

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Assessments issued by the
Ontario Energy Board pursuant to section 26.1 of the Ontario
Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice
and Procedure of the Ontario Energy Board.

**JOINT BOOK OF AUTHORITIES
OF THE CONSUMERS COUNCIL OF CANADA AND
AUBREY LEBLANC,
THE CANADIAN MANUFACTURERS & EXPORTERS,
AND THE
VULNERABLE ENERGY CONSUMERS COALITION**

Date: June 17, 2010

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Jurisprudence

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19. *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134

Secondary Sources

20. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supp., looseleaf (Toronto: Thomson Reuters Canada Ltd., 2007)
21. Andrew K. Lokan, *Constitutional Litigation in Canada*, looseleaf (Toronto: Thomson Carswell, 2006)

TAB 1

Indexed as:

Canada (Attorney General) v. Law Society of British Columbia

The Attorney General of Canada, the Restrictive Trade Practices Commission, L.A. Couture, in his capacity as Acting Chairman of the Restrictive Trade Practices Commission, and Robert J. Bertrand in his capacity as Director of Investigation and Research, Combines Investigation Act, appellants;

and

The Law Society of British Columbia and Victor McCallum, respondents;

and

The Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of New Brunswick, the Attorney General of British Columbia, the Attorney General of Saskatchewan, the Attorney General of Alberta, the Law Society of Upper Canada, Federation of Law Societies of Canada/Fédération des professions juridiques du Canada, Prepaid Legal Services Program of Canada, interveners.

And between

Donald Jabour, appellant;

and

The Law Society of British Columbia and Harry Rankin representing the Benchers of the Law Society of British Columbia, respondents;

and

The Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of New Brunswick, the Attorney General of British Columbia, the Attorney General of Saskatchewan, the Attorney General of Alberta, Prepaid Legal Services Program of Canada, interveners.

[1982] 2 S.C.R. 307

File Nos.: 16298 and 16299.

Supreme Court of Canada

1981: May 25, 26 and 27 / 1982: August 9.

**Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz,
Estey, McIntyre, Chouinard and Lamer JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Courts -- Jurisdiction -- Provincial superior courts -- Power to declare federal statute ultra vires -- Nature of exclusive powers of Federal Court (Trial Division) to grant injunctive and declaratory relief -- Constitutional Act, 1867, ss. 91(2), 91(27), 92(15), 96, 100, 101 -- Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2, 17, 18.

Combines -- Provincial law society -- Advertising restrictions -- Whether or not Combines Investigation Act applicable to restrictions -- Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 2, 8, 17(1), 32.

Civil rights -- Freedom of speech -- Law society restrictions as to advertising -- Whether restrictions imposed under valid provincial law -- Whether restrictions on member's right to advertise a violation of right to freedom of speech -- Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 2, 8, 17(1), 32 -- Legal Professions Act, R.S.B.C. 1960, c. 214 (now Barristers and Solicitors Act, R.S.B.C. 1979, c. 26), ss. 1, 2(3), 36, 36A, 37, 43, 48(b), 62.

The Law Society of British Columbia initiated steps to discipline Jabour, a member who had advertised his practice contrary to the Society's rules, for "conduct unbecoming a member". In the B.C. Supreme Court, Jabour sought: 1) a declaration that the Law Society's rulings and orders were null and void because they offended the Combines Investigation Act and infringed upon Jabour's freedom of speech; and 2) an interlocutory injunction restraining the Law Society from proceeding pending the Court's determination of the issues raised. The request for the interlocutory injunction was rejected. The Law Society's Discipline Committee found Jabour guilty and recommended suspension of his licence to practice. Jabour, however, successfully sought an order enjoining the Law Society from considering the Committee's report pending disposition of the Court action. The order was sustained on appeal.

The Law Society started an action in the British Columbia Supreme Court after it received a notice of investigation under the Combines Investigation Act. The action sought: 1) an injunction preventing the Director from continuing with the inquiry relating to the Law Society and 2) declarations that the Combines Investigation Act did not apply to the Law Society, and if it did, that that Act was ultra vires Parliament to that extent.

Held: The appeals should be dismissed.

The British Columbia courts have jurisdiction to entertain the claims for declarations relating to the applicability of the Combines Investigation Act to the Society and its members. Although Parliament might establish a court for the better administration of the laws of Canada, it lacks the constitutional authority to strip the provincial superior courts of the power to declare a federal statute beyond Parliament's competence. These courts occupy a position of prime importance in the constitutional pattern of this country and their power to consider the constitutionality of federal statutes is fundamental to the federal system established by the Constitution. Section 101 cannot justify such an exclusion of authority. Moreover, the British Columbia courts have jurisdiction to entertain a plea for injunction on these proceedings instituted under the Combines Investigation Act because it is a remedy ancillary to the court's principal determination and a part of the court's inherent general jurisdiction.

Section 32 of the Combines Investigation Act did not apply to the Law Society in the circumstances of this appeal. The Benchers' disciplining Jabour for advertising was authorized by the Legal Professions Act. That Act caused the discipline committee to be established, authorized disciplinary action for "conduct unbecoming a member of the society", and broadly defined that conduct to include "any matter, conduct or thing ... deemed in the judgment of the Benchers to be contrary to the best interests of the public or of the legal profession." The Benchers, in agreeing that Jabour was guilty of professional misconduct, did not conspire contrary to s. 32(1) of the Combines Investigation Act. Rather, they were discharging their duties under a valid provincial act. Where a federal statute can be properly interpreted so as not to interfere with a provincial statute, that interpretation is to be applied in preference to other constructions that would bring about a conflict between the two statutes. The defence, created by s. 32(6), dealing with conspiracy in relation to service or standards of competence reasonably necessary to protect the public in the practice of a profession, did not expand the charging section or otherwise fundamentally change the plain meaning of the section's main operating provision. It was not necessary to consider whether the Combines Investigation Act was *intra vires* Parliament.

Appellant's right to freedom of speech was not violated by the Benchers' ruling. This freedom, absent constitutional entrenchment placing it beyond the reach of Parliament or the Legislature, can be curtailed by valid statute law. The ethical, moral and financial aspects of a trade or profession can be regulated by a province within its boundaries. The Benchers' ruling here was exercised under valid provincial law and the fact that it reduced a member's right to freedom of economic speech (advertising) did not invalidate this otherwise validly delegated power.

