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

AND IN THE MATTER OF an application by Yellow Falls Power Limited Partnership for an Order pursuant to section 92 of the *Ontario Energy Board Act, 1998* granting leave to construct transmission facilities that will connect YFP's planned Yellow Falls Hydroelectric Project to Ontario's transmission grid.

Submissions of the Applicant
Yellow Falls Power Limited Partnership
re: Questions in Procedural Order No. 3

1. The applicant, Yellow Falls Power Limited Partnership ("YFP"), agrees with most of the submissions of Board Staff regarding the questions posed in Procedural Order No. 3.

2. The one point on which YFP may disagree with Board Staff is with respect to the Board's jurisdiction in section 92 leave to construct applications to consider Aboriginal Consultation issues as they relate to price, reliability and quality of electrical service and the promotion of renewable energy (the "Governing Criteria"). Board Staff suggested, on p. 8 of their submissions, that the Board might be required to consider consultation issues relating to the Governing Criteria in appropriate cases. In this case, Wabun Tribal Council ("WTC") has no concerns about the Governing Criteria, and it is not necessary to decide this issue in this case. However, the legal principles underlying the submissions of Board Staff and YFP lead to the conclusion that **in section 92 cases only** the Board has no jurisdiction to consider any Aboriginal Consultation issues, and the lack of jurisdiction extends to Aboriginal Consultation on issues relating to the Governing Criteria.

1. What is the scope of the Board's jurisdiction to consider issues relating to the duty to consult in a section 92 leave to construct application?

2. Is the Board's jurisdiction to consider the adequacy of the consultation, and possible accommodation, limited to the public interest criteria governing the Board's assessment of a leave to construct application (price, reliability and quality of electrical service)?

3. These submissions will consider questions 1 and 2 together as did the submissions of Board Staff and WTC.

4. The law is clear that the jurisdiction of an administrative tribunal like the OEB is limited to powers granted by statute. The Board cannot exercise an authority not granted to the Board by statute.[1]

5. Subsections 96(1) of the *Ontario Energy Board Act, 1998* (the "Act") is a ***mandatory*** provision which requires the OEB to grant leave to construct under section 92 if the Board is of the opinion that the proposed transmission line is in the public interest, and subsection 96(2) is another ***mandatory*** provision which requires the OEB to ***only*** consider the Governing Criteria and nothing else when determining whether a proposed electricity transmission line is in the public interest. Both subsections use the mandatory word "shall" to express the Board's duty to approve applications that meet the statutory test:

> 96. (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it **shall** make an order granting leave to carry out the work.
>
> (2) In an application under section 92, the Board **shall only** consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.

[1] See *ATCO Gas and Pipelines Ltd. v.Alberta (Energy and Utilities Board)* [2006] 1 S.C.R. 140 at para. 35 which was cited by Board Staff, and also *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 at paras. 28-29.

> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.
> (emphasis added)

6. As a result of subsections 96(1) and (2), the Board is required by statute to grant leave to construct if it is of the opinion that the proposed transmission line is in the interest of consumers with respect to prices, and the reliability and quality of electricity service and is consistent with the government policies promoting renewable energy. The legislature has clearly stated that the Board must make its decision with respect to section 92 applications only by reference to the Governing Criteria, and no other factors, such as Aboriginal consultation, are to be considered by the Board in a section 92 application.

7. In this case the WTC does not have any concerns regarding any of the Governing Criteria.

8. In a hypothetical case, if an Aboriginal group raised a concern relating to one of the Governing Criteria the Board would certainly have the jurisdiction and the duty to consider the substance of that concern and make a determination as to whether the proposed transmission line was in the public interest with respect to the Governing Criteria at issue. However, the Board would not have the jurisdiction to refuse the application on the basis that there was insufficient consultation with the Aboriginal Group with respect to the Governing Criteria at issue. Nothing in the Act gives the Board jurisdiction to consider the sufficiency of Aboriginal Consultation as it relates to section 92 applications.

9. None of the Governing Criteria that the legislature authorized the OEB to consider (price, reliability and quality of electrical service and the promotion of renewable energy) are factors that are typically part of the unique bundle of Aboriginal rights that are subject to the Crown's duty to consult. The Crown's duty to consult applies to actions contemplated by the Crown that could adversely impact Aboriginal rights, such as land rights and rights to hunt, trap and fish.

10. The fact that the OEB does not have jurisdiction to review Aboriginal Consultation in section 92 hearings does not mean that there is a gap in the protection of Aboriginal rights. As discussed in more detail below in the submissions relating to Question 3, Aboriginal groups always have the ability to seek judicial review in the courts if they believe that the Crown has breached its duty to consult.

***Carrier Sekani* Does Not Apply in this Case**

11. On pages 2-3 of its submissions, WTC concedes that the proposed transmission line is in the public interest, but WTC submitted that the OEB before considering the public interest must consider whether the constitutional duty of consultation has been fulfilled. There are several problems with WTC's submission, including:

- when considering section 92 applications for leave to construct, the Board has no jurisdiction to review any other criteria other than the Governing Criteria because of the mandatory requirements set out in subsections 96(1) and (2);
- in this case the applicant, YFP, has no constitutional duty to consult because it is not a Crown agency; and
- the Board has no jurisdiction to review whether Crown agencies like the Ministry of the Environment and the Ministry of Natural Resources have engaged in sufficient consultation.

12. The WTC relies on the decision of the British Columbia Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 ("*Carrier Sekani*") for its submission that the Board should consider the adequacy of Aboriginal Consultation in this case. However, there are two important differences between the facts in *Carrier Sekani* and the facts in this case, and as a result of these two distinguishing facts *Carrier Sekani* is not applicable in this case.

i) In *Carrier Sekani* the British Columbia Utilities Commission ("BCUC") was obligated to decide the application in that case based on the general public interest; whereas in this case the OEB's jurisdiction is statutorily limited to only considering the Governing Criteria (price, reliability and quality of electrical service and the promotion of renewable energy); and

ii) In *Carrier Sekani* the applicant was B.C. Hydro which is a Crown corporation and is only authorized to act as an agent of the government. In this case, the applicant is a privately owned entity, and WTC admits that the applicant has no constitutional duty to consult with Aboriginal groups.

i) Relevance of the Scope of the Public Interest Test

13. In *Carrier Sekani* the Court found that the BCUC had the power to decide relevant questions of law, and that the BCUC's jurisdiction to decide questions of law included the jurisdiction to decide relevant constitutional questions. The BCUC was obligated to consider the ***general*** public interest when it decided the application for approval of the energy purchase agreement (the "EPA") which was in issue. The court quoted the relevant statutory provisions in paragraph 24 of *Carrier Sekani*:

> [24] The Commission's authority regarding energy supply contracts comes from s. 71 of the *Utilities Commission Act*, which, including amendments effective May 1, 2008, now reads:
>
> 71. (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must
>
> (a) file a copy of the contract with the commission under rules and within the time it specifies, and
>
> (b) provide to the commission any information it considers necessary to **determine whether the contract is in the public interest.**
>
> (1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.
>
> (2) The commission may make an order under subsection (3) if the commission, after a hearing, **determines that an energy supply**

> **contract to which subsection (1) applies is not in the public interest.**
>
> (2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider
>
> (a) the government's energy objectives,
>
> (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
>
> (c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,
>
> (d) the interests of persons in British Columbia who receive or may receive service from the public utility,
>
> (e) the quantity of the energy to be supplied under the contract,
>
> (f) the availability of supplies of the energy referred to in paragraph (e),
>
> (g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
>
> (h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).
>
> (emphasis added)

Although subsection 71(2.1) of the BC *Utilities Commission Act* set out a list of factors that the BCUC was required to consider, that list was not exhaustive, and the BCUC was still obligated under subsection 71(2) to consider whether other factors not listed in subsection 71(2.1) affected the general public interest. In contrast, the OEB is required under subsection 96(2) of the Act to only consider the Governing Criteria and nothing else.

14. In *Carrier Sekani,* the B. C. Court of Appeal relied on the fact that the BCUC was obligated to consider the general public interest for its finding that the BCUC was required to consider whether there had been sufficient Aboriginal consultation by B.C. Hydro:

> 42. Section 71 of the *Utilities Commission Act* focuses on whether the EPA is in the public interest. I think the respondents advance too narrow a construction of public interest when they define it solely in economic terms. How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry.

15. In other words, in *Carrier Sekani* the constitutional question of whether there had been sufficient consultation by B.C. Hydro was a relevant question of law within the BCUC's jurisdiction because the BCUC had to consider whether the general public interest was served by the proposed EPA, and the question of whether there had been sufficient Aboriginal consultation was a relevant consideration in whether the public interest was served by the EPA. In contrast, there is a completely different statutory scheme in this case because the Act prohibits the OEB from considering the general public interest when determining section 92 applications.

16. As Board Staff pointed out in their submissions, pursuant to section 19(1) of the Act, the OEB's jurisdiction to determine questions of law is limited to matters within the OEB's jurisdiction.

17. The OEB's jurisdiction under section 96(2) of the Act is significantly different than the BCUC's jurisdiction under section 71 of the B.C. *Utilities Commission Act.* Pursuant to section 96(2), the OEB is prohibited from looking at any other factors other than price, reliability and quality of electrical service and the promotion of renewable energy when considering whether to approve a proposal for a transmission line under section 92, and therefore the question of whether there has been sufficient Aboriginal consultation is not a relevant issue of law within the OEB's jurisdiction in section 92 applications.

ii) YFP Has No Duty to Consult

18. In *Carrier Sekani* the applicant was B.C. Hydro which is a Crown corporation that is only authorized to act as an agent of the government (see paragraphs 13 and 27 of *Carrier Sekani*); as such B.C. Hydro would have had a duty to consult with affected Aboriginal groups if the other requirements for consultation existed (whether those other requirements existed was at issue in the case).

19. In this case, the applicant is a privately owned entity and not a Crown agent. In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 the Supreme Court of Canada clearly stated that the constitutional duty to consult does not apply to non-governmental entities:

> 52. The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.
>
> 53 It is suggested (per Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests.

20. In this case, the WTC has conceded that YFP has no obligation to consult with them. WTC's counsel, Mr. Edmonds, wrote an email (attached hereto as Appendix 1) to the Board and all parties on August 20, 2009 in which he stated:

> Regrettably the Wabun Submission of August 13 has been misunderstood. Nowhere does it suggest that YFPLP has any duty to consult. While Wabun Tribal Council and the First Nations comprising it wish to have a cordial and productive relationship with YFPLP, they make no claim that YFPLP, as a private entity, has any duty to consult with respect to adverse effects on their treaty rights. It is well established that the duty to consult and accommodate as appropriate is that of the Crown.

21. Accordingly, even if the OEB has the authority to consider Aboriginal consultation issues as they apply to applicants that are agents of the Crown, the OEB clearly has no authority to consider Aboriginal consultation issues in a section 92 application that is being brought by a private, non-governmental entity like YFP that has no constitutional duty to consult.

3. Does the Board have the jurisdiction to consider the adequacy of the consultation, and possible accommodation, in relation to approvals and processes beyond the leave to construct proceeding, including the environmental assessment, the various permitting processes of the Ministry of Natural Resources, and any other activity or approval undertaken by a Crown entity in connection with the Project? If the Board does have the requisite jurisdiction, how should it be exercised and how should it be aligned with the other related approval and permitting processes, for example the environmental assessment process?

22. The OEB does not have jurisdiction to consider the adequacy of consultation undertaken by government Ministries and agencies that are not parties to an application before the Board. If an Aboriginal group wants to challenge the adequacy of consultation by a government Ministry the proper forum for doing so is an application to the Divisional Court pursuant to the *Judicial Review Procedures Ac*t.

23. As stated at the beginning of these submissions, the law is clear that statutory decision makers, like the OEB and also like Crown Ministries exercising permitting authority, cannot exercise an authority not specifically assigned to them by statute. If a statutory decision maker exceeds its authority the proper recourse is to the courts for judicial review. The Supreme Court of Canada summarized this area of law in *Dunsmuir v. New Brunswick*, 2008 SCC 9, 291 D.L.R. (4th) 577 as follows:

> [28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. **Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority.** The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> [29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was

> intended to be given to the body in relation to the subject matter. **This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers:** *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234, 127 D.L.R. (3d) 1; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, 223 D.L.R. (4th) 599, at para. 21.
>
> [Emphasis added.]

24. Nothing in the Act, gives the OEB authority to review and set aside decisions of the Minister of Environment (the "MOE") in respect of an Environmental Assessment, nor to set aside permitting decisions made by the Ministry of Natural Resources (the "MNR").

25. In the seminal case of *Haida Nation*, the Supreme Court of Canada indicated that the courts were a proper forum for reviewing whether the government had fulfilled its duty to consult:

> 60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review.

26. In its submissions WTC says that the OEB should only issue leave to construct if it is satisfied that relevant Crown agencies have properly consulted and that the Board should examine the procedure leading up to the issuance of each provincial permit to ensure that the permitting agency properly consulted. WTC's suggestion is clearly contrary to the mandatory requirements of section 96(2) of the Act which says that the Board can only consider the Governing Criteria when considering whether to grant leave to construct.

27. Moreover, WTC's suggestion would result in the Board improperly taking jurisdiction to indirectly review the permitting decisions made by Crown agencies such as the Ministry of Natural Resources and the Ministry of the Environment when the Board has no jurisdiction to

directly review those decisions. The OEB is not entitled to do indirectly that which it is prohibited from doing directly.[2]

28. Another way to test WTC's suggestion is to examine the procedure that would have to be put in place in order for the Board to make a reasoned decision on whether there had been sufficient consultation by other Crown agencies. The Board would need information from those other Crown agencies about their consultation activities. Because those other Crown agencies are not parties to a section 92 application, the Board might only be able to obtain this information by issuing Summons to the relevant Crown agencies to produce documents and to testify because the applicant would not have access to all the relevant information. There is no precedent for the Board compelling evidence from other Crown agencies regarding their permitting decisions, and it is submitted that the Board lacks the jurisdiction to compel that sort of evidence because the actions of other Crown agencies that are not parties before the Board are not relevant to the issues within the Board's regulatory sphere.

29. In addition to being beyond the Board's jurisdiction, the procedure suggested by WTC would be cumbersome and unnecessary. WTC submitted that the Board should engage in the review of the adequacy of consultation **each time** a permit is issued by a Crown agency (at p. 4 of WTC's submissions). If the Board proceeded in the manner submitted by WTC that would truly result in a checkerboard approach, with the Board being called upon each time a permit is issued to compel evidence from the relevant Crown agency and then evaluate the efforts of the permitting agency.

30. WTC asserts (at p. 5 of WTC's submissions) that the Board must take jurisdiction to review the permitting decisions of the other Crown agencies such as the MOE and the MNR because the Board is "the Crown agency with final responsibility for approval". WTC's assertion is wrong because it misconstrues the Board's function. When considering section 92

[2] *Ottawa Electric Railway v. Nepean (Township)* (1920) 60 S.C.R. 216, 1920 CarswellNat 4, at para. 84, and *Quebec (Attorney General) v. Canada (Attorney General)* 1978 CarswellQue 40, [1979] 1 S.C.R. 218, at para. 23.

leave to construct applications, the OEB's function is to review the impact of the proposal on only the Governing Criteria of price, reliability and quality of electrical service and the promotion of renewable energy as set out in section 96(2). In section 92 applications, the OEB plays no role in determining whether the Province's environmental standards are met, nor in determining whether a permit to use a particular parcel of Crown land should be issued. Those decisions are left up to the MOE and the MNR respectively, and those agencies have the final responsibility for approval with respect to the matters delegated to them. The OEB has no more authority to interfere in decisions made by the MOE and the MNR, than the MOE or the MNR have authority to interfere in decisions made by the OEB. The OEB's area of expertise is the regulation of the energy industry, not aboriginal consultation. The OEB is in no better position to judge the reasonableness of the consultations undertaken by the MOE and the MNR than are those Ministries themselves.

31. The *Carrier Sekani* case is not helpful to WTC's position. As indicated above, *Carrier Sekani* is distinguishable from this case because i) the BCUC in that case had a broader statutory mandate to review the general public interest; and ii) B.C. Hydro as the applicant before the BCUC was a Crown agency that could itself be subject to a duty to consult.

32. Nothing in the *Carrier Sekani* decision supports the proposition that the B.C. Court of Appeal was of the view that the BCUC had the power to review whether other Crown agencies who were not before the BCUC (such as the B.C. Ministry of the Environment) had engaged in sufficient consultation. In fact the contrary is true. There are several statements in *Carrier Sekani* and in the companion case of *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 in which the B.C. Court of Appeal indicates that the BCUC's review of Aboriginal consultation should be limited to whether there had been sufficient consultation by the applicant B.C. Hydro with regard to the issues relevant to the proceeding before the BCUC. For example, in *Kwikwetlem* the court stated:

> 14 ... In my view, the nature and effect of the [Certificate of Public Convenience and Necessity] decision obliged the [BCUC] to assess the

> adequacy of **the consultation and accommodation efforts <u>of BC Hydro</u> on the issues relevant to the s. 45 proceeding.** [3]
>
> (emphasis added)

Summary

33. The OEB cannot exercise a power that is not granted to it by statute. There is no statute granting the OEB the power to review permitting decisions made by the MOE and the MNR or any other Crown agency, and the OEB cannot do indirectly what it is prohibited from doing directly.

34. In this leave to construct application by YFP, the OEB is not being asked to approve any proposed action by a Crown agency. Therefore, the OEB is not the final decision maker with respect to any Crown action. If WTC believes a Crown agency has made a permitting decision without adequate consultation the appropriate forum for reviewing that decision is a judicial review application to court where the impugned Crown agency will be a party and can answer for itself for its own actions.

35. YFP therefore requests that the Board deny WTC's request to add Aboriginal consultation issues to the relevant issues in this leave to construct proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 21, 2009

Sharon S. Wong
Lawyer for Yellow Falls Power Limited Partnership

[3] *Kwikwetlem First Nation v. British Columbia (Utilities Commission),* 2009 BCCA 68, at para. 14 and also paras. 8, 54 and 55, and see also *Carrier Sekani* at paras. 51 and 54

APPENDIX 1

From: J Edmond [mailto:jedmond@bell.net]
Sent: Thursday, August 20, 2009 9:49 AM
To: WONG, SHARON; Lillian Ing; jbatise@wabun.on.ca; Darlene@lehmanplan.ca; mark.massicotte@taykwa-forestry.com; shossie@canhydro.com
Subject: Re: Yellow Falls Transmission Line Application Board File No. EB-2009-0120

Regrettably the Wabun Submission of August 13 has been misunderstood. Nowhere does it suggest that YFPLP has any duty to consult. While Wabun Tribal Council and the First Nations comprising it wish to have a cordial and productive relationship with YFPLP, they make no claim that YFPLP, as a private entity, has any duty to consult with respect to adverse effects on their treaty rights. It is well established that the duty to consult and accommodate as appropriate is that of the Crown.

