaving aside for the moment the problems inherent in the division of the employer's operations in this department between a Western and an Eastern region and the jurisdictional complexities, the present case does not contain any novel feature. It is strictly another application by a group of supervisors under the authority of Section 125(4) of the Code, to obtain collective bargaining rights...

Proceeding then to consider "(B) The Instant Case" the Board commenced

> 1. One must first realize that we are dealing here with only one department of this large company, that is, the department involved in the installation of switching equipment.

Then followed twenty pages in which the Board reviewed the work and responsibilities of the installation supervisors, concluding finally that they did not perform management functions of such a nature as to disqualify them from the definition of "employee" within the meaning of the Code.

The Board then turned its attention to the matter of jurisdiction, and said this:

> 5. As to the jurisdiction there is a long history of vacillating as to where the jurisdiction over the employees of this employer lies, especially in the case of the installers and now, their supervisors.
>
> The Board refers more particularly to the events surrounding the certification of the installers by the Quebec Board and the attempts by installers in Ontario to get certification from the Ontario Labour Relations Board as well as the refusal of the predecessor to this Board in 1958 to grant certification to the Communications Workers of America, Local C-4 for a group of installers.
>
> In the first place, this Board wishes to stress the fact that it provided itself with all pertinent decisions by the Quebec and Ontario Labour Boards as well as its own together with the judgment of the Honourable J. Lacourcière of the Ontario Supreme Court, rendered in 1970.
>
> Secondly, there has been a significant development in the operations of this employer since 1950 and especially in recent years, a development which had not fully evolved when this Board's predecessor, chaired by C. Rhodes Smith, declined to assume jurisdiction in 1958 when dealing with an application for certification by a group of installers of the Western Region of this employer.
>
> As to the import and consequences of this development on the jurisdiction of this Board, we were particularly interested in verifying that part of the operations of the employer consisted of
>
> > "... a 'marked change in concept' whereby the company will undertake whatever the customer requires including repairs and maintenance in addition to installations."

Then followed two passages from the judgment of Mr. Justice Lacourcière and this comment:

> There has been no evidence in the instant case to contradict the facts as related in the above excerpts of the judgment of Mr. Justice Lacourcière.

The Board commended the "searching analysis" of Lacourcière J. as to the constitutional law issues involved and the jurisprudence, noting his conclusion as to the nature of the operations performed in the installation division of Telecom:

> ... I am satisfied that the system line-up testing in any event involves the operation of an interprovincial communications system.

and drawing comfort from his further conclusion:

> I am satisfied that ... the company's Installation Department at least is excluded by s. 92(10)(a) of the British North America Act from provincial jurisdiction and that the relevant employer-employee relations necessarily come within the purview of the Industrial Relations and Disputes Investigation Act.

The Board closed this portion of its decision by finding:

Therefore the Board is convinced that it has jurisdiction in the instant case.

The application of the Union was granted and an order issued certifying the Union as the bargaining agent of the employees of Telecom in the proposed unit.

THE FEDERAL COURT OF APPEAL

Telecom brought a s. 28 application before the Federal Court of Appeal to review and set aside the order of the Canada Labour Relations Board. The court dismissed the application. The argument advanced on behalf of Telecom that the Board acted without jurisdiction was rejected without calling upon the Union to respond. The court held that when an applicant seeks to have a reviewing court set aside an order as having been made outside the scope of its jurisdiction, the onus is on the applicant to ensure that evidence of the facts necessary to support the application is before the court. The nub of the court's decision, delivered by the Chief Justice, is to be found in the following paragraph:

> It follows that, in this case, for the applicant to succeed on the jurisdiction point, there must be evidence before this Court upon which this Court can decide that the certification order was outside the scope of the Board's jurisdiction, and it also follows that in this case the onus was on the applicant to ensure that such facts were made to appear before this Court. The applicant did not seek to adduce any evidence on the point in this Court and abstained from putting the matter in issue before the Board. There is, therefore, no evidence upon which this Court can find that the Board acted beyond its jurisdiction.

In another paragraph the court added:

> I have not, moreover, overlooked the existence of evidence put before the Board in connection with the issues that were raised before the Board from which, taken by itself, some conclusions might be drawn with regard to the nature of that part of the applicant's business operations that are involved in this matter. In my view, in the absence of agreement that such evidence reveals an accurate picture of such operations from a jurisdictional point of view, it having been led before the Board in respect of entirely different issues, it cannot be used by this Court, as a reviewing court, to make findings of fact on the jurisdictional question. In my view, such a use of evidence led with reference to one issue with which a hearing is concerned to make findings on an issue with which a hearing was not concerned is not, in the absence of agreement or other special circumstances, sound. It might be added that, in my view, the facts raise a very difficult question from a jurisdictional and constitutional point of view, upon which this Court should not make a pronouncement in the absence of a full exploration of the facts relating to the jurisdictional and constitutional question as such.

THE ISSUE BEFORE THE COURT

Telecom then sought leave to appeal to this Court and leave was granted on this single question:

> Did the Federal Court of Appeal err in holding that the Canada Labour Relations Board had jurisdiction to deal with an application for certification on behalf of the employees concerned in respect of the question raised whether they are employed upon or in connection with the operation of any federal work, undertaking or business?

In order to understand the nature of the question upon which leave was granted, one has to consider the provisions of the Canada Labour Code, R.S.C. 1970, c. L-1 which delimit the Canada Labour Relations Board's jurisdiction in certification matters. Part V of the Canada Labour Code, is the "Industrial Relations" portion of the Code and s. 108 states:

> 108. This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

The definition of "federal work, undertaking or business" is found in s. 2 of the Code and the relevant portions read as follows:

> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:
>
> ...
>
> (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other or others of the provinces, or extending beyond the limits of a province;
>
> ...
>
> (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and
> (i) a work, undertaking or business outside the exclusive legislative authority of provincial legislatures;

Clause (b) of the definition is merely a restatement of a portion of s. 92(10)(a) of the British North America Act, one of the classes of works and undertakings withdrawn from the provinces and rendered a matter exclusively federal by the terms of s. 91(29), i.e. "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". Similarly, clause (h) is a restatement of s. 92(10)(c) with the addition of the words "or undertaking". Clause (i) above would appear to be an effort to apply the general or residual power of the federal Parliament to the field of works and undertakings or it may stem from a federal perception of the effect of s. 92(10)'s exceptions from "Local Works and Undertakings".

Colin McNairn in his "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction" (1969), 47 Can. Bar Rev. 355, at 393, took the view that the exceptions as exceptions ought to be narrowly construed against federal power. W.R. Lederman in his illuminating article, "Telecommunications and the Federal Constitution of Canada" in H.E. English, ed., Telecommunications for Canada (1973), 339 at 360, puts much greater stress upon the effect of s. 91(29) in converting these exceptions to an exclusive head of federal power and thus supports a broader reading of federal authority.

The importance of ss. 108 and 2 of the Canada Labour Code read in conjunction with ss. 91 and 92 of the British North America Act is the recognition of the essentially constitutional nature of the problem of jurisdiction raised in this case. There can be no doubt that the administrative jurisdiction--apart from constitutional questions--of the Canada Labour Relations Board in this case has been effectively engaged. Ignoring the constitutional issue, the general subject-matter of the dispute before the Board lies at the very heart of a labour board's administrative law jurisdiction. No jurisdictional error was committed by the Board in the course of the inquiry. In its purely administrative aspects, the Board's decision was not challenged in this Court.

The appellant and the respondent attempt to bolster their respective arguments by adverting to principles of judicial review of administrative action. Telecom argues that there is operative in this case a "double presumption" against the jurisdiction of the Board--flowing from the reinforcing effects of the Board being an inferior tribunal of restricted jurisdiction and labour relations being as a rule within provincial jurisdiction. By means of this "double presumption" against jurisdiction, Telecom argues that the burden of proof rested upon the applicant Union before the Board. The respondent Union opens its factum with an argument based upon Jacmain v. Attorney General of Canada and Public Service Staff Relations Board [[1978] 2 S.C.R. 15], namely, that a question of "jurisdictional fact" arises. Accordingly, suggests the Union, the Board should be allowed "a degree of latitude" in its jurisdictional findings, only requiring "substantial evidence for its decision of fact and a rational basis for its decision of law". The courts should therefore exercise restraint in declaring the tribunal to be without jurisdiction, when it reached its decision honestly and fairly, and with due regard to the material before it. In effect, the Union argues that the burden of proof lies upon Telecom who now challenges the jurisdiction of the Board.

It will be seen, upon reflection, that there is here neither a "double presumption" against the Board's jurisdiction, nor is there occasion for applying the "jurisdictional fact" doctrine upon review. As I have pointed out, there is no question of the Board's administrative or subject-matter jurisdiction.

The Federal Court of Appeal appears to have treated the jurisdictional issue in this case as one of judicial review of an administrative board which has taken jurisdiction in an administrative sense. On this view, quite clearly, the onus would rest upon the applicant for judicial review and not, by implication, upon the Union. But what is in question here is not the Board's administrative jurisdiction in the classic sense of that term, but whether the jurisdiction given by Parliament to the Canada Labour Relations Board, through s. 108 of the Code, extends to the labour relations of the employees engaged in the work, undertaking or business here at issue, i.e., the installation department of Telecom. The answer to the question posed in the order granting leave must be found, not in the principles of judicial review of administrative action, but in the principles governing the constitutional division of authority over labour relations.

THE GRANTING OF LEAVE TO APPEAL

At the time leave was granted in this appeal, the Court had before it only the reasons for decision of the Canada Labour Relations Board and the judgment of the Federal Court of Appeal. As I have explained above, an important and difficult constitutional question would appear to have been raised on the record then before the Court.

When it came time to hear the appeal, the full record of some 2,479 pages was before the Court. In addition, an appendix containing the oral submissions of the parties before the Board was filed. It is to that record that we must look in resolving the case.

What became apparent in the course of oral argument was that serious problems existed in the

scope and cogency of the evidence relating to the constitutional question, as a consequence of the position taken by Telecom before the Board. The Court was directed by counsel to some of the passages in the evidence that might afford the factual basis for a determination of the issue before the Court. Before delving into that evidence, we must consider the board constitutional principles applicable to the field of labour relations in order to determine the "constitutional facts" that are relevant and material to the decision this Court is being called upon to make.

THE CONSTITUTIONAL PRINCIPLES

The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's Canadian Constitutional Law (4th ed., 1975) at p. 363:

> In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise ...

In an elaboration of the foregoing, Mr. Justice Beetz in Construction Montcalm Inc. v. Minimum Wage Commission [[1979] 1 S.C.R. 754] set out certain principles which I venture to summarize:

> (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment;
>
> exclusive provincial competence is the rule.
>
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
> (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
> (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

A recent decision of the British Columbia Labour Relations Board, Arrow Transfer Co. Ltd. [[(1974] 1 Can. L.R.B.R. 29], provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation

engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the Chairman of the Board phrased it, at pp. 34-5:

> In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

Any core federal undertaking present in this case must be found within the telephone and telecommunications system. Constitutional jurisdiction over telecommunications is a difficult and controversial subject. It is a field which has been the subject of no little academic comment: see Telecommunications and the Federal Constitution of Canada by W.R. Lederman in H.E. English, ed., Telecommunications for Canada, An Interface of Business and Government (Toronto; Methuen, 1973); Mullan, Attainment of Objectives and Jurisdiction in Janisch, ed., Telecommunications Regulation at the Crossroads (Dalhousie Continuing Legal Education Series, No. 13, 1976), 149; Analysis of the Constitutional and Legal Basis for the Regulation of Telecommunications in Canada, Study 1(a), The Department of Communications (1971); McNairn, "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction" (1969), 47 Can. Bar Rev. 355. Two recent judgments of this Court have dealt with constitutional jurisdiction in respect of certain aspects of telecommunications: see Capital Cities Communications Inc. v. C.R.T.C. [[1978] 2 S.C.R. 141] and Public Service Board v. Dionne [[1978] 2 S.C.R. 191].

At a minimum, it can be asserted that Bell Canada's operations have been found to be a federal undertaking: see City of Toronto v. Bell Telephone Co. of Canada [[1905] A.C. 52], and Quebec Minimum Wage Commission v. Bell Telephone Co. of Canada [[1966] S.C.R. 767].

In the field of transportation and communication, it is evident that the niceties of corporate organization are not determinative. As McNairn observes in his article, supra, at pp. 380-1:

> A transportation or communication undertaking is a possible corporate activity but it may or may not be segregated from the total corporate enterprise or it may even be larger in scope than a single corporate enterprise. To determine questions of this nature corporate objects have a certain relevance. But of primary concern is the integration of the various corporate activities in practice (including the corporate organizations themselves if more than one is involved) and their inherent interdependence.

McNairn's comment is borne out by the cases. On the one hand, a single enterprise may entail more than one undertaking, e.g. Canadian Pacific Railway's Empress Hotel was found to be an undertaking separate and independent from the railway undertaking in Canadian Pacific Railway Co. v. Attorney-General for British Columbia [[1950] A.C. 122]. On the other hand, two separate corporate enterprises may be found to be included within one single and indivisible undertaking, as in stevedores employed by a stevedoring company loading and unloading ships in the Stevedoring [[1955] S.C.R. 529, sub. nom. In re the validity of the Industrial relations and disputes Investigation Act.] case, or a trucking company which did 90 per cent of its business for the Post Office in Letter Carriers' Union of Canada v.

Canadian Union of Postal Workers [[1975] 1 S.C.R. 178].

Another, and far more important factor in relating the undertakings, is the physical and operational connection between them. Here, as the judgment in Montcalm stresses, there is a need to look to continuity and regularity of the connection and not to be influenced by exceptional or casual factors. Mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the work or undertaking at the core, the demand for greater interdependence becomes more critical.

On the basis of the foregoing broad principles of constitutional adjudication, it is clear that certain kinds of "constitutional facts", facts that focus upon the constitutional issues in question, are required. Put broadly, among these are:

(1) the general nature of Telecom's operation as a going concern and, in particular, the role of the installation department within that operation;
(2) the nature of the corporate relationship between Telecom and the companies that it serves, notably Bell Canada;
(3) the importance of the work done by the installation department of Telecom for Bell Canada as compared with other customers;
(4) the physical and operational connection between the installation department of Telecom and the core federal undertaking within the telephone system and, in particular, the extent of the involvement of the installation department in the operation and institution of the federal undertaking as an operating system.

It is with these evidentiary requirements in mind that I turn to review the record which is now before the Court in this appeal.

THE EVIDENCE

In the proceedings before the Board, there was some evidence concerning the general nature of Telecom's business and the role of the installation department within the company. No evidence was led to reveal the nature of the corporate and business relationships between Telecom and Bell Canada. All of the relevant evidence is found in the testimony of Mr. Lloyd Watt, at the time Director of S.P. 1 Installations for Northern Electric. As to the general nature of the business of Northern Electric, Mr. Watt said:

> Northern Electric Company designs, manufactures, sells communications equipment, cables in Canada and elsewhere in the world. The installation organization of Northern installs communications equipment in Canada and other countries of the world.

Watt clarifies this with the comment that Northern also installs other manufacturers' equipment, apart from that of Northern, "as an integral part of the system". This is followed by a description of the equipment installed, "basically, what we term central office switching and transmission equipment" and then he details the various types of such equipment.

The most detailed description of Northern's customers is contained in the following general comment:

> Q. Generally speaking, Mr. Watt, who are the customers or what is the type of customers Northern Electric has?

A. The major customers are various telephone companies whether they be independent public utilities or government telephones, many small telephone companies, government agencies such as, the Department of Defence Production. We have had contracts with NATO for communications equipment installations.

I guess looking at the Canadian telephone industry, we have worked for British Columbia Tel., Quebec Tel., Bell of course, the Manitoba Telephone System, Saskatchewan Government Telephone, City of Edmonton Telephones, Alberta Government Telephones. Basically, in the communication industry in Canada and in foreign countries such as, Turkey, it is called the P.T.&T. Post Telegraphs, and so on, Nigeria, that is for the Nigerian Government, Jamaica for an independent telephone company, that type of customer.

Watt describes installation within the company as "a department within a division". According to Watt, Telecom has seventeen manufacturing plans in Canada.

One can read through the thirteen volumes of evidence, only to find that that is the sum total of the evidence on the corporate and business relationships of Telecom.

As for the role of the installers within the system, there is some testimony on the part of Watt in response to questioning by the Chairman of the Board:

> The functions of the installer are to broadly put, assemble, cable, wire, adjust or verify and test a given piece of equipment, system or whatever, depending on the man's skill.
>
> In other words, if you could visualize this room without any furniture or equipment in it, that is what the central office looks like when we first arrive. The equipment is laid out and structures are erected to support the components to be assembled.
>
> The next natural sequence, of course, is to cable it to the various frames, interconnecting bays, switchboards, whatever, to bring it all together. The installer's work is limited to taking it to what we call the main frame, if you will, and from there on out it is the telephone cable that go in the manhole and the poles, etc., are usually installed by the telephone companies.
>
> However, in some contracts that we have had, we have taken it all on, that is the outside cabling and the construction of the building, almost like a turnkey operation, so the installer works, generally, within a central office. Although we have transmission installers who will work on towers on the wave guides, horns, reflectors and so on.
>
> Q. Does the work encompass after that the maintenance of that equipment?
> A. We, as a general rule, do not do maintenance unless it is a specific request of the customer for one or two installers or supervisors to stay behind to help train the customer and maintain the office. And they are on separate orders.
>
> We do provide customer training and we will, if requested by the customer, leave a skilled person or manager there to help him to get his system into service. That is generally what happens in the U.S.A.

Q. And, therefore, in those circumstances, your installers in fact operate the system?
A. In some instances.

In response to questions from counsel for Telecom on re-examination, with respect to the importance of the various functions of the installation department, Watt observed:

> The large bulk of our work consists of installing new and/or re-used equipment and testing it. The predominance of our work is in that area. The...

CHAIRMAN Can you get any closer than that, 75% 80%?

A. Oh! I would say that it would be in the high 90's, of the kinds of work we do. Relating to instructing customers or assisting them on maintenance, a very small percentage occasional customer's request as distinct to in the U.S.A. of course, our people usually remain there for the cut-over and perhaps a week or two after assisting the telephone company. But in volume of work and time, it is a very small percentage.

Further, on the subject of testing, Watt testified:

Q. How do you rate testing in terms of complexity by comparison to other functions that have to be performed during an installation job?
A. Testing is, again, depending on the system and the

> unit being worked on, could be from very simple to extremely complex, solid state, etc.

Q. What is the importance of testing?
A. This is the final analysis of what we have sold to our customer as a product that will do a certain thing. The testing ensures that that piece, part or system will, in fact, do what we have sold the customer and meet the specifications.