Cases Cited

R. v. Thomas Fuller Construction Co. (1958) Ltd. et al., [1980] 1 S.C.R. 695; Ontario Boys' Wear Ltd. et al. v. The Advisory Committee et al., [1944] S.C.R. 349; Reference re The Farm Products

Marketing Act, [1957] S.C.R. 198; Attorney General (Can.) and Dupond v. Montreal, [1978] 2 S.C.R. 770, applied; Merchant v. Benchers of the Law Society of Saskatchewan, [1973] 2 W.W.R. 109; Pharmaceutical Society of Great Britain v. Dickson, [1967] 2 All E.R. 558 (C.A.), affirmed [1968] 2 All E.R. 686 (H.L.); R. v. Chung Chuck, [1929] 1 D.L.R. 756; R. v. Can. Breweries Ltd., [1960] O.R. 601, considered; Dyson v. Attorney-General, [1911] 1 K.B. 410; Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; R. v. Bradley, [1914] S.C.R. 270; Valin v. Langlois (1879), 3 S.C.R. 1; Attorney General of Canada et al. v. Canard, [1976] 1 S.C.R. 170; Denison Mines Limited v. Attorney General of Canada (1972), 32 D.L.R. (3d) 419; City of Hamilton v. Hamilton Harbour Commissioners, [1972] 3 O.R. 61; British Columbia Power Corporation, Ltd. v. British Columbia Electric Company, et al., [1962] S.C.R. 642; Re Bridgman and City of Toronto, [1951] O.R. 489; R. v. Shamrock Fuel Co., [1924] 3 W.W.R. 454; R. v. Simoneau (1935), 65 C.C.C. 19; Cherry v. The King ex rel. Wood (1937), 69 C.C.C. 219; Goldfarb v. Virginia State Bar (1975), 421 U.S. 773; Bates v. State Bar of Arizona (1977), 433 U.S. 350; Parker v. Brown (1943), 317 U.S. 341; Reference re Alberta Statutes, [1930] S.C.R. 100, referred to.

APPEAL from a judgment of the British Columbia Court of Appeal (Law Society of British Columbia et al. v. Attorney-General of Canada et al.) (1980), 108 D.L.R. (3d) 753, 18 B.C.L.R. 181, [1980] 4 W.W.R. 6, dismissing an appeal from a judgment of Mackoff J. dismissing an application to strike out the writ of summons and to dismiss the action for want of jurisdiction. Appeal dismissed.

APPEAL from a judgment of the British Columbia Court of Appeal (Jabour v. Law Society of British Columbia et al.) (1980), 115 D.L.R. (3d) 549, 24 B.C.L.R. 1, [1981] 2 W.W.R. 159, allowing an appeal from a judgment of Mackoff J. relating to the Law Society's power to regulate advertising and the applicability of the Combines Investigation Act. Appeal dismissed.

Counsel at hearings: Attorney General of Canada et al. v. Law Society of British Columbia and Victor McCallum.

W.I.C. Binnie, Q.C., L.A.W. Hunter, and Morris Rosenberg, for the appellants.

D.M.M. Goldie, Q.C., D.G.S. Rae and W.S. Martin, for the respondents.

Lorraine E. Weinrit and John Cavarzan, Q.C., for the intervener the Attorney General of Ontario.

Henri Brun, for the intervener the Attorney General of Quebec.

Bruce Judah, for the intervener the Attorney General of New Brunswick.

E.R.A. Edwards, for the intervener the Attorney General of British Columbia.

John D. Whyte, for the intervener the Attorney General of Saskatchewan.

William Henkel, Q.C., for the intervener the Attorney General of Alberta.

Brendan O'Brien, Q.C., for the intervener the Law Society of Upper Canada.

Marcel Cinq-Mars, Q.C., and E. Neil McKelvey, Q.C., for the Federation of Law Societies of Canada.

Ian G. Scott, Q.C., for the intervener Prepaid Legal Services Program of Canada.

Counsel at hearings: Donald Jabour v. The Law Society of British Columbia et al.
Bryan Williams, Emilio S. Binavince, and Michael Mangan, for the appellants.
W.I.C. Binnie, Q.C., and L.A.W. Hunter, for the respondents.
J.A. Macaulay and A.D. Treleaven, for the interveners the Law Society of British Columbia et al.
Morris Rosenberg, for the intervener the Attorney General of Canada.
Lorraine E. Weinrit, for the intervener the Attorney General of Ontario.
Henri Brun, for the intervener the Attorney General of Quebec.
Bruce Judah, for the intervener the Attorney General of New Brunswick.
E.R.A. Edwards, for the intervener the Attorney General of British Columbia.
John D. Whyte, for the intervener the Attorney General of Saskatchewan.
William Henkel, Q.C., for the intervener the Attorney General of Alberta.

Solicitor for the appellants, the Attorney General of Canada, the Restrictive Trade Practices Commission, L.A. Couture, in his capacity as Acting Chairman of the Restrictive Trade Practices Commission, and Robert J. Bertrand, in his capacity as Director of Investigation and Research, Combines Investigation Act: Roger Tassé, Ottawa.

Solicitors for the respondents the Law Society of British Columbia and Victor McCallum: Russell & DuMoulin, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General of British Columbia, Victoria.

Solicitors for the appellant Donald Jabour: Swinton & Co., Vancouver.

Solicitors for the respondents the Law Society of British Columbia and Harry Rankin representing the Benchers of the Law Society of British Columbia: Macaulay, McColl, MacKenzie, Vancouver.

The judgment of the Court was delivered by

ESTHEY J.:- These two appeals are concerned with the answer to a series of questions settled by orders of this Court, some raising constitutional issues. These questions are as follows:

- A. The action instituted by the Law Society of British Columbia:
1. Does the Combines Investigation Act, R.S.C. 1970, c. C-23 as amended, apply to the Law Society of British Columbia, its governing body or its members?
 2. If the Combines Investigation Act does apply, is it in that respect intra vires the Parliament of Canada?

These questions were not in terms put before the learned trial judge but were answered in substance

as below indicated.

3. Does the Federal Court, Trial Division, have exclusive jurisdiction to grant declaratory or injunctive relief against the Attorney General of Canada, The Restrictive Trade Practices Commission, the Chairman of the said commission, and the Director of Investigation and Research, in connection with:

i) the interpretation or

- ii) constitutional applicability of the Combines Investigation Act to the Law Society of British Columbia, its governing body or its members?

This question was the object of interlocutory procedures and was answered in the negative in both courts below.

B. The proceedings instituted by Donald Jabour:

(No. 1--same as in Law Society action)

1. Does the Combines Investigation Act, R.S.C. 1970, c. C-23 as amended, apply to the Law Society of British Columbia, its governing body or its members?