In case there should be any lack of clarity to Wabun's submission, it is the position of Wabun that the Ontario Energy Board, as the final and only comprehensive approving authority relating to the YFPLP application, has a duty to ensure that all Crown entities involved in issuing "all necessary permits and authorizations" (Proc. Order No. 1) have considered the following:

1. Whether consultation is required in the circumstances of the permit or authorization in question;

2. If so, whether that consultation has been adequately carried out;

3. If consultation was required, whether any accommodation is required;

4. If so. whether such accommodation has been arranged.

This contrasts sharply with the indifference to these issues implied in Procedural Order No. 1, which states, "Should this Board approve the leave to construct application, its order will be conditional on all necessary permits and authorizations being acquired ..." (emphasis added), without more. If the simple acquisition of the permits and authorizations will serve, Wabun would be left to pursue separately every Crown entity involved in their issuance, should it consider that consultation has been inadequate. Moreover, the application would already have been approved.

The position of Wabun, therefore, is that the Board, as the Crown entity with both final and comprehensive authority in this matter, has a duty to require assurance, in respect of each of the "necessary permits and authorizations," from each Crown entity involved, that it has addressed consultation issues as set out above, and that no outstanding issues remain.

I trust this removes any lack of clarity that may have been found in the Wabun brief of August 13, 2009.

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[1920] 2 W.W.R. 1051, 60 S.C.R. 216, 27 C.R.C. 32, 54 D.L.R. 468

C1920 CarswellNat 4

Ottawa Electric Railway v. Nepean (Township)

Ottawa Electric Railway Company (Plaintiff) Appellant v. Township of Nepean et al (Defendants) Respondents

Supreme Court Of Canada

Sir Louis Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ.

Judgment: March 8, 1920

Counsel: F.H. Chrysler, K.C., for plaintiff, appellant.

S. Denison, K.C., and Wentworth Greene, for defendant, respondent, township of Nepean.

J.B. Caldwell, for defendant, respondent, village of Westboro.

F.B. Proctor, for defendant, respondent, city of Ottawa.

Subject: Torts; Contracts; Public

Carriers --- Statutory regulation -- Municipal transportation systems -- Regulation by federal boards.

Statutes --- Interpretation -- Effect of structural elements -- Schedules and agreements.

Railways -- Board of Railway Commissioners -- Regulation of Tolls on Street Railways -- Jurisdiction of Board -- Rights of Company under Special Act -- Works Declared to be for General Advantage of Canada -- Effect of The Railway Act on Company's Rights -- Whether in Fixing Rates for Branch within Its Control Board Should Regard Profits of Part of Line Considered not within Its Control -- Whether "Operation" or "Powers" Include Fixing of Fares.

The appellant street railway company, prior to 1892, under its charter and provincial statutes governing it, was empowered to regulate its tolls without control. In 1892 it obtained from the Dominion Parliament an Act authorizing a certain extension of its line and giving it additional right in the use of motive power, etc., declaring it to be a work for the general advantage of Canada, and providing that nothing in the Act should in any way impair any of the powers which the company had at its passing. In 1893 it made an agreement with the City of Ottawa, a provision whereof was that "no higher fare than five cents shall be charged ... within the present city limits." The agreement was confirmed by Dominion statute in 1894, which sanctioned its absorption of another company, declared that the company's lines were for the general advantage of Canada, and that it was subject to the authority of the Parliament of Canada, and provided that "the franchises, powers and privileges heretofore or hereby granted to or conferred

upon the said companies or either of them ... shall be exercised and enjoyed by the said united company, subject to the terms, provisos and conditions contained in the said agreement with the ... city of Ottawa," and "nothing in this Act shall in any respect impair any of the powers which the said ... company shall have immediately prior to the date appointed for this Act to take effect." No reference was made to the general Railway Act.

The Company was authorized by statute in 1899 to construct the "Britannia branch" "as an extension of its present railway," the Railway Act being made applicable to the company "with respect to the said extension." The extension was from a point outside the Ottawa city limits of 1893.

The company filed before the Board of Railway Commissioners a tariff asking for larger fares on said Britannia branch. The Board found as a fact that the operation of said branch, considered by itself, was not remunerative, but that the operation of the lines of the railway as a whole, including those within the city of Ottawa, were returning adequate profits.

Held (per Duff, Anglin, Brodeur and Mignault, JJ.) subject to the maximum rate provided in the agreement with the city of Ottawa, confirmed by the Act of 1894, the company could fix its fares within the city (as its limits stood in 1893) not subject to the Board's control; and the rates on the Britannia branch should be determined without regard to the profits made on its city lines.

Sir Louis Davies, C.J. and Idington, J. dissented, holding that, as the application for the power to make the extension and the Act giving it treated it expressly as an extension of the company's city lines, it should not be considered as a separate entity; and the Board having taken into consideration all the facts it was obliged to consider and not any facts which it had no right to consider, the question of higher rates on the Britannia branch was in its absolute discretion and judgment; under its statutory powers the Board was unfettered in regulating the rates within the city of Ottawa, subject to the maximum rate provided in said agreement; from and after the passing of the Act of 1894 declaring that the lines of railway were works for the general advantage of Canada and that the company was a body corporate subject to the legislative authority of the Parliament of Canada, the company had all the benefit of and became subject to, the general railway legislation of the Dominion then or thereafter passed, and secs. 314 and 323 of the Railway Act, 1906, as to control of rates by the Board, applied; in view of secs. 5 and 6 of the Railway Act it could not be contended that the powers formerly enjoyed by the company under provincial legislation as to control of rates were not interfered with.

The Board's decision and leave to appeal were given before the passing of The Railway Act, 1919, and the construction or scope of application of sec. 325 (5) of that Act was not dealt with. (That provision is not retroactive; per Anglin, J.)

The Act of 1892 provided that the "operation" of the railway "by any new or additional powers conferred by this Act" should be subject to the provincial law in relation to street railways. Anglin, J. held that "operation" did not include the fixing or regulation of fares, but referred to the working of the railway, how the cars should be run, control of the tracks, motive power and equipment. He also expressed the opinion that ordinarily the word "powers" in such a provision as in the Act of 1892, that nothing in the Act should in any way impair any of the powers which the company had at its passing, would not include the right to fix rates; but did include that right in view of the various enactments relating to the company.

Under a contract in 1895 with the then village of Hintonburgh (adjoining Ottawa on the west, now city of Ottawa) the company extended its railway as far as Holland Ave. in Hintonburgh, from which the Britannia extension was built. It was held that for the purpose of computing the toll to be charged on the Britannia branch the point of commencement should be Holland Ave. rather than at the former westerly limits of Hintonburgh, as the contract with Hintonburgh was confined to lines built on streets of the village and the Britannia branch within its limits was built on a private right of way.

[1920] 2 W.W.R. 1051, 60 S.C.R. 216, 27 C.R.C. 32, 54 D.L.R. 468

Appeal by leave on three questions of law from the decision of the Board of Railway Commissioners for Canada disallowing a tariff of tolls filed by the appellant. Appeal allowed with costs, Sir Louis Davies, C.J. and Idington, J. dissenting.

The Chief Justice **(dissenting):**

1 This is an appeal from the order or judgment of the Board of Railway Commissioners rejecting an application of the appellant company for leave to charge a higher rate than the existing one upon that portion of their railway known as the Britannia section or extension.

2 All the facts necessary for our decision on the questions of law referred to us are stated very fully in the reasons of the Chief Commissioner, Sir Henry Drayton, with which the rest of the Board concurred. Three questions are asked by them for us to answer. They are as follows:

> (1) Whether upon the proper construction of the agreements with the City of Ottawa and the Village of Hintonburgh the Statutes relating to the Ottawa Electric Railway Company and the relevant provisions of *The Railway Acts*, the Board was right in disallowing the tariff of the company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue, notwithstanding that the Board has found as a fact that the company did not require additional revenue.
>
> (2) Also, whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburgh now the City of Ottawa.
>
> (3) Has the Board the right to treat the Company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by Municipal agreements?

3 It appears clear to me that when exercising its statutory powers fixing the rates which a company may charge, the decision of the Board is final and we have no right to interfere or express any opinion upon it unless it clearly appears either: (1) That the Board in exercising its judgment has refused to consider facts which it ought to have considered; or (2) Has considered facts which it should not have considered; or (3) Has admittedly proceeded on a view of facts rightly taken into consideration which is erroneous at law.

4 In the case before us the Board determined that it should not consider the Britannia extension as a separate entity but should consider it as an extension of the main city line and form its conclusions on the rate question with reference to the operations of the whole line.

5 If the Railway Commissioners were obliged, as was contended by Mr. Chrysler, to consider this extension as a separate entity, they found that the present rates which the company sought permission to raise were not fair and reasonable, and would, therefore, in such case presumably have permitted some raise to be made.

6 If, on the other hand, they had to consider the application to raise the rates in the Britannia section with reference to the operations of the entire line and as a mere extension of it as they determined it was, then their decision is one with which we have no right to interfere or express any opinion upon.

7 I am of opinion that in so deciding they acted within their legal rights and that this Court has no jurisdiction to

interfere.

8 The question, therefore, to determine is whether or not the Britannia extension was to be considered as part of the company's main line or as a separate entity. That, I take it, is a legal question and one which the Board rightly determined. The application to Parliament for the power and privilege of constructing this extension was made by the company on the express ground that it was an extension merely of their city lines, and in the statutes passed it was so recited and enacted. I cannot in the face of the express words of the statute, construe it as a separate entity. It is true that the main charter of the company limits the fares which they charge on their city lines to the *then existing city limits* and that such limitation does not embrace the Britannia section which was outside of those limits. But that by no means disposes of the question whether the Board had the right to disallow the application to be allowed to charge on the Britannia extension higher rates than those now existing; that is a question which, the Board having taken into its consideration all the facts it was obliged to consider and not having considered any facts which it had no right to consider, was in its absolute discretion and judgment. Mr. Chrysler pressed upon us the admitted fact that the Britannia extension was, in part, constructed upon the company's own private property and not upon the streets or roads. It does not appear to me that this fact makes any difference in determining the question of an increase of the rates whether the extension was to be treated and considered as a separate entity or not. The Board determined not to consider it and, I think, was right in so doing. But when it has so decided after considering everything it was bound to consider, this Court has no right to interfere with its conclusions.

9 In reaching the conclusions I have stated and disallowing this appeal I do not wish to be understood as affirming or agreeing with the statement of the Chief Commissioner of the Railway Board in delivering the reasons of the Board for making the order disallowing the proposed new tariff, to the effect that the Board had no authority to reduce the company's charge for passenger services within the city of Ottawa below the five cents now charged for such service. As I understand the language of the Chief Commissioner, he holds that even if the rate of five cents was held by the Board to be an unfair and unreasonable one the Board was powerless to reduce it because the Dominion Parliament has confirmed the agreement between the companies and the corporation of the city of Ottawa which provided that rate as a maximum one. The question is simply as to the meaning of the agreement so confirmed. That agreement, it seems to me, merely establishes five cents as a maximum rate which the company in no case or under no circumstances can exceed. The Board itself with all its statutory powers could not in the face of this express prohibition agreement, allow a higher tariff rate than five cents. But I respectfully submit in exercising its statutory powers and determining whether the rate of five cents, or even a lower rate than that, was or was not a "fair and reasonable rate," the action of the Board is unfettered by the prohibition against charging more.

10 The question is not, of course, directly before us on this reference, but I am anxious not to be considered as agreeing with the conclusions of the Chief Commissioner on the point, concurred in as they were by the other members of the Board, and as such a conclusion was necessarily an important factor in deciding whether in disallowing the proposed new tariff the operations of the railway as a whole had a right to be considered by them.

11 At the second argument of this reference before us, the question whether this Court was in any respect governed by sec. 325 of *The Railway Act*, 1919, ch. 68, was debated.

12 In the view I take of the jurisdiction and powers of the Railway Board over the Ottawa Electric Railway Company being ample to justify their order, and also to fix the fares it may or may not charge, I do not deem it necessary to invoke the aid of the legislation of 1919. The previous legislation was quite sufficient, in my opinion, to give the Board jurisdiction and to justify its order now under appeal. If that legislation of 1919 was applicable I do not see how any question as to the validity of the Board's action could arise.

13 In the year 1894, the then two independent street railways in Ottawa were united, and the agreement made between them was ratified by Parliament as also the agreement between the united companies and the city of Ottawa by 57-58 Vict., ch. 86.

14 Sec. 7 of that Act is as follows:

> The lines of street railway constructed by the said companies, or either of them, are hereby declared to be works for the general advantage of Canada, and the said "The Ottawa Electric Railway Company" is hereby declared to be a body corporate subject to the legislative authority of the Parliament of Canada.

15 From and after the passage of that legislation the now appellant, the Ottawa Electric Railway Company, became, in the words of the statute, a body corporate subject to the legislative authority of the Parliament of Canada and its works were declared to be for the general advantage of Canada. The company, therefore, had all the benefit of the general railway legislation of the Dominion then or thereafter passed and became subject in all respects to the same.

16 In 1906, such a general Act was passed, [*The Railway Act*, R.S.C. 1906, ch. 37], the 314th section of which is as follows:

> 314. The company or the directors of the company, by by-law, or any officer of the company thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.
>
> 2. Such tolls may be either for the whole or for any particular portions of the railway.
>
> 3. All such by-laws shall be submitted to and approved by the Board.
>
> 4. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.
>
> 5. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any service as common carrier, except under the provisions of this Act.

17 Then sec. 323 enacts as follows in its first part:

> 323. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the toll so disallowed.

18 Under this legislation the Board, in my opinion, has full and ample powers to control the rates of the company on its main lines and its extensions, and, finding that the company had a revenue of at least 15 per cent from its works as a whole, was acting within its rights when it rejected the company's application for leave to charge a higher rate than the existing one upon the Britannia section or extension of their lines of railway.

19 I am unable to appreciate the argument that the powers granted to the companies by the provincial Legislature to make by-laws regulating the rates which might be charged for the carriage of passengers became vested in the united companies under the name of the Ottawa Electric Railway by the Act of the Parliament of Canada which declared the work to be for the general advantage of Canada and that the general *Railway Act* did not take away or impair those rights or powers. It seems to me that the contention is fully met by sec. 6 of *The Railway Act* of 1906,

and that under any construction of these various Acts the power to control and disallow any proposed tariff of rates as being "unjust and unreasonable" remained in the Railway Board under sec. 323 of *The Railway Act* and applied to the tariff of rates now under review.

20 The power of the common-law Courts over rates charged by a common carrier were practically transferred by sec. 323 of *The Railway Act* above quoted to the Board of Railway Commissioners.

21 I would, therefore, answer the first question, under the circumstances I have stated above, in the affirmative, construing the phrase "right in disallowing the tariff" in question as meaning "within its right." Whether the decision was right or wrong is not for me to pass on; I merely say the Board was within its right in deciding as it did.

22 My answer to the first part of the third question is in the affirmative, and, to the latter part, in the negative.

23 The appeal, therefore, should be dismissed with costs.

***Idington, J*, (dissenting):**

24 There existed in Ottawa in the early part of 1894, two street railways, each respectively owned by separate corporate companies whose early history and relations with the city of Ottawa concern, or at all events, should concern, us very little for the purpose of determining the questions raised by this appeal.

25 Suffice it to say, that in said year there were agreements; entered into between the said companies, whereby the assets of the one were to be sold to the other; and between both and the city of Ottawa; presented to the Parliament of the Dominion with a petition to confirm same and vest the properties which had been theretofore, and were then, held by either in the appellant.

26 Parliament, by 57-58 Vict. ch. 86, sec. 1, ratified the said agreement between the said companies, and by sec. 2, the said agreement between them and the city of Ottawa.

27 Then by sec. 3 of said Act, it enacted as follows:

> 3. The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them, and which are hereby authorized to be transferred to the said united company, shall be exercised and enjoyed by the said united company, subject to the terms, provisos and conditions contained in the said agreement with the Corporation of the city of Ottawa.

28 Sec. 6 provided as follows:

> 6. The name of the Ottawa City Passenger Railway Company is hereby changed from "The Ottawa City Passenger Railway Company" to "The Ottawa Electric Railway Company" but such change in name shall not in any way impair, alter or affect the rights or liabilities of the company, nor in any wise affect any suit or proceeding now pending or judgment existing either by or in favour of, or against the said company, which, notwithstanding such change in the name of the company, may be prosecuted or continued, completed and enforced as if this Act had not been passed.

29 And sec. 7 of the same Act declared as follows: [See *ante*, p. 1055.]

30 That legislation beyond doubt constituted the appellant and the said lines of railway, in the language just quoted, "works for the general advantage of Canada" and subjected the appellant as the new corporate owner of

same and said works to the future railway legislation of the Dominion, unless when expressly exempted therefrom.

31 The Dominion Parliament by *The Railway Act* of 1906, sec. 5, provided as follows:

> 5. This Act shall, subject as herein provided, apply to all persons, companies and railways, other than Government railways, within the legislative authority of the Parliament of Canada.

32 The said *Railway Act*, 1906, provides, by sec. 314, as follows: [See *ante*, p. 1056.]

33 Sec. 323 of said Act reads in first part as follows: [See *ante*, p. 1056.]

34 The foregoing outline of so much of the legal history of appellant as can be made relevant to any of the questions herein submitted, when taken in connection with said sec. 323 of said Act, contains all the law to which we should have regard in answering same.

35 Indeed I hold that the lastly quoted part of sec. 323 contains all that is relevant in this particular case, for the Board finds that the appellant has a revenue of at least 15 per cent from its works, as a whole. That renders it impossible to say, as matter of law, that the ruling is "unjust and unreasonable" and hence in any way such a violation of said sec. 323 as to furnish any ground of complaint on the appellant's behalf.

36 If it is not possible to hold that in law there has been something unjust or unreasonable done by the Board in reaching its judgment, or in the application of any of the statutes to which I have referred, then it hardly seems possible that there can be any question of law proper for this Court to be called upon to decide.

37 I may briefly state some other facts which it is said give rise to the doubt of the correctness in law of the conclusion reached by the Board.

38 It seems that the appellant's railway extends from a point some short distance east of Ottawa to Britannia-on-the-Bay to the west of said city, with numerous divergent parts and branches running over many of the city streets.

39 As inevitably happens in every large business enterprise, there are some parts of this railway which do not pay as well as others; and indeed are a burden, according to the absurd view that the feeders to serve the system are entirely useless and that all the persons passing over same would in any event pass over the other central part and pay a fare.

40 The part of the said railway extending from Ottawa to Britannia-on-the-Bay was authorized by Parliament, by the Statutes of 1899, ch. 82, expressly enacting that the company might as an extension to its then existent railway, construct and operate, etc.,such a branch.

41 An agreement referred to in the questions I am about to quote had been entered into between the appellant and the village of Hintonburgh specially providing for its franchise in that part of its line.