That is the sum total of the evidence that describes, however scantily, the relationship between installation and operation in the telephone system.

THE DILEMMA

One thing is clear from the earlier discussion of the applicable constitutional principles. In determining whether a particular subsidiary operation forms an integral part of the federal undertaking, the judgment is, as was said in Arrow Transfer, a "functional, practical one about the factual character of the ongoing undertaking". Or, in the words of Mr. Justice Beetz in Montcalm, to ascertain the nature of the operation, "one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors" and the assessment of those "normal or habitual activities" calls for a fairly complete set of factual findings. The importance of such findings of fact is only heightened when one considers that some question exists here as to the presence of both federal and provincial undertakings, requiring close and careful consideration of the connection between this particular subsidiary operation and the core undertakings.

Equally clear from the record is the near-total absence of the relevant and material "constitutional

facts" upon which such a delicate judgment must be made. On the evidence in the record, this Court is simply not in a position to resolve the important question of constitutional jurisdiction over the labour relations of the employees involved in the installation department of Telecom.

The absence of any such evidence can be almost wholly attributed to the ambiguous stance taken by Telecom before the Board. Counsel for Telecom drew the Board's attention to the fact that the Telecom reply to the Union's application did not suggest that the Board lacked jurisdiction. Counsel assured the Board, subject to its "reservation", what "this respondent will not contest this Board's jurisdiction" and once again stated we will not contest the Board's jurisdiction". As Telecom made no challenge to the Board's jurisdiction, neither Telecom nor the Union adduced constitutional facts, and jurisdiction was not argued, before the Board. No further evidence was adduced before the Federal Court of Appeal on the s. 28 application to review and set aside the decision of the Board.

I am inclined toward the view that, in the absence of the vital constitutional facts, this Court would be ill-advised to essay to resolve the constitutional issue which lurks in the question upon which leave to appeal has been granted. One must keep in mind that it is not merely the private interests of the two parties before the Court that are involved in a constitutional case. By definition, the interests of two levels of government are also engaged. In this case, the appellant did not apply to the Court, pursuant to Rule 17 of the Supreme Court Rules, for the purpose of having a constitutional question stated. If the appellant had intended to raise a question as to the constitutional applicability of the Canada Labour Code, then the obligation was upon the appellant to assure that the constitutional issue was properly raised. As no constitutional question was stated nor notice served upon the respective Attorneys General, the Court lacks the traditional procedural safeguards that would normally attend such a case and the benefit of interventions by the governments concerned.

There is always the overriding concern that the constitution be applied with some degree of certainty and continuity and regularity and not be wholly subject to the vagaries of the adversarial process. The case at bar is an apt demonstration of the occasional vagaries of that adversarial process.

CONCLUSION

How is the Court to dispose of this case and resolve this dilemma? The matter could be referred back to the Board to hear evidence, find facts and consider arguments on the constitutional question. I do not think this would be an appropriate disposition of this case. The Union applied on April 22, 1974 to the Board for certification of the bargaining unit which is the subject-matter of these proceedings. To refer the whole affair back to the Board for a re-hearing would start the matter all over again. Over five years have passed. It would work a grave injustice on the employees seeking certification and reward the employer for the equivocal, and if I may say so, questionable tactics which it saw fit to adopt.

Telecom did not raise the constitutional question before the Board, nor did Telecom there take the position that the Board lacked a prima facie basis of facts upon which it could conclude that it had jurisdiction. Absent any serious challenge to its jurisdiction, the Board dealt with this issue briefly and assumed jurisdiction. Telecom, by its actions, effectively deprived a reviewing court of the necessary "constitutional facts" upon which to reach any valid conclusion on the constitutional issue.

After consideration of the full record in all its thirteen volumes, a record which the Court did not have available to it upon granting leave, I have concluded that this Court is in no position to give a definitive answer to the constitutional question raised. I think we must leave that question to another day and dismiss the appeal simply on the basis that the posture of the case is such that the appellant has failed to show reversible error on the part of the Canada Labour Relations Board.

I would dismiss the appeal with costs throughout to the Union.

Appeal dismissed with costs.

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Indexed as:

Eaton v. Brant County Board of Education

The Brant County Board of Education and the Attorney General for Ontario, appellants;
v.
Carol Eaton and Clayton Eaton, respondents, and The Attorney General of Quebec, the Attorney General of British Columbia, the Canadian Foundation for Children, Youth and the Law, the Learning Disabilities Association of Ontario, the Ontario Public School Boards' Association, the Down Syndrome Association of Ontario, the Council of Canadians with Disabilities, the Confédération des organismes de personnes handicapées du Québec, the Canadian Association for Community Living, People First of Canada, the Easter Seal Society and the Commission des droits de la personne et des droits de la jeunesse, interveners.

[1997] 1 S.C.R. 241

[1996] S.C.J. No. 98

File No.: 24668.

Supreme Court of Canada

1996: October 8 / 1996: October 9.
Reasons delivered: February 6, 1997.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Charter of Rights -- Equality rights -- Physical disability -- Child with physical disabilities identified as being an "exceptional pupil" -- Child placed in neighbourhood school on trial basis -- Child's best interests later determined to be placement in special education class -- Whether placement in special education class and process of doing so absent parental consent infringing child's s. 15 (equality) Charter rights -- If so, whether infringement justifiable under s. 1 -- Whether Court of Appeal erred in considering constitutional issues absent notice required by Courts of Justice Act -- Canadian Charter of Rights and Freedoms, ss. 1, 15 -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 109(1) -- Education Act, R.S.O. 1990, c. E.2, ss. 1(1), 8(3) -- R.R.O. 1990, Reg. 305, s. 6.

The respondents are the parents of a 12-year-old girl with cerebral palsy who is unable to communicate through speech, sign language or other alternative communication system, who has some visual impairment and who is mobility impaired and mainly uses a wheelchair. Although identified as an

"exceptional pupil" by an Identification, Placement and Review Committee (IPRC), the child, at her parents' request, was placed on a trial basis in her neighbourhood school. A full-time assistant, whose principal function was to attend to the child's needs, was assigned to the classroom. After three years, the teachers and assistants concluded that the placement was not in the child's best interests and indeed that it might well harm her. When the IPRC determined that the child should be placed in a special education class, the decision was appealed by the child's parents to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal (the "Tribunal"), which also unanimously confirmed the decision. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. The Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. At issue here are whether the Court of Appeal erred (1) in proceeding, proprio motu and in the absence of the required notice under s. 109 of the Courts of Justice Act, to review the constitutional validity of the Education Act, and (2) in finding that the decision of the Tribunal contravened s. 15 of the Canadian Charter of Rights and Freedoms.

Held: The appeal should be allowed.

Per: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The purpose of s. 109 of the Courts of Justice Act is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but also to the people. Moreover, this Court has the ultimate responsibility of determining whether an impugned law is constitutionally infirm and it is important that the Court, in making that decision, have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

Two conflicting strands of authority dealing with the issue of the legal effect of the absence of notice exist. One favours the view that in the absence of notice the decision is ipso facto invalid, while the other holds that a decision in the absence of notice is voidable upon a showing of prejudice. It is not necessary to express a final opinion as to which approach should prevail (although the former was preferred) because the decision of the Court of Appeal is invalid under either strand. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.

While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the Charter, the s. 15 Charter issue can be resolved on the basis of principles in respect of which there is no disagreement. Before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant. The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability.

The principal object of certain of the prohibited grounds is the elimination of discrimination resulting from the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally

important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which the disabled will never be able to gain access. It is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not prevent the disabled from participation, which results in discrimination against the disabled. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning is simply inappropriate here. It is recognition of the actual characteristics and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

Disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. Disability means vastly different things, however, depending upon the individual and the context. This produces, among other things, the "difference dilemma" whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability.

The Tribunal set out to decide which placement was superior, balanced the child's various educational interests taking into account her special needs, and concluded that the best possible placement was in the special class. It also alluded to the requirement of ongoing assessment of the child's best interests so that any changes in her needs could be reflected in the placement. A decision reached after such an approach could not be considered a burden or a disadvantage imposed on a child.

For a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on that child's behalf, usually by his or her parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. The decision-making body, therefore, must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective -- one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children and for persons who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.

The application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a Charter-mandated presumption favouring integration which could be displaced if the parents consented to a segregated placement. The operation of a presumption tends to render proceedings more technical and adversarial. Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. That a presumption as to the best interests of a child is a constitutional imperative must be questioned given that it could be automatically displaced by the decision of the child's parents. This Court has held that the parents' view of their child's best interests is not dispositive of the question.

The child's placement which was confirmed by the Tribunal did not constitute the imposition of a burden or disadvantage nor did it constitute the withholding of a benefit or advantage. Neither the Tribunal's order nor its reasoning can be construed as a violation of s. 15. The approach that the Tribunal took is one that is authorized by the general language of s. 8(3) of the Act. In the circumstances, it is

unnecessary and undesirable to consider whether the general language of s. 8(3) or the Regulations would authorize some other approach which might violate s. 15(1).

Per: Lamer C.J. and Gonthier J.: Sopinka J.'s analysis of the arguments made under s. 15(1) of the Charter and his conclusion that the child's equality rights were not violated were agreed with.

Slaight Communications Inc. v. Davidson was incorrectly applied below in that the Court of Appeal found the constitutional imperfection of the Education Act to reside in what the Act does not say -- the statute must authorize what it does not explicitly prohibit, including unconstitutional conduct. Slaight Communications, however, held exactly the opposite -- that statutory silences should be read down to not authorize breaches of the Charter, unless this cannot be done because such an authorization arises by necessary implication. Whatever section of the Act or of Regulation 305 grants the authority to the Tribunal to place exceptional students, Slaight Communications would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the Charter.

Cases Cited

By Sopinka J.

Considered: D.N. v. New Brunswick (Minister of Health & Community Services) (1992), 127 N.B.R. (2d) 383; Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc. (1993), 12 O.R. (3d) 385; R. v. Beare; R. v. Higgins (1987), 31 C.R.R. 118; Citation Industries Ltd. v. C.J.A., Loc. 1928 (1988), 53 D.L.R. (4th) 360; referred to: R. v. Turpin, [1989] 1 S.C.R. 1296; Roberts v. Sudbury (City), Ont. H.C., June 22, 1987, unreported; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; Miron v. Trudel, [1995] 2 S.C.R. 418; Egan v. Canada, [1995] 2 S.C.R. 513; Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143; E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

By Lamer C.J.

Considered: Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038.

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Canadian Charter of Rights and Freedoms, ss. 1, 15(1), (2). Constitutional Question Act, R.S.B.C. 1979, c. 63. Constitutional Questions Act, R.S.S. 1978, c. C-29. Courts of Justice Act, R.S.O. 1990, c. C.43, s. 109(1). Education Act, R.S.O. 1990, c. E.2, ss. 1(1), 8(3). Education Act, 1974, S.O. 1974, c. 109, s. 34 (1). Education Amendment Act, 1980, S.O. 1980, c. 61. Family Services Act, S.N.B. 1980, c. F-2.2. Identification of Criminals Act, R.S.C. 1970, c. I-1. Judicature Act, R.S.N.B. 1973, c. J-2, s. 22. Human Rights Code, R.S.O. 1990, c. H.19. R.R.O. 1990, Reg. 305, s. 6(1), (2).
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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 1, 123 D.L.R. (4th) 43, 77 O.A.C. 368, 27 C.R.R. (2d) 53, [1995] O.J. No. 315 (QL), allowing an appeal from a judgment of the Divisional Court (1994), 71 O.A.C. 69, [1994] O.J. No. 203 (QL), dismissing an application for judicial

review of a decision of the Ontario Special Education Tribunal. Appeal allowed.

Christopher G. Riggs, Q.C., Andrea F. Raso and Brenda J. Bowlby, for the appellant the Brant County Board of Education.
Dennis W. Brown, Robert E. Charney and John Zarudny, for the appellant the Attorney General for Ontario.
Stephen Goudge, Q.C., and Janet L. Budgell, for the respondents.
Isabelle Harnois, for the intervener the Attorney General of Quebec.
Written submissions only by Lisa Mrozinski for the intervener the Attorney General of British Columbia.
Written submissions only by Cheryl Milne for the interveners the Canadian Foundation for Children, Youth and the Law and the Learning Disabilities Association of Ontario.
Brenda J. Bowlby, for the intervener the Ontario Public School Boards' Association.
W. I. C. Binnie, Q.C., and Robert Fenton, for the intervener the Down Syndrome Association of Ontario.
David W. Kent, Melanie A. Yach and Geri Sanson, for the interveners the Council of Canadians with Disabilities, the Confédération des organismes de personnes handicapées du Québec, the Canadian Association for Community Living and People First of Canada.
Mary Eberts and Lucy K. McSweeney, for the intervener the Easter Seal Society.
Philippe Robert de Massy, for the intervener the Commission des droits de la personne et des droits de la jeunesse.

Solicitors for the appellant the Brant County Board of Education: Hicks, Morley, Hamilton, Stewart, Storie, Toronto.
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Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.
Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.
Solicitor for the interveners the Canadian Foundation for Children, Youth and the Law and the Learning Disabilities Association of Ontario: The Canadian Foundation for Children, Youth and the Law, Toronto.
Solicitors for the intervener the Ontario Public School Boards' Association: Hicks, Morley, Hamilton, Stewart, Storie, Toronto.
Solicitors for the intervener the Down Syndrome Association of Ontario: McCarthy, Tétreault, Toronto.
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Solicitors for the intervener the Easter Seal Society: Eberts, Symes, Street & Corbett, Toronto.
Solicitor for the intervener the Commission des droits de la personne et des droits de la jeunesse: Philippe Robert de Massy, Montreal.

The reasons of Lamer C.J. and Gonthier J. were delivered by

1 LAMER C.J.:-- I concur with Justice Sopinka's analysis of the arguments made under s. 15(1) of the Canadian Charter of Rights and Freedoms and his conclusion that there was no violation of Emily

Eaton's equality rights. However, I wish to address briefly an issue which he has chosen not to explore in light of his conclusion on s. 15(1) - the incorrect manner in which the court below applied my judgment in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, to find that the source of the alleged discrimination against Emily Eaton was the Education Act, R.S.O. 1990, c. E.2. Although it is, strictly speaking, unnecessary to address this question, because the Charter was not violated, I think it important that I address it because I do not want to leave the impression that I believe this portion of the Court of Appeal's judgment was correct.

2 To understand how the Court of Appeal (1995), 22 O.R. (3d) 1, erred in its application of Slaight Communications, it is necessary to recapitulate briefly an aspect of the proceedings in that court. After having found that the separate placement of Emily Eaton violated s. 15(1) of the Charter, Arbour J.A. went on to consider the source of the discrimination. This issue arose because the order to place Emily Eaton in a special classroom was taken pursuant to the regime for special education which is centred on the Education Act, but was made by an administrative tribunal, the Ontario Special Education Tribunal. However, Arbour J.A. characterized the respondents' argument as an attack neither on the Act, nor on the order of the Tribunal, but on the reasoning of the Tribunal. Then, citing Slaight Communications, she went on to hold at p. 19 that the "legislative scheme provides no impediment to the method and reasoning employed by the IPRC, Appeal Board and Tribunal", and for that reason was unconstitutional.

3 Arbour J.A.'s judgment can be summarized as follows - the constitutional imperfection of the Education Act resides in what it does not say; what it does not prohibit explicitly, the statute must authorize, including unconstitutional conduct. However, in Slaight Communications, where I dissented in the result but spoke for the majority on this very issue, I held exactly the opposite - that statutory silences should be read down to not authorize breaches of the Charter, unless this cannot be done because such an authorization arises by necessary implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can potentially violate Charter rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like Emily Eaton - a question which I need not address - Slaight Communications would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the Charter.

4 For the reasons stated above, I agree with Sopinka J. in his disposition of this appeal.

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

5 SOPINKA J.:-- The issue in this case is whether a decision of the Ontario Special Education Tribunal (the "Tribunal") confirming the placement of a disabled child in a special education class contrary to the wishes of her parents contravenes the equality provisions of s. 15(1) of the Canadian Charter of Rights and Freedoms. The Court of Appeal held that it did. I have concluded that the decision of the Tribunal was based on what was in the best interests of the child and that in the circumstances no violation of s. 15(1) of the Charter occurred. The Court of Appeal went on to consider the validity of s. 8 of the Education Act, R.S.O. 1990, c. E.2 (the "Act") and found it to be constitutionally deficient in authorizing the Tribunal to proceed as it did. No notice of a constitutional question had been given in accordance with s. 109 of the Courts of Justice Act, R.S.O. 1990, c. C.43. I conclude that the constitutional issue was not open to the Court of Appeal but, in any event, in view of the fact that the decision of the Tribunal complied with s. 15(1) of the Charter, it was not necessary to consider whether s. 8 was constitutionally valid.

Facts

6 The respondents, Carol and Clayton Eaton, are the parents of Emily Eaton, a 12-year-old girl with

cerebral palsy. Emily is unable to speak, or to use sign language meaningfully. She has no established alternative communication system. She has some visual impairment. Although she can bear her own weight and can walk a short distance with the aid of a walker, she mostly uses a wheelchair.

7 When she began kindergarten, Emily attended Maple Avenue School, which is her local public school. The Identification, Placement and Review Committee ("IPRC") of the Brant County Board of Education (the "appellant") identified Emily as an "exceptional pupil" and, at the request of her parents, determined that she should be placed on a trial basis in her neighbourhood school. A full-time educational assistant, whose principal function was to attend to Emily's special needs, was assigned to her classroom. At the end of the school year, the IPRC determined that Emily would continue in kindergarten for the following year. This arrangement was continued into Grade 1. A number of concerns arose as to the appropriateness of her continued placement in a regular classroom. The teachers and assistants concluded, after three years of experience, that the placement was not in Emily's best interests and might well harm her.

8 The IPRC determined that Emily should be placed in a special education class. Emily's parents appealed this decision to a Special Education Appeal Board, which unanimously confirmed the IPRC decision. The parents appealed again to the Tribunal, which also unanimously confirmed the decision. The Tribunal heard from a large group of witnesses and made numerous findings of fact which are described below. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. However, the Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. The court held that s. 8 of the Act should be read to include a direction that, unless the parents of a disabled child consent to the placement of that child in a segregated environment, the appellant must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs. The court also ordered that the matter be remitted to a differently constituted Tribunal for rehearing. With leave of this Court, the appellant appealed from that decision. Shortly after the conclusion of argument, the Court gave judgment allowing the appeal with costs and with reasons to follow.

II. Relevant Statutory Provisions

9 In the Education Act, exceptional pupils are defined as follows:

> 1.__(1) . . .
>
> "exceptional pupil" means a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee . . . of the board. . . .