(No. 2--essentially same as in Law Society action)

2. If the Combines Investigation Act does apply, is it in that respect valid Federal legislation under the Criminal law and/or the Trade and Commerce Powers contained in Section 91(27) and 91(2) respectively of the British North America Act, (U.K.) 30 and 31 Victoria c. 3 and amendments thereto?
3. Does the ruling of the Benchers of the Law Society of British Columbia prohibiting the Appellant from informing the public about the type and cost of legal services provided, violate the Appellant's right to freedom of speech in Canada?

Question one, which is common to both actions, the learned trial judge answered as follows:

There being no specific implicit authorization in the Legal Professions Act for

the defendants to impose what this Court has found to be a blanket restraint, tantamount to a complete prohibition of advertising by members of the Law Society to the public at large, the Combines Investigation Act does apply to the defendants.

The Court of Appeal of British Columbia answered the question in the negative, finding that the Combines Investigation Act, *supra*, does not apply to the conduct of the Society relating to the advertising by the appellant Jabour.

The second question, which in substance is also common to the two actions, is answered:

- (a) by the trial judge in the negative, that is to say the Combines Investigation Act is not ultra vires as it purports to apply to the Law Society; and
- (b) by the Court of Appeal, having found that the Combines Investigation Act does not apply to the Law Society, concluded that it was unnecessary to answer this question.

On the third question in the Law Society action both courts found jurisdiction in the British Columbia Supreme Court to entertain the action for a declaration and that ss. 17 and 18 of the Federal Court Act did not oust such jurisdiction. The constitutionality of these sections was not found to be an issue for determination in either court.

The third question in the Jabour action relates to the alleged infringement by the Law Society of the appellant Jabour's right of freedom of speech. The trial judge, having found that the Law Society action taken with respect to the advertising activities by Jabour was unauthorized by the provincial statute, considered it was unnecessary to answer this question. The Court of Appeal decided that the Benchers had the right in law "to ban" the activity in question by Jabour and thus the issue of freedom of speech did not arise.

The Law Society is an institution established under the Legal Professions Act, R.S.B.C. 1960, c. 214 (now the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26). (For convenience I will follow the practice of the Court of Appeal and continue to refer to the section numbers of the old Act.) Its membership comprises all those persons called to the Bar in British Columbia who have remained in good standing under the Act and applicable regulations, together with retired members. The Society is governed by the Benchers, being twenty-three members elected by the membership together with the Attorney General of the province as an ex officio member, and persons who have been elected and re-elected for a period of time prescribed by the statute who remain Benchers so long as they continue to be members of the Society. By subs. 2(3) "Every member of the Society admitted as a solicitor of the Supreme Court is an officer of all the Courts of the Province". By s. 36 of the Act the Benchers are directed to "govern and administer the affairs of the Society" and, in particular, to provide for the printing of legal decisions in the courts; to take "such action ... as they may consider necessary for the promotion, protection, interest, or welfare of the Society"; and to

"establish and maintain a system of legal education" By s. 36A the Benchers are directed by the statute to continue in force the insurance fund required for the payment of group insurance contract premiums and to make rules respecting the levy upon members of the Society of annual assessments for the maintenance of such insurance fund and the payment of premiums in respect of group insurance contracts relating thereto, all to the end no doubt of protecting the public from loss and/or damage due to errors and omissions on the part of members of the profession acting in the course of the practice of law.

The Legislature by s. 37 empowered the Benchers to make rules concerning the maintenance of the Society's standards and honour and for the protection and well-being of those engaged in the practice of law in the province; for enrolling articulated students and calling persons to the Bar of the province and admitting persons as a solicitor of the Supreme Court of British Columbia; for providing for precautions to be taken by members for the care of clients' funds or other trust funds or property; and for the implementation of the insurance fund program, and the general discharge by the Society of its duties under the statute. By s. 43 et seq. the Benchers are directed to establish a discipline committee for the investigation into the conduct or competence of members and for determining:

... whether a member or former member has been guilty of

(i) misappropriation or wrongful conversion by him of money or other property entrusted to or received by him in his capacity as a member of the Society; or

(ii) other professional misconduct; or

(iii) other conduct unbecoming a member of the Society; or

(iv) a breach of any provision of this Act or the Rules made hereunder.

[s. 48(b)]

By s. 1 "conduct unbecoming a member of the Society" includes:

any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession.

From action taken by the Benchers and their Discipline Committee, an appeal lies to the Court of

Appeal of the province. Reference should be made to s. 71 of the Act which requires the Benchers to continue the "Special Fund" established for the reimbursement of:

pecuniary losses sustained by any person by reason of the misappropriation or wrongful conversion by a member of the Society ... of money or other property entrusted to or received by him in his capacity as such ...

In related sections of the Act provision is made for the protection of the public by the seizure of moneys and properties in the possession of a member of the Society when disbarred, suspended, or where the member appears to have absconded.

Related to the activities of the Benchers under the Act is the establishment of the "Law Foundation" by s. 71E et seq. for the purpose of establishing and maintaining:

... a fund to be used for the purpose of legal education, legal research, legal aid, law reform, and the establishment, operation, and maintenance of law libraries.

[s. 71G(1)]

The Board of Governors of the Foundation comprises eighteen members of which twelve are members of the Law Society appointed by the Benchers and the remainder are appointed either by the Attorney General or the Canadian Bar Association. Into this Foundation is paid by reason of other provisions in the statute, interest accumulations on trust accounts maintained by lawyers for the holding of clients' moneys. The ordinary solicitor-client relationship and responsibilities are set aside in this context by the statute and the moneys are made, by operation of law, the property of the Foundation to be applied to the discharge of the above objects.

I will return to other provisions of the statute relating to the taxation of solicitors bills later in these reasons.

In the discharge of their functions the statute accords to the Benchers and its committees powers under the Public Inquiries Act, R.S.B.C. 1960, c. 315. The statute expressly protects members of the Benchers from action for anything done in their capacity as Benchers so long as it is done in good faith.

Law societies in other provinces^{below} are similarly established by statute and have the same general self-governing authority and characteristics as the Law Society here. Sometimes the rule-making function is subject to confirmation by the Lieutenant Governor in Council (vide The Law Society Act, R.S.O. 1970, c. 238, s. 55); sometimes the Attorney General as a member of the Benchers is directed to "serve as guardian of the public interest in all matters within the scope of this Act or having to do with the legal profession in any way ..." (ibid., s. 13(1)). There are other variations and differences which have no relevance to these appeals.

Note: The Law Society Act, 1977, (Nfld.), c. 77; The Law Society and Legal Profession Act, R.S.P.E.I. 1974, c. L-9; Barristers and Solicitors Act, R.S.N.S., 1967, c. 18; Barristers' Society Act, 1973 (N.B.), c. 80; Professional Code, R.S.Q. 1977, c. C-26; An Act Respecting the Barreau du Québec, R.S.Q. 1977, c. B-1; Notarial Act, R.S.Q. 1977, c. N-2; The Law Society Act, S.M. c. L100; The Legal Profession Act, R.S.S., 1978, c. L-10; The Legal Profession Act, R.S.A. 1970, c. 203.