42 That agreement has expired, and can hardly be said as matter of law to have anything to do with the questions raised; especially when the maximum limit of basis fixed thereby is adhered to by appellant.

43 The Board, however, for some reason not very apparent in so plain a case, has submitted the following alleged questions of law on which appellant bases this appeal, and asks us to find that what has been done by the Board is in law unwarranted: [See *ante*, p. 1053.]

44 I am unable to understand the argument that in law there is such an imperative legal distinction, between the part of the company's line beyond Holland Avenue, and those other parts of same, which must of necessity become effective and so operate as an imperative mandate in relation to the defining or fixing of rates that there must be different rates east of that line from those west thereof, which conflicts with the conclusions reached by the Board. The mathematical distinction I can grasp but that we have to deal with must be one so founded in law as to affect this case.

45 To urge that a separate and distinct line of treatment thereof in regard to the question of fares for passage over it because it was authorized and built at a different time from some other part, seems to me, with great respect, a very idle argument. And it does not seem to me to be improved by a reference to the question of whether the power of expropriation existed before or was first enforced by a particular clause in the legislative history of the appellant.

46 The same sort of argument would lead to holding as matter of law that the Hintonburgh part of the line must be treated as a thing separate from the rest of the lines in fixing fares, and so on throughout the system.

47 I can understand the question of the delimitation of rates as evidenced by agreements between appellant and municipal bodies being a matter of fact which probably the Board of Railway Commissioners should examine in reaching a determination as to any tariff of tolls. When the Board has done so and examined all else in the way of facts bearing upon the questions raised by the proposed imposition of a tariff, I fail to see how any question of law arises. It is not for us to pass upon the question of whether or not the proper construction of the agreements and the relevant provisions of the Railway Acts, as a matter of law, lead to the allowance or disallowance of the proposed tariff when we find that the Board, even assuming as well founded appellant's contention relative to the construction of said agreements and statements, has found as fact that the company did not require additional revenue and hence it was neither just nor reasonable to impose further rates.

48 I could understand the question of law being put as to whether or not the rates of fares named in such agreements and legislative validation thereof must be held to have been thereby in law imperatively and definitely determined for all time. But when we find the Board and counsel for appellant have assumed that to be law (which I much doubt but pass no opinion upon) and acted upon such assumption, there seems nothing but mere questions of fact involved in what remains for consideration.

49 There is much to be said for the true legal aspect of the whole matter involved having been reduced, by the parliamentary legislation above recited, to a mere question of what would in the opinion of the Board be a just and reasonable tariff, regardless of the agreements in question and especially so when we find they seem in this regard to have merely arrived at a maximum tariff.

50 Evidently this part of the agreement though for even that and many other purposes validated by the preceding legislation, may be held to have been overridden by the later legislation constituting the Board and assigning it such powers as it has been, constituting it absolute master of the whole question of rates or tolls, provided always as a test of the due discharge of such duties as entailed thereby that it has duly considered all that is involved as fact in such like agreements.

51 Let us assume that there had, instead of a highly profitable investment such as appellant's has turned out, resulted an enterprise that could not be made productive of a fair profit without discarding the limitations in these agreements; could it be said that the Board under the legislation conferring such an absolute power long after the agreements had come into existence, would be powerless to grant any relief?

52 The questions as presented and the argument thereon do not permit me to feel at liberty to answer definitely this question.

53 I, therefore, merely submit it as an illustration of what might have been a possible solution of much that is involved in what has been considered, and suggesting a reason why the questions submitted cannot be answered in a more helpful way than I am compelled to.

54 Holding the view I have expressed as to the first question, it seems self-evident that the answer to the second question is not involved in the disposition of the question before the Board and hence needs no answer.

55 As to the third question I cannot conceive of any rule of law that would prevent the Board from considering the company's operations as a whole, and if it saw fit to disallow the proposed tariff, or any portion thereof which it considered to be unjust, or unreasonable, or contrary to the provisions of *The Railway Act*, it was entirely within its province. So far as the doing so can be said to raise any question of law, I have no hesitation in answering affirmatively.

56 As to the second branch of the third question, raising the point of whether or not the Board must permit the fixing of tariffs on a mileage basis, I may point out that the appellant's factum distinctly disavows desiring to raise such a question and insists that "there was no question before the Board as to whether the tolls should be raised upon mileage, or upon a flat rate."

57 That seems to eliminate so far as this appellant is concerned in this appeal, the only other possible question of law raised by the third question for our decision.

58 It is only as a basis of appeal by way of which an appellant may seek to get relief that we can consider any such question. However willing we should be to aid the Board we cannot properly so interfere unless incidentally to the determination of something in respect of which an appellant seeks relief.

59 With great respect I submit the questions submitted (save the first part of the third question) do not raise or distinctly state any definite question of law actually relevant to the matters in issue between those concerned, upon which a ruling is desired, and can be properly made.

60 The first part of the third question should be answered in the affirmative.

61 I think, therefore, following our view expressed in the case of *C.P.R. v. Regina Board of Trade*, 45 S.C.R. 321, 1 W.W.R. 474, 20 W.L.R. 291, the appeal should be dismissed with costs.

62 After I had written the foregoing the majority of the court decided to direct a re-argument (which has been had) upon certain stated questions. In deference, however, to suggestions made in that argument, which was not directed to the grounds upon which I proceeded and hence has not changed my opinion, I may be permitted to point out that the declaration, contained in the above quoted sec. 7 of the Dominion Act, 57-58 Vict., that, so long ago as 1894, the works of the appellant were thereby declared to be for the general advantage of Canada; and hence by such declaration withdrawn, by virtue of item No. 10 of sec. 92 of *The B.N.A. Act*, from any control of, or incidental to, their operation either by virtue of any legislation of Old Canada or the legislation of the province of Ontario.

63 Such, I think, must be held to be the result of the decision of the Judicial Committee of the Privy Council in the case of *Toronto v. Bell Telephone Co.*, [1905] A.C. 52, 74 L.J.P.C. 22. Unfortunately that case was not referred to in either argument herein.

64 By the express language of the above-quoted sec. 7, as well as the necessities of the situation created by the other provisions of the said Act, a new corporate entity, composed of two such previously existent, is created and that is declared to be subject to the legislative authority of the Parliament of Canada.

65 The result of the said legislation, viewed in light of said decision, seems to have been to give predominant effect to the Act of Parliament wherever conflict arises between the respective enactments.

66 We are not left to depend alone upon such reasoning for this conclusion was adopted by the enactment of sec. 6 in *The Railway Act* of 1906, which reads as follows:

> 6. Where any railway, the construction or operation of which is authorized by a Special Act passed by the legislature of any province, is declared, by any Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the said Special Act as are inconsistent with this Act, and in lieu of any general railway Act of the province.

67 Hence beyond peradventure all the subsequent undertakings of the new creation such as the new branch, declared by the later Act authorizing it, to be an extension, and that extension which is now in question, must be governed in every respect by the Dominion *Railway Act*, and not by any legislation of the Ontario Legislature either as to fares or otherwise.

68 This evidently was the view held by the appellant itself otherwise it never should have troubled the Board of Railway Commissioners by filing with it a proposed new tariff of fares.

69 The point made, by Mr. Denison of counsel for one of the respondents, that at common law the common carrier was as between him and any one of the public, not entitled to charge any fare beyond what was just and reasonable, was well taken.

70 Besides those cases he referred to I find the case of *Interstate Commerce Commission v. Baltimore & Ohio Ry. Co.*, 145 U.S.R. 263, 12 Sup. Ct. 844, which proceeds upon a distinct holding of such a view as the basis upon which the legislation there in question proceeded. See also *Harris v. Packwood*, 3 Taunt. 264, 15 R.R. 755.

71 Our *Railway Act* in making a statutory provision for the determination of what rates are chargeable, also proceeds upon the same basis of what is just and reasonable.

72 I therefore repeat that I can see nothing else to test the jurisdiction of the Board so long as it has not gone beyond its statutory authority and has not failed to consider all relevant facts.

***Duff, J.*:**

73 The questions submitted should, in my opinion, be disposed of as follows:

74 The first question: This question is not answered since it involves questions of fact within the exclusive competence of the Board of Railway Commissioners. So far as it involves a question of law it is covered by the answer given to the first part of the third question.

75 The second question: At Holland Avenue.

76 The third question: First member. No. Second member: Yes; though not necessarily on a mileage basis.

77 My reasons for these conclusions can be stated briefly. They are based upon two propositions which appear to me clearly established.

> (1). I concur fully with the opinion of the chairman of the Board as to the effect of the statute of 1894. By force of that statute and the scheduled agreements the rights and obligations of the Ottawa Electric Railway Company in relation to the fares chargeable in respect of the services provided for or contemplated by the agreement between the street railway companies and the city -- services which may with sufficient accuracy be referred to as city services -- were to be governed by the agreement itself; and consequently the Ottawa Electric Railway Company did not on the passing of *The Railway Act* of 1903 (see sec. 3) become in respect of such fares subject to the jurisdiction of the Board of Railway Commissioners touching the matter of the regulation of rates.
>
> (2) As regards the Britannia extension, on the other hand, authorized by the Act of 1899, ch. 82, I can find nothing in that Statute excluding this line from this jurisdiction of the Board and I think that on the passing of *The Railway Act* of 1903 the provisions of that enactment on the subject of the regulation of rates became applicable to it.

78 The first of these propositions seems to involve this consequence: The fares exigible under the statute and agreement of 1894 must be taken to be a just remuneration, neither too much nor too little, for the city services; and it seems to follow that in determining what is a just and reasonable remuneration for the services performed on the Britannia lines the proceeds derived from the city services must be left out of account. That is to say that in determining what is just and reasonable in respect of the Britannia lines, you must start with the hypothesis that everything paid in respect of city services has been fully earned by the performance of those services.

79 The point may be illustrated by a reference to one example of the manner in which the existing tariff operates. Under that tariff the company is entitled to charge a maximum fare of five cents for transport from the corner of Laurier Avenue and Charlotte Street to Britannia, a charge which the company, by the Act and agreement of 1894 is nevertheless entitled to make for that part of the service which is performed within the city. In other words, under existing conditions, so long as the Britannia line is kept in operation and this service is maintained, the company is obliged to give, for a fare of five cents, the city service (for which by law it is entitled to receive a fare of five cents) plus the service from Holland Avenue to Britannia; and that appears to be the necessary consequence of treating the operations of the company as a whole and maintaining the existing tariff.

80 I think it is not permissible to do this because thereby full effect is denied to the legal rights of the company under the statute and agreements of 1894.

81 I must mention that in answering these questions we are governed by the law as it stood before the enactment of *The Railway Act, 1919*.

***Anglin, J.*:**

82 This case comes before us by leave of the Board of Railway Commissioners granted under subsec. 3 of sec. 56 of *The Railway Act*, R.S.C., 1906, ch. 37, as enacted by 9 and 10 Edw. VII., ch. 50, sec. 1. The Board is thereby empowered to grant a right of appeal "upon any question which *in the opinion of the Board* is a question of law." It may therefore be that this Court should not decline to pass upon any question, leave for the submission of which as a question of law has been given by the Board, however difficult or even impossible it may be to find in it such a question. On the other hand if a question formulated by the Board is susceptible of more than one interpretation, inasmuch as it must be assumed that the Board did not intend to ask the opinion of the Court on anything other than a question of law, the Court should put upon it any construction at all admissible that presents such a question. If on no possible interpretation can a question of law be found, it would seem reasonable to assume that there had been some mistake in the drafting of the question in respect of which leave has been given, and on that assumption the Board might be asked to reconsider it and, if possible, to state it in a form which would present an issue of law. I

should have been disposed to adopt this course in regard to the first question in the present case were it not for the fact that I incline to the view that it was probably intended by it to cover substantially the same ground as is covered by the first member of the third question, and in the latter may be found a question of law. It would not seem to be practicable to answer the first question submitted to this appeal without reviewing the discretion of the Board exercised upon considerations which are in no sense matters of law. It is beyond the function which sec. 56 (3) of *The Railway Act* contemplated should be exercised by this Court to determine

> whether ... the Board was (or was not) right in disallowing the tariff of the Company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue.

83 Should there be no legal obstacle to the adoption of the course decided upon by the Board, there may be error in the determination of some matter of fact or in the exercise of the wide discretion entrusted to it by the Statute, neither of which can be made the subject of an appeal to this Court. I find it difficult to conceive of any case in which the Court may properly be asked whether any action taken by the Board is or is not "right," unless where the law peremptorily requires that some particular course should be taken in regard to the subject-matter of the question.

84 The facts out of which the questions submitted arise appear in the order of the Board granting leave to appeal. Mr. Chrysler contends that the finding of the learned chief commissioner, that the company has a statutory right, not subject to the control of the Board, created by the confirmation of its agreement of 1893 with the city of Ottawa by the Dominion Act of 1894 (ch. 86), to charge any rate of fare fixed by it, not exceeding five cents, for the carriage of each adult passenger within the then limits of the city of Ottawa, constitutes such a legal requirement and compels the allowance by the Board of some additional rate for carriage on the Britannia extension, admittedly beyond those limits, and precludes that tribunal from taking into account in fixing such rate the company's profits on the operation of so much of its system as is covered by the agreement. If the chief commissioner's finding is right, or must be assumed to be so on this appeal, I am, with respect, of the opinion that the learned counsel's conclusions would seem necessarily to follow. Otherwise the company would be obliged to expend in the operation of an extension found to be unprofitable (par. "r") income derived from other portions of its system to which, *ex hypothesi*, it has an absolute statutory right: To put it otherwise -- having by statute a right to be paid five cents for carrying a passenger, who embarks in Ottawa, to the former city limits, it would be compelled to carry him *gratis* beyond those limits -- and for an additional three miles should he desire to travel to the Britannia terminus. The same result would ensue in the case of a passenger boarding one of the company's cars at some point on the extension to be carried to a place within the city of Ottawa as it stood in 1893. The only traffic on the Britannia extension for which the company would receive any remuneration would be that having both its point of origin and its point of destination on the extension itself. If it is beyond the jurisdiction of the Board directly to control the company's tolls within the limits of the Ottawa of 1893, it cannot, in my opinion, do so indirectly by refusing to the company reasonable remuneration for the traffic on the Britannia extension, considered by itself.

85 Mr. Chrysler argued that the Board has not submitted to the Court the question whether the company has or has not the statutory right which the chief commissioner has found it enjoys with regard to the rates of fare within the city of Ottawa as it stood in 1893-4, and that that matter is therefore not subject to review here. It is quite true that the question is not formulated in explicit terms. But the first member of the third question submitted:

> Has the Board the right to treat the company's operations as a whole and continue the existing tariff.

86 Treating the word "right" used in it as meaning power or jurisdiction -- necessarily involves it. I find nothing else in the statutes and agreements referred to in the first question, and recited in the statement of facts embodied in the order of the Board, that could possibly exclude that right. They include the statute and agreement on which the chief commissioner bases his finding that a statutory right to a five-cent fare for each adult passenger carried within the limits of the Ottawa of 1893, over which the Board has no power of regulation or control, is vested in the company. We cannot in answering the first member of the third question propounded ignore this feature of the case before us which appears to me to be so vital that it is virtually the turning point in its determination and presents, if not

the sole, at least the most obvious and most important question of law to be found in the entire submission. Somewhat paradoxically upon this question the appellant company upholds the finding of the chief commissioner while the respondents maintain that it is wrong.

87 Although, for reasons presently to be stated, of the opinion that the company has a right not subject to the control of the Board to fix a rate of fare not exceeding five cents for each adult passenger, except as provided by clause 49 of the agreement of 1893, carried by it within the then limits of Ottawa, with respect, I fail to find in the confirmation by the statute of 1894 of clause 46 of the agreement of 1893 sufficient ground for that conclusion. On the contrary, if the company's right rested on that contract and statute alone, while it could not claim any fare exceeding five cents (except for the traffic specifically provided for by clause 47) for the carriage of a passenger within the limits of the Ottawa of 1893, its right to demand fares up to that figure would, in my opinion, be subject to the control of the Board. Clause 46 is purely restrictive in its terms. Had the company intended to stipulate for a right to charge any fare fixed by it not exceeding five cents, it is scarcely conceivable that that right would not have been expressed in positive terms such as are found in clause 47 deal ing with the special rates of fare between 12 o'clock midnight and 5:30 a.m. Moreover, the fact that its right to collect and fix fares within the Ottawa of 1893 existed independently of, and antecedently to, the contract of that year and the statute of 1894, as I shall now endeavour to demonstrate, renders it wholly unnecessary to import by implication into clause 46 of that contract the positive provision which the contracting parties would seem to have deliberately omitted from it.

88 The Ottawa City Passenger Railway Company was incorporated by the Parliament of the late province of Canada in 1866 and by sec. 8 of that statute (ch. 106) its directors were empowered to make by-laws touching (*inter alia*)

> the fares to be received for passengers and freight transported over the railway, or any part thereof.

89 The franchise conferred was to construct and to operate by animal power a street railway on certain specified streets and others to be agreed upon in the city of Ottawa and adjoining municipalities. The work being purely local and provincial passed, at Confederation, under the control of the Legislature of Ontario. That body in 1868 amended the company's charter (ch. 45) by declaring applicable to it certain sections of the *Consolidated Railway Act* of 1859 (ch. 66), *inter alia*, those with respect to "Powers," and expressly excluding the application of other clauses of the same Act, *inter alia*, secs. 118 and 151, relating one to the reduction of tolls by the Legislature and the other to the approval of tariffs by the Governor in council. Under the heading "Powers" it was by sec. 9 of the *Consolidated Railway Act* provided that

> the company shall have power and authority ... tenthly ... to regulate ... the tolls and compensation to be paid and to receive such tolls and compensation.

90 Subsec. 1 of sec. 31 of ch. 170 of R.S.O. 1887 (*The Ontario Railway Act*) applied to the Ottawa City Passenger Railway Company, but subsecs. 9, 10, 11 and 12 of the same section did not. R.S.O. 1887, ch. 2, sec. 10.

91 No other change in the Statutes affecting the company was made prior to 1892. It would therefore appear that at that time under the provincial statutes governing it one of the "powers" of the company was to regulate its tolls -- a power which it would probably exercise through directors' by-laws passed under sec. 8 of the Act of 1866-without control by the Legislature or by the Governor in Council under secs. 118 or 151 of the *Consolidated Railway Act* of 1859, or the corresponding sections of ch. 170 of the Revised Statutes of Ontario, 1887. *The Ontario Street Railway Act* of 1883 (46 Vict., ch. 18) (R.S.O. 1887, ch. 171) by its 24th section provided that

> nothing in this Act contained shall apply to or affect any street railway company existing or incorporated before the first day of February, 1883.