10 Section 8(3) sets out the Minister of Education's responsibility for the provision of special education in Ontario:

> 8. . . .
>
> (3) The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,

(a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and
(b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

11 Regulation 305 (Special Education Identification Placement and Review Committees and Appeals), R.R.O. 1990, under the Education Act, requires that every board of education set up an IPRC and establishes the process by which exceptional students are identified and placed, and the process by which parents may appeal the IPRC's decision.

> 6.--(1) An exceptional pupil shall not be placed in a special education program without the written consent of a parent of the pupil.
>
> (2) Where a parent of an exceptional pupil,
>
> (a) refuses or fails to consent to the placement recommended by a committee and to give notice of appeal under section 4; and
> (b) has not instituted proceedings in respect of the determinations of the committee within thirty days of the date of the written statement prepared by the committee,
>
> the board may direct the appropriate principal to place the exceptional pupil as recommended by the committee and to notify a parent of the pupil of the action that has been taken.

12 The Courts of Justice Act, s. 109(1), states that:

> 109.__(1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

13 The Canadian Charter of Rights and Freedoms, s. 15, states that:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

III. Judgments in Appeal

Tribunal

14 The respondents requested that the Tribunal set aside the placement decision of the IPRC, and asked that the Tribunal direct that Emily be placed full time, in a regular, age-appropriate class, with full accommodation of her special needs. The Tribunal heard from the respondents, speech, occupational and physical therapists familiar with Emily, parents of some of Emily's classmates, a witness who, himself, had received a segregated education before high school, Emily's teachers, special assistants and principal at Maple Avenue School, the Board Superintendent, and a special education teacher with the Board.

15 The Tribunal stated the principal question as "whether Emily Eaton's special needs can be met best in a regular class or in a special class". The Tribunal considered the wishes of Emily's parents; the empirical evidence available from Emily's three school years in a regular classroom setting; the evidence from the literature on placement; the testimony of experts in the matter of classroom placement; the Ontario Ministry of Education and Training's proposed directions regarding the integration of exceptional pupils; and the Charter and Ontario Human Rights Code, R.S.O. 1990, c. H.19, in reaching its conclusion that the IPRC placement decision was the best placement for Emily.

16 The Tribunal observed at the outset that it is the extent of Emily's special needs which provokes consideration of a special placement, and not the fact that her needs are different from the mainstream. The Tribunal then reviewed Emily's needs under a number of headings and made numerous findings of fact upon which it based its decision.

17 Intellectual and Academic Needs: Despite the difficulty in assessing Emily's intellectual abilities owing to her inability to communicate, the Tribunal nevertheless found that there was considerable evidence that Emily had a profound learning deficit, and that there was a wide and significant intellectual and academic gap between her and her peers. The Tribunal considered the testimony presented on the subject of the "parallel curriculum" approach in which an adapted curriculum is delivered in the regular classroom setting. However, the Tribunal concluded that "[e]xperience demonstrates that in practice, 'parallel curriculum' benefits the receiver when it is realistically parallel. But when a curriculum is so adapted and modified for an individual that the similarity -- the parallelism -- is objectively unidentifiable, the adaptation becomes mere artifice and serves only to isolate the student". The Tribunal concluded that it was clear from the evidence that "a 'parallel' learning program specifically designed to meet [Emily's] intellectual needs, isolates her in a disserving and potentially insidious way".

18 Communication Needs: Emily has very limited abilities to communicate. Carol Eaton and Emily's educational assistants testified "that to learn sign, Emily needs repetitive, hand-over-hand instruction". The evidence suggested that despite this approach, Emily cannot yet communicate using sign. The importance of communication was emphasized by the Eatons' witness, Robert Williams, an adult with cerebral palsy who communicates by means of assistive technology. The Tribunal concluded that "Emily's need to communicate is going to be met only with very individualized, highly specialized, extremely intense, one-on-one instruction. Because this need is of such over-riding importance for Emily, it makes sense to address it, at least initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for such instruction".

19 Emotional and Social Needs: The Tribunal relied on the testimony of Emily's parents, teachers and educational assistants in assessing these needs. The teachers and educational assistants testified that Emily's classmates tend not to involve themselves with Emily in class or at play. The Tribunal concluded that "although the empirical evidence is that there is limited, if any, interaction between Emily and her classmates, it may be possible that some of her social and emotional needs are nevertheless being met. Because she does not communicate effectively, it is conceivable that she is

enjoying the experience and cannot tell us. However, her classroom behaviours -- the increasing incidents of crying, sleeping and vocalization -- suggest that this is not the case. There appears to be little if any, social interaction between Emily and her peers in the regular class".

20 Physical and Personal Safety Needs: The Tribunal found that Emily's physical disabilities by themselves ought not to be a deciding factor in evaluating whether her needs can be met best in a regular or special class since it is reasonable to expect that the adaptations necessary would be made in order to accommodate Emily in the regular classroom even if a special classroom may be better designed to address her special physical needs. However, the Tribunal was concerned with Emily's tendency to place objects in her mouth. Emily's parents asserted that they were not concerned, and were confident that Emily would not swallow harmful objects. The Tribunal found that "a home setting that is adjusted to a child with pervasive muscular dysfunction, and idiosyncratic communication abilities, and who regularly mouths objects, is significantly different from a regular classroom setting". The Tribunal found that it was not reasonably possible to cleanse the classroom of mouthable materials or to establish the level of adult supervision necessary in the regular, integrated classroom.

21 The Tribunal then considered Emily's three years of experience in the integrated classroom. The Tribunal found "that the desired outcome of integration for an exceptional child, namely, fulfilment of intellectual and especially social and emotional needs through regular and natural interaction, has not been realized in Emily's case". It observed that the frequency and intensity of Emily's expressions of discontent __ crying, sleeping, vocalizing __ had been increasing over the three-year period.

22 The Tribunal agreed that integration confers great psychological benefit on disabled children, but that in Emily's case, the three years of experience in the regular classroom with the adult intervention necessary to meet her profound needs even minimally "has the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting". The Tribunal found that "this is a far more insidious outcome than would obtain in a special class".

23 Accordingly, the Tribunal concluded that "[i]t is our opinion that where a school board recommends placement of a child with special needs in a special class, contrary to the wishes of the parents, and where the school board has already made extensive and significant effort to accommodate the parents' wishes by attempting to meet that child's needs in a regular class with appropriate modifications and supports, and where empirical, objective evidence demonstrates that the child's needs are not being met in the regular class, that school board is not in violation of the Charter or the OHRC [Ontario Human Rights Code]".

Ontario Divisional Court (Adams J. for the court) (1994), 71 O.A.C. 69

24 The respondents applied for judicial review of the Tribunal's decision and sought to quash it on several grounds. First, they argued that the Tribunal was not expert since it was protected by a privative clause of the "final and binding" style only. Second, the Tribunal committed the following errors: it conducted its own literature search after the hearing, and it failed to place a legal burden (arising from the Charter and Ontario Human Rights Code) on the Board to establish that a special education class was clearly better than a regular class for Emily.

25 The court found that the specialized Tribunal had dealt comprehensively and thoughtfully with all the issues raised before it and with the central focus being what was best for Emily. Adams J. stated that the Tribunal had accepted that a regular class was to be preferred where consistent with the child's best interests and had been conscious of the Charter and Ontario Human Rights Code.

26 The court held that the Tribunal was worthy of curial deference given the structure of the legislation, the subject matter, and the composition of the Tribunal, but in any event there was no error

of law. The court held that the Tribunal's post-hearing review of "the literature" to which the experts generally referred did nothing more than confirm its assessment of the evidence before it and the various admissions of the applicants' experts with regard to that research. Accordingly there was no denial of natural justice.

27 The court rejected the idea that the Charter creates a presumption in favour of one pedagogical theory over another. The issue of burden was academic in this case because the Tribunal found that the evidence clearly established that Emily's best interests would be better served in the special class.

28 The court echoed the Tribunal's reminder to the School Board that this placement did not relieve the Board and the parents of the obligation to collaborate creatively in a continuing effort to meet Emily's present and future needs.

Court of Appeal (Arbour J.A. for the court) (1995), 22 O.R. (3d) 1

29 The respondents raised several issues on appeal before the Ontario Court of Appeal. First, they contended that the Divisional Court erred in its application of the Charter to the process of placing disabled students in appropriate educational settings. Second, they raised a number of legal errors committed by the Tribunal which, they submitted, ought to have been reviewed by the Divisional Court.

30 Arbour J.A. discussed the scope of judicial review appropriate in this case. Owing to the privative clause, the subject matter of the legislation, and the composition of the Tribunal, she held that the Tribunal was worthy of curial deference. However, in constitutional matters, she held that the standard of review was one of correctness.

31 Arbour J.A. dealt with the alleged errors of law first and concluded at p. 8 that although the Tribunal erred in conducting its own review of the literature after the hearing, this error of law "does not come within the ambit of reviewable error within the standard set out above since the analysis conducted by the Tribunal does little more than confirm that there is an ongoing pedagogical debate about the various models for the placement of disabled students, and that, solely from the pedagogical point of view, integration has not yet been proven superior". Consequently, even if the error was reviewable it would not result in the invalidation of the decision.

32 Arbour J.A. then turned to the constitutional issue. She noted that the respondents submitted that the Charter and the Ontario Human Rights Code both require a presumption in favour of the integration of disabled students, and that, therefore, the Board had to establish why Emily's needs would be better met in a segregated classroom. Arbour J.A. found at p. 9 that the Tribunal asked itself "whether Emily Eaton's special needs can be met best in a regular class or in a special class".

33 Arbour J.A. held that the Tribunal clearly rejected any notion of a presumption in favour of inclusion, and that the Tribunal simply found that the integrated classroom had not been successful. The Tribunal never answered the question as it framed it, namely, whether Emily's needs could be met best in a regular class or a special class.

34 The respondents contended that the "best interests of the child" test is not satisfactory in determining the appropriate placement for a disabled child because this test could prove insensitive to the equality rights of the child. They stated that there ought to be a presumption in favour of integration. Accordingly, Arbour J.A. looked at whether Emily's placement in a special classroom amounted to discrimination within the meaning of s. 15 of the Charter. She found that Emily was prevented from attending the regular class because of her disability. Thus, a distinction had clearly been made on a prohibited ground. Arbour J.A. then turned to the question of whether the distinction resulted in the imposition of a burden or disadvantage. She held at p. 13 that "[a]lthough one should not ignore the

intended recipient's perception of whether the measure designed to enhance her equality is in fact a burden rather than a benefit, that subjective perception is not in itself determinative of the issue". Arbour J.A. applied R. v. Turpin, [1989] 1 S.C.R. 1296, in which scrutiny of the larger social, historical and political context was mandated, and found that the history of disabled persons, which the Charter seeks to redress and prevent, is a history of exclusion from the mainstream of society. In fact, "[i]n all areas of communal life, the goal pursued by and on behalf of disabled persons in the last few decades has been integration and inclusion" (p. 15). Arbour J.A. concluded that, when analysed in its larger context, a segregated educational placement is a burden or disadvantage, and is therefore discriminatory within the meaning of s. 15.

35 Arbour J.A. stated at pp. 15-16:

> Inclusion into the main school population is a benefit to Emily because without it, she would have fewer opportunities to learn how other children work and how they live.
>
> . . .
>
> When a measure is offered to a disabled person, allegedly in order to provide that person with her true equality entitlement, and that measure is one of exclusion, segregation, and isolation from the mainstream, that measure, in its broad social and historical context, is properly labelled a burden or a disadvantage.

36 The School Board suggested that distinctions based on disability are not like those based on race or sex in the context of access to education because equality in education requires that the students be treated according to their actual abilities or disabilities. Arbour J.A. criticized this argument saying that although it may be easier to justify differences in access to educational facilities on the basis of disability than it would be if differences were based on race, this analysis must belong to s. 1. There is no reason to create a hierarchy of prohibited grounds within s. 15 which would elevate distinctions based on some to a more suspect category than others. Arbour J.A. stated at p. 17 that "[i]f anything, one should be wary of accepting as inevitable and innocuous a classification on the basis of . . . disability, without the rigorous analysis required by s. 15".

37 The Eatons stated that they were not attacking the Education Act, because, in the appropriate case and using the appropriate test, a Tribunal could order that a child like Emily be put in a special segregated class. They were attacking only the reasoning of the Tribunal. Not only did the respondents not attack the Education Act, but they also expressly disavowed any intention of doing so. No motion pursuant to s. 109 of the Courts of Justice Act had been given.

38 Arbour J.A. expressed considerable difficulty with this argument. She held that if it is true that the Charter mandates a presumption in favour of integration, then the deficiency must be in the failure of the Education Act to so provide. She stated at p. 19 that the Act infringed s. 15(1) because it "provides no impediment to the method and reasoning employed by the . . . Tribunal in the present case".

39 Arbour J.A. went on to consider s. 1 of the Charter and concluded that, "[s]ince it [the Education Act] permits a Charter infringement, without further guidance, I cannot say that the Act infringes the equality rights of disabled students as little as possible" (p. 20).

40 Arbour J.A. found that the appropriate remedy was to declare that s. 8 of the Act should be read to include a direction that, unless the parents of a disabled child consent to the placement of that child in a segregated environment, the school board must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs.

41 Arbour J.A. held that the Tribunal would not have inevitably arrived at the same conclusion had it appreciated that the Charter required that segregated placement be used only as a last resort. Therefore Arbour J.A. directed that the matter be remitted to a differently constituted tribunal for re-hearing in accordance with the constitutional principles set out in her reasons.

IV. Issues

42 This appeal raises the following issues:

> 1. Did the Court of Appeal err in proceeding proprio motu and in the absence of the required notice under s. 109 of the Courts of Justice Act to review the constitutional validity of the Education Act?
>
> 2. Did the Court of Appeal err in finding that the decision of the Tribunal contravened s. 15 of the Charter?

43 The other issues raised below were not pursued in this Court.

V. Analysis

The Constitutionality of the Education Act and Regulations

44 Section 109(1) of the Courts of Justice Act provides that:

> 109.__(1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

45 No notice in compliance with this section was given either in the Divisional Court or in the Court of Appeal and no issue was raised with respect to the constitutionality of the Act. Moreover, in the Court of Appeal the respondents expressly disavowed any intention of attacking the Act or the Regulations. The Attorney General for Ontario relied on the respondents' position in the courts below and made no submissions on the constitutionality of the Act and had no opportunity to adduce evidence or make submissions to support the Act under s. 1 of the Charter. I am satisfied that the Attorney General for Ontario was prejudiced by the absence of notice.

46 In the order of the Chief Justice of this Court dated February 13, 1996, he stated:

> The Court of Appeal proprio motu found that s. 8 of the Act was a restriction to s. 15 of the Charter and proceeded to salvage the section by reading certain words into it. This initiative as regards s. 15 was not taken as regards s. 7.
>
> As the law as it now stands has been amended through reading in, in order to salvage the restriction to s. 15, it is for this reason and this reason only that I will state the following constitutional questions:
>
> 1. Do s. 8(3) of the Education Act, R.S.O. 1990, c. E.2, as amended, and s. 6 of Regulation 305 of the Education Act, infringe Emily Eaton's equality rights under s. 15(1) of the Canadian Charter of Rights and

Freedoms?

2. If the answer to question 1 is in the affirmative, are s. 8(3) of the Education Act, and s. 6 of Regulation 305 of the Education Act, justified as a reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms?

47 The order stating constitutional questions did not purport to resolve the question as to whether the decision of the Court of Appeal to raise them was valid in the absence of notice or whether this Court would entertain them. The fact that constitutional questions are stated does not oblige the Court to deal with them.

48 The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

49 While this Court has not yet addressed the issue of the legal effect of the absence of notice, it has been addressed by other courts. The results are conflicting. One strand of decision favours the view that in the absence of notice the decision is ipso facto invalid, while the other strand holds that a decision in the absence of notice is voidable upon a showing of prejudice.

50 In D.N. v. New Brunswick (Minister of Health & Community Services) (1992), 127 N.B.R. (2d) 383, the Court of Appeal considered a situation in which the trial judge, on his own motion, set aside provisions of the Family Services Act, S.N.B. 1980, c. F-2.2, as contrary to the Charter. There had been no notice under s. 22 of the Judicature Act, R.S.N.B. 1973, c. J-2, as required. The Court of Appeal held, at p. 388, that "the wording of s. 22(3) leaves no doubt that notice is mandatory. For this reason, the trial judge ought not to have decided the case on a Charter issue raised on his own initiative without notice to the Attorneys General".

51 However, in Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc. (1993), 12 O.R. (3d) 385, a majority of the Ontario Court of Appeal came to a different conclusion, Arbour J.A. dissenting. Grange J.A. considered an argument that, pursuant to D.N. v. New Brunswick (Minister of Health & Community Services), supra, s. 109 notice was mandatory so that failure to give notice rendered a decision a nullity. He found further support for this position in the short judgment of Callaghan A.C.J.H.C. in Roberts v. Sudbury (City), Ont. H.C., June 22, 1987, unreported, where Callaghan A.C.J.H.C. allowed an appeal from a decision made without notice and sent the matter back to the District Court for a rehearing. Grange J.A. also reviewed two Saskatchewan cases, R. v. Beare and R. v. Higgins heard together and both reported at (1987), 31 C.R.R. 118 (C.A.). In one case notice had been served, while in the other it had not. The cases concerned the validity of the Identification of Criminals Act, R.S.C. 1970, c. I-1. In both cases the trial court upheld the validity of the Act. The Court of Appeal found that there was no prejudice because the Attorney General was able to present an argument in the Higgins case that would have applied to the Beare case as well. Therefore, there was no actual prejudice in the Beare case resulting from the failure to file notice under The Constitutional Questions Act, R.S.S. 1978, c. C-29. Grange J.A. also referred to Citation Industries Ltd. v. C.J.A., Loc. 1928 (1988), 53 D.L.R. (4th) 360 (B.C.C.A.), in which the Court of Appeal dealt with a similar section under the Constitutional Question Act, R.S.B.C. 1979, c. 63. In that case, all counsel asked that the

matter be heard on the merits even though notice had not been given to the provincial Attorney General. Seaton J.A. agreed to hear the merits because (at p. 363) "[a]t this stage nothing turns on the absence of earlier notice". Grange J.A. observed (at pp. 390-91) that:

> Neither of the courts in Saskatchewan or British Columbia specifically dealt with the argument that the judgments under appeal were nullities. Nevertheless, both relied heavily on a lack of prejudice to the Attorney General in his argument on appeal. In the case at bar, counsel for the Attorney General was invited to show prejudice and was unable to do so. In my view, that should be the controlling factor. The failure to give notice was entirely inadvertent. . . . We have heard full argument on the question. Nothing would be gained by sending it back but repetition and expense.