The appellant Jabour, a member of the Law Society of British Columbia had some correspondence with the Benchers in connection with his practice of law. The advertising consisted of four advertisements in local newspapers in and around Vancouver and the installation of an illuminated sign measuring three feet in height by sixteen feet in length on the exterior of the office building in which his office is located. The newspaper article took the following form:

DONALD E. JABOUR
Barrister & Solicitor wishes to
announce the opening of a new
concept of law office

LEGAL SERVICES AT PRICES
MIDDLE INCOME FAMILIES
can afford

Buying or selling a home. Writing a will.
Motor vehicle accidents or offences.
Landlords tenant problems. Family matters.
Incorporations. Estates. Court appearances.

These are the kinds of situations where middle income families need legal assistance. Now it is available at moderate cost, with pre-set fees for many services.

Some sample fees (excluding out-of-pocket expenses):

Simple will \$ 35 Uncontested Divorce from \$195 Advice on Interim
Agreements \$25 Purchase of Home (any value) \$175 Incorporations
from \$165 Advice on Consumer Contracts \$15 Review your present will Free

INITIAL CONSULTATION FREE

Opening February 1st, 1978

The North Shore	142A W. 15th St.,
NEIGHBOURHOOD	North Vancouver.
LEGAL CLINIC	936-4225

HOURS: 9 a.m. to 5 p.m. As a convenience to clients we will also be open Wed.
Eve. 7 to 9 p.m. Sat. from 10.30 a.m. to 1 p.m.

Call or write for free brochure.

The sign on the building displayed the words "The North Shore Neighbourhood Legal Clinic,
Donald E. Jabour, Barrister and Solicitor".

History of Proceedings

These proceedings find their source in the initial steps taken by the Benchers to discipline the appellant Jabour for "conduct unbecoming a member" contrary to s. 48(b)(iii) of the Act by reason of the advertising activities mentioned. The appellant then issued a writ in the Supreme Court of British Columbia seeking a declaration that the rulings and orders of the Law Society were null and void by reason of the provisions of the Combines Investigation Act (hereafter for brevity referred to as the CIA) and in violation of the appellant's right to freedom of speech; and an interlocutory injunction to restrain the Law Society from proceeding pending the determination in court of the issues raised by the appellant. This request for an interlocutory order was rejected by Anderson J. of the Trial Division.

The Law Society continued the discipline proceedings before its Discipline Committee. The Committee found the appellant guilty and recommended suspension of licence to practice for a

period of six months. The appellant successfully sought an order in the Supreme Court enjoining the Law Society and the Benchers from proceeding with consideration of the Committee's report pending the disposition of the court action. The interlocutory order was sustained on appeal.

Following a sporadic exchange of communications over a two-year period and after the Discipline Committee's report had been issued, the appellant, the Director of the Investigation and Research, commenced an inquiry under the CIA into "the Production, Purchase, Sale and Supply of Legal Services and Related Products in the Province of British Columbia". In the notice to the Law Society the Director stated, "The conduct of the Society will be enquired into" Earlier letters from the Director of the Law Society had implied that regulation of advertising by the Benchers may have amounted to criminal offences under Part V of the CIA. Specifically the letters raised the issue of Law Society compliance with the amended s. 32.

Shortly after the receipt of the Director's Notice of Investigation the Law Society started an action in the Supreme Court of British Columbia in which the Society sought declarations that the CIA was not applicable to it or, if it purported to be applicable, the CIA was to that extent ultra vires the Parliament of Canada; together with an injunction preventing the Director from continuing with the enquiry. The two actions in the Supreme Court were heard consecutively and the evidence in the first was by agreement applicable in the second. Both courts below disposed of both actions in single judgments.

It should be noted that in addition to the two actions in the Supreme Court of British Columbia, the enquiry under the CIA, and the discipline proceedings under the Legal Professions Act, it is said in the judgment of the Court of Appeal that there is a right of appeal by the appellant Jabour under s. 62 of the Act. This is an appeal from the acceptance by the Benchers of the recommendations of the Discipline Committee, should that come to pass. Since the injunction issued by Anderson J. against implementation of the Discipline Committee report pending the outcome of these proceedings, no further action has been taken in implementation of the recommended suspension and hence no appeal is outstanding.

Finally the Attorney General of Canada and the Attorney General of British Columbia joined the Jabour and Law Society actions respectively as interveners when notices were given under the Constitutional Questions Determination Act, R.S.B.C. 1960, c. 72. The provinces of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta as well as the Prepaid Legal Services Program of Canada, The Law Society of Upper Canada and the Federation of Law Societies of Canada/Fédération des professions juridiques du Canada also appeared as interveners before this Court.

Jurisdiction of the Supreme Court of British Columbia

I will turn at the outset to the threshold question of the jurisdiction of the British Columbia Supreme Court to entertain the action by the Law Society. This action was commenced after the Jabour action (so referred to for easy reference) in response to notification by the Director of

Investigation and Research, Combines Investigation Act, of his intention to hold an enquiry under s. 8 of that Act into the rulings, policies and activities of the Law Society in relation to those regulations or policies concerning advertising by members of the Law Society.

The respondents, in their writ of summons, seek three declarations:

- (a) that the CIA, in whole or in part, does not apply to the Law Society or to its members;
- (b) alternatively, that if the CIA does apply to the Law Society or its members, then to such extent the CIA or part thereof is ultra vires the Parliament of Canada;
- (c) that the respondent McCallum is under no obligation to comply with the direction given by the appellants to attend and to be examined upon oath in the investigation under the CIA.

The respondents further seek in the writ of summons herein injunctions against the appellants restraining the conduct of the aforementioned enquiry under the CIA in so far as it relates to the respondents. This submission relates principally to the provisions of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2, 17 and 18, the applicable parts of which are as follows:

2. ...

[m] "relief" includes every species of relief whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise;

17. (1) The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all such cases.

18. The Trial Division has exclusive original jurisdiction

- (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

These provisions of the Federal Court Act, assuming for the moment they are constitutionally valid, are applicable only if the remedies sought by the respondents fall within the definition of "relief" and if they are in essence claims "against the Crown". The fundamental remedies sought by the respondents are the declarations relating to the federal statute, the CIA; the injunctions claimed are ancillary and predicated only on the success of the first remedy.