92 In 1892, the company desiring to extend its line across the Union Bridge and into the city of Hull sought and obtained from the Dominion Parliament an Act (ch. 53) empowering it to do so, (sec. 1) declaring it to be a work for the general advantage of Canada (sec. 6), conferring on it the additional right to use motive power other than animal power, except steam (sec. 3), making applicable to the new lines of which the construction was thereby authorized, the Acts of 1866 and 1868 and "the powers thereby conferred," and providing that the "operation" of the railway "by any new or additional powers conferred by this Act," should be subject to the provincial law in relation to street railways (sec. 6).

93 "Operation" in this statute in my opinion does not include the fixing or regulation of fares. It refers to the working of the railway -- how the cars should be run-control of the tracks, motive power and equipment. *Bedford Bowling Green Stone Co. v. Oman*, 134 Fed. Rep. 441-450; *Minneapolis Street Railway Co. v. Minneapolis*, 155 Fed. Rep. 989-1000. A reference to the clauses of the Dominion *Railway Act* (R.S.C., 1906, ch. 37) included in the fasciculus headed "Operation" will serve to indicate the purview of that term as understood by the Parliament of Canada.

94 By sec. 13 of the Act of 1892 it was provided that

> nothing in this Act shall in any way impair any of the powers which the Company has at the passing of this Act.

95 Ordinarily I should incline to think that the word "powers" in such a section would not include the right to fix rates. But that right was conferred by the Act of 1866 as a "power and authority;" and by the Act of 1868 it was confined [confirmed?] as one of the "powers" under sec. 9 of the consolidated statute of 1859 incorporated with the Act of 1868. Furthermore, in the Dominion Act of 1892, while secs. 92 and 93-98 of the general *Railway Act* (51 Vict., ch. 29) are expressly made applicable to the company, there is no reference either to sec. 223 empowering the company to fix tolls or to secs. 11 (k) and 227 and 228 providing for the control of tolls by the Railway Committee of the Privy Council and the Governor in Council respectively. The proper conclusion from these circumstances appears to me to be that the "power" of fixing and regulating its rates of fare free from the control of the Lieutenant-Governor in Council, which the company possessed un der the provincial legislation affecting it, was continued unimpaired by the operation of secs. 6 and 13 of the statute of 1892, notwithstanding the declaration thereby made that the company's undertaking was a work for the general advantage of Canada, and that that right thus became the subject of a "Special Act" excluding the application of inconsistent provisions of the general *Railway Act* (51 Vict., ch. 29, secs. 3 and 6), if they would otherwise have been applicable to it as a street railway.

96 Such was the position of the Ottawa City Passenger Railway Company in regard to the imposition and control of tolls at the time of the agreement of 1893 and the statute of 1894 confirming it, so much canvassed at bar. The Ottawa Electric Street Railway Company, then absorbed by and amalgamated with the Ottawa City Passenger Railway Company, had been incorporated in 1890 and was subject to *The Street Railway Act of Ontario* (R.S.O., 1887, ch. 171). But the only statutory provision affecting its tolls was that contained in sec. 9 of that Act, limiting the maximum fare to be charged by it to five cents for any distance not, exceeding three miles and one cent for each additional mile. It seems very clear to me, therefore, that the sole office of the first member of clause 46 of the agreement of 1893 --

> No higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present city limits --

was so to limit the company's right to fix its rates of fare conferred by the provincial Acts of 1866 and 1868 and confirmed by the Dominion Act of 1892, and not otherwise subjected to statutory control or restriction, that thereafter the ordinary fare for the carriage of an adult passenger within the then city limits should not exceed five cents -- a concession which the company no doubt made in consideration of countervailing benefits and advantages obtained

by it under the agreement. That, in my opinion, is the entire scope and purpose of the part of clause 46 now under consideration and it therefore becomes quite unnecessary to consider the effect of its confirmation by the Statute as creating a statutory right in favour of the company.

97 The Act of 1894 continues the existence of the "Ottawa City Passenger Railway Company" under the name of the "Ottawa Electric Railway Company" (sec. 6) and sanctions its absorption of the Ottawa Electric Street Railway Company (sec. 1), declaring that the lines of street railway of both companies are works for the general advantage of Canada and that the Ottawa Electric Railway Company is sub ject to the authority of the Parliament of Canada (sec. 7). But any effect which these latter provisions might otherwise have had under sec. 6 of the *Railway Act* of 1903 (ch. 58; R.S.C., 1906, ch. 37, sec. 6) is excluded by secs. 3 and 11, to which, as well as to sec. 13 of the Act of 1892, the provisions of sec. 3 of the *Railway Act* of 1903 would seem to apply. Secs. 3 and 11 of the Act of 1894 are as follows:

> 3. The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them, and which are hereby authorized to be transferred to the said united company, shall be exercised and enjoyed by the said united company, subject to the terms, provisos and conditions contained in the said agreement with the Corporation of the city of Ottawa.
>
> 11. Nothing in this Act shall in any respect impair any of the powers which the said Ottawa City Passenger Railway Company shall have immediately prior to the date appointed for this Act to take effect.

98 Under these provisions the power or privilege of the Ottawa City Passenger Railway Company to fix and regulate its rates of fare conferred by the legislation of 1866 and 1868 and confirmed by the Statute of 1892 are again preserved for the benefit of the continuing corporation, the Ottawa Electric Railway Company. As provisions made by the Parliament of Canada inconsistent with the jurisdiction over tariffs and tolls then possessed by the governor in council and the Railway Committee of the Privy Council and now vested in the Board of Railway Commissioners by *The Railway Act*, they override the latter (sec. 3 of ch. 37, R.S.C., 1906). There is no reference to the general *Railway Act* in the Statute of 1894.

99 The construction of the Britannia branch by the Ottawa Electric Railway Company was authorized by a Dominion statute of 1899 (ch. 82) "as an extension of its present railway." Neither the agreement of 1893 between the city of Ottawa and the appellant company, nor the (now expired) agreement of the company with the village of Hintonburgh applies *proprio vigore* to this extension. The former is explicitly confined in its operation to the city of Ottawa of 1893; the latter to lines of railway constructed on streets of the village. No part of the Britannia extension is within the Ottawa of 1893 and the short portion of it within the former village of Hintonburgh is constructed not on streets but on a private right-of-way. The fact that the company was authorized by the statute of 1899 to construct the line from Holland Avenue west to Britannia-on-the-Bay "as an extension of its present railway" does not bring that extension within the terms of agreements explicitly confined in their operation, the one to territory within which no part of it is constructed and the other to property over which it does not pass; nor does it, in my opinion, as a matter of law preclude the sanction by the Board of a tariff of fares for that extension distinct from that in force for the rest of the company's system.

100 Sec. 3 of the Act of 1899, ch. 82, reads as follows:

> Sections 90 to 172, both inclusive, of *The Railway Act* and such of the other sections as are applicable, shall apply to the Company with respect to the said extension.

101 It is common ground that as to the Britannia branch the **jurisdiction** of the Board of Railway Commissioners over tariffs and tolls conferred by the general *Railway Act* is unfettered. But I cannot find in the mere description of this branch as an "extension" anything entitling the Board in the exercise of that **jurisdiction** to disregard the effect

of any rights which the company may have to fix and regulate tolls on its lines within the limits of the city of Ottawa of 1893 independently of the Board's supervision and control. If, in order "to treat the company's operations as a whole and continue the existing tariff," the Board must disregard such a right of the company, either **directly** or **indirectly**, in my opinion it may not do so. It follows that the Board should

> permit the filing of tariffs ... covering service on the Britannia line without reference to the larger part of the system covered by the municipal agreements...

102 though not necessarily on a mileage basis.

103 On the proper construction of the relevant agreements and statutes I am of the opinion that the Britannia extension commences at Holland Avenue since from that point westerly the company's tracks are laid on a private right of way and not on public streets and it is "from some point on its present railway" (of which the terminus was then at Holland Avenue) that the company was by the Act of 1899 authorized to construct and operate its line to Britannia-on-the-Bay.

104 While it would seem to follow from what I have said that it is not possible to hold as a matter of law that the order of the Board disallowing the tariff in question was not "right" and the respondents may therefore be entitled to ask the Court to decline to answer the first question in the affirmative, in view of the facts and finding in par. "r" of the order allowing the appeal the company is entitled to such fares and on such basis as the Board may deem reasonable and just in respect of traffic on its Britannia branch irrespective and independently of the rates of fare prevailing on the rest of its system. As the learned chief commissioner said in delivering the opinion of the Board in this case:

> Under *The Railway Act* the same company may have different rates on different parts of its system where traffic and operating conditions and construction costs are dissimilar, for example, railway tolls are justifiably higher in a mountainous district where cuttings and grades are heavy and as a result the cost of construction and operation is greater than in other districts. Again the tolls may be greater where traffic density and diversity differ.
>
> Rates on a branch or lateral line may be justified, although higher than those of a main line, with greater traffic and although owned by the same company.

105 The fact that a flat rate of fare prevails throughout the rest of the company's system does not as a matter of law, in my opinion, preclude the authorization of an additional fare, either on a mileage or "measured" basis or as a flat rate, on the Britannia extension.

106 I would, for the foregoing reasons, without answering the first question, answer the second question: "At Holland Avenue;" and to the first member of the third question my answer would be: "No;" and to the second member thereof: "Yes, though not necessarily on a mileage basis."

107 In reaching these conclusions I have entirely put out of consideration subsec. 5 of sec. 325 of *The Railway Act, 1919;* that provision is not retroactive. The statute was passed on July 7, 1919; the decision of the Board was pronounced on February 25, 1919; and leave for this appeal was granted on April 14, 1919. The answers to the questions before us, therefore, in nowise depend on subsec. 5 of sec. 325 and I refrain from expressing any opinion whatever either upon its construction or upon the scope of its application.

108 On the whole the appeal succeeds and the appellants should have their costs.

***Brodeur, J.*:**

109 The appellant company operates within the city limits of Ottawa and what was the village of Hintonburgh a street railway proper, and beyond those city limits it runs a suburban railway called the Britannia line.

110 This suburban railway is constructed upon a private right-of-way and passes through the territories of the respondents, the township of Nepean and the village of Westboro.

111 The rates within the city of Ottawa are fixed by a contract which was confirmed by Parliament.

112 As far as the suburban line is concerned the railway company has filed before the Railway Board a tariff asking for larger fares than those charged heretofore and the municipalities interested, including the city of Ottawa, applied for the disallowance of the proposed tariff and their application was granted on February 25, 1919. The Ottawa Electric Railway Company dissatisfied with the order of the Board, obtained on April 14, 1919, leave from the Board to appeal to this Court upon the following questions: [See *ante*, p. 1053].

113 These questions arise out of certain facts which the Board stated in their order granting leave.

114 The Board has found as a fact the operation of the Britannia line, considered by itself, is not remunerative, but that the operation of the lines of the railway as a whole, including those within the city of Ottawa, are returning to the company adequate profits. The Board has found also that within the city limits on the street railway proper it could not reduce nor increase the rates because they have been the subject of an agreement with the city which has been approved and confirmed by Parliament (1894 ch. 86, sec. 2) and that the Board's jurisdiction is bound by this special Act.

115 Though the railway commissioners thought they could not change, alter or reduce the city rates, they decided, however, that the profits made by the company under its contract should be utilized to cover the deficit incurred in the operation of the Britannia extension and they ordered the company to operate at a loss its suburban line. This decision does not seem to me satisfactory. If the contract with the city has the effect asserted by the Board it is then binding to all intents and purposes and this part of the system should have been left alone and the profits or losses made in connection with it should not have been considered in its determination of the rates to be paid as some other part of the system. In other words the company's operations should not have been treated as a whole.

116 When the company was incorporated in 1866 by the Legislature of the Union of Canada (ch. 106) it was declared by sec. 8 that the directors would have the power to make by-laws touching "the fares to be received for passengers and freight transported over the railway or any part thereof."

117 We find also another provision in this statute of 1866 giving the right to the company to lay their tracks on certain streets.

118 These two provisions give more extensive powers than those which would be granted to-day, for Parliament would not give the power to a railway company to lay tracks on a particular street without the consent of the municipality, and as far as the rates are concerned Parliament would not to-day give a railway company the right to fix its rates without the control of the Railway Board. But in 1866 the street railways were new institutions which were treated most liberally by our legislators.

119 The appellant company had then the power under its charter to fix its rates without being bound to submit them to the Government and it could lay its tracks upon certain streets within the city of Ottawa.

120 The line of railway being a provincial line fell after Confederation under the legislative control of the prov-

ince of Ontario. But in 1892 the company being desirous to connect its railway with a line situate in another province, its undertaking was declared by the Federal Parliament under the provisions of subsec. 10 of sec. 92 of *The B.N.A. Act* to be a work for the general advantage of Canada (1892, ch. 53).

121 In 1893, the railway company made a contract with the city of Ottawa in which it was stipulated that it could run its cars upon some other streets than those mentioned in the Act of incorporation of 1866 and the railway company agreed by clause 46 that

> No higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said lines and branches thereof within the present city limits...

and that it could amalgamate with an electric street railway company then in existence under its present name.

122 This contract was ratified and confirmed by the Canadian Parliament in 1894 and by the Special Act then passed it was declared that:

> The franchises, powers and privileges heretofore or hereby granted to or conferred upon the ... company shall be exercised and enjoyed, [1894, ch. 86, sec. 3].

and by sec. 11 of the Act it was also declared

> Nothing in this Act shall in any respect impair any of the powers which the said ... company shall have immediately prior to the date appointed for this Act to take effect.

123 This Act came into effect on June 1, 1894.

124 What is the effect of this legislation of 1894?

125 First, it ratifies and confirms the agreement with the city of Ottawa by which a flat rate not exceeding five cents should be charged for the conveyance of a passenger at day time. It becomes a binding contract for the city, for the company and also for the public by which this fare of five cents would be considered a reasonable rate. This provision forms part of the special Act of the railway company.

126 At the same time Parliament in declaring that the powers possessed by the railway company would not be impaired, but, on the contrary, these powers would continue to be exercised and enjoyed by the company, confirms and ratifies the power that the company possessed by its Act of incorporation of 1866 to fix its rates, subject, of course, to the new rates fixed in its agreement with the city.

127 It seems to me that as a result of this legislation of 1894, the company was the only authority that could deal with the rates within the city of Ottawa provided it should not charge more than five cents.

128 The general provisions of *The Railway Act* giving the Board the power to deal with the rates would certainly not affect the lines of the appellant company within the city limits since sec. 3 of ch. 37 of the R.S.C., 1906, declares that *The Railway Act* should be construed as incorporate with the special Act and where the provisions of *The Railway Act* and of the special Act relate to the same subject-matter, the provisions of the special Act will override those of the general Act.

129 The Parliament of Canada having by the special Act of the appellant company dealt specifically with the tolls within the city of Ottawa, the subject-matter of these tolls could not be considered by the Board of Railway Com-

missioners, whether they are profitable or not.

130 In 1899, the Parliament of Canada authorized the appellant company to build a suburban line outside of the city limits on private rights-of-way as an extension of its street railway. It was provided by this new Act that certain sections of the *Railway Act* were applicable

> and such of the other sections as are applicable, shall apply to the company with respect to the said extension.

131 It may be claimed that under the provisions of the Act of 1894 the tolls to be charged on the suburban or extension line shall be under the control of the railway company itself but the question of jurisdiction of the Board in that regard has not been raised, and both parties agree that the Board has jurisdiction to fix the rates on the suburban railway. But it is claimed on the part of the appellant that these rates on the extension line should be determined without regard to the profits or losses made on the city lines because the latter are not under the control of the Board.

132 I fully concur with this view of the appellant. The special Act of 1894 fixed the rates for the city limits and these rates cannot be disturbed by the Board since they form part of an Act which overrides the general powers of the Board under *The Railway Act.* The Board having come to the conclusion that the rate on the Britannia line was not remunerative, it was its duty to grant to the appellant company a remunerative rate on this part of the line and it should not have taken into consideration the profits made on some other part of the line which did not come under its jurisdiction.

133 The first question which is submitted to us involves questions of fact which, of course, have to be dealt with exclusively by the Board. We have no authority to decide whether the rates asked for by the company are fair and just. So far, however, as this question No. 1 involves a question of law, it is covered by the answer I give below to the first part of the third question.

134 We are asked by the second question submitted to us to state whether the tolls to be charged on the extension line should be computed from Holland Avenue where the extension begins.

135 If the extension line were built on the streets with the consent of the city, special tolls, could be charged only from the city limits, but the extension line is not built on the streets but on a private right-of-way. Then I would declare in answer to the second question that the point of commencement of the extension line should be considered for toll purposes to be at Holland Avenue.

136 I would answer in the negative the first part of the third question and in the affirmative the second part of it. As a result of these answers the appellants' contentions are generally sustained.

137 The appeal should be allowed with costs.

***Mignault, J.*:**

138 This is an appeal by leave on three questions of law from the decision of the Board of Railway Commissioners for Canada disallowing a tariff of tolls filed by the appellant. The only point involved is as to the extension of the appellant's line from Holland Avenue in the former village of Hintonburgh, now a part of the city of Ottawa, to Britannia-on-the-Bay in the township of Nepean, but to answer the questions submitted it is necessary to consider the statutes and contracts under which the appellant carries on its operations.

139 All the facts found by the Board are stated in the order granting leave to appeal, as well as in the opinions

given by the learned chief commissioner, and it will be sufficient to give briefly my reasons for the answers which I make to the questions submitted.

140 The appellant now stands in the place of two Ottawa street railway companies, the Ottawa City Passenger Railway Company, incorporated in 1866, by an Act of the Province of Canada (29-30 Vict. ch. 106), and the Ottawa Electric Street Railway Company, incorporated in 1891 by letters patent of the province of Ontario. These two companies amalgamated in 1894, forming what was termed the united company under the name of the Ottawa Electric Railway Company. Previously to the amalgamation, 1892, an Act was passed by the Dominion Parliament (55-56 Vict. ch. 53) declaring the undertaking of the Ottawa City Passenger Company to be a work for the general advantage of Canada, conserving its charter powers, and authorizing it to extend its line to the city of Hull, in the province of Quebec. After the amalgamation an Act was passed by the Dominion Parliament, in 1894 (57-58 Vict., ch. 86), ratifying the amalgamation, and confirming the contract entered into between the city of Ottawa and the Ottawa City Passenger Railway Company and the Ottawa Electric Street Railway Company and the appellant was declared a body corporate subject to the legislative authority of the Parliament of Canada. It is under this contract and this statute that the appellant carries on its operations in so far as the city of Ottawa, as it then was, is concerned.

141 It may be added that, in 1895, the appellant entered into a contract with the then village of Hintonburgh, adjoining Ottawa on the west, for the extension of its lines, under which the appellant extended its railway as far as Holland Avenue in the said village. This contract has now expired.

142 In 1899, by the Dominion statute, 62-63 Vict., ch. 82, sec. 1, it was enacted that the appellant

> may, as an extension of its present railway, construct, and operate by means of electricity or other motive power, except steam, a double or single track, iron or steel railway, with the necessary side tracks, switches and turnouts for the passage of cars, carriages, and other vehicles adapted to the same, from some point on its present railway in the municipalities of Hintonburgh or Nepean in the county of Carleton, to some point at or near Bell's Corners in the township of Nepean.