52 Arbour J.A. dissented. She held that s. 109 creates a mandatory requirement of notice, and that the presence or absence of prejudice is irrelevant. "An adjudication made in violation of that mandatory language must be considered a nullity" (p. 394).

53 In view of the purpose of s. 109 of the Courts of Justice Act, I am inclined to agree with the opinion of the New Brunswick Court of Appeal in D.N. v. New Brunswick (Minister of Health & Community Services), supra, and Arbour J.A. dissenting in Mandelbaum, supra, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.

54 There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a de facto notice which is the equivalent of a written notice. It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.

55 It was suggested that notwithstanding the above, this Court should entertain the question of the validity of the provisions of the Act which were addressed by Arbour J.A. It might be suggested that a refusal to do so would be based on a technical ground. The absence of notice and the absence of a record developed in the courts and tribunals below are far from technical defects. Moreover, as a general rule, we are only authorized to make the disposition that the court appealed from ought to have made (Supreme Court Act, R.S.C., 1985, c. S-26, s. 45). There is, however, an additional reason for not dealing with the constitutionality of the Act. Arbour J.A. felt constrained to do so because she was of the view that the decision of the Tribunal was discriminatory and violated s. 15(1) of the Charter. On the basis of Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, she felt obliged to consider whether the Act purported to authorize this result. I am respectfully of the opinion that Arbour J.A. erred in this regard. If she had concluded, as I do, that the reasoning and decision of the Tribunal did not discriminate contrary to s. 15 of the Charter, it would have been unnecessary for her, and it is unnecessary for me, to consider the constitutional validity of the Act.

56 I will turn to the issue of the validity of the decision of the Tribunal.

Does the Decision of the Tribunal Contravene s. 15 of the Charter?

57 The placement of children in special education programs and services is carried out pursuant to the provisions of s. 8 of the Education Act and the Regulations thereunder. Prior to 1980, there was no mandatory requirement that school boards provide such programs and a disabled person could be denied status as a resident pupil at elementary school if that person was "unable by reason of mental or physical handicap to profit by instruction in an elementary school" (The Education Act, 1974, S.O. 1974, c. 109, s. 34(1)).

58 A change in attitude with respect to disabled persons was initiated by the report of Walter B. Williston entitled Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario (1971). With it came a recognition of the desirability of integration and de-institutionalization. The change in attitude was reflected in changes in the Education Act.

59 The current legal framework for the education of exceptional pupils was adopted on December 12, 1980 when Royal Assent was given to The Education Amendment Act, 1980, S.O. 1980, c. 61. The Act and Regulations made it mandatory for all school boards to provide special education programs and services for exceptional pupils. The policy of the Ministry of Education is that "[e]very exceptional child has the right to be part of the mainstream of education to the extent to which it is profitable" (Special Education Information Handbook (1984)).

60 Ontario Regulation 305, R.R.O. 1990, adopted as O. Reg. 554/81, deals exclusively with Special Education Identification Placement and Review Committees and appeals. It provides for the identification of exceptional pupils, a determination of their needs and placement into an educational setting where special education programs and services can be delivered. The specific program modification and services required by each exceptional pupil are outlined in the pupil's education plan. Parents and guardians are involved in the identification and placement process and provision is made for appeal of the identification with a placement decision of the board.

61 This is the process that culminated in a decision by the Tribunal in the present case. After a three-year trial period in a regular class, the IPRC, after consultation with teacher assistants and Emily's parents, determined that she should be placed in a special education class. Emily's parents appealed to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal which unanimously confirmed the decision of the Special Education Appeal Board in a hearing lasting 21 days.

62 While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the Charter, I believe that the issue in this case can be resolved on the basis of principles in respect of which there is no disagreement. There is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant.

63 In Miron v. Trudel, [1995] 2 S.C.R. 418, at p. 485, McLachlin J. stated:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to

> the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the Charter.

At p. 487 she added:

> Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate s. 15: Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872.

64 In Egan v. Canada, [1995] 2 S.C.R. 513, at p. 584, Cory and Iacobucci JJ. stated:

> The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
>
> Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

65 Both Gonthier J. (the Chief Justice and La Forest and Major JJ. concurring) in Miron and La Forest J. (the Chief Justice and Gonthier and Major JJ. concurring) in Egan were of the view that a distinction must be shown to be based on irrelevant personal characteristics. On this view, relevance to the legislative goal or functional value of the legislation where such is not itself discriminatory can negate discrimination. The majority view as expressed in Miron was that relevance may assist as a factor in showing that the case falls into the rare class of case in which a distinction on a prohibited or analogous ground does not constitute discrimination. While this does not purport to be an exhaustive treatment of the differences between the majority and the minority on this point, it is a sufficient synopsis of them for the purposes of this appeal.

66 The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the "accommodation of differences . . . is the true essence of equality". This emphasizes that the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

67 The principal object of certain of the prohibited grounds is the elimination of discrimination by the

attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

68 The interplay of these objectives relating to disability is illustrated by the evolution of special education in Ontario. The earlier policy of exclusion to which I referred was influenced in large part by a stereotypical attitude to disabled persons that they could not function in a system designed for the general population. No account was taken of the true characteristics of individual members of the disabled population, nor was any attempt made to accommodate these characteristics. With the change in attitude influenced by the Williston Report and other developments, the policy shifted to one which assessed the true characteristics of disabled persons with a view to accommodating them. Integration was the preferred accommodation but if the pupil could not benefit from integration a special program was designed to enable disabled pupils to receive the benefits of education which were available to others.

69 It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the interveners whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Schools focussed on the needs of the blind or deaf and special education for students with learning disabilities indicate the positive aspects of segregated education placement. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides.

70 These are the basic principles in respect of which the Tribunal's decision should be tested in order to determine whether that decision complies with s. 15(1). In applying them, I do not see any purpose in distinguishing between the order of the Tribunal and the reasons for that order. That was a distinction that was sought to be made in the Court of Appeal but, in my view, the reasons and the order are to the same effect and cannot be dealt with separately in this case. Either both are valid, as I conclude, or both are invalid.

The Tribunal's Decision

A Distinction

71 It is quite clear that a distinction is being made under the Act between "exceptional" children and others. Other children are placed in the integrated classes. Exceptional children, in some cases, face an inquiry into their placement in the integrated or special classes. It is clear that the distinction between "exceptional" and other children is based on the disability of the individual child.

Burden

72 In its thorough and careful consideration of this matter, the Tribunal sought to determine the placement that would be in the best interests of Emily from the standpoint of receiving the benefits that an education provides. In arriving at the conclusion, the Tribunal considered Emily's special needs and strove to fashion a placement that would accommodate those special needs and enable her to benefit from the services that an educational program offers. The Tribunal took into account the great psychological benefit that integration offers but found, based on the three years experience in a regular class, that integration had had "the counter-productive effect of isolat[ing] her, of segregating her in the theoretically integrated setting".

73 Moreover, in deciding on the appropriate placement, the Tribunal considered each of the various categories of needs relevant to education. It found that it was not possible to meet Emily's intellectual and academic needs in the regular class without "isolating her in a disserving and potentially insidious way". It found that Emily's communication needs would be best met in the special class. It expressed doubt as to whether her emotional and social needs were being met in the regular class. While it is not clear that the special class would meet these particular needs better, it did appear to the Tribunal that there was little, if any, social interaction between Emily and her peers in the regular class. Although not central to the Tribunal's decision, it also found that certain adaptations to the classroom, such as the provision of a special desk, physical assistance and extra supervision from educational assistants were reasonable, but that it would not be reasonably possible to accommodate Emily's particular safety needs without radically altering the classroom or establishing a very isolating level of adult supervision.

74 The Court of Appeal, at p. 9, was of the view that the Tribunal stated the principal issue as "whether Emily Eaton's special needs can be met best in a regular class or in a special class", but that it never actually answered this question. Rather, the Court of Appeal held that the Tribunal found that the integrated placement was inadequate without finding that the segregated placement would be any better. It held that the Tribunal ought not to have ordered a segregated placement unless it found that the segregated placement was better than the integrated placement.

75 In my view, the Tribunal did answer the question which it set itself, namely, which placement was superior. While it did not specifically state that the segregated placement was superior to the integrated placement, its findings clearly indicated this conclusion. The Tribunal grouped its findings into several categories of needs and interests implicated in education. With respect to Emily's communication needs, the Tribunal clearly found that "[b]ecause this need is of such over-riding importance for Emily, it makes sense to address it, at least initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for [individualized, highly specialized, extremely intense, one-on-one] instruction". While the Tribunal did not indicate how Emily's academic or social needs would be better met in the segregated placement than in the integrated placement, it clearly concluded that these needs were not only unsatisfied, but that she was being isolated in a "disserving and potentially insidious way". The Tribunal also found that, with respect to Emily's physical safety, the special classroom was superior to the integrated classroom. The Tribunal looked at several categories of needs and pointed out that some, including the most important for Emily, would be better met in the segregated classroom. With respect to the others, while an express conclusion was not drawn as to how

the segregated classroom would be superior, the inefficacy of the integrated classroom was established.

76 The Tribunal, therefore, balanced the various educational interests of Emily Eaton, taking into account her special needs, and concluded that the best possible placement was in the special class. It is important to note that the placement proposed was in a class located in a regular school where "the special class is integrated with the regular classes through morning circle and a buddy system which may include hand-over-hand art activities, music, reading, outings such as walks and recess, special activities like assemblies, mini olympics, interactive games, including rolling balls and playing catch" according to the testimony of the teacher of the class in which the Board proposed to place Emily. In addition, the Tribunal alluded to the requirement of ongoing assessment of Emily's best interests so that any changes in her needs could be reflected in the placement. Finally, the Tribunal stated:

> . . . our decision in favour of a special class placement does not relieve the school board and the parents of the obligation to collaborate creatively in a continuing effort to meet her present and future needs. Emily's is so unusual a case that unusual responses may well be necessary for her. Such achievements can only be realized through cooperation, and most important, compromise.

It seems incongruous that a decision reached after such an approach could be considered a burden or a disadvantage imposed on a child.

77 We cannot forget, however, that for a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is, where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children, and those like Emily, who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.

78 The Court of Appeal was of the view that the Tribunal's reasoning infringed s. 15(1) because the Charter mandates a presumption in favour of integration. This presumption is displaced if the parents consent to a segregated placement. This is reflected in the remedy that the Court of Appeal found to be appropriate. Section 8 of the Act was to be read to include a direction that, unless the parents of a disabled child consent to the placement of the child in a segregated environment, the presumption applies.

79 In my view, the application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a presumption. The operation of a presumption tends to render proceedings more technical and adversarial. Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. I would also question the view that a presumption as to the best interests of a child is a constitutional imperative when the presumption can be automatically displaced by the decision of

the child's parents. Such a result runs counter to decisions of this Court that the parents' view of their child's best interests is not dispositive of the question. See E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

80 I conclude that the placement of Emily which was confirmed by the Tribunal did not constitute the imposition of a burden or disadvantage nor did it constitute the withholding of a benefit or advantage from the child. Neither the Tribunal's order nor its reasoning can be construed as a violation of s. 15. The approach that the Tribunal took is one that is authorized by the general language of s. 8(3) of the Act. I have concluded that the approach conforms with s. 15(1) of the Charter. In the circumstances, it is unnecessary and undesirable to consider whether the general language of s. 8(3) or the Regulations would authorize some other approach which might violate s. 15(1).

81 In the result, the appeal is allowed, the judgment of the Court of Appeal is set aside and the judgment of the Divisional Court is restored. The appellants are entitled to costs in this Court. I would not award any costs in the Court of Appeal.

cp/d/hbb/DRS/DRS

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Indexed as:

Halifax Longshoremen's Assn., Local 269 v. Offshore Logistics Inc.

Between
Offshore Logistics Incorporated, applicant, and
Halifax Longshoremen's Association, Local 269 of the International Longshoremen's Association, respondent

[2000] F.C.J. No. 1155

[2000] A.C.F. no 1155

61 C.L.R.B.R. (2d) 179

257 N.R. 338

25 Admin. L.R. 224

[2000] CLLC para. 220-047

98 A.C.W.S. (3d) 829

Court File No. A-425-99

Federal Court of Appeal
Montréal, Quebec

Linden, Rothstein and Malone JJ.

Heard: June 22, 2000.
Judgment: July 17, 2000.

(68 paras.)

Labour law -- Labour Relations Boards and judicial review -- Canada Industrial Relations Board -- Judicial review -- Standard of review -- Of board's inclusion of employees in the bargaining unit -- Powers of board -- Composition of board -- Natural justice, denial of -- Hearing, opportunity to be heard -- Constitutional law -- Raising constitutional issues -- Practice -- Notice -- Intervenors, Attorney General.

Application by Offshore Logistics for judicial review of a decision of the respondent Canada Industrial Relations Board. The Board allowed a certification application by the respondent Halifax Longshoremen's Association regarding Offshore's employees. Offshore entered into an agreement with Mobil to provide services and equipment to manage and operate its supply base for the Sable Island offshore energy project. The base consisted of a dock and pipeyard. At the dock the employees loaded

and unloaded Mobil vessels. The employees only worked 25 per cent of the time at the dock. The Union's application was only to represent the employees for their dock work. The application was initially heard by a three-member tribunal. After the hearing but before the decision was rendered one member died and a second member withdrew. The chairman continued alone and rendered the decision. The Board extensively reviewed the circumstances. It concluded that the dock work related to vessels that were engaged in navigation and shipping. Such work was within the Board's jurisdiction. It rejected Offshore's submission that the work related to oil and gas exploration and development. The Board concluded that the loading and unloading of ships was an integral part of the work. It was not ancillary to the exploration and development. An implication of this decision was that longshoring was subject to federal regulation. Offshore claimed that the Board's decision was patently unreasonable. Its decision violated the Canada Labour Code and was a breach of natural justice because the decision was only made by the chairman. Offshore raised constitutional arguments that were not raised before the Board. It did not serve a notice of constitutional question upon the federal and provincial attorneys-general before this hearing. Offshore also submitted that if oil and gas exploration was subject to federal jurisdiction its operations were not essential for that undertaking. It was also improper for the Board to sever its dock and pipeyard operations.

HELD: Application dismissed. Parliament decided that the question of whether the dock work was longshoring was to be resolved by the Board. The standard of review was patent unreasonableness. The Board's decision satisfied this standard. The chairman complied with the Code when he rendered the decision alone. The death of the member was irrelevant. The withdrawal of the other member gave the chairman authority to continue alone. There was no breach of natural justice. The Board applied the proper applicable legislation. Offshore did not have to be provided with the opportunity to make submissions as to how the Board should proceed once it consisted of one member. This did not apply when one of the members refused to be involved and it was necessary for the chairman to continue alone. Submissions were only necessary if the matter was transferred to another panel in the middle of the proceedings. The constitutional arguments could not be considered because proper notice was not given. The court did not have the opportunity to hear proper submissions on these issues. It also lacked a proper record. The essential purpose of judicial review was to review decisions. It was not to determine new questions that were not canvassed before the tribunal under review. The dock work was integral to Mobil's offshore work. The drilling could not occur without Offshore's services. The Board ruled correctly when it severed the dock and pipeyard work. The two types of work were different. The dock work, however, was similar to the type of work performed by other members of the Union.

Statutes, Regulations and Rules Cited:

Canada Labour Code, R.S.C. 1985, c. L-2, ss. 34, 34(1),88, 88(1), 88(3).

Canadian Charter of Rights and Freedoms, 1982, s. 2(d).

Constitution Act, 1867, ss. 91(9), 91(10), 92(10)(a).

Corporations and Canada Labour Unions Return Act, S.C. 1998, c. 26.

Federal Court Act, R.S.C. 1985, c. F-7, s. 57, 57(1).

Counsel:

Richard Charney, for the applicant.
Ronald Pink, for the respondent.
Renée Caron, for the intervenor.

The judgment of the Court was delivered by

ROTHSTEIN J.:--

INTRODUCTION

1 This is a judicial review of a June 9, 1999 decision of the Canada Industrial Relations Board that granted an application by the respondent Union for inclusion in its geographical certification for the Port of Halifax, of the applicant's operations of loading and unloading of vessels chartered to Mobil Oil Canada Properties at the Mobil dock at Dartmouth, Nova Scotia. The Board Order was made under section 34 of the Canada Labour Code R.S.C. 1985, c.L-2, a provision dealing with labour relations in the longshoring industry. Subsection 34(1) provides:

> 34. (1) Where employees are employed in
>
> (a) the long-shoring industry, or
> (b) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board, the Board may determine that the employees of two or more employers actively engaged in the industry in the geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.
>
> * * *
>
> 34. (1) Le Conseil peut décider que les employés de plusieurs employeurs véritablement actifs dans le secteur en cause, dans la région en question, constituent une unité habile à négocier collectivement et, sous réserve des autres dispositions de la présente partie, accréditer un syndicat à titre d'agent négociateur de l'unité, dans le cas des employés qui travaillent:
>
> a) dans le secteur du débardage;
>
> b) dans les secteurs d'activité et régions désignés par règlement du gouverneur en conseil sur sa recommandation.

2 Section 34 is unique in that it empowers the Board to join together, for collective bargaining purposes, independent employers in a geographic area. The context is usually the hiring hall method of employment whereby all employers obtain employees as needed from the hiring hall.

ISSUES

3 The applicant Offshore challenges the Board's order on four grounds.

1. The Board's determination that Offshore's employees were engaged in longshoring is patently unreasonable.
2. The decision of the Board was rendered by the Chairman alone, in violation of the Canada Labour Code.
3. The proceedings before the Board violated the principles of natural justice.

4. Offshore is subject to provincial and not federal jurisdiction and the Board exceeded its constitutional jurisdiction in purporting to regulate its labour relations.

FACTS

4 Under a Supply Base Management Agreement between Offshore and Mobil, Offshore provides services and equipment to manage and operate a supply base at Dartmouth, Nova Scotia, for the Sable Offshore Energy Project. The supply base consists of a warehouse/pipeyard at 30 Atlantic Street, about 1 km from the waterfront at Dartmouth and the Mobil dock.

5 Offshore employs 10 persons at the supply base, consisting of 2 coordinators, 1 secretary, 1 foreman and 6 hourly-rated general labourers, one of whom is also a crane operator.

6 The Offshore employees work at both the pipeyard and the Mobil dock. About 75% of time of the Offshore employees is spent at the pipeyard and 25% at the Mobil dock. The work at the dock involves the loading and unloading of vessels chartered to Mobil.

7 The vessels are chartered to Mobil by Secunda Marine Services Ltd. The ownership of Offshore and Secunda is common, although each is under separate management.