The appellants in the Law Society action challenged the jurisdiction of the Supreme Court of British Columbia to grant the declaratory and injunctive relief sought herein against the Attorney General for Canada, the Restrictive Trade Practices Commission and its Chairman and Director on the ground that the Trial Division of the Federal Court of Canada has the exclusive jurisdiction so to do.

The declaratory action has long been known to the courts here and in the United Kingdom. In its modern form it is epitomized in the case of *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), where the courts found the plaintiff entitled to proceed against the Crown for a declaration without proceeding by way of petition of right. *Cozens-Hardy M.R.*, at p. 416, recognized the court's jurisdiction to receive such a case "... although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs". This form of action takes on much greater significance in a federal system where it has been found to be efficient as a means of challenging the constitutionality of legislation. *Vide Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, per Laskin J. (as he then was) at p. 162; and *Wade, Administrative Law*, 4th ed., p. 500.

The definition of "relief" in s. 2 includes "a declaration" specifically. It was said in the courts below that the reference to "declaration" in s. 2(m) is to a remedy, collateral or ancillary to other remedies, but is not to be read as including a declaration as an independent remedy. The trial judge put it this way:

The addition of "declaration" in the definition of "relief" in the Federal Court Act, which was not present in the definition of the Petition of Right Act, refers, in my opinion, to declarations associated with and incidental to the actions formally requiring a fiat and proceeding by petition of right in the Exchequer Court. In other words, it only adds a form of relief associated with and incidental to the actions formally requiring a fiat and proceedings by a petition of right in the Exchequer Court and it does not add an additional cause of action. The inclusion of "declaration" in the definition of "relief" does not extend the jurisdiction of the Federal Court beyond that possessed by the Exchequer Court.

Both courts below were of the view that the declaration in question did not come within the expression "claims against the Crown" as the term is employed in s. 17 of the Federal Court Act. The trial judge stated:

Such proceedings to determine whether it is within the legislative competence of Parliament to enact a certain Federal Act involves not the Crown but rather

Parliament. What is sought here is merely a determination of whether Parliament has exceeded the limits of its authority and this can in no sense be characterized as a case where "relief is claimed against the Crown".

This view was upheld in the Court of Appeal where Hinkson J.A. (Nemetz C.J.B.C. and Macdonald J.A. concurring) drew a distinction between relief for which a petition of right had been necessary and the 'Dyson' type declaration, concluding that the provisions of the Federal Court Act referred only to the former. Hinkson J.A. stated:

An examination of the definition of relief as contained in the Federal Court Act and of the provisions of ss. 17 and 18 of that Statute appears to indicate that the exclusive jurisdiction of the Federal Court involves claims by a subject against the Crown in which the subject is seeking to have something done in order to give effect to his legal rights against the Crown or seeking a decision that he is entitled to property or some interest therein or to possession thereof as against the Crown. It is in that sense that the definition of "relief" is found in the Federal Court Act.

Applying the distinction between the ancient procedure by petition of right for a claim against the interests of the Crown on the one hand, and the 'Dyson' type declaration on the other, Hinkson, J. A. concluded:

... it is clear that the respondents are not seeking a judgment which would declare or decide that the respondents are entitled to have something done in order to give effect to their legal rights as against the Crown or that they are entitled to property or some interest therein or to the possession thereof. Rather, they are seeking declarations of the same nature as those sought in *Dyson v. Attorney-General*.

Such was the case in *R. v. Bradley*, [1941] S.C.R. 270, where a holder of a patent sought compensation from the Crown in the right of Canada for unauthorized use of his invention. The plea for a declaration that the Crown had made use of the plaintiff's patents was accompanied by a claim that the Crown "be condemned to pay to your suppliant the amount of compensation so found to be reasonable ..." The Court contrasted this form of declaratory relief with the simple declaration in *Dyson* concerning the validity of a notice issued under a taxation statute:

This, of course, is a vastly different thing from a judgment such as that in *Dyson v. Attorney-General* (supra), which does not declare or decide that the subject is entitled to have something done in order to give effect to his legal rights as against the Crown, or that he is entitled to property or some interest therein, or to the possession thereof. The proceeding by petition of right is not applicable to such a claim as that in question in *Dyson v. Attorney-General*. Such a proceeding is only competent where a petition of right does not lie. (*Esquimalt*

and Nanaimo Rly. Co. v. Wilson, [[1920] A.C. 358, at 364, 365, 367 and 368]].
[per Duff C.J., at p. 276.]

This same idea was reflected in Thorson, supra, per Laskin J., as he then was, at pp. 151-52 where it was stated:

The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied: Electrical Development Co. of Ontario v. Attorney General of Ontario, [[1919] A.C. 687,] B.C. Power Corp. Ltd. v. B.C. Electric Co. Ltd., [[1962] S.C.R. 642.]

The claims for declaration made here are unaccompanied by any claim for recovery of property or rights from the defendants in the action but are indeed the core of the action, the only goal sought by the plaintiffs (respondents).

The statutory interpretation approach may prove or demonstrate more than this Court in this action is required to determine. This is so because if s. 2(m) is read down as proposed in the courts below to exclude the so-called 'Dyson' declaration, not only does this protect the Supreme Court of British Columbia from the claim of exclusivity made in ss. 17 and 18 but also throws into question the jurisdiction of the Federal Court to entertain a claim for such a declaration even on the basis of a concurrent jurisdiction. This question need not and should not be determined in this action. I therefore, with respect, conclude that the issue raised on this third question cannot be resolved on the basis proposed below, namely by the interpretation of these provisions in the Federal Court Act.

There is, however, another and more fundamental aspect to this issue. The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the Constitution Act and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the Constitution Act). As was said by Pigeon J. in R. v. Thomas Fuller Construction Co. (1958) Ltd. et al., [1980] 1 S.C.R. 695, at p. 713:

It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the superior courts of the provinces in all matters federal and provincial. The federal Parliament is empowered to derogate from this principle by establishing additional courts only for the better administration of the laws of Canada.

Earlier in his judgment Pigeon J. quoted from Chief Justice Ritchie in Valin v. Langlois (1879), 3

S.C.R. 1, at pp. 19-20:

... These courts [provincially organized superior courts] are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. They are the courts which were the established courts of the respective Provinces before Confederation, ... They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures, ...

The jurisdiction of superior courts, and indeed other courts in the provinces, to review the constitutionality of federal statutes was the subject of comment in this Court in *Attorney General of Canada et al. v. Canard*, [1976] 1 S.C.R. 170, where Beetz J. at p. 216 stated:

Once it is conceded that the Minister has jurisdiction to appoint an administrator, the exercise of this jurisdiction can only be reviewed in accordance with the Indian Act and the Federal Court Act and not by the Courts of Manitoba. It is true that the latter's jurisdiction had not been questioned by the appellants, presumably because the action taken by the respondent challenged the constitutional validity and the operation of the Indian Act and the Manitoba Courts had jurisdiction to adjudicate upon this issue as well as upon appellants' counterclaim. The Courts of Manitoba could not on the other hand hear an appeal from the Minister's decision or otherwise review it.