143 The railway referred to in this enactment as the present railway of the appellant did not extend further west than Holland Avenue in the village of Hintonburgh, and the extension from that point to Britannia-on-the-Bay, which I understand is to the east of Bell's Corners, was constructed, not on a street or road, but on a private right-of-way acquired by the appellant.

144 The statute of 1899 declared that secs. 90 to 172, both inclusive, of *The Railway Act* (then that of 1888) and such of the other sections of the said Act as are applicable shall apply to the appellant with respect to the said extension.

145 The appeal having been argued on November 17, 1919, this, Court, on December 22, 1919, ordered a re-argument on the following questions:

> (1) Has the Board of Railway Commissioners authority to reduce the company's charge for passenger services within the city of Ottawa below the fare of 5 cents now charged for any such service?
>
> (2) If the first question is answered in the negative, has the Board power to require the Company to provide a service partly within and partly beyond the limits of the City of Ottawa for a charge not exceeding 5 cents?
>
> (3) In passing upon the questions raised upon this appeal, is the Court in any respect governed by section 325 of *The Railway Act* of 1919?

146 The re-argument took place on February 3 and 4, 1920, and was of a very exhaustive character.

147 The principal question discussed was as to the effect of clause 46 of the contract with the city of Ottawa which reads as follows:

> No higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present city limits, and for children under ten years of age no higher fare than three cents shall be charged, except between the hours of twelve o'clock midnight and five thirty a.m.

148 The question was also discussed whether the Board of Railway Commissioners could reduce the maximum rate of five cents for passengers provided for the city of Ottawa.

149 It is argued that clause 46 is purely negative, that it in no way determines any toll or fare which the company may charge, that its object was not to empower the company to exact tolls, the power to do so being conferred on the directors by the statute of 1866, but merely to restrict the exercise of this power, so that in any event the company could not demand more in the daytime than five cents per adult passenger, and that in so far as the fixing of tolls and the control of the Board is concerned, the whole matter was left where it was before the contract, so that the directors can by by-law regulate the tolls to be charged, subject to the control of the Board, these tolls however not to exceed the maximum stipulated in clause 46 of the contract.

150 I cannot so construe the contract. It is true that clause 46 is negative in form, such negative form being usual in agreements of this kind, and it is also true that the directors derive their power to regulate tolls from the charter the company obtained from the Legislature. But the whole object, or at least the main object, of the contract was to oblige the company to operate a street railway in the city of Ottawa, the city receiving from the company an annual payment based on the mileage of the latter's lines, and for this service the company was to be remunerated by tolls charged for the carriage of passengers. So the fixing of a maximum fare by the contract necessarily implies that the company may charge any fare, provided it does not exceed the maximum, and within these limits, and during the life of the contract, the city cannot contend that the fare charged is not just and reasonable. This contract was ratified and confirmed by Parliament, the latter thus recognizing that the fixing of fares had been treated as a matter between the city and the company, and unquestionably the contract binds both the city as representing the public interested in the railway service and the company for the term of its duration, with the consequence that the power of interference of the Railway Board -- which can be exercised only on the ground that the tolls charged are unfair and unreasonable -- is excluded by the recognition by the city and by Parliament that up to the maximum stipulated by clauses 46 and following of the contract, any tolls charged by the company while the contract is in force are fair and reasonable.

151 I am therefore of opinion that, properly construed, clause 46 of the contract authorizes the appellant to charge five cents per passenger during the hours mentioned, or any lower rate; and also, inasmuch as the contract was ratified and confirmed by Parliament, and the ratification and confirmation was accompanied by the declaration (sec. 3) that the franchises, powers and privileges conferred on the original companies should be exercised and enjoyed by the appellant subject to the terms, provisos and condition contained in the agreement with Ottawa, my opinion is that the Board of Railway Commissioners cannot, for the services contemplated in this agreement, reduce, no more than it can increase, the maximum rate provided by the contract. In coming to this conclusion I also rely on sec. 3 of *The Railway Act* (R.S.C., 1906, ch. 37), the statute of 1894 being a special Act overriding the provisions of *The Railway Act* in so far as is necessary to give effect to such special Act.

152 This disposes of question 1, submitted by the Court for reargument, which question should be answered in the negative. I may add this is also the opinion expressed by the learned chief commissioner.

153 Mr. Denison argued however that the statute of 1894 is a private Act, which cannot prevail over a public Act

like *The Railway Act.* This argument is answered by sec. 13 of *The Interpretation Act* (R.S.C. 1906, ch. 1) as well as by sec. 3 of *The Railway Act*, for surely the statute of 1894 is a special Act within the meaning of that section.

154 Question 1 being answered in the negative, question 2 requires a reply, and I am of opinion that this reply must also be in the negative. In so far as service outside Ottawa is concerned it cannot be considered as covered by the charge made for the city of Ottawa under the contract and statute of 1894. By the city of Ottawa I mean the territory described in the contract.

155 Question 3, in so far as this appeal is concerned, should be answered in the negative. This section was enacted subsequently to the order of the Board, but the power it confers on the Board, should the question now come before it, renders possibly the discussion of this appeal of somewhat an academic interest. I may add that I do not wish to be understood as placing a construction on sec. 325 of *The Railway Act*, 1919.

156 I now come to the questions submitted by the Board which are the subject of this appeal. And here I must note the following findings of fact of the Board in pars. (r) and (s) of the order allowing the appeal:

> (r) The Board has found, as a fact, that the operation of the Britannia extension considered by itself is not remunerative, and that if the operation of this line can be so considered it is clear that the company is entitled to an increased remuneration for the services it performs thereon.
>
> (s) The Board has also found that the operation of the lines of this railway as a whole including those within the City of Ottawa have returned or are returning to the company adequate profits. The company contends that inasmuch as the receipts from the lines within the city of Ottawa are the result of the operations of the company under a schedule of rates limited by the agreement with the city and confirmed by the Act of Parliament such favourable result is not a valid reason under the Railway Act for disallowing a tariff which will give the company power to collect additional fares upon the Britannia extension.

157 I may add that the contracts with Ottawa and Hintonburgh in nowise apply to the Britannia extension, which is governed by the Statute of 1899. The respondents, however, contend that the contract with Hintonburgh applied to the extension from Holland Avenue up to the western limits of the former village, a distance of some 1,900 feet. I think this contention cannot be sustained, because the contract with Hintonburgh refers to a railway to be built on the streets of the village, and this extension was built, not on any street, but on the private right-of-way of the appellant from Holland Avenue to the west, and because the statute of 1899, which governs the extension, gives authority to the appellant to construct the said extension, from some point on the then present railway of the appellant in the village of Hintonburgh, and the most westerly point of the said railway was at Holland Avenue. The extension was constructed under the authority given by this statute.

158 I cannot doubt, moreover, in special reference to par. (r) of the order granting leave to appeal, that the Board can consider by itself the operation of the Britannia extension from Holland Avenue to Britannia-on-the-Bay.

159 The answers I would give to the questions submitted, are contained in the formal judgment of the Court, and in my opinion the appeal should be allowed with costs.

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6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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Quebec (Attorney General) v. Canada (Attorney General)

ATTORNEY GENERAL OF QUEBEC AND KEABLE v. ATTORNEY GENERAL OF CANADA ET AL.

Supreme Court of Canada

Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

Heard: May 23, 24, 25 and 26, 1978
Judgment: October 31, 1978

Counsel: G. Tremblay and R. Bilodeau , for Attorney General of Quebec.

M. Décary and J-P. Lussier , for Keable.

J. Nuss, Q.C. , and G.H. Waxman , for Attorney General of Canada.

M. Robert and L. Cadieux , for Solicitor General of Canada.

P. Lamontagne, Q.C. , and V.A. Percival , for Commissioner of R.C.M.P.

J.D. Watt, D.W. Mundell, Q.C. , and L.E. Weinrib , for Attorney General of Ontario.

H.H. Strange, Q.C. , and P.L. Cumming , for Attorney General of New Brunswick.

M. Samphir and B.W. Drever , for Attorney General of Manitoba.

L. Lindholm , for Attorney General of British Columbia.

S. Kujawa, Q.C. , and K.W. MacKay , for Attorney General of Saskatchewan.

R. Paisley, Q.C. , and W. Henkel, Q.C. , for Attorney General of Alberta.

Subject: Constitutional; Civil Practice and Procedure; Criminal; Evidence; Public

Evidence --- Affidavits.

Police --- Commissions of inquiry -- Conduct of inquiry.

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Constitutional law -- Administration of justice in province -- Criminal law -- Appointment of inquiry commission -- Whether provincial inquiry into criminal activities of R.C.M.P. is ultra vires as infringing upon federal legislation over criminal law and procedure -- Whether such inquiry can be made on management of federal police force -- Whether it can intrude into regulations of federal agency.

Witnesses -- Compelling attendance -- Commissions -- Whether commission set up by virtue of royal prerogative has power to compel attendance of witnesses -- Need for statutory authority -- Whether Solicitor General of Canada or other minister can be compelled as witness -- Common law prerogative of Crown against discovery -- Statutory privilege of Crown in interest of national security -- Whether such privilege applies to provincial courts and to officials invested with powers of court to compel production of documents.

Certiorari -- Judicial determination -- Subpoenas to compel attendance of witnesses and production of documents -- Whether compulsion of witness is judicial act reviewable -- Whether provincial inquiry commission under Quebec law is a court amenable to evocation -- Nature of writ of evocation.

Civil rights -- Self-incrimination -- Right to silence -- Whether such right can be reduced or altered by provincial action.

An inquiry commission was appointed under the Quebec Public Inquiry Commission Act to, broadly speaking, inquire into alleged criminal activities of the R.C.M.P.

The commissioner's mandate and his orders compelling the Solicitor General of Canada to testify and to produce documents were challenged on jurisdictional and constitutional grounds.

The Quebec Court of Appeal reversed a previous judgment of the Superior Court, issued a writ of evocation against the commissioner and suspended the inquiry proceedings.

The commissioner and the Attorney General of the province of Quebec appealed against this judgment to the Supreme Court of Canada.

Held:

Appeal allowed in part; suspension of proceedings limited to certain matters.

Per Pigeon J

The commissioner is a court and therefore amenable to evocation, such writ being the equivalent of certiorari and prohibition combined. He has all the powers of a judge of the Superior Court in term. In issuing subpoenas to the Solicitor General of Canada and in requiring him to produce documents, he was claiming to exercise some powers of a court. The compulsion of witnesses to testify and to produce documents is a judicial act subject to judicial review.

Powers to compel the attendance of witnesses to testify under oath and to produce documents are not available to a commission set up by virtue of the royal prerogative. They depend on statutory authority and a provincial statute cannot be effective beyond the constitutional limits of a provincial legislature's authority.

The commissioner's mandate is valid to the extent that it is for an inquiry into specific criminal activities. There is no basis for a distinction between such an inquiry against members of the R.C.M.P. and an inquiry into "organized crime". They both come within the scope of the administration of justice in the province. But no provincial authority

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may intrude into the management of the federal police force, and it cannot do so under the guise of inquiring into criminal acts. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation.

It is not within the proper scope of the authority of a provincial legislature to authorize an intrusion by an agent of a provincial government into regulations and practices of an agency of the federal government.

At common law, the Crown enjoys a prerogative against being compelled to discovery. The commissioner's inquiry is not a trial and the fact that the commissioner has the powers of a judge of a superior court does not make his inquiry the legal equivalent of a trial. He cannot compel the attendance of the Solicitor General of Canada or of any other minister of the Crown in right of Canada as a witness.

Section 41 of the Federal Court Act, which gives the Crown a privilege in the interests of national security, applies, not only to the provincial courts, but also to any official invested with the powers of a court for the production of documents.

The commissioner is bound to accept an affidavit made in support of the privilege under s. 41(2) of the Federal Court Act. If ever this affidavit can be challenged, it may be done only before a superior court.

Under s. 4 of the Official Secrets Act, it is the duty of every person who has in his possession information entrusted in confidence by a government official to refrain from communicating it to any unauthorized person. His employer cannot compel him to act in breach of a duty of confidentiality.

The suspension of proceedings ordered by the Quebec Court of Appeal should be limited to proceedings in respect of matters relating to the parts of the commissioner's mandate found to be ultra vires, to the subpoenas to the Solicitor General and to some R.C.M.P. documents.

Per Estey J

One of the main bastions of the criminal law is the right of the accused to remain silent. In the coldest practical terms, that right, so long as it remains unaltered by Parliament, may not be reduced, truncated or thinned out by provincial action. Investigations of allegation of specific crime with a view to the enforcement of the criminal law by prosecution must be in accordance with federally prescribed criminal procedure and not otherwise as, for example, by coercive inquiry under general inquiry legislation of the province. The Di Iorio case does not go so far as to permit the invasion by provincial action of the sanctity of the right to remain silent during what is in truth and substance a criminal investigation.

Neither plenary authority, i.e., federal or provincial, may investigate the undertaking of an agency validly established by the other plenary authority.

Per Pratte J

Had it not been for the majority decision of this court in Faber v. R. , it could have been said that the commission's mandate was in excess of provincial powers to the extent that it provided for a coercive inquiry which was essentially aimed at investigating specific crimes and in searching for their authors.

Cases considered:

Distinguished:

Cock v. A.G. (1908), 28 N.Z.L.R. 405 (C.A.)

McGee v. Pooley, 44 B.C.R. 338, [1931] 3 W.W.R. 65, 56 C.C.C. 325, [1931] 4 D.L.R. 475 (C.A.) .

St. John v. Fraser, [1935] S.C.R. 441, 64 C.C.C. 90, [1935] 3 D.L.R. 465 .

R. v. Snider, [1954] S.C.R. 479, 54 D.T.C. 1129, [1954] C.T.C. 255, 109 C.C.C. 193 .

Guay v. Lafleur, [1956] S.C.R. 12, [1964] C.T.C. 350, 64 D.T.C. 5218, 47 D.L.R. (2d) 226 .

Referred to:

Duncan v. Cammell Laird & Co. Ltd., [1942] A.C. 624, [1942] 1 All E.R. 587 .

Conway v. Rimmer, [1968] A.C. 910, [1968] 1 All E.R. 874 (C.A.) .

Approved:

R. v. Coote (1873), L.R. 4 P.C. 599 .

Re Société Les Affréteurs Réunis, [1921] 3 K.B. 1 .

Crombie v. R., 52 O.L.R. 72, [1923] 2 D.L.R. 542 (C.A.) .

R. v. Lanctot (1941), 71 Que. K.B. 325 (C.A.) .

Cahoon v. Conseil de la Corpn. des Ingénieurs, [1972] R.P. 209 .

Re Royal Commn. and Ashton (1975), 10 O.R. (2d) 113, 27 C.C.C. (2d) 31, 64 D.L.R. (3d) 477 .

Considered:

Lymburn v. Mayland, [1932] A.C. 380 (P.C.) .

R. v. Richardson, [1948] S.C.R. 57, [1948] 2 D.L.R. 305 .

Rogers v. Home Sec.; Gaming Bd. for Great Britain v. Rogers, [1973] A.C. 388, [1972] 2 All E.R. 1057 (H.L.) .

Can. Pac. Ltd. v. Que. North Shore Paper, [1977] 2 S.C.R. 1054, 9 N.R. 471 .

Followed:

A.G. for Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd. , [1914] A.C. 237 (P.C.) .

Kelly v. Mathers (1915), 25 Man. R. 580, 8 W.W.R. 1208, 23 D.L.R. 225 (C.A.) .

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
(sub nom. Keable v. Canada (Attorney General)) 24 N.R. 1

Gauthier v. R. (1918), 56 S.C.R. 176, 40 D.L.R. 353 .

A.G. Sask. v. A.G. Can., [1949] A.C. 110, [1949] 1 W.W.R. 742, [1949] 2 D.L.R. 145 .

Three Rivers Boatman Ltd. v. Lab. Rel. Bd. (Can.), [1969] S.C.R. 607, 12 D.L.R. (3d) 710 .

Bell v. Ont. Human Rights Commn., [1971] S.C.R. 756, 18 D.L.R. (3d) 1 .

Faber v. R., [1976] 2 S.C.R. 9, 32 C.R.N.S. 3, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423, 8 N.R. 29 .

Reference re Commn. of Inquiry into Police Dept. of Charlottetown (1977), 74 D.L.R. (3d) 422 (P.E.I.C.A.) .

R. in Right of Alta. v. C.T.C., [1978] 1 S.C.R. 61, 75 D.L.R. (3d) 257 .

Di Iorio v. Montreal Jail Warden, [1978] 1 S.C.R. 152, 35 C.R.N.S. 57, 8 N.R. 361 .

Cotroni v. Que. Police Commn., [1978] 1 S.C.R. 1048, 38 C.C.C. (2d) 56, 80 D.L.R. (3d) 490, 18 N.R. 541 .

A.G. Que. v. Farrah (1978), 86 D.L.R. (3d) 161, 21 N.R. 595 (Can.) .

Statutes considered:

B.N.A. Act, 1867, ss. 91(27), 92(14).

Code of Civil Procedure, 1965 (Que.), c. 80, ss. 758, 847(2), 848.

Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 41.

Official Secrets Act, R.S.C. 1970, c. O-3, s. 4.

Public Inquiry Commission Act, R.S.Q. 1964, c. 11, s. 7.

Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9.

Authority considered:

Clokie and Robinson, Royal Commissions of Inquiry, pp. 150-51.

Appeal against judgment granting a writ of evocation and suspending proceedings.

***Pigeon J. (Martland, Ritchie, Dickson* and *Beetz JJ.* concurring):**

1 This is an appeal from a judgment of the Court of Appeal of Quebec reversing the judgment of Hugessen A.C.J. of the Superior Court and ordering the issuance of a writ of evocation against Jean Keable, one of the appellants in

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this court, also ordering him to suspend all proceedings as inquiry commissioner and to transmit to the office of the Superior Court the record in the case and all the exhibits connected therewith. Kaufman J.A., dissenting in part, would have issued a restricted staying order.

2 The proceedings were instituted by a motion to a judge of the Superior Court under arts. 846 to 850 of the Code of Civil Procedure, 1965 (Que.), c. 80, for the issuance of a writ of evocation against appellant Jean Keable in his capacity of commissioner, appointed under the Public Inquiry Commission Act, R.S.Q. 1964, c. 11, of the province of Quebec. It was alleged that the subject matter of the inquiry being related to the administration of the R.C.M.P. was beyond the scope of provincial powers and that some decisions of the commissioner respecting the scope of the inquiry and the documents required to be produced by the Solicitor General of Canada were invalid.

Availability of evocation

3 In the Superior Court, Hugessen A.C.J. dismissed the application on the basis that the commissioner was not a court and therefore not amenable to evocation (translation):

> Respondent commissioner is not a court and will become one only when and to the extent that he decides to impose penalties in the exercise of his ancillary powers.