8 The Mobil dock is located within the Union's geographical certification at the Port of Halifax.

9 By application dated June 11, 1998, the Union requested the Board to amend a prior Board order granting the Union its geographical certification at the Port of Halifax to include Offshore.[1] The Union's request was limited to including in its certification only the work of Offshore employees at the Mobil dock, not the work at the pipeyard.

10 Before the Board, the Union argued that Offshore's work at the dock involved the loading and unloading of vessels, that such vessels were engaged in navigation and shipping and that the work was therefore within the Board's jurisdiction and within the scope of the Union's longshoring certification. Offshore argued that its work at the dock was the loading and unloading of vessels related to oil and gas exploration and development. To the extent that some work was of a longshoring nature, Offshore said this should not govern as the work was largely not a part of navigation and shipping but was work related to oil and gas exploration.

WAS THE BOARD'S DECISION PATENTLY UNREASONABLE?

11 Offshore argues that the Board's determination that its employees were engaged in longshoring is patently unreasonable. The argument is made because if the work is not considered longshoring, section 34 of the Code is not applicable.

Standard of Review

12 While Offshore submits the Board's decision is patently unreasonable, it makes a preliminary argument that what is at issue is a jurisdictional question subject to the correctness standard of review. The application of section 34 of the Code depends upon whether the work involved is longshoring. Offshore submits the Board's determination that the work is long-shoring is jurisdictional in nature and therefore the standard of review should be correctness.

13 It is now well settled that the standard of review is to be determined according to a functional and pragmatic approach. The test is whether the question which the provision under consideration raises is

one that was intended by Parliament to be left to the exclusive decision of the Board, subject to review only for patent unreasonableness. See Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890, at paragraph 18, and Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, at paragraphs 26 to 28. The factors to be taken into account in the functional and pragmatic approach, among others, are the presence or absence of a privative clause, expertise of the tribunal, the purpose of the Act as a whole and the provision in particular, and whether the nature of the problem is one of fact or law and the generality of the proposition under consideration. (See Pushpanathan, supra, paragraphs 29-38.)

14 It is now trite law that decisions of the Canada Labour Relations Board and its successor, the Canada Industrial Relations Board, are, in matters within their core expertise, to be granted substantial deference by the Courts. (See Canadian Broadcasting Corporation v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157, Canada (Attorney General) v. P.S.A.C., [1993] 1 S.C.R. 941 at 962-963. The Supreme Court has also cautioned that the Courts should not be aggressive as branding as jurisdictional, and therefore subject to broader curial overview, that which may be doubtfully so. (See I.L.W.U. v. Prince Rupert Grain Limited [1996] 2 S.C.R. 432 at 445-46.

15 The question in this case is whether the work of Offshore employees at the Mobil dock should be considered longshoring. Application of the Board's jurisdiction under section 34 of the Code will depend on this determination. In a sense, therefore, the question might be viewed as jurisdictional. On the other hand, every time a board makes a positive decision which involves the exercise of its jurisdiction, its decision might be branded as jurisdictional. The functional and pragmatic approach, I think, is intended, among other things, to guide the Courts in deciding whether decisions that may have a jurisdictional overtone or implication are, nonetheless, not to be subjected to review for correctness. This approach supersedes the inquiry formerly conducted by reviewing courts into whether the statutory provision in dispute was, in an abstract or acontextual sense, jurisdictional in nature.

16 In the case of the Canada Industrial Relations Board, there is a broad privative clause in section 22 of the Code. As to the question of expertise, it has been found that the Board is a highly specialized type of administrative tribunal and that its members are experts in administering comprehensive labour statutes. In ILWU v. Prince Rupert Grain Limited, supra, Cory J. stated at page 446:

> It has often been very properly recognized that labour relations boards exemplify a highly specialized type of administrative tribunal. Their members are experts in administering comprehensive labour statutes which regulate the difficult and often volatile field of labour relations. Through their constant work in this sensitive area, labour boards develop the special experience, skill and understanding needed to resolve the complex problems of labour relations.

The question of whether work is or is not longshoring has been dealt with by the Board on a number of occasions in the past. (See Halifax Offshore Terminal Services Limited (1987), 71 d.i. 157, Halifax Grain Elevators Limited (1989), 76 d.i. 157, Équipments Bellemare Limitée (1995), 197 d.i. 84, M&M Manufacturing Ltd. (1997), 104 d.i. 45.) I have no doubt that the Board not only has expertise but experience in deciding whether work is longshoring in any given case.

17 Although interpretation of the term longshoring is involved, the Board's determination as to whether work is longshoring is largely based on the facts and circumstances of a given case. Its determination in this case does not involve the establishment of a highly generalized proposition of law about the meaning of longshoring in section 34 that might be more appropriately assigned to the Courts.

18 I am therefore satisfied that the question of whether the work of Offshore employees at the Mobil dock is or is not longshoring is one that Parliament intended be left to the Board, even though such

determination affects whether section 34 of the Code applies. Because of the presence of a privative clause and having regard to the expertise of the Board, the reasonableness simpliciter standard is not applicable. The standard of review is patent unreasonableness.

Longshoring: the Board's decision

19 The Board wrote a 25-page decision, extensively reviewing the circumstances. It found that loading and unloading of vessels chartered to Mobil at the Port of Halifax was carried out by Offshore employees. It reviewed the contractual arrangements under which these services were provided to Mobil.

20 The issue of whether the work of the Offshore employees at the Mobil dock was or was not longshoring in large measure comes down to whether the finding in a prior Canada Labour Relations Board decision in Halifax Offshore Terminal Services Limited et al., supra, the Checkers case, was applicable in the circumstances here. In the Checkers case, the Board dismissed an application by the Checkers' Union to include in its geographical certification at Halifax, work related to the checking of cargoes.

21 The Board assessed the evidence in this case, some of which was similar to the evidence in the Checkers case and some of which was not. In determining whether section 34 applied, the Board characterized the issue as whether the work should be classified in its longshoring or in its oil and gas aspect. The Board noted that in the Checkers case, the work was ancillary to loading and unloading while here the work was the function of loading and unloading itself. At paragraph 53 it stated:

> [53] The oil and gas exploration support aspect was given predominance by the CLRB in the Checkers case. However, it should be recalled that the work primarily and actually before the Board in that case was the ancillary work of checking in support of the loading and unloading of ships and not the function of loading and unloading as such. In the present circumstances, where the loading and unloading of ships are an integral part of the work, it is more difficult to draw the conclusion that the longshoring component should be viewed as incidental and ancillary. In the view of this Board, the corporate arrangements and the purposes of the Canada Labour Code must also be very carefully considered. The question must be carefully asked whether, in classifying the work here, its longshoring aspect or its oil and gas aspect should be given prominence.

22 At paragraphs 62 and 68 the Board distinguished the present case from that of Checkers, primarily on the basis that the activities of the employees are not, as in Checkers, incidentally related to longshoring, but are the essence of longshoring and that Offshore is more of an individual entity, vis-à-vis Mobil, than was the employer in the Checkers case, which the Board there viewed as an integral part of Mobil.

> [62] Given the above decisions, it is helpful to consider the basic nature of the matter presently in issue. In the present circumstances, as distinguished from the Cargill case and the Checkers matter, it is clear beyond dispute that the activities of the employees are not incidentally related to longshoring but are the essence of longshoring. The longshoring activities of Offshore employees are not an incidental or occasional part of their work. The evidence indicates that approximately 25% of the work of this employee group is carried out at the Mobil dock and a large part is longshoring work or very closely related to it. The longshoring aspect occurs regularly and substantially and not incidentally and occasionally. The loading and unloading of the chartered

> vessels is a regular and ongoing activity. Offshore is clearly an essential link in a system which undertakes the marine transport of goods on a regular and ongoing basis.
>
> [68] In the Checkers decision, East Coast was viewed by the Board as an integral part of Mobil. Here, while there are similarities between the situation of Offshore and East Coast, on careful review, Offshore appears to be more of an individual entity than East Coast was on the basis of the evidence cited by Vice-Chairperson Jamieson in the Checkers case.

23 At paragraph 71, the Board concluded that the Offshore employees in question were actively engaged in longshoring:

> [71] ... A key question will be whether the employees in question are actively engaged in longshoring. They are here. Parliament intended that certification in the longshoring industry should be more inclusive and not less so in order to prevent the disruption of port operations. The operation here, to a significant extent, is longshoring, the direct operation of loading and unloading ships. The operation is severed from the oil exploration business in its corporate organization and is severable in a labour relations sense. It occurs frequently and regularly. It serves a number of clients. In all of the circumstances, it is most appropriate that Offshore's present structure and longshoring operations be reflected by requiring that Offshore be included in the Port of Halifax geographic certification.

Offshore's arguments that the Board's decision was patently unreasonable

24 Offshore says that the shipping involved is not commercial shipping but is only providing a service for the Mobil offshore drilling activity. Further, it says that only 25% of the work performed by its employees is at the dock and 75% is at the pipeyard. These arguments are made to distinguish Offshore from other employers who service commercial shipping and whose employees are more extensively engaged in loading and unloading. However, it is plain from its reasons that the Board was aware of and considered these points. To the Board, the loading and unloading was not an incidental or occasional part of the work of the Offshore employees. Nor was commercial shipping considered an essential ingredient for a finding that the employees are engaged in longshoring activities. Such conclusions cannot be said to be irrational.

25 Offshore extracted from the Board's decision a few sentences that it says constitute errors in the approach of the Board. For example, it challenges the Board's view that "Parliament intended that certification in the longshoring industry should be more inclusive and not less so in order to prevent the disruption of port operations". Indeed, there is some indication in the cases that section 34 is to be used "sparingly" as it affects the freedom of association protected under paragraph 2(d) of the Charter of Rights and Freedoms. See the Board decision in Longshoremen's Protective Union Local 1953 v. St. John's Shipping Association (1983), 3 C.L.R.B.R. (N.S.) 314.

26 Whether or not this panel's view is inconsistent with the panel's view in St. John's Shipping need not be analysed here. The determination here was largely factual. On a consideration of the facts, Offshore's activities at the Port of Halifax were found to constitute longshoring. The Court would be hard-pressed to say that the analysis conducted by the Board and its conclusion in this case were patently unreasonable because one or two isolated observations in its reasons may be questionable.

27 Offshore says the Board was obliged to consider paragraph 2(d) of the Charter, the freedom of association, or in the context of this case, freedom from association. If the Union is successful, Offshore

will be required to join with other longshoring employees at Halifax for purposes of collective bargaining. However, Offshore does not challenge the constitutionality of section 34 of the Code. Absent such a challenge, the Court must accept section 34 as valid legislation even though, on its face, and in some circumstances, it may operate to limit freedom from association.

28 For all these reasons, I cannot accept Offshore's argument that the Board's decision that the loading and unloading carried on by Offshore employees was longshoring, was patently unreasonable.

WAS A DECISION BY THE CHAIRMAN ALONE IN VIOLATION OF THE CODE?

29 I now turn to the argument that the Board acted in violation of the Code because its decision was rendered by the Chairman alone. In this case, the panel hearing the case constituted its Chairman Paul Lordon, and members Michael Eayrs and Edmund E. Tobin. Some time after the hearing but before the decision was rendered, Mr. Eayrs died. Thereafter Mr. Tobin withdrew from the file. The Chairman, Mr. Lordon, then continued alone and rendered the decision himself.

30 The relevant provision is section 88 of An Act to Amend the Canada Labour Code (Part I) and the Corporations and Canada Labour Unions Returns Act, S.C. 1998, c. 26. Section 88 provides:

> 88. (1) Subject to subsection (2), any proceeding that the former Board was seized of on the day immediately proceeding the commencement day shall be transferred to and disposed of by the new Board in accordance with the new Act.
>
> (2) Any member of the former Board may, at the request of the Chairperson, continue to hear, consider or decide any matter that was before the member before the commencement day and in respect of which there was any proceeding in which they participated as a member.
>
> (3) Where a member of a panel refuses to continue to hear, consider or decide any matter referred to in subsection (1), the chairperson of the panel may continue to hear, consider or decide the matter or the Chairperson may remove that matter from the panel and hear, consider or decide that matter or assign a Vice-Chairperson or a panel of the new Board to do so on any terms and conditions that the Chairperson may specify for the protection and preservation of the rights and interests of the parties.
>
> (4) For the purposes of subsection (2), the members of the former Board shall exercise the powers of the new Board.
>
> (5) The Chairperson of the new Board has supervision over and direction of the work of members of the former Board who exercise powers under subsection (4).
>
> * * *
>
> 88. (1) Sous réserve du paragraphe (2), les affaires don't l'ancien Conseil était saisi la veille de la date de référence se poursuivent devant le nouveau Conseil qui en dispose selon la nouvelle loi.
>
> (2) Un membre de l'ancien Conseil peut, à la demande du président, continuer l'audition de toute affaire qui lui a été soumise avant la date de référence et a déjà fait

l'objet d'une procédure à laquelle il a participé en sa qualité de membre.

(3) En cas de refus d'un membre d'une formation de continuer l'audition d'une affaire visée au paragraphe (1), le président de la formation peut la continuer seul ou le président peut en dessaisir la formation et s'en charger lui-même ou la confier à un vice-président ou à une formation du nouveau Conseil selon les modalités et aux conditions qu'il fixe dans l'intérêt des parties.

(4) Pour l'application du paragraphe (2), les membres de l'ancien Conseil jouissent des pouvoirs du nouveau Conseil.

(5) Dans l'exercice des pouvoirs mentionnés au paragraphe (4), les membres agissent sous l'autorité du président du nouveau Conseil.

31 Pursuant to section 2 of the amending Act, the Canada Labour Relations Board was replaced by the Canada Industrial Relations Board effective January 1, 1999. Under subsection 88(1), proceedings of which the former Board was seized were transferred to the new Board. Mr. Tobin's withdrawal was, for purposes of subsection 88(3), a refusal by a member to continue to consider and decide a matter. Such refusal engaged subsection 88(3) which provided the Chairman of the panel, Mr. Lordon, with the authority to continue with the matter alone. Contrary to the applicant's submission, Mr. Eayrs' death was irrelevant. Subsection 88(3) is engaged when one member of a panel refuses to continue. That was the situation when Mr. Tobin refused to consider and decide the matter. Mr. Lordon, as chairman of the panel, was in compliance with subsection 88(3) when he continued to consider and decide the matter alone.

BREACH OF NATURAL JUSTICE ARGUMENTS

32 The breach of natural justice arguments of the applicant also cannot be accepted. First, Offshore argues that it was entitled to notice that the Board intended to change its policy and the law it established in Checkers. Offshore's argument rests on the proposition that the Board in this case reversed its finding in Checkers. It did not do so. It distinguished Checkers. The Board dealt extensively with the evidence and argument advanced by both sides on whether this case was or was not the same as Checkers. There is no basis for a breach of natural justice argument on this account.

33 Second, Offshore says that the Board decided the case on the basis of section 34 as amended on January 1, 1999, whereas the case was argued in November of 1998 on the basis of the unamended section 34. The amendment added to subsection 34(1) the words "actively engaged" to modify the nature of the employers in the longshoring industry included in section 34. However, nothing turns on this change for natural justice purposes.

34 Once the amendment took effect on January 1, 1999, the Board was bound to apply that substantive law when it rendered its decision on June 9, 1999. This was not a matter of discretion. The Board could not apply the unamended section 34. Submissions from the parties could have made no difference. As to the interpretation of the amended subsection 34(1), nothing prevented Offshore, had it considered it important, from making submissions to the Board after January 1, 1999 as to the effect, if any, of the coming into force of the amendment. It chose not to do so. It cannot now be heard to complain of a breach of natural justice by the Board.

35 The third natural justice argument is that the Board was obliged to provide Offshore with an opportunity to make submissions as to how the Board should proceed in view of the death of Mr. Eayrs and the withdrawal of Mr. Tobin. The common law natural justice point seems to be that parties are entitled to have decisions rendered by those who have heard the matter. See, for example, IWA v.

Consolidated Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, at 329-330. Here, the chairman of the panel heard the matter and decided it. No common law natural justice issue arises.

36 Nonetheless, subsection 88(3) of the Code does refer to the "protection and preservation of the rights and interests of the parties". These words suggest that Parliament envisioned that parties be given an opportunity to tell the Board how their rights and interests might be affected.

37 However, on a closer reading of subsection 88(3), it appears that these words apply where the Chairperson of the Board removes a matter from the panel that has been hearing, considering or deciding it and has dealt with it himself or assigns it to a Vice-Chairperson or another panel. The rights and interests of the parties are not engaged when the chairperson of the panel that heard the matter continues with it alone on the refusal of a member to continue to hear, consider and decide it. Parliament appears to have concluded that the rights and interests of the parties to a fair hearing are not affected when, due to a refusal by a member to continue, the chairman continues alone. On the other hand, when a matter is withdrawn from a panel, in mid-stream so to speak, and others take over to hear, consider or decide it, questions involving the rights and interests of the parties may arise. One obvious example would be where witnesses have testified before the first panel and whether they should re-testify before a new panel or whether their prior testimony and cross-examination should be taken into account by the new panel. This involves the rights and interests to which Parliament referred in subsection 88(3).

38 In the circumstances here, there was no obligation on the Board, upon subsection 88(3) being engaged by the refusal of Mr. Tobin to continue, to notify the parties that the chairman would proceed to deal with the matter alone.

CONSTITUTIONAL ARGUMENTS

39 This leaves the matter of Offshore's constitutional arguments. At the outset, it is important to observe that Offshore does not challenge the constitutional validity of any law and in particular, section 34 of the Canada Labour Code. Rather, the issue is whether, in a division of powers context, section 34 is applicable to Offshore's activities at the Port of Halifax.

The Board's decision

40 Before the Board, the issue seems only to have been whether Offshore's loading and unloading activities at the Port of Halifax constituted longshoring or conversely, whether such activities should be viewed as an incidental component of managing a supply base and providing management and support services to the offshore oil and gas industry. In the proceedings before the Board, it was implicit that if the Offshore activities are longshoring, they are subject to federal regulation and in particular section 34. At paragraph 42 of its reasons, the Board cites the words of Taschereau J. In Re the Validity of the Industrial Relations and Disputes Investigation Act (the Stevedores' case) [1955] S.C.R. 529, to explain why longshoring has been found to come under federal jurisdiction.