The Federal Court, as the successor to the Exchequer Court of Canada which was first established by Parliament in 1875, was established pursuant to the authority of s. 101 of the Constitution Act which provides "for the Establishment of any additional Courts for the better Administration of the Laws of Canada". The expression "laws of Canada" has been settled as meaning the laws enacted by the Parliament of Canada, at least for the purposes of this appeal: *Thomas Fuller*, supra, per Pigeon J. at p. 707. It is difficult to see how an argument can be advanced that a statute adopted by Parliament for the establishment of a court for the better administration of the laws of Canada can at the same time include a provision that the provincial superior courts may no longer declare a statute enacted by Parliament to be beyond the constitutional authority of Parliament. Sections 17 and 18 of the Federal Court Act must, in the view of the appellants, be so construed. In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the Constitution Act. At the same time it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws, to paraphrase the *Valin* case, supra, while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid

statutes. For this second and more fundamental reason I conclude that the British Columbia courts have the requisite jurisdiction to entertain the claims for declarations herein made. Moreover, it would amount to an attempt by Parliament to grant exclusive jurisdiction to the Federal Court to administer the "laws of Canada" while the validity of those laws remained unknown. Any jurisdiction in Parliament for the grant of exclusive jurisdiction to the Federal Court must be founded on exclusive federal powers under s. 91 of the Constitution Act. In so far as there is an alleged excess of that jurisdiction by Parliament, s. 101 of the Constitution Act cannot be read as the constitutional justification for the exclusion from the superior courts of the jurisdiction to pronounce upon it.

Before moving on to the claim made by the respondents for injunctions a word should be said about two cases advanced in argument before us: *Denison Mines Limited v. Attorney-General of Canada* (1972), 32 D.L.R. (3d) 419, and *City of Hamilton v. Hamilton Harbour Commissioners*, [1972] 3 O.R. 61. In neither case was the Court apparently addressed as to the distinction between a 'Dyson' declaration and the declaratory relief sought for example in *Bradley*, supra. In the Hamilton case Chief Justice Gale observed at p. 62:

Perhaps the only other thing that I should add is that the constitutionality of the Federal Court Act, or any of its sections, was not raised before us on the hearing of this appeal.

The judgment of the learned trial judge in the *Denison Mines* case makes no reference to any argument on the constitutional limits of ss. 17 and 18 of the Federal Court Act.

The respondents also claimed, as already indicated, an injunction restraining the appellants, the Restrictive Trade Practices Commission and the individual appellants from conducting the inquiry under the CIA so far as it related to the conduct of the Law Society. Again the word "injunction" is included in the definition of "relief" in s. 2(m) of the Federal Court Act. In this instance the remedy sought would run against a federal board as defined by s. 2(g) of that Act and therefore is expressly included in s. 18 as being within the exclusive jurisdiction of the Trial Division of the Federal Court of Canada. Both courts below determined in essence that the injunction was sought out of an abundance of caution and as a matter of convenience was combined in the declaratory action now rather than risk possible recourse to later supplementary litigation should circumstances then require it.

Courts having a competence to make an order in the first instance have long been found competent to make such additional orders or to impose terms or conditions in order to make the primary order effective. Similarly courts with jurisdiction to undertake a particular *lis* have had the authority to maintain the status quo in the interim pending disposition of all claims arising even though the preservation order, viewed independently, may be beyond the jurisdiction of the court. An example of the latter type of judicial action is found in *British Columbia Power Corporation, Limited v. British Columbia Electric Company, et al.*, [1962] S.C.R. 642. Kerwin C.J., speaking for

the majority of the Court, said at pp. 644-45:

In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.

In this case it is no doubt academic that the appellants or any officer of the Crown would conduct an inquiry under the CIA in the face of a judicial determination in favour of the respondents. I answer the technical point as to the jurisdiction of the British Columbia courts to entertain a plea for injunction on these proceedings on the technical basis that such a remedy could be granted as ancillary to the court's principal determination and in support thereof as a matter of inherent jurisdiction of a superior court of general jurisdiction to ensure the effectiveness of its dispositions.

First Question

The first question put in the order of the Chief Justice is as follows:

1. Does the Combines Investigation Act, R.S.C. 1970, c. C-23 as amended, apply to the Law Society of British Columbia, its governing body or its members?

In the courts below, this question (which was number 2) read as follows:

ISSUE No. 2

Does the Combines Investigation Act, R.S.C. 1970, Chap. C-23 and amendments thereto, apply to the Defendants in connection with the Defendants' prohibition (position of the Plaintiff) or regulation (position of the defendant] of advertising.

The answer given by the learned trial judge I repeat here for convenience:

There being no specific nor implicit authorization in the Legal Professions Act for the defendants to impose what this Court has found to be a blanket restraint, tantamount to a complete prohibition of advertising by members of the Law Society to the public at large, the Combines Investigation Act does apply to the defendants. I express no opinion as to whether the defendants have in this case contravened the provisions of the Combines Act. That matter was not argued.

The trial judge found that the Benchers had the authority under the Legal Professions Act to regulate advertising but that the Benchers did not have the authority to prohibit it.

The Court of Appeal, speaking through Seaton J.A., concluded:

I can see nothing in the Legal Professions Act that would justify the conclusion that the Benchers are authorized to regulate advertising but not to prohibit advertising.

and later,

They [the Benchers] may prohibit any conduct that is contrary to the best interest of the public or the profession. Conduct need not be specifically prohibited before it may be the subject of disciplinary proceedings. Whether advertising as done by Mr. Jabour constitutes conduct amenable to disciplinary proceedings is a matter for the Benchers.

and finally,

I conclude that the Benchers have the power to prohibit the type of advertising that is found here and to discipline with respect to that type of advertising. Whether they ought to exercise the power is not for us to decide in these appeals.

Seaton J.A. then concluded that before 1975 the CIA "did not encompass regulation of trade by a provincial authority;" and was "not persuaded that Parliament intended by the 1975 amendments to take within the Act governing bodies of professions." He also excluded the professions from the trade and commerce authority of Parliament thus limiting the impact of the CIA on the professions to criminal law. In the end the learned appeal justice found that the performance of an act authorized by the legislature of the province had not by the CIA been made a crime, without deciding whether Parliament could constitutionally do so.