4 The Court of Appeal was unanimous in rejecting that view. Under s. 7 of the Public Inquiry Commission Act, R.S.Q. 1964, c. 11, a commissioner has, "with respect to the proceedings upon the hearing, all the powers of a judge of the Superior Court in term". Relying on this provision the commissioner has issued subpoenas to the Solicitor General of Canada and rendered decisions requiring him to produce a number of documents pertaining to the administration of the R.C.M.P. In so acting, the commissioner was claiming to exercise some powers of a court against the Solicitor General. The latter could not be required to wait until he was sentenced for contempt in order to challenge the validity of the orders and of the commission itself if he had good legal grounds to dispute their validity. The writ of evocation under the present Code of Civil Procedure is the equivalent of certiorari and prohibition combined: *Three Rivers Boatman Ltd. v. Lab. Rel. Bd. (Can.)*, [1969] S.C.R. 607, 12 D.L.R. (3d) 710 . Prohibition is properly applied for at the outset of the impugned proceedings: *Bell v. Ont. Human Rights Commn.*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1 . It was suggested that an injunction would have been the proper remedy but, under art. 758 of the Code of Civil Procedure, "An order of injunction can in no case be granted to restrain legal proceedings".

5 Much was sought to be made of such cases as *Guay v. Lafleur*, [1965] S.C.R. 12, [1964] C.T.C. 350, 64 D.T.C. 5218, 47 D.L.R. (2d) 226 , and *St. John v. Fraser*, [1935] S.C.R. 441, 64 C.C.C. 90, [1935] 3 D.L.R. 465 , in which applications to restrain the proceedings of a commission of inquiry were dismissed on the basis that these were administrative, not judicial, proceedings, but those were applications made by persons whose actions were being investigated and against whom no judicial power was being exercised. Such is not the case here. Assuming the commissioner's report will not amount to any judicial or quasi-judicial determination, what is presently in issue is the validity of strictly judicial acts: the compulsion of witnesses to testify and to produce documents. It is conclusively established by the recent judgment of this court in *Cotroni v. Que. Police Commn.*, [1978] 1 S.C.R. 1048, 38 C.C.C. (2d) 56, 80 D.L.R. (3d) 490, 18 N.R. 541 , that the validity of the conviction of a witness for contempt by a commissioner with similar powers is subject to judicial review. The Court of Appeal was plainly right in holding that this was not the only possible remedy and that evocation was available to challenge the validity of the commissioner's mandate, subpoenas and orders on jurisdictional and constitutional grounds.

The mandate

6 The commissioner's terms of reference as determined by provincial O.C. 1968-77, 2736-77, 2986-77 and 3719-77 are as follows (translation):

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(a) to investigate and report on all the circumstances surrounding the search carried out during the night of October 6 to 7, 1972 at 3459 St. Hubert Street in Montreal, as well as any previous or subsequent events that might be related thereto, and the conduct of all persons involved in the search or in a previous or subsequent event that might be related thereto, and, without restricting the generality of the foregoing:

(i) the closing of the investigation files that had been opened in the Montreal Urban Community Police Department following the complaints that were filed, shortly after the search, by the three organizations whose premises had been searched;

(ii) the discrepancy in the different versions that were given of this search;

(iii) the disposal of the documents that were seized during the search;

(iv) the collaboration of the R.C.M.P., the Quebec Police Force and the Montreal Urban Community Police Department with the Department of Justice during the investigation that was launched after the existence of this search became publicly known;

(v) the methods used during this search and the frequency of their use;

(b) to investigate and report on any circumstances and any previous or subsequent events that might be related to the following acts, as well as the conduct of all persons involved in the following acts and events:

(i) the illegal entry made during January 1973 into premises in which computer tapes were kept, containing a list of the members of a political party;

(ii) setting fire to a farm known as 'Petit Québec Libre' in Sainte-Anne-de-la-Rochelle on May 9, 1972;

(iii) a theft of dynamite in Rougemont in the spring of 1972;

(c) to investigate and report on the methods used during the acts referred to in paragraph (b) and the frequency of their use;

(d) to make recommendations on the measures to be taken to ensure that any illegal or reprehensible acts the Commission uncovers will not be repeated in future.

The subpoenas

7 The list of documents called for in the subpoena issued 28th September 1977 to the Solicitor General of Canada included the following (translation):

Concerning the search (opération bricole) made during the night of October 6 to 7, 1972 in the premises located at 3459 St. Hubert Street in Montreal, occupied by the Agence de presse libre du Québec, the Mouvement pour la défense des prisonniers politiques du Québec and the Coopérative de déménagement, du ler mai;

PLEASE BRING WITH YOU:

I -- The originals of all files or documents in your possession prepared by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Department, or any other person, relating to opération bri-

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cole, and, without restricting the generality of the foregoing:

1. All operation reports in your possession;

2. All analysis reports on the documents seized;

3. The notebooks, analysis reports and operation reports and records of the R.C.M.P. members who took part in the operation; ...

7. All analysis reports on the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai prior to October 7, 1972;

8. All reports on technical projects (electronic eavesdropping) concerning the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai prior to October 7, 1972;

9. The microfilms of the documents seized at 3459 St. Hubert in Montreal during the night of October 6 to 7, 1972;

10. The files on the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai, as given to Messrs. Robert Samson and Guy Bonsant when they were assigned to these movements;

11. All photographs and all negatives of photographs taken by a member of the R.C.M.P. during the night of October 6 to 7, 1972, and while the documents seized at the residence of Mr. Jean-Claude Brodeur were being examined;

12. All written correspondence or written reports of oral communication between January 1, 1972 and September 28, 1977:

-- among the various police forces;

-- within these same police forces;

-- with the Quebec Department of Justice;

-- or with the Solicitor General of Canada; ...

16. The originals of all files or documents concerning the following subjects:

(a) The allegations concerning break and entry into the home of Louise Vandelac on October 24, 1972;

(b) The allegations concerning the theft of Louise Vandelac's handbag at her residence during the night of October 25, 1972;

(c) The interrogation of a member of the Agence de presse libre du Québec who used Louise Vandelac's motorcycle between October and December 1972;

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(d) The use and discovery of microphones at 2074 Beaudry Street, in Montreal (November 1973);

17. All instruction manuals as well as all written instructions, administrative policies and documents in effect during October 1972, and any amendments, concerning:

(a) all rules respecting the operation of the R.C.M.P.'s Security Service;

(b) The opening, keeping, disposal and/or destruction of any file, document or daily notebook for members of the R.C.M.P.;

(c) The conducting of all police operations, including investigations, searches, electronic eavesdropping, shadowing, surveillance and so on;

(d) The rules of ethics of the members of the R.C.M.P.;

(e) The pattern of authority among the members of different levels of the R.C.M.P.;

(f) List of all cases where reports must be made by members to their superiors;

(g) List of all cases where an authorization is required by superior officers;

(h) The functioning of a joint operation among different police forces, particularly in the case of operations taking place on the territory of the Montreal Urban Community where the R.C.M.P., the Quebec Police Force and the Montreal Urban Community Police Department are all involved at the same time;

(i) The operation of internal communications, including the operation of the Telex system;

II -- The originals of any files or documents, not specifically mentioned in this request, but which you believe would be useful for the work of the Commission under its mandate, and in particular any documents in any file whatsoever that might reveal the existence [and] use of methods similar to those that are the subject of this investigation and/or that might reveal the frequency of use of such similar methods.

8 On 11th November a further subpoena was served upon the Solicitor General with an amended list of documents which I do not find necessary to cite. There were also, within a few days, further subpoenas covering the three following lists (translation):

I -- The original of a memorandum to which the Prime Minister of Canada, Mr. Trudeau, referred on June 2, 1977 in a statement in the House of Commons (*Hansard* , pages 6207-6208);

II -- Concerning an investigation known to have begun on or about June 1, 1977 under the direction of Messrs. Nowlan and/or Quintal and/or other persons: all reports, including the files and documents appended, prepared for one or more of these persons, or any other person, concerning allegations of acts said to be illegal or reprehensible and committed within the territory of Quebec;

III -- All files and documents concerning the setting fire to a farm known as 'Petit Québec Libre' in Sainte-Anne-de-la-Rochelle on May 9, 1972 as well as all files and documents concerning a theft of dynamite in Rougemont in the spring of 1972.

Regarding the electronic eavesdropping carried out at 3459 St. Hubert Street in Montreal:

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1. A written authorization or a written report of an oral authorization given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons, on or about November 3, 1972;

2. Any other written authorizations or any other written reports of oral authorizations given by Mr. Jean-Pierre Goyer or Mr. John Starnes and/or other persons.

I -- The originals of all files or documents in your possession prepared by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Department, or any other person, on the following subjects or events mentioned in a letter dated May 28, 1976 from Commissioner J. Nadon to the Hon. Warren Allmand, Solicitor General of Canada, and forwarded by the latter on May 31, 1976 to the Hon. Fernand Lalonde, Solicitor General of Quebec, to wit:

1. In January 1970, Daniel Cohn-BENDIT, a revolutionary known around the world, arrived in Montreal, where he stayed with a former F.L.Q. member, Bernard MATAIGNE.

2. In June of the same year, two (2) Quebec terrorists were trained in a guerilla camp in Jordan to act as assassins once they returned to Quebec.

3. In October 1970, James Richard CROSS and Pierre LAPORTE were kidnapped and the latter was subsequently assassinated. In the first communiqué from the Liberation Cell, the F.L.Q. demanded the release of the terrorists in prison (political prisoners).

4. During the same period searches revealed that Pierre VALLIERES, one of the ideological leaders of the F.L.Q., had sent a letter to Jacques LARUE LANGLOIS on June 26, 1968, advising him to proceed with the kidnapping of political figures. Later VALLIERES admitted he was guilty of this criminal offence with which he was charged.

5. Toward the end of 1971 the latter stayed in hiding to avoid being charged with sedition. After four (4) months he came out of hiding, stating that "in theory" the violent actions of guerillas were ineffective and reckless.

6. On February 9, 1972, 90 sticks of dynamite were found in a room in the Laurentian Hotel in Montreal.

7. In May 1972 the Montreal Urban Community Police Department arrested Christian LEGUERRIER, who confessed at that time that a group was making plans, giving rise to the suspicion that there might be selective assassinations and kidnappings (and in particular your file D-928-2372 and a report dated May 31, 1972).

8. On September 19, 1972 the R.C.M.P. informed the Solicitor General of Canada that Marcel GUERIN, Donald LACOSTE, Hélène LACASSE, Jacques BEAULNE and Jean-Luc ARENE were planning to commit criminal acts with a view to obtaining the release of the alleged political prisoners (and in particular, your file D-909- 2-D-6 and the report dated September 19, 1972).

9. On September 26, 1972 Jacques BEAULNE, André BEAULNE, Pierre DORAIS, Donald MCINNES, Renald LEVESQUE, Roger VINCENT, D'Arcy ARCHAMBAULT and André LAFOND were preparing an airplane hijacking, for the same purpose (and in particular, your file D-926-113-D-1-3 and a report dated September 26, 1972).

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> II -- The files and documents on 'DISRUPTIVE TACTICS', and in particular those classified in file D-938-Q-25.

The Solicitor General's affidavit

9 The affidavit submitted to the commissioner by the Solicitor General in its final form under date 13th October 1977 included the following statements (translation):

> 3. I have taken cognizance of a subpoena addressed to me as Solicitor General of Canada by the Commissioner of the said Commission and dated September 28, 1977.
>
> 4. The said subpoena, as amended by an oral order of the Commissioner dated October 6, 1977, requires *inter alia* the files or documents of the R.C.M.P. concerning an operation known as 'Opération Bricole', and requires in particular the production of the following files and documents:
>
> (a) All analysis reports on the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai from January 1, 1972 to September 28, 1977;
>
> (b) All reports on technical projects (electronic eavesdropping) concerning the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement from January 1, 1972 to September 28, 1977;
>
> (c) The files on the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du ler mai, as given to Messrs. Robert Samson and Guy Bonsant when they were assigned to these movements;
>
> (d) The originals of all files or documents concerning the following subjects:
>
> (i) The allegations concerning break and entry into the home of Louise Vandelac on October 24, 1972;
>
> (ii) The allegations concerning the theft of Louise Vandelac's handbag at her residence during the night of October 25, 1972;
>
> (iii) The interrogation of a member of the Agence de presse libre du Québec who used Louise Vandelac's motorcycle between October and December 1972;
>
> (iv) The use and discovery of microphones at 2074 Beaudry Street, in Montreal (November 1973).
>
> 5. Before receiving the said subpoena I had already, through my solicitors, produced before the Commission the R.C.M.P. files entitled 'Opération Bricole', except for certain documents contained in a list attached hereto as Appendix 1.
>
> 6. I have examined the R.C.M.P. files entitled 'Opération Bricole' and the documents mentioned in the appendix to this affidavit.
>
> 7. I have further examined the R.C.M.P. files and documents relating to the documents mentioned in subparagraphs (c) and (d)(i), (ii), (iii) and (iv) of paragraph 4 of this affidavit. I have also examined the

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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R.C.M.P. files and documents relating to the documents mentioned in subparagraphs (a) and (b) of paragraph 4 of this affidavit for the period from January 1, 1972 to September 28, 1977.

8. I know and in fact believe that the documents and files mentioned in paragraph 7 above and in the attached appendix were prepared and are kept in the strictest secrecy, as part of current and ongoing investigations in all regions of Canada into matters of extreme importance for national security.

9. To allow any of the documents mentioned in paragraph 7 and the attached appendix to be produced, or the contents of any one of them to be disclosed in testimony, would seriously jeopardize the effectiveness of the current and ongoing investigations being carried out by the R.C.M.P.'s Security Service, and might thwart the operations being conducted by the R.C.M.P.'s Security Service in accordance with the mandate it has been given by the Government of Canada.

10. In particular, production of the documents mentioned in paragraph 7 and the attached appendix, or disclosure of their contents, would reveal quite specifically certain sources of information, certain methods of collecting information, the personnel involved in investigations and the scope of these investigations, and this could only have consequences injurious to these investigations, which the Government of Canada decided were necessary in the interest of national security.

11. For all these reasons I am of the opinion, and I certify under s. 41(2) of the *Federal Court Act* , R.S.C. 1970 (2nd Supp.), c. 10, that the production or discovery of the files and documents mentioned in paragraph 7 of this affidavit and the attached appendix, or any one of them, would be injurious to national security.

12. I therefore object to the production of these files and documents and the disclosure of their contents by a member of the R.C.M.P., or by any person having one of these documents in his possession either lawfully or unlawfully or having had access to them on occasion, or as the result of an exchange of information between the R.C.M.P. and the various police forces, including the Quebec Police Force and the Montreal Urban Community Police Department.

The Commissioner's orders

10 The conclusions of the decision given by the commissioner on 18th October 1977 after considering the affidavit and the submissions of counsel for the Solicitor General were as follows (numbers added for convenience as agreed at the hearing) (translation):

The Commission:

1. CONSIDERS that it is a court within the meaning of s. 41(2) of the *Federal Court Act* with regard to present and former members of the R.C.M.P., employees and former employees of the Government of Canada and federal government politicians;

2. CONSIDERS that it is not a court with regard to all its other witnesses; an affidavit from the Solicitor General of Canada under s. 41(2) is not effective against it in such cases;

3. REJECTS affidavits P-6 and P-7 as not being in accordance with the Act;

4. ACCEPTS affidavit P-40 as regards the R.C.M.P. files and documents that were not produced before the Commission by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Depart-

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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ment; the same applies to the contents of Appendix 1 of affidavit P-40; it will refuse discovery and production without any examination of the documents;

5. AUTHORIZES counsel for the Solicitor General to be present, solely for the purpose of helping the Commission fulfil its obligation arising from the filing of affidavit P-40 during the *in camera* hearings at which evidence will be given by present and former members of the R.C.M.P., employees and former employees of the Government of Canada and federal government politicians;

6. ACKNOWLEDGES that counsel for the Solicitor General of Canada have the same rights as any counsel appearing before it during public hearings;

7. REJECTS, even assuming that it constitutes a court with regard to all its witnesses -- an assumption which is denied -- those parts of affidavit P-40 concerning non-production and non-disclosure of:

-the R.C.M.P. files and documents produced before the Commission by the Q.P.F. or the M.U.C.P.D. and marked as follows: 'This document is the property of the Government of Canada. It must be classified as a SECRET document and its contents may not be circulated in whole or in part without the author's prior consent';

-the R.C.M.P. files and documents sent to the Q.P.F. or the M.U.C.P.D. that were produced before the Commission by the Q.P.F. or the M.U.C.P.D. and not marked as being the property of the Government of Canada;

-the telexes of reports on the electronic eavesdropping carried out by the R.C.M.P. at 3459 St. Hubert Street in Montreal that were sent to the M.U.C.P.D. and produced before the Commission by the M.U.C.P.D.;

-certain parts of a document prepared by Mr. Fernand Tanguay of the M.U.C.P.D. that was filed before the Commission as Exhibit P-38;

-The analysis reports on the documentation seized from M.D.P.P.Q., the A.P.L.Q. and the Coopérative de déménagement du ler mai, prepared during the months following the search and produced before the Commission;

-certain documents referred to in affidavit P-40 as reports on technical projects (electronic eavesdropping) produced before the Commission by the M.U.C.P.D. as Exhibit H-15 and made public as P-34 and P-35;

8. INVITES the representatives of the Solicitor General of Canada to make the representations they consider appropriate under article 3.2 of the Commission's rules of practice and procedure.

11 The conclusions of the motion for a writ of evocation take exception to paras. 2, 5 and 7 of the above conclusions. They also challenge in its entirety a further decision of the commissioner issued 1st November 1977 in the following terms (translation):

On October 20, 1977 one of the Commission's counsel, Mr. Michel Décary, asked Mr. Claude Brodeur, a member of the R.C.M.P., the following question:

> Were you aware that members under your authority, your command, participated in illegal operations or activities?

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(October 20, 1977, volume 29, p. 18).

Various representations having been made, the Commission decided to suspend the examination of Mr. Brodeur and to make a final ruling on the objection on November 1, 1977.

The evidence adduced in *The Queen v. Coutellier, Beaudry & Cobb* , which the Commission examined with the authorization of the Attorney General of Quebec, and that gathered by the Commission itself, indicate:

(A) That the witness was personally involved in the circumstances surrounding the search made during the night of October 6 to 7, 1972 at 3459 St. Hubert Street in Montreal;

(B) That the witness was personally involved in certain previous or subsequent events that might be related to the circumstances surrounding the search or the search itself;

(C) That consequently the Commission must examine his behaviour as a person involved in the search or in a previous or subsequent event that might be related to the circumstances of the search or to the search itself.

It should be mentioned that among the specific points which the Commission is to investigate and report on, the Lieutenant-Governor in Council specifically mentioned:

> The methods used during this search and the frequency of their use.