> [42] In Re Eastern Canada Stevedoring Company Limited, [1955] 3 S.C.R. 529, the Supreme Court of Canada considered the validity of the Industrial Relations and Disputes Investigation Act of Canada and its applicability to certain employees of Eastern Canada Stevedoring. The Court found that the legislation in question was valid federal legislation supported by the provisions of section 91(10) of the British North America Act, giving the Parliament of Canada exclusive jurisdiction on navigation and shipping. The words of Taschereau, J., in that decision are helpful in the present context.
>
> Generally, I think that the Industrial Relations and Disputes Investigation Act

> may be justified by head (10) of s. 91 of the British North America Act, which gives to the Parliament of Canada exclusive jurisdiction on Navigation and Shipping. Regulation of employment of stevedores is, I believe, an essential part of navigation and shipping and is essentially connected with the carrying on of the transportation by ship. Even if incidentally the law may affect provincial rights, it is nevertheless valid if it is, as I think, in relation to a subject within the federal legislative power under s. 91.
>
> As it was said by Viscount Haldane in The City of Montreal v. Montreal Harbour Commissioners: "Now, there is no doubt that the power to control navigation and shipping conferred on the Dominion by s. 91 is to be widely construed", and he further adds: "The terms on which these powers are given are so wide, as to be capable of allowing the Dominion Parliament to restrict very seriously the exercise of proprietary rights." (Page 541)

41 The Board stated at paragraph 43 of its reasons that the Stevedores' case makes it clear that if the employment of stevedores in connection with navigation and shipping is under consideration, a valid federal law to regulate such employment may be enacted.

42 However, the Board recognized that it was possible to view the loading and unloading of vessels at a port in either its longshoring aspect as related to navigation and shipping or in its role in support of the offshore oil and gas industry. At paragraph 53 it stated:

> [53] it should be noted at this point that the characterization of the activities of the employees depends to an extent upon the aspect from which the work is viewed. From one perspective, it is clear that work may be viewed as longshoring work related to navigation and shipping and therefore falling within section 91(10) of the Constitution Act 1867. This was the view taken in the Eastern Canada Stevedoring case. As the work falls less directly within the traditional definition of longshoring and becomes more incidentally related to it, as occurred in the Cargill decision, although the work involves longshoring to a certain extent, it may be viewed in its industrial setting. The oil and gas exploration support aspect was given predominance by the CLRB in the Checkers case. However, it should be recalled that the work primarily and actually before the Board in that case was the ancillary work of checking in support of the loading and unloading of ships and not the function of loading and unloading as such. In the present circumstances, where the loading and unloading of ships are an integral part of the work, it is more difficult to draw the conclusion that the longshoring component should be viewed as incidental and ancillary. In the view of this Board, the corporate arrangements and the purposes of the Canada Labour Code must be very carefully considered. The question must be carefully asked whether, in classifying the work here, its longshoring aspect or its oil and gas aspect should be given prominence.

43 The Board then considered what to take into account in determining how to classify the work in question. At paragraphs 55 and 56, it observed that application of section 34 was less appropriate where the work did not fall squarely within the definition of longshoring, i.e. the loading and unloading of ships.

> [55] An examination of the Eastern Stevedoring case together with the Cargill Grain decision shows that where this balancing has occurred, the application of the federal legislation appears to have been less appropriate where the work performed did not

fall squarely within the definition of longshoring. In the Cargill case, the employees involved were considered to be engaged in their work after the loading and unloading of the ships had been completed and were seen to be only very incidentally engaged in activity related to longshoring.

[56] In the Checkers case, the activities did not fall squarely within the notion of longshoring defined as the loading and unloading of ships. It was also a consideration that longshoring duties, if any, were carried out a very small percentage of the time and formed a very small proportion of the overall operations. In the Checkers' case, because of these factors the Board viewed the work of East Coast as an element of the overall work performed by Mobil.

44 In concluding that the work in question was longshoring, the Board made the following findings:

1. The activities of the Offshore employees at the Mobil dock are not incidentally related to longshoring but are the essence of longshoring.
2. The longshoring activities are not an incidental or occasional part of the work of Offshore employees.
3. The longshoring work occurs regularly and substantially and is an ongoing activity.
4. Shipping is a continuous and integral part of the operations in question.
5. The Offshore employees are engaged on an ongoing basis in navigation and shipping within the definition of that term in the Stevedores' case.
6. While the shipping here is not general commercial shipping, the employees are those of Offshore and not of Mobil and are paid and are instructed by Offshore.
7. Offshore's activities are severable from those of Mobil and its activities at the port are severable from its other logistical, preparatory and organizational work. The work at the dock is primarily directed to the objective of the marine transportation of the goods being shipped.

45 The Board concluded that Offshore's activities were, to a significant extent, longshoring, that is, the loading and unloading of ships. As a result, section 34 of the Canada Labour Code was found by the Board to be applicable to the loading and unloading work at the Mobil dock.

The Intraprovincial Shipping Argument

46 Offshore's first constitutional argument was not argued before the Board and was raised for the first time in this Court. In this argument, Offshore says that longshoring is only subject to federal jurisdiction when the relevant shipping is interprovincial or international. Here, it is argued that the vessels which are loaded and unloaded by Offshore are not engaged in commercial shipping; rather, they are chartered to Mobil and move exclusively between Halifax and the offshore drilling sites near Sable Island. Offshore says this shipping is wholly within Nova Scotia, is subject to provincial legislative authority and by extension, Offshore's longshoring activity is therefore subject to exclusive provincial legislative authority and not section 34 of the Canada Labour Code.

47 Subsection 91(10) of the Constitution Act, 1867 provides that the Parliament of Canada has exclusive legislative authority over Navigation and Shipping. However, under paragraph 92(10)(a), a province may exclusively make laws in relation to:

10. Local Works and Undertakings other than such as are of the following Classes:

> a. Lines of Steam or other Ships, Railways, Canals, telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> * * *
>
> 10. Les travaux et entreprises d'une nature locale, autres que ceux énumérés dans les catégories suivantes:
> a. Lignes de bateaux à vapeur ou autres bâtiments, chemins de fer, canaux, télégraphes et autres travaux et entreprises reliant la province à une autre ou à d'autres provinces, ou s'étendant au-delà des limites de la province;

48 Offshore says that shipping that is not interprovincial or international is a local work or undertaking and therefore the longshoring connected to it is also under provincial jurisdiction.

49 Dicta in the Stevedores' case supports the view that shipping within the limits of a province is under provincial jurisdiction.

> "... in some particulars a provincial legislature has jurisdiction over ferries or ships plying only between points within the limits of the province, ..."(Per Kerwin C.J.C. at page 535)
>
> "This however, cannot be construed as excluding the provincial jurisdiction over certain matters, as for instance inland shipping, which is not always of federal concern." (Per Taschereau J. at page 542)
>
> It seems clear that the loading and unloading of ships (often referred to as stevedoring when done by men who are not members of the ship's crew) is an essential part of the transportation of goods by water. As such, in my opinion, it comes within the exclusive legislative authority of Parliament under head 10 of s. 91 of the British North America Act "Navigation and Shipping", which term, as Viscount Haldane said in the Montreal Harbour Commissioners Case (1), is to be widely construed. I should add, however, that in my view, except in such aspects as may relate to the navigation of the vessel, the combined effect of heads 10, 13 and 29 of s. 91 and head 10 of s. 92 is to exclude from federal jurisdiction shipping which is purely local in character such as a ferry or a line of ships operating wholly within the limits of one province.
> (Per Abbott J. at page 591)
> (1) [1926] A.C. 299 at 312.

In Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrières, [1969] S.C.R. 851, Fauteux J. stated at page 728:

> I cannot see how leaving the inland waters to travel from one point to another in the same Province constitutes going beyond the boundaries of that Province, within the

> meaning of s. 92(10) of the British North America Act, and of s. 53(c) of the Industrial Disputes Act.
>
> We must therefore hold that, as the record is presently constituted, the appellant's maritime operations are intraprovincial ones.
>
> ...
>
> I am of the opinion, that in a case of the type presently before us, and, except in so far as the shipping aspect of the matter is concerned, the provisions of s. 91(29) and s. 92 (10)(a) and (b) are collectively intended to exclude from the jurisdiction of Parliament maritime shipping undertakings whose operations are carried on entirely within the boundaries of a single Province.

The indication is that stevedoring or longshoring related to shipping wholly within the limits of one province is not subject to section 34 of the Canada Labour Code.

50 As I stated earlier, this was not an issue raised before the Board. Nor was a notice of constitutional question issued by Offshore pursuant to subsection 57(1) of the Federal Court Act R.S.C. 1985, c. F-7. Subsection 57(1) provides:

> 57. (1) Where the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of any province, or of regulations thereunder, is in question before the Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be adjudged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).
>
> * * *
>
> 57. (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la Loi sur la défense nationale, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

51 Further, the respondent Union submits that had this constitutional issue been raised before the Board, the Union would have adduced factual evidence that it says is relevant to the issue to demonstrate that the shipping involved is subject to federal jurisdiction. The Union says that regulatory obligations, offshore agreements and the regulation of safety are examples of matters that it would have addressed in evidence to demonstrate this conclusion.

52 The issue of the territorial limits of Nova Scotia in the waters contiguous to its land mass is a complex question with far-reaching implications. In Constitutional Law of Canada, Loose-leaf Edition (Toronto: Carswell, 1997), Professor Hogg identifies some of the issues at page 13-5:

> A threshold question concerns the territorial limits of the province. Obviously, these are defined by the boundaries of the province.[2]

> With respect to coastal provinces, a question arises as to their jurisdiction over offshore waters. If the definition of a province's boundaries explicitly includes some portion of the offshore, then of course that area is within the province. If the definition of a province's boundaries is not explicit on the point, the general rule is that the territory of the province ends at the low-water mark. The only exceptions are "inland waters", such as harbours, bays, estuaries and other waters lying "between the jaws of the land"; these waters are within the province. The territorial sea and the high sea beyond (over the continental shelf) are outside the territory of the province. The coastal provinces therefore lack either ownership of the seabed (with its minerals) or legislative authority over the territorial sea and continental shelf.

53 In this case, some questions are:

1. Are there constitutional instruments that define the boundaries of Nova Scotia in its coastal waters?
2. Are there judicial decisions that address the issue in respect of Nova Scotia?
3. Is the general rule that the territory of the province ends at the low-water mark applicable?
4. If so, where is the low-water mark in relation to the main land?
5. Having regard to subsection 91(9) of the Constitution Act, 1867, conferring legislative jurisdiction on the Dominion in respect of Sable Island, is Sable Island within the territorial boundaries of Nova Scotia?
6. If so, where is the low-water mark in relation to Sable Island?

54 Except in the most general terms, there is no evidence as to the exact location of the offshore drilling sites in relation to any low-water mark or the boundaries established by constitutional instruments or otherwise.

55 Further, the argument of Offshore appears to be that shipping that is not interprovincial or international is a local work or undertaking. However, the words of paragraph 92(10)(a) exclude lines of steam or other ships, ... connecting the province with any other or others of the provinces, or extending beyond the Limits of the province. While the shipping may not be interprovincial or international as such, it may, if the drilling sites being serviced are not within the territorial limits of Nova Scotia, extend beyond the limits of the province. No argument has been presented on the issue.

56 The respondent argues, with examples, that where a constitutional issue is not raised before the Board, no section 57 notice is issued in respect of the proceedings before the Board and there are obvious constitutional facts that are not in the record, it is prejudiced by reason of not having notice of the constitutional issue, it would be inappropriate for this Court, de novo, to purport to decide the issue. In Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241, Sopinka J. explained why it was essential for the Supreme Court to have the benefit of a record that is the result of a thorough examination of the constitutional issues in the court or tribunal from which the appeal arises. He stated at page 264:

> The purpose of s. 109 [of the Ontario Courts of Justice Act, which is substantially the same as section 57 of the Federal Court Act] is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the

> legislature would work a serious injustice not only to elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

57 While the observations of Sopinka J. are with respect to the Charter and the Supreme Court, I think they are equally applicable to the issue of the constitutional division of powers and the Federal Court of Appeal. The essential purpose of judicial review is the review of decisions, not the determination de novo of questions that were not canvassed in the evidence and argument before the tribunal whose decision is under review. See Gitxsan Treaty Society v. Hospital Employees' Union, [2000] 1 F.C. 135, at paragraph 15.

58 Offshore says that as provincial competence in labour relations is the rule and federal jurisdiction is the exception, the onus was on the Union, which was invoking the federal exception, to establish the constitutional facts necessary for the exception to come into play and that failing such a demonstration, exclusive provincial jurisdiction must govern. The onus may well be on the party seeking to invoke the federal exception to establish its applicability. However, that onus does not arise unless the party seeking to raise a constitutional question does so. Without expressing a view on whether section 57 of the Federal Court Act is mandatory in these circumstances, one salutary effect of a section 57 notice is, in addition to notifying the Attorneys General, of giving notice to opposing parties that there is a specific constitutional question in issue. Federal Court Form 69 requires that the material facts giving rise to the constitutional question be set out, as well as the concise legal basis for the constitutional question. The onus was on Offshore to raise the inapplicability of section 34 of the Canada Labour Code based on paragraph 92(10)(a) of the Constitution Act, 1867 if it wished to do so. It did so before this Court but did not do so before the Board.

59 The result is that the matter was not in issue before the Board. Relevant evidence was not adduced. The Board did not pronounce upon the issue and now this Court, on the basis of an inadequate record and de novo, is asked to decide the issue. I think the observations of Dickson J. in Northern Telecom v. Communications Workers, [1980] 1 S.C.R. 115, at 140, are apt here:

> Telecom did not raise the constitutional question before the Board, nor did Telecom there take the position that the Board lacked a prima facie basis of facts upon which it could conclude that it had jurisdiction. Absent any serious challenge to its jurisdiction, the Board dealt with this issue briefly and assumed jurisdiction. Telecom, by its actions, effectively deprived a reviewing Court of the necessary "constitutional facts" upon which to reach any valid conclusion on the constitutional issue.
>
> After consideration of the full record in all its thirteen volumes, a record which the Court did not have available to it upon granting leave, I have concluded that this Court is in no position to give a definitive answer to the constitutional question raised. I think we must leave that question to another day and dismiss the appeal simply on the basis that the posture of the case is such that the appellant has failed to show reversible error on the part of the Canada Labour Relations Board.

It would be inappropriate in the circumstances here for this Court to decide the constitutional question relating to intraprovincial shipping.

Offshore Oil and Gas Exploration

60 Offshore then makes a series of constitutional arguments which it says are related to the offshore oil and gas exploration activities of Mobil. The arguments are premised on Offshore itself being subject to provincial labour jurisdiction unless it becomes subject to federal jurisdiction by reason of a connection with the offshore oil and gas undertaking for which its services have been retained by Mobil. Offshore first says that oil and gas exploration falls under provincial jurisdiction and therefore Offshore's connection to this industry would not bring it under federal labour jurisdiction. A second argument is that even if oil and gas exploration is subject to federal jurisdiction, Offshore's operations are not essential or integral to this undertaking. A third argument is that it was inappropriate for the Board to sever Offshore's operations at the Mobil dock from its operations at the pipeyard, that the pith and substance of Offshore's work is at the pipeyard and there was no evidence put before the Board to suggest that the pipeyard and dock operations could be severed. As the dock operations of Offshore could not be severed, the entirety of Offshore's operation should continue to remain under provincial labour jurisdiction.

61 As to oil and gas exploration being subject to provincial rather than federal legislative jurisdiction, as noted earlier, no section 57 notice was issued in respect of proceedings before the Board. Offshore concedes that "Parliament has the residual jurisdiction over the right to explore and exploit natural resources off the shores of the provinces of Newfoundland and British Columbia", but says the issue has not been decided in respect of natural resources off the shores of Nova Scotia. Not only does there not appear to have been any argument on this issue before the Board, there was virtually no argument before this Court. This is a major constitutional issue. Constitutional facts to show that the circumstances with respect to Nova Scotia are the same or different from those with respect to Newfoundland and British Columbia are not before the Court. In such a factual and legal vacuum, as was the case with the intraprovincial shipping argument, it would be imprudent for the Court to attempt to decide this issue.

62 The second argument is that Offshore's operations are not essential or integral to the offshore exploration of oil and gas. However, the Supply Base Management Agreement between Offshore and Mobil states that Offshore will "provide all the services and equipment required to manage and operate a supply base located at Dartmouth, Nova Scotia for the Sable Offshore Energy Project. It seems obvious that offshore drilling cannot take place without the movement by vessel of supplies, materials and equipment between the mainland and the offshore drilling sites. The supplies, material and equipment are prepared and organized by Offshore at its pipeyard and are loaded and unloaded onto and from vessels at the Mobil dock. Whether or not one views the Offshore operation at the Mobil dock as longshoring connected to maritime transportation, the offshore drilling activity could not take place without the services of Offshore. Such services must be viewed as essential to the oil and gas exploration which they support.

63 Nor can Offshore's severance argument be accepted. The Union sought certification over Offshore's operations at the Mobil dock but not at the pipeyard. It was implicit in the application that the Board was being called upon to sever, for labour relations purposes, the operations at the dock and the operations at the pipeyard.

64 The Union presented to the Board a video tape of the Offshore operation at the Mobil dock. Its witnesses testified that the work performed by Offshore at the dock was substantially the same as longshoring work by members of the Union at other locations at Halifax harbour.

65 On the evidence before it, the Board concluded that the work at the dock was different in context than the work at the pipeyard. At paragraph 67 of its reasons, the Board stated:

> [67] Offshore's operations as a whole are severable from Mobil's operations. The work at the dock is even more clearly severable. There is no doubt that if Offshore were to service other clients, there is nothing in the corporate organization or other arrangements, including the contractual arrangements under which the work is performed that would preclude such outside involvement. Offshore is a separate undertaking. Its work at the dock, which is the subject of this application, is similarly different in content from that of the pipeyard. While the pipeyard work may be viewed as logistical, preparatory and organizational, the work at the dock is primarily directed to the objective of the marine transportation of the goods being shipped.

66 Nothing in the argument before this Court suggests that the Board was incorrect in severing the Offshore operation at the Mobil dock from its operation at the pipeyard for labour relations purposes. Offshore argues that severance should only occur when the operations are not integrated in a functional or business sense and that the Board had no evidence to suggest that the operations at the dock and the pipeyard could be severed. However, there was evidence of the similarity of Offshore's dock work with other longshoring work as contrasted with the work at the pipeyard. The Supply Base Management Agreement indicates the type of activity carried on at the dock, loading and unloading of vessels, and at the pipeyard, stuffing and de-stuffing of containers, engineering and construction activities and processing of documentation, etc.

67 Given the severance implicit in the Union's application, if there was evidence that indicated the operations of Offshore are integrated in a functional and business sense, such that it would be inappropriate to sever them for labour relations purposes, I think Offshore was the party that bore the responsibility of ensuring such evidence was put before the Board. After all, it is Offshore that knows its own business. In the absence of such evidence, I cannot say that the Board was incorrect in severing the Offshore dock activities from those at the pipeyard.