I conclude that the combines legislation simply does not apply to regulatory schemes validly established by provincial legislation. Such schemes are not prohibited by the Act. The conduct of those who make the regulations is

not made an offence. Compliance with such rules is not made a crime.

The provisions of the Legal Professions Act have already been reviewed in a general way. Further reference to this Act should be made as it relates to this first question. By s. 5 of the Act the Attorney General of the province is an ex officio Benchers. The Benchers, by s. 41, may call to the Bar of the province any Canadian citizen they are satisfied is "... fit to become a barrister and solicitor of the Supreme Court." Once admitted to the Bar a member falls within the disciplinary process of the Benchers as outlined in a group of sections from 43 to 51. It is under these provisions that the Discipline Committee sat with respect to the appellant Jabour. The Discipline Committee made its determination under s. 48 but no action has been taken, pending these proceedings, by the Benchers under s. 49 for the implementation of that determination and the recommended suspension, because of the interlocutory injunction already mentioned.

From any action of the Benchers in the discipline of a member, an appeal lies by s. 62 to the Court of Appeal of the province, which may make "such order as to it seems just". The Act contains many special duties and rights such as the institution of proceedings by the Benchers for injunction or prosecution for breach of the statute.

There remains to be pointed out one more aspect of the practice of law by members of the Society, that of rendering accounts to the public for services rendered. The statute provides a summary procedure whereby a person receiving a bill for services from a member of the Bar may apply to an officer of the Court referred to as a Taxing Officer to have the account taxed. This power in the Taxing Officer is subject to review by a judge of the Supreme Court but otherwise the amount taxed becomes recoverable as though it were awarded under a judgment of the Court. The Court official is not bound in assessing the bill by any statutory or other tariffs, nor is he otherwise limited. Indeed where a contract has been made between the solicitor and a client for remuneration to be paid for services to be rendered, the Court may set the agreement aside and the account may be taxed as though no such contract had been made. All such procedures would, of course, cut across any arrangements proffered by advertising or otherwise by the solicitor and accepted expressly or by implication by the client. This procedure is one of long standing under statutory provisions in the provinces and in the United Kingdom. The procedure raises many questions collateral to the issues which will arise in the event of price advertising by members of the profession. Would the unilateral contract which arises upon the acceptance of the services be, for example, one deemed to have been reached between solicitor and client in advance of the rendering of services so as to require an order of the Court to set it aside should the member of the public receiving those services ultimately resort to his right to taxation of the account as and when rendered? If that be so then is there a need, notwithstanding the public advertisement, for the intervention of independent legal advice before the acceptance of the arrangement when it is subject by statute, which may or may not be mentioned in the advertisement in question, to being set aside by a court at the instance of the client. These questions lie in the path of other courts but fortunately not this one on this appeal.

These taxing provisions, the sections dealing with insurance, client compensation funds, the trust account provisions and the disciplinary measures, to name a few, may find their origin in the unusual nature of legal services, the fiduciary position of the solicitor, the status of the member of the Bar as an officer of the courts of the Province, or perhaps these provisions are the simple recognition in the community of the fact that by the nature of things the worth of legal services cannot be assessed by the general public on receiving them. The matter reaches even further. The general public is not in a position to appraise unassisted the need for legal services or the effectiveness of the services provided in the client's cause by the practitioner, and therefore stands in need of protection. It is the establishment of this protection that is the primary purpose of the Legal Professions Act. Different views may be held as to the effectiveness of the mode selected by the Legislature, but none of the parties here challenged the right of the province to enact the legislation. It is up to the Legislature to determine the administrative technique to be employed in the execution of the policy of its statutes. I see nothing in law pathological about the selection by the provincial Legislature here of an administrative agency drawn from the sector of the community to be regulated. Such a system offers some immediate advantages such as familiarity of the regulator with the field, expertise in the subject of the services in question, low cost to the taxpayer as the administrative agency must, by the statute, recover its own expenses without access to the tax revenues of the Province. On the other hand, to set out something of the other side of the coin, there is the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere. In some provinces some lay Benchers are appointed by the provincial governments; in other provinces the Attorney General is seized with the duty as an ex officio Bencher of safeguarding the public interest; a right of appeal from decision affecting members is given to the Court; and the confirmation by the Provincial Executive, the Lieutenant Governor in Council, of all regulations adopted by the Society as a prerequisite to their validity. It is for the Legislature to weigh and determine all these matters and I see no constitutional consequences necessarily flowing from the regulatory mode adopted by the province in legislation validly enacted within its sovereign sphere as is the case here.

There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment. The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal

services throughout the community. Having said all that, it must be remembered that the assignment of administrative control to the field of self-administration by the profession is subject to such important protective restraints as the taxation officer, the appeal to the courts from action by the Benchers, the presence of the Attorney General as an ex officio member of the Benchers and the legislative need of some or all of the authority granted to the Law Society. In any case this decision is for the province to make.

What then has the Law Society, through the Benchers, done with reference to the regulation of advertising by its members? The courts, it should be said at once, are not concerned with the arguments for and against the advertising of legal services or with the method of regulation adopted by the Benchers in connection therewith; but only with the result in law of those actions and then only to the extent of issues raised in the several questions specified in the order of the Chief Justice as set out above.

In advancing towards a determination that the CIA applied to the Law Society, the learned trial judge concluded the Benchers were not authorized by the Act (a) to establish the "policies and Rulings of the Law Society of British Columbia ... with respect to advertising by members;" and (b) to impose "what I have found to be a blanket restraint, tantamount to a complete prohibition of advertising by members ... to the public at large." Reference is then made to a handbook prepared by the Benchers which set forth some rulings on professional conduct "for the guidance of members of the Law Society." The foreword to these rules describes their origin and function:

This Handbook has been published and distributed by the Benchers of The Law Society of British Columbia to guide and assist the Members in meeting and maintaining proper standards of professional conduct. Members of the profession I am sure will appreciate this intention.

Members should also appreciate that breaches of these rules will have to be considered as unprofessional conduct.

On the other hand, the Professional Conduct Committee invites your comments and criticism in connection with these Rules and your suggestions as to further aspects of professional ethics which may require clarification or specific direction. Undoubtedly as a result, further rulings will be made by the Benchers as occasion requires and these, together with amendments as may be necessary, will be published and distributed from time to time.

Ruling 1 deals with "Canons of Legal Ethics" and outlines the various capacities in which a lawyer functions in the community and his duties in these roles to the state, the court, the client, his fellow practitioner and to himself. In the last-mentioned category reference is made to self-advertisement:

5. (3) The publication or circulation of ordinary simple business cards in recognized legal publications is not per se improper but solicitation of business by circulars or advertisements or by personal communications or interviews not warranted by personal relations, is unprofessional. It is equally unprofessional to seek retainers through agents of any kind. Indirect advertisements for business by furnishing or inspiring newspaper comment concerning causes in which the lawyer has been or is connected, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and like self-laudations which defy the traditions and lower the tone of the lawyer's high calling, should not be tolerated. The best advertisement for a lawyer is the establishment of a well-merited reputation for personal capacity and fidelity to trust.