The word 'method' means 'way of acting with regard to someone else' and refers to behaviour, conduct, manner of acting or method to be followed to obtain a result.

The evidence already reveals some of the methods used during the search carried out at 3459 St. Hubert Street in Montreal, but our inquiry should not stop there. What is at the very heart of the methods used, and characterizes the entire operation or the conduct of the police in this matter, is the fact that the police acted illegally.

The question asked is aimed directly at ascertaining the existence and frequency of use of the illegal methods employed on other occasions and the frequency of their use. This question falls squarely within the Commission's mandate.

The Commission accordingly orders you, Mr. Brodeur, to answer the following question:

> Were you aware that members under your authority, your command, participated in illegal operations?

12 Finally exception is taken to a decision of the Commissioner given 5th December 1977 the conclusions of which read (translation):

The Commission:

REQUIRES the production before it of a written authorization or a written report of an oral authorization given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons on or about November 3, 1972, as well as of any other written authorizations, or any other written reports of oral authorizations, given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons regarding the electronic eavesdropping carried

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out at 3459 St. Hubert Street in Montreal;

REQUIRES the production before it of the files and documents concerning 'disruptive tactics', and in particular those classified in file D-938-Q-25;

REQUIRES the production before it of all files, including the documents, statements, depositions and reports, connected with the investigation known to have begun on or about June 1, 1977 under the direction of Messrs. Nowlan and/or Quintal and/or other persons, prepared for one or more of these persons or any other person, concerning allegations of acts said to be illegal or reprehensible and committed in the territory of Quebec;

ORDERS the Solicitor General of Canada, under all penalties provided for by the Act, to give it the said files and documents on December 12, 1977 at 2:00 p.m. in room 5.15 of the Courthouse, 1 Notre Dame Street East, in Montreal;

INVITES the representatives of the Solicitor General of Canada to make any representations they consider appropriate under article 3.2 of the Commission's rules of practice and procedure after giving it the said documents.

The allegations

13 In respect of all the above, the motion for a writ of evocation includes the following main allegations (translation):

26. Moreover, respondent Keable is giving his mandate an unconstitutional interpretation, which is *ultra vires* the powers of the Quebec Legislature, in that he is inquiring into and intends to inquire into the following subjects:

(a) the operating rules of the R.C.M.P.'s Security Service;

(b) the Security Service organization, including the pattern of authority among the various levels;

(c) the methods of collecting information, such as:

(i) technical or electronic sources;

(ii) human sources, recruiting, informing and payment;

(iii) searches;

(iv) interviews with subjects of interest;

(v) infiltration;

(vi) surveillance and shadowing;

(d) the system of classifying files on individuals and the movements of and rules governing the management of the files;

(e) the operation of internal communications and communications among the various police forces;

(f) internal disciplinary investigations, and in particular the investigation conducted by superintendent Nowlan during June 1977;

(g) the relations between the Commissioner of the R.C.M.P. and the Director General of Security and senior officials of the Solicitor General's Department, the Prime Minister of Canada's Office, the Cabinet, the Solicitor General of Canada and the Cabinet Committee on Security;

(h) the kidnapping of James Cross, the kidnapping and assassination of Pierre Laporte, the visit of Cohn-Bendit to Canada, an alleged excape plot in 1972, an alleged airplane hijacking plot in 1972 and other subjects related to the 1970 October crisis and the acts of terrorism between 1963 and 1973;

(i) interception of mail for purposes of counter-espionage or anti-subversion; ...

31. The inquiry conducted by respondent may lead to breaches of the *Official Secrets Act* by the witnesses, and confronts members and former members of the R.C.M.P. with multiple and contradictory obligations: the obligation to give answer to respondent, the obligations under the *R.C.M.P. Act* and the obligations under the *Official Secrets Act;*

32. The inquiry conducted by respondent encroaches upon the function of the federal commission of inquiry into the R.C.M.P.'s Security Service, negates the precautions for confidentiality taken by the federal government in the direction of this commission, and in general this investigation conducted by respondent usurps the authority and functions of a commission validly created by the Governor in Council in the exercise of his mandate.

The constitutional questions

14 On the appeal to this court an order was made stating the constitutional issues raised in the form of the five following questions:

1. Are the Orders-in-Council 1968-77, 2736-77, 2986-77 and 3719-77, in whole or in part, *ultra vires* the Province of Quebec?

2. Are the powers of a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province limited by the distribution of legislative powers as provided for in the British North America Act?

3. If members of a federal institution, namely, the Royal Canadian Mounted Police, be involved in allegedly criminal or reprehensible acts, does a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province have the right, while conducting an inquiry into the circumstances surrounding the commission of said acts, to inquire into:

a) the federal institution, namely, the Royal Canadian Mounted Police;

b) the rules, policies and procedures governing the members of the institution who are involved;

c) the operations, policies and management of the institution;

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> d) the management, operations, policies and procedures of the security service of the Royal Canadian Mounted Police; "and to make recommendations for the prevention of the commission of said acts in the future?
>
> 4. Can the Solicitor General of Canada or any other Minister of the Crown in Right of Canada, in his official capacity, be compelled to appear, testify and produce documents by a commissioner appointed pursuant to provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province?
>
> 5. Does a Minister of the Crown in Right of Canada, in his official capacity, have the constitutional power to prevent by means of affidavit or otherwise, the production of documents demanded by a commissioner appointed pursuant to provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province, when such documents may relate to the commission of allegedly criminal or reprehensible acts, to circumstances surrounding such acts, or to the frequency of their occurrence?

The interventions

15 Interventions have been filed on behalf of the Attorneys General of Ontario, New Brunswick, Manitoba, British Columbia, Saskatchewan and Alberta, generally supporting the appeal in varying degree. Leaving aside for the moment the question raised by the dissenting judge in the Court of Appeal -- the extent of a staying order -- I propose to deal with the merits by considering the constitutional questions in order, but taking the first three together.

The validity of the commissions's mandate

16 Although unanimously of the view that the motion's allegations required the issuance of a writ of evocation, the Court of Appeal was equally unanimous in holding that the commission's mandate was not in excess of provincial powers.

17 In support of this conclusion, appellants submitted first that there was no constitutional restriction on the possible scope of such an inquiry. It was contended that there was nothing to prevent a provincial government from ordering, in the public interest, an investigation into any subject whatever, just as any university or private institution can. The short answer to this contention is that this is not an inquiry of the same kind: it is being made, not by resorting only to generally available sources of information, but by compelling the attendance of witnesses to testify under oath and to produce documents. Such powers are not available to a commission set up by virtue of the royal prerogative; they depend on statutory authority, in the present case, on the Inquiries Act under which this commission was established. A provincial statute cannot be effective beyond the constitutional limits of a provincial legislature's authority. In *Reference re Commn. of Inquiry into Police Dept. of Charlottetown* (1977), 74 D.L.R. (3d) 422 (P.E.I.C.A.) , Nicholson C.J. said after referring to *Kelly v. Mathers* (1915), 25 Man. R. 580, 8 W.W.R. 1208, 23 D.L.R. 225 (C.A.) (at p. 424):

> This statement of Perdue, J.A., with which I agree, is to the effect that the Lieutenant-Governor in Council of a Province has power, apart from the *Public Inquiries Act* [R.S.P.E.I. 1974, c. P-30], to issue a commission to investigate matters which fall strictly within one of the classes of subjects assigned exclusively to the provincial Legislatures by s. 92 of the *British North America Act, 1867* , but that such a power by itself would not by itself entitle the commissioner or persons named to compel the attendance of witnesses or to administer oaths.

18 This is in accordance with what Viscount Haldane L.C. has said in *A.G. for Commonwealth of Australia v.*

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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Colonial Sugar Refining Co. Ltd., [1914] A.C. 237 at 257 (P.C.) :

> A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law.

19 On the other hand, it appears to me that the majority opinion in *Di Iorio v. Montreal Jail Warden*, [1978] 1 S.C.R. 152, 35 C.R.N.S. 57, 8 N.R. 361 , is conclusive of the validity of the commission's mandate to the extent that it is for an inquiry into specific criminal activities. I can see no basis for a distinction between such an inquiry and an inquiry into "organized crime" as in *Di Iorio* , or a coroner's inquiry into a criminal homicide as in *Faber v. R.*, [1976] 2 S.C.R. 9, 32 C.R.N.S. 3, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423, 8 N.R. 29 , or a fire marshal's inquiry into arson as in *R. v. Coote* (1873), L.R. 4 P.C. 599 . Notwithstanding all the arguments submitted by counsel for the Solicitor General of Canada, I find myself bound by authority to hold that such inquiries come within the scope of "The Administration of Justice in the Province".

20 Reference was made to the judgment of the Court of Appeal of New Zealand in *Cock v. A.G.* (1908), 28 N.Z.L.R. 405 . I do not find the decision of great interest; it merely turns on the proper construction of the relevant Commissions of Inquiry Act, 1908. In the present case, no question arises as to the extent of the legislation under which the inquiry was ordered. The issue is as to the extent of the province's legislative authority over this inquiry.

21 Reference was also made to the judgment in *McGee v. Pooley*, 44 B.C.R. 338, [1931] 3 W.W.R. 65, 56 C.C.C. 325, [1931] 4 D.L.R. 475 (C.A.) , where an injunction was issued to restrain a security frauds investigation on the basis that this was an inquiry into a criminal matter. That case is of no authority: it rests on views which are not in accordance with the decision of the Privy Council rendered the following year in *Lymburn v. Mayland*, [1932] A.C. 380 .

22 Great stress was laid by the appellants as well as by intervenants on Dickson J.'s statement in *Di Iorio* , at p. 208, that: "A provincial commission of inquiry, inquiring into *any* subject, might submit a report in which it appeared that changes in federal laws would be desirable." This was said obiter in a case concerning an inquiry into organized crime. As previously noted, the basis of the decision was that such an inquiry into criminal activities is within the proper scope of "The Administration of Justice in the Province". The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The commission might therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable. This does not mean that the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission.

23 I thus must hold that in inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this police force. It is operating under the authority of a federal statute, the Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9. It is a branch of the Department of the Solicitor General Act, R.S.C. 1970, c. S-12, s. 4. Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation. As Viscount Simon said in *A.G. Sask. v. A.G. Can.*, [1949] A.C. 110 at 124, [1949] 1 W.W.R. 742, [1949] 2 D.L.R. 145 :

> you cannot do that indirectly which you are prohibited from doing directly.

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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24 The words (translation) "and the frequency of their use" at the end of para. a) as well as the words (translation) "and the frequency of their use" at the end of para. c) of the commissioner's mandate do not contemplate an inquiry into criminal acts but into the methods used by the police forces. Those are essential aspects of their administration and therefore, to the extent that those words relate to the R.C.M.P., what they purport to authorize is beyond provincial jurisdiction to inquire into. That this is the intended scope of the inquiry is apparent from the subpoenas which call for the production of all operating rules and manuals. For similar reasons, I would hold that para. d) is invalid insofar as it relates to the R.C.M.P. This paragraph pertaining to recommendations, following as it does provisions contemplating an inquiry into the regulations and practices of the R.C.M.P., is clearly intended to invite, *as a purpose of the inquiry* , recommendations for changes in such regulations and practices. Inasmuch as these are the regulations and practices of an agency of the federal government, it is clearly not within the proper scope of the authority of a provincial legislature to authorize such an intrusion by an agent of a provincial government.

25 Counsel for the appellants took exception to the statement by Paré J.A. that (translation) "a commission of inquiry ... is merely an extension of the executive branch, which it serves and to which it reports". It was contended that a commission's status was like that of a court, one of independence towards the executive. In support of this contention, reference was made to the report of the Royal Commission on some spying activities, dated 27th June 1946, in which, at p. 683, reference is made to Clokie and Robinson, Royal Commissions of Inquiry, pp. 150-51. It should, however, be noted that, at p. 87, the authors of this book have written:

> A 'crown-appointed' or 'royal' commission is only in a formal sense a monarchial weapon; in practice it is quite clearly and undeniably an agency of ministers who possess a majority in the House of Commons.

The Solicitor General not a compellable witness

26 I do not find it necessary to review at great length the numerous authorities cited on the fourth constitutional question. Because, at common law, a commission of inquiry has no power to compel the attendance of witnesses and to require the production of documents, any jurisdiction for such purposes depends on statutory authority, and it seems clear that provincial legislation cannot be effective by itself to confer such jurisdiction as against the Crown in right of Canada. In the recent case of *R. in Right of Alta. v. C.T.C.*, [1978] 1 S.C.R. 61, 75 D.L.R. (3d) 257 , Laskin C.J.C. said with the concurrence of all but two of the other members of the court (at p. 72):

> ... a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation.

27 In *Can. Pac. Ltd. v. Que. North Shore Paper*, [1977] 2 S.C.R. 1054, 9 N.R. 471 , Laskin C.J.C. said, speaking for the full court (at p. 1063):

> It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature.

28 In *R. v. Richardson*, [1948] S.C.R. 57, [1948] 2 D.L.R. 305 , Estey J. said with reference to the Ontario Highway Traffic Act, R.S.O. 1937, c. 288, barring any action after the expiration of 12 months from the time the damages were sustained [p. 79]:

> ... this statutory provision enacted by the province does not specifically mention His Majesty and therefore would not be effective against His Majesty in the right of the province and much less against His Majesty

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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> in the right of the Dominion.

29 In *Gauthier v. R.* (1918), 56 S.C.R. 176, 40 D.L.R. 353 , Anglin J., as he then was, said (at p. 194):

> Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion.

30 Appellants submit that the decision of this court in *R. v. Snider* , [1954] S.C.R. 479, 54 D.T.C. 1129, [1954] C.T.C. 255, 109 C.C.C. 193 , means that a minister of the Crown is a compellable witness at a trial, and they point out that under s. 7 of the provincial Act a commissioner has "all the powers of a judge of the Superior Court in term". This enactment cannot, at least towards federal authorities, have the effect of making an inquiry the legal equivalent of a trial. Such an inquiry is rather in the nature of a discovery and it seems to be well established that, at common law, the Crown enjoys a prerogative against being compelled to submit to discovery. In *Re Société les Affréteurs Réunis*, [1921] 3 K.B. 1 , Darling J. said (at p. 15):

> But even if the statement of Rigby L.J. was an *obiter dictum* , this Court is entitled to have regard to it and must look at it in order to see whether or not it lays down a principle which appears to be the right one. What he said was: 'I have got to administer the law; the law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not [*A.G. for Newcastle-upon-Tyne*, [1897] 2 Q.B. 384 at 395].' It was stated in *Tomline v. R.* (1879), 4 Ex. D. 252 (C.A.) , that the Crown does not owe discovery to the subject. I think Rigby L.J. was saying no more than that. There is thus a definite decision of the Court of Exchequer that the Crown is not bound to give discovery to the subject, and the opinion of a Lord Justice in the Court of Appeal recognizing that decision, and that decision and opinion are sufficient authority for this Court to recognize the rule which they lay down as the law of the land, unless it is convinced that it cannot be so. Rigby L.J. goes on:
>
> > That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it.

31 In *Crombie v. R.*, 52 O.L.R. 72, [1923] 2 D.L.R. 542 (C.A.) , Masten J. said (at p. 546):

> But, though discovery is a remedy merely, yet none the less the right of the Crown to refuse discovery is a matter of prerogative right.

32 In *R. v. Lanctot* (1941), 71 Que. K.B. 325 (C.A.) , Bond J. said (at p. 332):

> It would appear, accordingly, from the authorities -- a few of which I have referred to -- that the Crown cannot be compelled to give discovery.

33 Counsel for the appellants suggested that this question did not appear to have been raised initially as part of the Solicitor General's objections to the commissioner's demands. Be that as it may, the point is raised in one of the constitutional questions set down in this court, and was explicitly dealt with in the Court of Appeal where Paré J.A. said (translation):

> I am therefore of the opinion that the provincial statute on commissions of inquiry, and the powers a commissioner is given under this statute, cannot bind the Crown in right of Canada, and respondent commission cannot exercise against a minister of the Crown in right of Canada the powers it is given by ss. 7, 9, 10 and 11 of this statute. It should be emphasized in this regard that the subpoenas ordering the Solicitor General to appear and produce the required documents are not addressed to him personally but in his capacity as Solicitor General of Canada. In fact this could not have been otherwise, since it is only in this capacity that he has control of the documents required.

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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34 I would therefore answer Q. 4 in the negative.

The Crown privilege

35 The last constitutional question relates to the extent of the Crown privilege claimed in the interest of national security. This brings up for consideration the provisions of s. 41 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), which reads:

> 41.(1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

36 Although this enactment is in the Federal Court Act, the wording makes it clearly applicable to "any court". This makes it applicable not only to the provincial courts which are, in the main, courts of general jurisdiction, federal and provincial, but also to any official invested with the powers of a court for the production of documents. I would in this respect make the same reasoning as for the availability of evocation: whenever the commissioner claims to exercise such powers he is subject to the provisions applicable to a court in respect of those powers.

37 Counsel for the appellants pointed out that the commissioner does not deny that he is subject to the application of s. 41 of the Federal Court Act. However, he has claimed the right to decide to what extent the Solicitor General's objections made by affidavit should be upheld, and the court was invited by counsel to examine all the documents filed with the motion, including the complete transcript in 30 volumes of all of the proceedings at the inquiry. In my view, such an exhaustive examination of the voluminous exhibits filed with the motion and therein referred to does not come within the scope of the task assigned to the judge called upon to decide whether a writ of evocation should issue. Under the two-step procudure contemplated by the Code of Civil Procedure, the duty of the judge at the first hearing is described as follows, in art. 847, second paragraph:

> The judge to whom the motion is presented cannot authorize the issuance of a writ of summons unless he is of opinion that the facts alleged justify the conclusions sought.

38 In my view this enactment does not require a full examination of all the proceedings of the commissioner. It is sufficient to examine his terms of reference and his impugned decisions in the light of the facts alleged in the motion in order to determine whether, taking for the moment those facts as established, the issuance of the writ is justified. It is not the duty of the court at this juncture to review all the proceedings of the commissioner in order to decide immediately to what extent the allegations of the motion are proved or disproved by the complete record.

39 In my view, the effect of the above-quoted enactment is correctly stated by Deschênes J.A., as he then was, in *Cahoon v. Conseil de la Corpn. des Ingénieurs*, [1972] R.P. 209 , as follows (at pp. 212-13)(translation):

> It must therefore be held that, in performing its duty under Art. 847(2) C.C.P., the Court is fully entitled to

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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> refer to the documents that have been filed in support of the motion, provided however that these are authentic documents or exhibits the accuracy of which is not in dispute between the parties. *A fortiori* the Court may have recourse to them where, as here, the applicant incorporates them into his motion and extracts from them passages which he introduces into his actual allegations.
>
> Obviously, the judge hearing the motion for authorization to issue the writ should not decide prematurely the merits of the case, on the basis of his examination of the documents produced by the applicant. However, he may draw from them the conclusions he feels are necessary in order to ascertain whether 'the facts alleged justify the conclusions sought' (art. 847(2) C.C.P.).