DISPOSITION

68 The appeal will be dismissed with costs.

ROTHSTEIN J.
LINDEN J.:-- I agree.
MALONE J.:-- I agree.

* * * * *

JUDGMENT

The appeal is dismissed with costs.

cp/d/qlndn/qlhcs

1 The application originally included other employers as well as Offshore but during the proceedings before the Board, the other firms were struck.

2 The boundaries of a province will be ascertained by reference to the instruments by which the province was initially created or defined, to the terms of union with Canada (where applicable), to any modifications of the boundaries after confederation under s. 3 of the Constitution Act, 1871 and to any judicial decisions on boundaries, e.g., Re Labrador Boundary [1927] 2 D.L.R. 401 (P.C.); Re Offshore Mineral Rights of B.C. [1967] S.C.R. 792; Re Strait of Georgia [1984] 1 S.C.R. 388.

---- End of Request ----
Print Request: Current Document: 1
Time Of Request: Tuesday, July 14, 2009 18:26:27

Case Name:

Paluska v. Cava

Between
Joseph John Paluska Jr., appellant/(respondent in appeal), and
Dr. Josephine Cava, respondent/(respondent in appeal), and
The Attorney General of Ontario, intervenor/(appellant/moving party), and
Legal Aid Ontario, intervenor/(respondent in appeal)

[2002] O.J. No. 1767

Docket No. M28254 (C37150)

Also reported at: 59 O.R. (3d) 469

Ontario Court of Appeal
Toronto, Ontario

Laskin, Borins and Gillese JJ.A.

Heard: April 11, 2002.
Judgment: May 6, 2002.

(28 paras.)

On appeal from the endorsement of Justice Anne M. Molloy dated September 12, 2001, reported at 55 O.R. (3d) 681 (S.C.J.).

Counsel:

Anita Szigeti, for the appellant (respondent in appeal).
Sean Hanley, for the intervenor (appellant/moving party).
Annie Finn, for the intervenor (respondent in appeal).

The judgment of the Court was delivered by

LASKIN J.A.:--

A. INTRODUCTION

1 The respondent Joseph John Paluska Jr. was found incapable of consenting to treatment by the Consent and Capacity Board. He appealed the Board's decision to the Superior Court of Justice. Molloy

J. decided that Mr. Paluska had a constitutional right under s. 7 of the Canadian Charter of Rights and Freedoms to publicly-funded counsel to represent him on the appeal. She ordered the Government of Ontario to pay his counsel's legal fees.

2 The Attorney General of Ontario has appealed this decision. On this preliminary motion, the Attorney General asks that the order of the motions judge be declared invalid because he was not given notice of her proposed order as required by s. 109(1) of the Courts of Justice Act. I would grant the motion. Under s. 109, notice to the Attorney General is mandatory when a Charter remedy is sought and the absence of notice renders the decision invalid.

B. BACKGROUND FACTS

3 Mr. Paluska is a patient at the Centre for Addiction and Mental Health in Toronto. At his trial on a charge of mischief he was found not criminally responsible on account of mental disorder. His treating psychiatrists believe that he needs anti-psychotic and mood-stabilizing medication. In February 2001, however, his doctor, the respondent Dr. Cava, found that Mr. Paluska lacked the capacity to consent to the proposed psychiatric treatment. His substitute decision-maker - his father - will consent to the treatment.

4 But Mr. Paluska challenged Dr. Cava's finding before the Board. On March 2, 2001, after hearing evidence, the Board upheld Dr. Cava's finding. Mr. Paluska appealed the Board's order but did not perfect his appeal. Dr. Cava then brought a motion to dismiss Mr. Paluska's appeal for delay or for an order that he be treated while his appeal was outstanding. It was on Dr. Cava's motion that Molloy J. made the order in question before us.

5 At the hearing before the Board, Mr. Paluska was represented by counsel on a legal aid certificate. But he was refused legal aid for his appeal, and he did not appeal that refusal to the Legal Aid Area Committee. Thus, Mr. Paluska represented himself when, on September 11, 2001, Dr. Cava's motion first came before the motions judge. Dr. Cava's motion raised a dilemma for Molloy J.: Mr. Paluska needed a lawyer to have a meaningful right of appeal; but Dr. Cava believed Mr. Paluska needed immediate treatment and, without it his condition would deteriorate. The motions judge solved the dilemma, not by dismissing Mr. Paluska's appeal for delay or by ordering interim treatment, but by ordering that he be given publicly-funded counsel. In her opinion, "the appropriate remedy is to direct the appropriate authority to provide legal counsel to Mr. Paluska, funded by the government whether through Legal Aid or otherwise."

6 The motions judge gave this remedy without being asked to do so by either side and without any notice to the Attorney General of Ontario. In her view, Mr. Paluska's constitutional right to life, liberty and security of the person under s. 7 of the Charter required that he have legal representation. She referred by analogy to this court's decision in R. v. Rowbotham (1988), 41 C.C.C. (3d) 1, which held that forcing an indigent accused to proceed to trial without counsel where the charge is serious and the case complex may violate that accused's fair trial rights under ss. 7 and 11 of the Charter. The motions judge held at para. 16:

> The consequences for Mr. Paluska of the matters raised in this appeal are as serious as the consequences of the kind of criminal charges that have been found to warrant a Rowbotham type order. He faces a loss of liberty as well as forcible treatment with anti-psychotic and other drugs. The legal issues on the appeal are complex, both in respect of the medical issues involved and the legal standard to be applied on such appeals. Further, his own inability to deal effectively with the issues raised must be taken into account.

7 At para. 17 the motions judge concluded that she could make the order for publicly-funded counsel "as part of my inherent jurisdiction to control the process of this court and the administration of justice." She saw her responsibility "to ensure that the statutory right of appeal given to Mr. Paluska can be exercised by him in a manner that respects his rights under the Charter of Rights and Freedoms. This requires legal representation and I will therefore order that it be provided."

8 Although the motions judge effectively made the order for publicly-funded counsel on September 12, 2001, she adjourned the motion and the formal issuance of her order until September 21. She was concerned about the unexplained failure of Legal Aid to give Mr. Paluska a certificate, and she thought that the Public Guardian and Trustee might assist the court. She ordered counsel for Dr. Cava to serve both the Director of the Legal Aid Plan and the Public Guardian and Trustee with the motion materials. She did not, however, order that Dr. Cava's counsel serve the Attorney General, who, up until then, had no notice of these proceedings.

9 On September 19, 2001, two days before the return of the motion, counsel for Legal Aid Ontario, in a telephone call, informed counsel for the Attorney General about the proceedings. The Attorney General's office received the motion material on September 20. Counsel for the Attorney General appeared before the motions judge on September 21 and requested an adjournment to obtain instructions, which was refused. The motions judge decided that the question whether Mr. Paluska should be treated needed to be resolved quickly. She formally ordered that the Public Guardian and Trustee arrange for legal counsel for Mr. Paluska for his appeal and that the Government of Ontario pay that counsel's reasonable fees at Legal Aid rates.

10 The Attorney General appealed the order to this court and brings this preliminary motion for a determination that the order was invalid because he was not given notice under s. 109.

C. ANALYSIS

11 Before discussing the s. 109 issue, I will briefly deal with two subsidiary issues: one relates to whether we should decide the motion even though the appeal is moot; the other relates to whether we should address the s. 109 issue on a preliminary motion rather than on the appeal itself.

12 The government's appeal is moot because, although it disagreed with the motions judge's order, it voluntarily paid the legal fees for Mr. Paluska's appeal regardless of the outcome of its own appeal. Mr. Paluska's appeal from the Board's decision has now been disposed of by the courts. Greer J. dismissed his appeal [reported at [2001] O.J. No. 4010] and his further appeal to this court was dismissed for delay on January 29, 2002.

13 Despite its mootness, I think we should decide the s. 109 issue, largely for the reasons the Supreme Court of Canada exercised its discretion to decide whether s. 7 of the Charter entitled a mother in contested child protection proceedings to government-funded legal counsel. See New Brunswick (Minister of Health and Community Services) v. G.J., [1999] 3 S.C.R. 46. The appeal in the New Brunswick case was also moot by the time it reached the Supreme Court of Canada because the children had already been returned to the mother's care. The Supreme Court, nonetheless, heard the appeal because it raised an important question that may well arise again, it was presented on a proper evidentiary record, and it was fully argued. Similar considerations apply here. Thus, I do not consider the mootness of the appeal to be a bar to determining the Attorney General's motion.

14 I also think it appropriate to decide the s. 109 issue on this preliminary motion. A panel of this court has jurisdiction to do so under rule 61.16(2.2) of the Rules of Civil Procedure and I would exercise that jurisdiction in this case. If granted, the motion will finally dispose of the appeal and thus will

economize the parties' and the courts' resources. Additionally, both sides agree that we proceed in this way. I therefore turn to whether the failure to comply with s. 109 of the Courts of Justice Act makes the order for public-funded counsel invalid.

15 Section 109(1) states:

> 109(1) Notice of constitutional question - Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:
>
> 1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
> 2. A remedy is claimed under subsection 24(1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Canada or the Government of Ontario.

The notice must be in writing. Section 109(2.1) states:

> (2.1) Form of notice - The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

16 The notice requirement has two related purposes: to ensure that governments have a full opportunity to support the constitutional validity of their legislation or to defend their action or inaction; and to ensure that courts have an adequate evidentiary record in constitutional cases. See Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.

17 The questions raised by this motion are whether the motions judge's proposed order triggered s. 109, whether the telephone notice received by the Attorney General's office on September 19, 2001 complied the section and, if not, whether the absence of notice renders the order for publicly-funded counsel invalid.

18 Section 109(1) required that the Attorney General of Ontario be given notice of the motions judge's order before it was made. The provision is mandatory where a remedy is sought under s. 24(1) of the Charter for the failure of the Ontario government to act. Here, although the motions judge did not expressly refer to s. 24(1), she must have made her order under that section of the Charter because she found that the government's failure to pay for a lawyer for Mr. Paluska violated his s. 7 rights.

19 The telephone notice of the proceedings given to the Attorney General's office by counsel for Legal Aid Ontario did not constitute the notice required by s. 109(1). Even if one were to overlook the formal defects in the notice - the notice was not in writing and the constitutional question was not specified - by the time the Attorney General's office received the telephone call on September 19, the motions judge had already made her order. Section 109 obviously requires notice before a Charter remedy is given, not after. The remedy given in this case was awarded without first complying with s. 109.

20 That leaves to be decided the legal effect of non-compliance. The parties have competing positions. The Attorney General contends that the absence of notice renders the order of the motions judge invalid. Counsel for Mr. Paluska contends that the order is not invalid either because the Attorney General cannot show it was prejudiced by the absence of notice or because the court may dispense with notice despite the mandatory wording of s. 109.

21 Both s. 109(2) of the Courts of Justice Act and the Supreme Court of Canada's decision in Eaton resolved this debate in favour of the Attorney General's position. Section 109(2) specifies that if notice is not given, a remedy under s. 24(1) of the Charter shall not be granted:

> 109(2) Failure to give notice - If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

22 In Eaton, at para. 49, the Supreme Court considered whether "in the absence of notice the decision is ipso facto invalid" or whether "a decision in the absence of notice is voidable upon a showing of prejudice." Sopinka J. favoured the view that notice is mandatory and the failure to give it invalidates the decision whether or not the government shows prejudice. In so concluding, he relied on the dissenting judgment of Arbour J.A. in a case in this court, Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc. (1993), 12 O.R. (3d) 385. Sopinka J. wrote, at para. 53:

> In view of the purpose of s. 109 of the Courts of Justice Act, I am inclined to agree with the opinion of the New Brunswick Court of Appeal in D.N. v. New Brunswick (Minister of Health & Community Services), 127 N.B.R. (2d) 383, supra, and Arbour J.A. dissenting in Mandelbaum, supra, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest.

23 Admittedly, as Sopinka J. recognized at para. 54, cases might arise where the failure to serve a written notice may not be fatal "either because the Attorney General consents to the issue's [sic] being dealt with or there has been a de facto notice, which is the equivalent of a written notice." And, because it was unnecessary to do so in that case, Sopinka J. declined to express a final opinion on whether the absence of notice made the decision invalid only on a showing of prejudice.

24 Nonetheless, the prevailing view - supported by the wording of the statute and affirmed by this court's recent decision in R. v. Briggs (2001), 55 O.R. (3d) 417 - is that the absence of notice by itself renders the decision invalid. Moreover, none of the alternative possibilities mentioned by Sopinka J. apply here. The Attorney General did not consent to the issue being decided in the absence of notice, it did not receive de facto notice equivalent to written notice, and, in my view, it was prejudiced by the absence of notice. It was prejudiced because it was ordered to pay out public money without having any opportunity to persuade the court why it should not have to do so. Also, in the absence of notice, the two purposes of s. 109 were not met. The government was not able to show why its failure to pay for counsel for Mr. Paluska did not violate s. 7 of the Charter, and the court was deprived of a more complete evidentiary record. Accordingly, I conclude that the motions judge's order requiring the Ontario government to pay Mr. Paluska's counsel's legal fees is invalid.

25 That said, I have considerable sympathy for what the motions judge did. She was faced with a proceeding that had to be dealt with urgently, that had potentially serious consequences for Mr. Paluska, and yet a proceeding in which he had no ability to represent himself. She had compelling reasons to order publicly-funded counsel and that order may well have been made no matter what the Attorney General said. Moreover, so-called Rowbotham orders - to which the motions judge analogized - are often made without formal notice to the Attorney General.

26 But Rowbotham orders are made in criminal proceedings in which a Crown attorney can represent the Attorney General's interest and are now common enough that formal notice is likely impliedly waived. There is no parallel here. The Crown was not represented before the motions judge and the

order that she made, though probably sensible, was nonetheless novel.

27 Once the motions judge contemplated ordering publicly-funded counsel for Mr. Paluska, she should have directed that the Attorney General be given the notice required by s. 109. To meet the urgency of the situation, under s. 109(2.2) she could have shortened the 15-day notice period:

> (2.2) Time of notice - The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42(1).

Indeed, the motions judge did not issue her formal order for funding until nine days after she had effectively made it. Nine days would have been ample time for the Attorney General to present its position.

28 I would therefore grant the motion and declare the September 21, 2001 order of the motions judge invalid. Neither party asked for costs of this motion and I would therefore make no order for costs.

LASKIN J.A.
BORINS J.A. -- I agree.
GILLESE J.A. -- I agree.

cp/e/nc/qlhcc/qlkjg

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Print Request: Current Document: 1
Time Of Request: Tuesday, July 14, 2009 18:36:47

Case Name:

Jacobs v. Sports Interaction

Between
Trevor Jacobs, appellant, and,
Sports Interaction, respondent

[2006] F.C.J. No. 490

[2006] A.C.F. no 490

2006 FCA 116

2006 CAF 116

348 N.R. 292

Docket A-82-05

Federal Court of Appeal
Montréal, Quebec

Desjardins, Létourneau and Noël JJ.A.

Heard: March 13, 2006.
Oral judgment: March 13, 2006.

(9 paras.)

Administrative law -- Judicial review and statutory appeal -- Appeal of a Federal Court decision which granted a judicial review application on the grounds that the decision of the adjudicator appointed under the Canada Labour Code was invalid for lack of constitutional jurisdiction by virtue of section 88 of the Indian Act -- Appeal allowed -- An argument based upon section 88 of the Indian Act triggered a consideration of the division of powers -- It was inappropriate for the application judge to pronounce on the constitutional inapplicability of the Canada Labour Code in the absence of the requisite notice under section 57 of the Federal Courts Act -- Federal Courts Act, s. 57.

Constitutional law -- Division of powers -- Appeal of a Federal Court decision which granted a judicial review application on the grounds that the decision of the adjudicator appointed under the Canada Labour Code was invalid for lack of constitutional jurisdiction by virtue of section 88 of the Indian Act -- Appeal allowed -- An argument based upon section 88 of the Indian Act triggered a consideration of the division of powers -- It was inappropriate for the application judge to pronounce on the constitutional inapplicability of the Canada Labour Code in the absence of the requisite notice under section 57 of the Federal Courts Act -- Federal Courts Act, s. 57.

Civil procedure -- Applications and motions -- Notice of -- Appeal of a Federal Court decision which

granted a judicial review application on the grounds that the decision of the adjudicator appointed under the Canada Labour Code was invalid for lack of constitutional jurisdiction by virtue of section 88 of the Indian Act -- The Attorney General of Canada was served with a copy of the application for judicial review, but not the notice required under section 57 of the Federal Courts Act -- Appeal allowed -- An argument based upon section 88 of the Indian Act triggered a consideration of the division of powers -- It was inappropriate for the application judge to pronounce on the constitutional inapplicability of the Canada Labour Code in the absence of the requisite notice under section 57 of the Federal Courts Act -- The service of a copy of the application for judicial review to the Attorney General of Canada was not sufficiently explicit notice for the purpose of section 57 -- Federal Courts Act, s. 57.

Appeal of a Federal Court decision which granted the application of the respondent, Sports Interaction, for judicial review. In its application for judicial review, the respondent alleged that the adjudicator's decision was patently unreasonable. As a further ground, it argued that by virtue of section 88 of the Indian Act, the adjudicator lacked jurisdiction. On the morning of the application hearing, the respondent's counsel filed a letter from the Attorney General of Canada which indicated that he had been served with a copy of the application for judicial review and that he did not intend to appear at the hearing. However, neither the respondent nor Jacobs had contested the jurisdiction of the adjudicator when they appeared before him. The application judge declared that the decision of an adjudicator appointed under the Canada Labour Code was invalid for lack of constitutional jurisdiction.

HELD: Appeal allowed. The application judge's decision was based upon an analysis of the constitutional jurisdiction over labour relations. An argument based upon section 88 of the Indian Act triggered a consideration of the division of powers. As a result, it was inappropriate for the application judge to pronounce on the constitutional inapplicability of the Canada Labour Code in the absence of the requisite notice under section 57 of the Federal Courts Act. The service of a copy of the application for judicial review was not sufficiently explicit notice for the purpose of section 57. The matter was referred back to the Federal Court for re-adjudication once notice of a constitutional question had been given by the respondent pursuant to section 57.

Statutes, Regulations and Rules Cited:

Canada Labour Code, R.S.C. 1985, c. L-2

Federal Courts Act, s. 57

Indian Act, R.S.C. 1985, c. I-5, s. 88

Appeal From:

Appeal from an order of Justice Tremblay-Lamer of the Federal Court dated January 26, 2005, docket no. T-1411-04, [2005] F.C.J. No. 150.

Counsel:

Chantal Poirier, for the appellant.

Dan Goldstein, for the respondent.