40 No question is raised as to the constitutional validity and applicability of s. 41, and I find it unnecessary to review the well-known decisions of the House of Lords in *Duncan v. Cammell Laird & Co. Ltd.* , [1942] A.C. 624, [1942] 1 All E.R. 587 , and *Conway v. Rimmer*, [1968] A.C. 910, [1968] 1 All E.R. 874 (C.A.) , in which somewhat different views were taken of the nature of the privilege in question at common law. Parliament has subsequently enacted explicit provisions which spell out the law for Canada, and the affidavit submitted to the commissioner was obviously made under subs. (2) of s. 41. There was much discussion at the hearing whether such an affidavit is really conclusive or may somehow be challenged. I do not find it necessary to decide this point because if such an affidavit can be challenged this may be done only before a court of competent jurisdiction and a commissioner is not such a court and does not enjoy the powers of such a court.

41 Section 7 of the provincial Act purports to confer upon a commissioner "all the powers of a judge of the Superior Court in term" but this cannot make him a superior court, as this is something a provincial legislature cannot do by reason of s. 96 of the B.N.A. Act: see the recent judgment of this court in *A.G. Que. v. Farah* (1978), 86 D.L.R. (3d) 161, 21 N.R. 595 . The commissioner does not enjoy the status of a superior court; he has only a limited jurisdiction. His orders are not like those of a superior court, which must be obeyed without question; his orders may be questioned on jurisdictional grounds because his authority is limited. Therefore his decisions as to the proper scope of his inquiry, the extent of the questioning permissible, and the documents that may be required to be produced, are all open to attack, as was done before the Ontario Divisional Court in *Re Royal Commn. into Metro. Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113, 27 C.C.C. (2d) 31, 64 D.L.R. (3d) 477 . In that case this was done by stated case under some specific provisions of the Ontario Public Inquiries Act. In the absence of similar provisions in Quebec, evocation is the proper remedy, just as certiorari was found proper by the House of Lords in *Rogers v. Home Sec.; Gaming Bd. for Great Britain v. Rogers*, [1973] A.C. 388, [1972] 2 All E.R. 1057 .

42 Because a commissioner has only limited authority he enjoys no inherent jurisdiction, unlike superior courts which have such jurisdiction in all matters of federal or provincial law unless specifically excluded. It is by virtue of this inherent jurisdiction that superior courts have a general superintending power over federal as well as provincial authorities, as held in *Three Rivers Boatman* , supra. It is unnecessary to decide in the present case whether any possible attack against an affidavit made under s. 41(2) of the Federal Court Act comes within the exclusive jurisdiction conferred upon the Trial Division of the Federal Court by s. 18 of that Act, because I find it clear that any jurisdiction for entertaining such attack can be found only in a superior court. The commissioner is therefore bound to accept the affidavit as submitted unless it is set aside by a competent court.

The Official Secrets Act

43 A special point has been made with reference to some documents for which the Solicitor General's affidavit claims Crown privilege in the interest of national security but which the commissioner has obtained from other witnesses. The commissioner was of the view that the claim of privilege by affidavit was ineffective. In the present case, those documents had been entrusted by R.C.M.P. officers to members of police forces under provincial authority. These documents were classified as secret and stamped as such. They were communicated under obligation to preserve their confidentiality. Counsel for the commissioner sought to defend his decision to make some of those documents public over the Solicitor General's objection, not only on the basis that the affidavit became ineffective

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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when the commissioner managed to get the documents from other sources, but also on the basis that any obligation of confidentiality assumed by members of police forces under provincial authority disappeared in the face of orders given by their provincial superiors. I find this an untenable contention. Even apart from the provisions of the Official Secrets Act, an employee's duty of obedience towards his employer does not mean that the latter has any power to compel his employee to act in breach of a duty of confidentiality. The medical director of a hospital cannot release a doctor from his obligation of confidentiality towards his patient, only the latter may release him from his duty. Section 4 of the Official Secrets Act makes it clear that it is the duty of every person who has in his possession information entrusted in confidence by a government official and subject to the Act, to refrain from communicating it to any unauthorized person. No special form is prescribed for bringing this duty to the attention of all concerned. The commissioner certainly could not brush aside the objection because it was raised by affidavit and after he had obtained possession of the documents. Whether these were in fact subject to the Act will have to be decided on the merits.

The staying order

44 As previously mentioned, the Court of Appeal when ordering the issue of the writ also directed that all proceedings in the inquiry be suspended. Kaufman J.A., dissenting on that point, said:

> I would therefore allow the appeal in part, quash the judgment a quo, and order that a writ do issue, enjoining the respondent and his staff to transmit to the Superior Court, within 15 days from the date of this judgment, all documents, including transcripts of the argument and evidence, which relate to information given by the R.C.M.P. to other persons and which were produced by them before the commission. I would also enjoin the respondent and his staff from utilizing in any form or manner the contents of these documents; nor should the respondent and his staff attempt to obtain this information by viva voce evidence or any other means.

45 The majority felt that, in the circumstances, a general staying order was preferable. The reasons for this conclusion were expressed as follows by Monet J.A. (translation):

> The provisions of art. 858 of the Code of Civil Procedure, which apply to all cases of evocation provided for in art. 846, are drafted in general terms and do not confer, at least expressly, the power to 'suspend the proceedings in part'.
>
> Even if the Superior Court has this power -- something on which I am not expressing an opinion -- the interests of justice, in the circumstances of the case under review, do not require that a dividing line be drawn, the accuracy of which may be subject to interpretation on the question of which part of the proceedings should be suspended. Rather than imposing on respondent *és qualités* the duty to decide this question, it would be better for the Superior Court to evoke the matter and rule on the merits.

46 After lodging their appeal to this court, the appellants moved for an order limiting the suspension of the inquiry as suggested by Kaufman J.A. This motion was unanimously dismissed by judgment of the full court dated 21st March 1978, [1978] 2 S.C.R. 135, 20 N.R. 243 . The chief justice expressed our unanimous opinion as follows:

> There are serious jurisdictional and constitutional questions involved in the appeal, questions to which the Quebec Court of Appeal was sensitive, and I think the proper course is not to truncate its order for the issue of a writ of evocation and for suspension of the Keable Commission's proceedings prior to the determination of the appeal proper.

47 No other conclusion was possible at that time, if only because the commissioner's mandate was challenged in its entirety. Having, however, come to the conclusion that the attack fails save in some respects, the question must

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now be considered in a new light. The conclusion of this court on the validity of the mandate is, although pronounced in appeal from interlocutory proceedings, a final judgment on that point because this is a pure question of law. Questions of fact remain to be decided only in respect of the issues other than the validity of the commissioner's mandate.

48 The majority decision in the Court of Appeal was based on a sound exercise of judicial discretion in a case like this. However the issue as to the validity of the commissioner's mandate has now been disposed of. It is therefore necessary to consider whether the whole inquiry should remain suspended while some secondary issues are being litigated on the merits. At first sight, art. 848 of the Code of Civil Procedure would appear to contemplate a complete suspension of proceedings because it reads:

> 848. The writ introductive of suit is addressed to the opposite party and to the court, judge or functionary, and it orders the suspension of all proceedings and the transmission to the office of the Superior Court, within the delay fixed, of the record in the case and all the exhibits connected therewith.

49 It must, however, be noted that what is the "case" is not specified. It is clear that when the validity of the commissioner's mandate was in issue, the "case" was the whole inquiry. But now that this issue is being disposed of by the judgment on this appeal, does the remaining "case" include anything more than the specific decisions of the commissioner under attack, the subpoenas to the Solicitor General and R.C.M.P. documents including the transcript of the argument and evidence relating thereto? I fail to see any reason for construing art. 848 as preventing the court from so defining the "case". I would therefore allow the appeal for the purpose of issuing a restricted staying order.

Conclusions

50 For those reasons, I would allow the appeal in part and answer the constitutional questions stated in this case as follows:

51 Q. 1: Yes, to the following extent as concerns the R.C.M.P., namely: in para. a), the words "et la fréquence de leur utilisation" (and the frequency of their use); in para. c), the words "ainsi que la fréquence de leur utilisation" (and the frequency of their use); and para. d).

52 Q. 2: Yes.

53 Q. 3: No.

54 Q. 4: No.

55 Q. 5: Yes.

56 I would direct that the suspension of proceedings ordered by the Court of Appeal be limited to proceedings in respect of matters relating to the parts of the commissioner's mandate found to be ultra vires in the answer to the first constitutional question and to the decisions of the commissioner under attack, to the subpoenas to the Solicitor General and to R.C.M.P. documents including the transcript of the argument and evidence relating thereto and that such decisions, subpoenas and documents be the record of the inquiry ordered to be transmitted to the prothonotary of the Superior Court.

57 There shall be no order as to costs.

***Estey J. (Spence J.* concurring):**

6 C.R. (3d) 145, [1979] 1 S.C.R. 218, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161,
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58 I have had the opportunity of reading the judgment of my brother Pigeon and with his disposition of this appeal I am respectfully in complete agreement. Reference is made in those reasons to the judgments of this court in *Faber v. R.*, [1976] 2 S.C.R. 9, 32 C.R.N.S. 3, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423, 8 N.R. 29 , and *Di Iorio v. Montreal Jail Warden*, [1978] 1 S.C.R. 152, 35 C.R.N.S. 57, 8 N.R. 361 , in determining "the validity of the Commission's mandate to the extent that it is for an enquiry into specific criminal activities".

59 Holding as I do to the view that a province may not in the guise of acting within its legislative authority under s. 92(14) of the B.N.A. Act, 1867, invade the exclusive federal power under s. 91(27), I feel compelled to make the following observations with respect to those two authorities as they may apply to this appeal. There can be no debate at this stage of our constitutional development that the position of the federal Parliament with reference to the legislative power in relation to criminal procedure and criminal law is exclusive and may not be eroded or undermined by a purported exercise of legislative or executive authority in relation to "The Administration of Justice in the Province". I do not read the *Di Iorio* case, supra, as going so far as to permit the invasion by provincial action of the sanctity of the right to remain silent during what is in truth and substance a criminal investigation. The investigation of the incidence of crime or the profile and characteristics of crime in a province, or the investigation of the operation of provincial agencies in the field of law enforcement, are quite different things from the investigation of a precisely defined event or series of events with a view to criminal prosecution. The first category may involve the investigation of crime generally and may be undertaken by the invocation of the provincial inquiry statutes. The second category entails the investigation of specific crime, the procedure for which has been established by Parliament and may not be circumvented by provincial action under the general inquiry legislation any more than the substantive principles of criminal law may be so circumvented.

60 The only room left for debate is where the line between the two shall be drawn. The difficulty in ascertaining and describing this line is matched by the importance of doing so. The judgment of this court in *Faber* , supra, from a technical viewpoint went off on the ground that the application for writ of prohibition restraining the coroner was made to the wrong court. It must at the same time be acknowledged that the substantial thrust of the majority decision was that the nature of the coroner's investigation had shifted "from investigation of crimes to investigation of everything that is not natural or purely accidental"; and later, in the judgment of de Grandpré J. speaking for the majority (there were four dissents) (p. 30):

> ... the coroner is not now a part of the structure of criminal justice. The link was completely severed in 1892, and subsequent legislative changes have only made this fact more apparent. The traditional role of the coroner, as it existed in England, disappeared, and was replaced by a duly Canadianized function, one which was not primarily of a criminal nature, but came to have a social context.

61 There have been several earlier judicial dissertations in other courts on the legal characterization of the coroner's inquest, and, generally, it may be said that the main stem of the classification or characterization was the absence of a lis and that there was no accused and no charge. Indeed, this court in *Batary v. A.G. Sask.*, [1965] S.C.R. 465, 46 C.R. 34, 51 W.W.R. 449, [1966] 3 C.C.C. 152, 52 D.L.R. (2d) 125 , found that the characterization in law of a coroner's inquest may well depend upon the timing of the laying of a charge or the preferring of an indictment. In the *Batary* case, supra, this court found that a writ of prohibition should indeed issue against the coroner on the application of one of several persons arrested in connection with the death of a person which was being investigated by the coroner and in the course of which investigation the accused-applicant had been subpoenaed to appear before the coroner for examination as a witness in the proceedings. The coroner ruled that the applicant under subpoena and criminal charge was a compellable witness but this court found otherwise. In the *Faber* case, supra, the *Batary* judgment was distinguished by the majority judgment in this court on the footing that the applicant for prohibition, Faber, had not at the time he was required to testify before the coroner been charged with an offence in connection with the death under investigation before the coroner. The circumstance, sometimes almost accidental or at least undirected, of the existence or non-existence of a charge by indictment, information or otherwise, is not, in my view, of controlling significance when determining the constitutional status of a process such as we are now considering.

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62 In *Di Iorio* , supra, the subject of the proceedings was, as pointed out by my brother Pigeon, "an enquiry into organized crime". The mandate of the commission of inquiry was expressed this way:

> That in the fight against organized crime, the Quebec Police Commission shall make an enquiry into the activities of any organizations or systems including their ramifications.

63 Two things are abundantly clear from the terms of the mandate as they are in part set forth in the [S.C.R.] report at p. 181:

64 (a) The Quebec Police Commission was directed to inquire into the activities of unspecified organizations or systems where such operate "in illegal gaming and betting", etc.; and

65 (b) That the commission, upon completing its investigation, shall submit a "'written report setting forth the findings' which it will have made".

66 This court found that such executive direction by a province to a provincially constituted inquiry was constitutionally valid.

67 The nature of the directed inquiry now before this court is generically similar to the *Di Iorio* inquiry in that:

68 (a) The commission is directed to investigate certain specified activities of the police of the city of Montreal, La Sûreté de Québec and the R.C.M.P. of Canada; and

69 (b) "de faire des recommandations sur les mesures à prendre pour éviter que les actes illégaux ou repréhensibles que découvre la Commission ne se reproduisent à l'avenir".

70 It is equally clear in both instances that the mandate could not be performed by the inquiry tribunal without an investigation into specific instances of alleged criminal activities or at least events and circumstances in the course of which it is alleged offences had been committed.

71 In my view, the "administration of justice" authorizes and indeed requires a province to establish, maintain and operate such facilities as may from time to time be necessary and advisable for the proper and effective enforcement of the criminal law. That is not to say that only these activities are embraced in the expression "administration of justice". On the other hand, it is not only the province and its agencies which may be concerned with the enforcement of the criminal law. It is equally clear that s. 92(14) does not authorize the province to legislate with respect to criminal procedure directly or indirectly. It is the Criminal Code, R.S.C. 1970, c. C-34, which sets forth the procedure prescribed by the sovereign authority, the Parliament of Canada, and which is to be followed in the investigation of crime and in the prosecution of ensuing charges. The province, in the discharge of its role under s. 92(14) of the B.N.A. Act, may be required or may find it convenient to examine by the usual executive agencies or by a commission of inquiry the operation of its policing facilities and personnel and the prevalence of crime and its nature in the province. Such was the case before the court in *Di Iorio* , supra. At the other end of the scale, the enforcement agencies of the province may of course investigate allegations or suspicions of specific crime with a view to the enforcement of the criminal law by prosecution. This investigation must be in accordance with federally prescribed criminal procedure and not otherwise as, for example, by coercive inquiry under general inquiry legislation of the province.

72 In the middle of the scale is the situation facing the court in this proceeding. The province has set out to investigate the operations of provincial and municipal police apparatus in relation to certain specific events which have

obvious criminal connotations. Each such enterprise when undertaken by a province must be examined in its own particular circumstances. Where the object is in substance a circumvention of the prescribed criminal procedure by the use of the inquiry technique with all the aforementioned serious consequences to the individuals affected, the provincial action will be invalid as being in violation of either the criminal procedure validly enacted by authority of s. 91(27), or the substantive criminal law, or both. Where, as I believe the case to be here, the substance of the provincial action is predominantly and essentially an inquiry into some aspects of the criminal law and the operations of provincial and municipal police forces in the province and not a mere prelude to prosecution by the province of specific criminal activities, the provincial action is authorized under s. 92(14).

73 One of the main bastions of the criminal law is the right of the accused to remain silent. In the coldest practical terms, that right, so long as it remains unaltered by Parliament, may not be reduced, truncated or thinned out by provincial action.

74 On the other hand, to strip a province of the right to investigate the operations of provincial and municipal police in the detection of crime and the enforcement of the criminal law would be to put a serious impediment in the path of those authorities charged with "the administration of justice" within the province and I would not readily find such an interpretation to be appropriate in the application of these competing subsections of ss. 91 and 92. This right or authority on the part of the province in relation to s. 92(14) does not by a back door, as it were, lead to a right to investigate a validly established federal organization, including a federal police organization. That is not to say that where members of such a federally organized force offend the criminal law, the ordinary agencies of criminal investigation and law enforcement within the province would not operate as in the case of any other individuals. There may be circumstances in those provinces which have contractual or other arrangements with the federal government with reference to the maintenance of police forces which will call into question different principles but with which we are not here concerned.

75 It is my view, therefore, that a province may investigate an identified crime in the manner and through the procedures prescribed by Parliament, remaining free in the directing of its forces engaged in the administration of justice within the province to investigate crimes and criminal activities generally and the operations of provincially organized agencies engaged in law enforcement; but neither plenary authority may investigate the undertaking of an agency validly established by the other plenary authority. The dividing line will at all times be difficult to establish. This is an unhappy characteristic of constitutional law and its application. Difficulty in ascertaining the precise boundary in specific circumstances is no reason to withdraw from the responsibility of enunciating a constitutional doctrine which recognizes the validity of the exclusive authorities in the subsections of ss. 91 and 92 respectively.

76 I add these few words in these proceedings because of the tendency which may develop to construe the aforementioned judgments of this court as necessarily indicating a hardening into what might be construed as an arbitrary principle available in a slide rule sense for the determination of appropriate provincial or federal actions in related but not necessarily parallel circumstances.

***Pratte J*:**

77 I have read the reasons proposed to be delivered by my brother Pigeon and in which, in answer to the first constitutional question, he expresses the view that the mandate was valid except as concerns the R.C.M.P. and to the extent indicated by him.

78 Had it not been for the majority decision of this court in the case of *Faber v. R.*, [1976] 2 S.C.R. 9, 32 C.R.N.S. 3, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423, 8 N.R. 29 , I would have answered this first question differently. I would have said that the commission's mandate was in excess of provincial powers to the extent that it provides for a coercive inquiry which is essentially aimed at investigating specific crimes and searching for their authors. However, in the light of the decision in the *Faber* case, I feel obligated to answer this constitutional question in the manner pro-

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posed by Pigeon J.

79 As to the other points raised in the appeal, I agree with Pigeon J.

Appeal allowed in part; only partial suspension of proceedings ordered.

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