The judgment of the Court was delivered by

1 DESJARDINS J.A. (orally):-- This is an appeal of a decision of the Federal Court which granted the respondent's application for judicial review and declared that a decision of an adjudicator appointed under the *Canada Labour Code*, R.S.C. 1985, c. L-2 was invalid for lack of constitutional jurisdiction (*Sports Interaction v. Trevor Jacobs* (2005), 268 F.T.R. 218, 2005 FC 123).

2 Neither the appellant nor the respondent contested the jurisdiction of the adjudicator when they appeared before him.

3 In its application for judicial review, the respondent alleged that the adjudicator's decision was patently unreasonable. As a further ground, it argued that: "... by virtue of section 88 of the *Indian Act*, R.S.C. 1985, c. I-5, the adjudicator lacked jurisdiction in the present matter."

4 The application judge's decision was based upon an analysis of the constitutional jurisdiction over labour relations. An argument based upon section 88 of the *Indian Act*, such as the present one, inevitably triggers a consideration of the division of powers.

5 It was consequently inappropriate for the motions judge to pronounce on the constitutional inapplicability of the *Canada Labour Code* in the absence of the requisite notice under section 57 of the *Federal Courts Act* (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2004] 3 F.C.R. 436 at paras. 74 to 81 (F.C.A.) per Sharlow J.A., dissenting: the majority did not pronounce on this point; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at paras. 263-264). While this latter case concerns a *Charter* challenge, the same considerations apply with respect to constitutional questions based upon the division of powers (*Halifax Longshoremen's Association, Local 269 v. Offshore Logistics Inc.* (2000), 257 N.R. 338 at para. 57 F.C.A.).

6 In *Northern Telecom v. Communications Workers,* [1980] 1 S.C.R. 115 at 139-140, Dickson J. (as he then was) stated the following:

> I am inclined toward the view that, in the absence of the vital constitutional facts, this Court would be ill-advised to essay to resolve the constitutional issue which lurks in the question upon which leave to appeal has been granted. One must keep in mind that it is not merely the private interests of the two parties before the Court that are involved in a constitutional case. By definition, the interests of two levels of government are also engaged. In this case, the appellant did not apply to the Court, pursuant to Rule 17 of the *Supreme Court Rules*, for the purpose of having a constitutional question stated. If the appellant had intended to raise a question as to the constitutional applicability of the *Canada Labour Code*, then the obligation was upon the appellant to assure that the constitutional issue was properly raised. As no constitutional question was stated nor notice served upon the respective Attorneys General, the Court lacks the traditional procedural safeguards that would normally attend such a case and the benefit of interventions by the governments concerned. [Emphasis added]

7 Counsel for the respondent filed on the morning of the hearing a letter from the Attorney General of Canada indicating that he was served with a copy of the application for judicial review and that he did not intend to appear in the proceedings. The service of a copy of the application for judicial review is not sufficiently explicit notice for the purpose of section 57 of the *Federal Courts Act*, especially in this case

where brief reference, without much explanation, was made to section 88 of the *Indian Act* as an alternative ground of judicial review. In any event, the provincial Attorneys General were not served with a notice of a constitutional question as required by section 57.

8 The matter will therefore be referred back to the Federal Court for readjudication. The notice of a constitutional question under section 57 of the *Federal Courts Act* should be given by the respondent since it is it which invokes section 88 of the *Indian Act* and, consequently, raises the constitutional question (see also form 69). If necessary, the application judge will then move on to dispose of the other issues raised in the application for judicial review.

9 This appeal will be allowed with costs, the decision of the motions judge will be quashed and the matter will be referred back to the Federal Court for a new hearing once notice is properly given by the respondent under section 57 of the *Federal Courts Act*.

DESJARDINS J.A.

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It would be wise for a party intending to raise a constitutional issue before an agency to give notice of that fact to the agency. This will enable the agency to ensure that adequate time is reserved for the hearing and assign members best suited for that type of issue.

3. The agency may, if it has the legislative authority, adjourn the matter and state a case to the court. Frankly, I think this is not in the public interest. It is costly, time consuming, and may be returned to the agency by the court as being premature, particularly where the court will not have a factual backdrop against which to decide the issue. Furthermore, by holding the hearing, even on review or appeal, the court will benefit by the finding of the agency.

Inherent in this third step is a stay by the agency of the proceedings to allow one of the parties to move before the court. My own view is that this is a weak redress, and the court will likely refer the matter back to the agency on the grounds that the application is premature.

It should be observed that an agency may make a decision and then adjourn to state a case[112] or alternatively make its decision and adjourn to let the decision be reviewed or appealed.

23.13 NOTICE OF CONSTITUTIONAL QUESTION[112.1]

23.13(a) Legislative Requirements to Give Notice of Constitutional Issue

Some jurisdictions require that notice of a constitutional issue be given to the Attorney General for Canada, or a provincial Attorney General or both, before an agency may adjudge a legislative provision or a remedy sought as being constitutionally invalid or inapplicable. The various legislative provisions respecting notice of constitutional issues are listed in section 28 and set out in the Legislation tab.

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reviews:

> In the normal course, appeals are not the proper forum in which to raise brand new issues which significantly expand or alter the landscape of the litigation. On occasion, such issues can be raised on appeal where the party seeking to raise the new issue demonstrates that the interests of justice require an exception to the normal and accepted course of litigation.

The Divisional Court stated that no explanation was provided as to why the constitutional issue was not raised before the Tribunal and failed to satisfy the onus of demonstrating that the interests of justice required the Divisional Court to entertain the issue on judicial review.

112 But see *Gerrard v City of Saskatoon* (1987), 62 Sask. R. 302, 44 D.L.R. (4th) 767 (C.A.) where a stated case by the Saskatchewan Assessment Appeal Board was dismissed for the lack of a factual basis.

112.1 Notices of constitutional questions are also discussed later in chapter 28.18.

Many of these provisions refer only to proceedings in the courts. However, it is clear that at the federal level section 57 of the Federal Court Act extends the notice obligation to agency proceedings[112.2] as section 109 of Ontario's Courts of Justice Act does to Ontario agencies.

It appears that section 7(2) of Manitoba's Constitutional Questions Act could apply to both judicial and agency proceedings as it refers to the obligation to give notice arising "Where in a cause, matter or other proceeding the constitutional validity or constitutional applicability of any law is challenged or an application is made for a remedy" which appears broad enough to apply to agencies as well as courts. However, this question is not without doubt as the Act later refers to a power, in section 7(5) to a fourteen day notice period "unless **the court** authorizes a shorter period". B.C.'s Constitutional Question Act (s. 8) is similar with section 8(2) being broad enough to encompass both agency and court proceedings while the extension of time provision in section 8(5) refers to the extension being given by a "court". Section 57 of the Newfoundland's Judicature Act also appears to fall into this situation with section 57(1) imposing the notice obligation in a "proceeding" but with section 57(6) referring to the authority of "the court" to order notice.

It appears that section 7(2) of Manitoba's Constitutional Questions Act could apply to both judicial and agency proceedings as it refers to the obligation to give notice arising "Where in a cause, matter or other proceeding the constitutional validity or constitutional applicability of any law is challenged or an application is made for a remedy" which appears broad enough to apply to agencies as well as to courts. However, this question is not without doubt as the Act later refers in section 7(5) to a fourteen day notice period "unless the **court** authorizes a shorter period." (emphasis added). Section 57 of Newfoundland's Judicature Act also appears to suffer from this ambiguity in light of the apparent broad imposition of the notice obligation in a "proceeding" (section 57(1)) coupled with a later reference in section 57(6) to the authority of "the court" to order notice. A similar ambiguity in British Columbia's Constitutional Question Act appears to have been resolved by the passage of section 46 of the B.C. Administrative Tribunals Act, S.B.C. 2004, c. 45. Section 8(2) of the Constitutional Question Act refers to notice being required in "a cause matter, or other proceeding" (which could encompass agency proceedings) with section 8(5) again referring to the authority of a "court" to shorten the prescribed notice period. However, section 46 of the B.C. Administrative Tribunals Act expressly requires that notice be given in compliance with section 8 of the Constitutional Question Act where a constitutional issue is raised before an agency subject to that provision which has the authority to determine such questions.

112.2 *Gitxsan Treaty Society v. Hospital Employees' Union* (1999), [2000] 1 F.C. 135 (Fed. C.A.) (application of section 57 and use of regulated Form in proceedings before Canada Labour Relations Board).

Alberta's Judicature Act, section 25(1), imposes the restriction on "proceedings" again a term which might apply to both courts and agencies.[112.3] Section 95 of Quebec's Code of Civil Procedure also might be broad enough to encompass agency proceedings, as might be section 41 of P.E.I.'s Supreme Court Act,

Saskatchewan's Constitutional Questions Act, section 8(2), does not appear to apply to agency proceedings, nor does section 22(3) of New Brunswick's Judicature Act or section 10 of Nova Scotia's Constitutional Questions Act. All of these provisions clearly refer to court proceedings.

Of course, even in the absence of a statutory direction to do so, common sense should lead an agency to require that notice be given to the appropriate Attorney General before the agency makes a determination of the constitutional validity of a legislative provision or a remedy authorized by legislation. An agency should want the expertise of the Attorney to assist it in this determination.

It is important to note that the Federal Court Act and the Ontario Courts of Justice Act (as well as all of the other legislative notice provisions noted above which might apply to agency proceedings) only prohibit an agency from ruling that an Act or regulation is invalid, inapplicable or inoperative in the absence of proper notice being given. In the absence of such notice there would appear to be no prohibition on an agency upholding the constitutional validity of a legislative provision or from determining a matter with constitutional overtones which does not require ruling that legislation is constitutionally invalid or inoperative. The only exception is Newfoundland (assuming that its Judicature Act does apply to agency proceedings) which directs that the constitutional question "shall not be heard until notice has been given" (s. 57(1)).

23.13(b) Failure to Give Notice

Although there was provincial case law going both ways the Supreme Court of Canada has now ruled (in the context of the notice requirements of the Ontario Courts of Justice Act) that failure to give notice as required by the constitutional notice legislation will render void any resulting decision striking down or ignoring the legislation in question whether or not the ability of the Attorney General to argue the case is prejudiced or not by the failure. The notice provision is mandatory. The Court, however, did note that there may still be cases where failure to serve a written notice is not fatal either because the Attorney General consents

112.3 See also the notice requirement set out in s. 4(1) of the Alberta Bill of Rights which requires notice to be given to the Minister of Justice and the Alberta Attorney General in any action or other proceeding where a question arises as to whether any law of Alberta abrogates, abridges or infringes, or authorizes the abrogation, abridgment or infringement, of any of the rights and freedoms set out in the Bill. The Bill of Rights is reproduced in the Legislation tab later in this text.

to the issues being dealt with or there has been a de facto notice given. See *Eaton v. Brant (County) Board of Education.*[113]

Also the failure to serve the required notice of constitutional question will not in most cases prohibit the reviewing court from dealing with the question IF the Court ultimately rules against the challenge. Generally, the various statutory provisions regarding notice prohibit the court from ruling that a provision is invalid, inapplicable or inoperable. They do not prohibit a ruling that the provision is valid, applicable or valid.[113.1]

23.13(c) Form of Notice

At the federal level, while it is not altogether certain, it appears that Rule 69 of the Federal Court Rules, SOR/98-106, prescribes the form of notice to be given under section 57 of the Federal Court Act when the proceedings are before a federal agency, as well as when they are before the Federal Court. Rule 69 prescribes the use of Form 69 (which form is set out in the Legislation tab).[113.2] Although it seems unusual that the Federal Court Rules Committee would make rules applicable to proceedings outside of the Federal Court, section 46(2) of the Federal Court Act does appear to give it that authority, at least where the Act under which the proceedings are taking place makes no provision for the matter at hand.[113.3] The Federal Court of Appeal has proceeded on the basis that the Form can be used in proceedings before at least the Canada Labour Relations Board.[113.4]

Form 69 requires that the day, date, time and place be specified at which the question is to be argued. This, obviously implies an oral hearing. However, the Federal Court of Appeal has held that this wording of the Form does not restrict the application of section 57 to oral proceedings only. The Court held that the section applies to oral and written proceedings and that the Form was to be adapted to meet the circumstances.

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113 [1997] 1 S.C.R. 241. To the same effect see *Gagnon v. College of Pharmacists (British Columbia)* (1997), 148 D.L.R. (4th) 306, 92 B.C.A.C. 135 (C.A.); *Gitxsan Treaty Society v. Hospital Employees' Union* (1999), [2000] 1 F.C. 135 (Fed. C.A.). *Paluska v. Cava*, 2002 CarswellOnt 1457, 212 D.L.R. (4th) 226 (Ont. C.A.).

See also *Hawley v. Bapoo*, 2007 CarswellOnt 4355, 2007 ONCA 503, 227 OA.C. 81 (Ont. C.A.) which declined to invalidate a proceeding due to a failure to formally provide the notice of constitution question required under s. 109 of Ontario's Courts of Justice Act as the Attorney General was present throughout the trial and had effective notice of the claim.

113.1 *Cannon v. Royal Canadian Mounted Police Assistant Commissioner* (1997), 6 Admin. L.R. (3d) 246 (Fed. T.D.). See the various provisions in the Legislation tab.

113.2 "69. A notice of constitutional question referred to in section 57 of the Act shall be in Form 69."

113.3 "46(2) Rules and orders made under this section may extend to mattes arising out of or in the course of proceedings under any Act involving practice and procedure or otherwise, for which no provision is made by that Act or any other Act but for which it is found necessary to provide in order to ensure the proper working of that Act and the better attainment of its objects."

113.4 *Gitxsan Treaty Society v. Hospital Employees' Union* (1999), [2000] 1 F.C. 135 (Fed. C.A.). The Court was discussing Form 2.1, a predecessor to Form 69.

> When it is not known whether an oral hearing will be held, any party wishing to raise a constitutional challenge to the validity, applicability or operability of a statute must still notify the attorneys general of its intention to do so. While I do not prescribe the form of notice, in the circumstances, I would think it advisable for counsel to indicate that an oral hearing may not be convened and that the attorneys general should make it known to the tribunal that they wish to make written or oral submissions. If a hearing is scheduled, a further notice of the date, time and place is a simple matter of follow up. If no hearing is scheduled, then the tribunal will undoubtedly advise the attorneys general and give them a deadline for written submissions.[114]

In Ontario the form of notice is prescribed by R.R.O. 1990, Reg. 194, as amended by O. Reg. 70/95, which establishes Form 4F as the form of Notice of Constitutional Question.[115]

It is likely reasonable for a party wishing to give notice or an agency in designing a notice where no form has been legislated to base the form of notice on the requirements of either of the above forms or any of legislated requirements noted above. Generally, it appears sufficient if the notice identifies the proceeding, the agency before which it is taking place, the legislative provision or matter under attack, the facts and legal issues relating to the question and the day and time of the proceeding.

The addresses of the various Attorneys General are set out in chapter 28.

23.13(d) On Whom Does the Obligation to Give Notice Rest?

The general rule that he who asserts must prove would usually indicate that the party raising the constitutional challenge bear the burden of giving the notice.

However, while this would appear to be logical in the case of requests for remedies under section 24 of the Charter, it may not be as straightforward with respect to matters involving section 52 of the Constitution. Agency authority under section 52 is not an authority to determine constitutional validity only on request. It is a duty imposed upon them by the constitution. It appears open to question that a procedural failure by a party to give notice as required by legislation authorizes an agency to apply a law which may be in conflict with the constitution. It may be that where the parties fail to give notice as required the duty not to apply laws inconsistent with the constitution may impose a duty upon the agency to give the requisite notice as a pre-condition of its mandate. This may be particularly true in the cases of agencies which do not feel bound by the parameters of the arguments advanced by the parties in a matter but take a more active role in introducing issues and questions in the pursuit of a large public interest mandate.

Agencies do not generally, in the performance of their public duties, recognize an authority in the parties to define the agency's mandate or jurisdiction.

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114 *Gitxsan Treaty Society v. Hospital Employees' Union* (1999), [2000] 1 F.C. 135 (Fed. C.A.).
115 Also set out in the Legislation tab.

Where an agency's statute, or an agency's policy, mandates the pursuit of a particular course of action the agency generally does not rely on the invocation of that statutory or policy direction by the parties. It does so on its own initiative. One may wonder why the question of notice under section 57 would be any different.

The National Energy Board has taken it upon itself[116] to give the required notice under section 57 of the Federal Court Act when the constitutional issue was raised by the agency rather than the parties. It appears to me that where a constitutional issue arises out of the performance by an agency of its statutory mandate an argument may be made that the ultimate obligation may rest, not with the parties, but upon the agency, to ensure compliance with section 57. Otherwise the procedural requirement becomes an easy dodge whereby parties, or the agency itself, may attempt to avoid the agency's duty to determine constitutional issues.

I suggest that, depending on the nature of the application before it, an agency faced with a constitutional question and a failure by the parties to give the requisite notice may have a number of options.

1. Where the issue with respect to which the constitutional question is relevant can be severed from the rest of the matter before the agency, the agency may, where otherwise permitted by statute, elect not to deal with that issue and proceed to determine the balance of the matter before it.

2. Where the application before the agency deals with a matter brought on at the discretion of an applicant for his personal benefit the agency may place the burden of notice on the applicant. In that case, where the applicant fails to give the requisite notice the agency may elect not to proceed with the application. It is questionable whether the agency could apply the same approach to a respondent where the constitution provides a defence.

3. Where the agency is under a statutory duty to determine a question to which the issue in question is integral the agency may itself have to give the notice.

The above is not intended to be exhaustive of the options open to an agency. The approach which might be appropriate in any given situation will depend on the specific statutory duty being performed by the agency. I do not believe, however, that it is open to an agency, with the authority to make the constitutional determination in question, to disregard the strictures of the constitution and apply

116 As did the former National Transportation Agency.

a legislative provision that is in conflict with them on the basis of a failure of the parties to give notice.[117]

117 This is consistent with the duty on trial judges, for example, to raise Charter issues where the evidence indicates a Charter breach, notwithstanding that the parties or the counsel fail to raise the issue. (*R. v. Tran*, [2001] O.J. No. 3056 (C.A.); *R. v. Arbour* (1990), 4 C.R.R. (2d) 369 (Ont. C.A.)).

See also *Paluska v. Cava,* 2002 CarswellOnt 1457, 158 O.A.C. 319, 212 D.L.R. (4th) 226 (Ont. C.A.) where the Court of Appeal invalidated a lower court order made without notice of constitutional question being given to the Attorney General notwithstanding that the Court of Appeal felt that the lower court judge had compelling reasons to make the order regardless of what the Attorney General said. The Court of Appeal said that once the lower court judge had contemplated the possibility of the order in question she should have directed that the Attorney General be given the required notice perhaps using the statutory authority to shorten the time period of the notice.