Part C of the Handbook is headed "Advertising" and includes the following:

Ruling 1 General

It is improper for a member to advertise, except as permitted in this Part, in any publication or on radio or television or in any other media of communication, provided however, that a lawyer may place a card in a directory, law report, legal magazine or review or text intended primarily for circulation amongst lawyers.

Ruling 2 states that it is improper to indicate to the press or public that the lawyer is a specialist in some aspect or field of law. Ruling 3 deals with use of letterhead in fund raising campaigns. Ruling 4 is concerned with the manner of listing of a lawyer's name in telephone directories. This ruling includes an interesting anti-discriminatory provision directed towards the prevention of listings by members in a local directory in which the names of all practitioners may not be listed. Ruling 6 relates to "Announcements" and provides in part:

Announcements may be

(a) published once or twice in a local newspaper and

(b) may be sent by mail

when a lawyer or a firm commences practice, changes his or its telephone number, address, or name or when a lawyer retires or joins as an employee or partner, or a firm is dissolved; but such announcements as are sent by mail may be sent only to other lawyers or to clients of the firm; no other announcements shall be published or sent without the consent of the Law Society or as otherwise permitted by this Part.

An announcement that a member is restricting his practice may be sent only to members of the profession.

When making an announcement in a legal publication, it is proper to indicate date and place of birth, membership in any law or bar society or other professional society, and dates of call to the Bar or admission as a solicitor, but it is improper to include:

- (a) Any alleged specialist qualification;
- (b) Any office held in any society other than a society devoted to the legal profession;
- (c) Membership in any fraternity, club or organization;
- (d) Official positions such as Municipal Solicitor, Member of Law Faculty or Public Trustee, unless the lawyer is not engaged in the public practice of law.

Ruling 9 refers to dealings with the press and broadcasters and limits what is popularly referred to as 'trial outside the courtroom'. Ruling 10 is entitled "Signs" and as it deals expressly with what is before the Court in these appeals it should be set out in full:

It is permissible to have a sign at the place of business of a lawyer stating the name or names of the firm and its members with the additional words "Barrister and Solicitor" but the sign may not be of an advertising or commercial nature. Any such signs may be lettered on windows or affixed to buildings but shall not extend over public property nor be larger than dignity and good taste would permit.

There is no need to particularize these rulings further. None of the parties have asserted that they have any statutory base in the sense of promulgated regulations. The issue here arises not because of this informal compilation of accumulated determinations by the Benchers in their committees functioning under s. 48(b) and s.1 of the Act, but because of the action specifically taken here by the Law Society under these provisions of the statute.

Having reviewed the statute in detail, the Court of Appeal concluded that the "Legal Professions Act authorizes the Law Society of British Columbia to do what it has done". The appellants in the Law Society action do not challenge this on the basis of any inadequacy of provision in the statute itself but rather on the grounds that the Benchers, not being a publicly appointed body have not acted and cannot act with the "authorization" of the province in the sense of the so-called regulated industry cases. The appellant in the Jabour action likewise does not

challenge this conclusion of the Court of Appeal. The appellant Jabour takes the view that whatever the effect be of action by the Benchers under the provincial statute or whatever it be specifically authorized to do by that Act, the provincial statute does not have the effect in law of removing the action of the Benchers from the reach of the CIA. This position appears to be differently expressed from that of the other appellants and imports the added notion that the provincial statute must go further than simply authorizing the action of the Benchers in regulating advertising, but must in doing so set up "a regulatory scheme as a substitute for competition," or "a substitute mechanism for competition to achieve the public interest". I will return to this submission in a moment. The appellant Jabour does, however, challenge the notion that statutory authorization to regulate includes the authority to prohibit. The federal appellants phrase this viewpoint by submitting that a prohibition against "informational advertising" is a blanket prohibition of advertising and when adopted by a self-governing body cannot be a scheme adopted, approved and authorized by the province so as to qualify as a regulated industry immune from prosecution under the CIA. In short the "prohibited" actions must be organized and specified by the Province and not by the Benchers. At this point the position of all the appellants converges.

May it be emphasized that courts are not here to scrutinize the policy on advertising as such. However it does not advance the answer to the issue to quantify or classify the regulatory effect of the decision of the Discipline Committee according to supposed classifications of advertising. The propriety in law, and its ultimate position under the CIA, of the action in question will not vary according to whether the advertising be informational or otherwise, if there be in fact or in law such a distinction. Whether it be a "blanket prohibition" or some other type of prohibition will not dictate the outcome here either. The policy of the Benchers as revealed by the Professional Conduct Handbook does allow some specific advertisements which do include 'information' about the member practitioners. That said, the issue remains, firstly, does the statute authorize the Benchers' action in disciplining the appellant Jabour for his advertising activities, and secondly, in any case does the CIA apply to the action by the Benchers first as a matter of statutory interpretation and then as a matter of constitutional law. It is at this point in the journey through these various issues that I respectfully come to the same conclusion as the Court of Appeal, namely that the action taken by the Benchers is authorized by the statute.

It is true, as argued here and below by all appellants, that a statutory "power" to regulate does not always include the "power" to prohibit (vide *Re Bridgman and City of Toronto*, [1951] O.R. 489 (H. Ct.); *R. v. Shamrock Fuel Co.*, [1924] 3 W.W.R. 454 (Sask. K.B.)) but that is not the issue here. The statute directs the Law Society acting through the Benchers to determine in the public interest what "matter, conduct or thing" is "conduct unbecoming a member of the Society," to refer back to s. 1 of the Act. The decision of the Discipline Committee presumably reflects the announced policy of the Law Society on the matter of advertising. None of the parties has said otherwise. The statute does not limit the Benchers in the regulation of advertising nor does it confine them to matters of standards of "competence and integrity" in the words of s. 32(6) of the CIA. The statute authorizes disciplinary action for "conduct unbecoming a member of the Society" and the mandate was broadly styled by the Legislature when it saw fit to define "conduct unbecoming" as including "any matter,

conduct or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession".

That is a far cry from a legislative mandate predicated on a single power "to regulate" where there is no elaboration of the conduct to be regulated. Authorities such as the decision of the Saskatchewan Court of Appeal in *Merchant v. Benchers of the Law Society of Saskatchewan*, [1973] 2 W.W.R. 109, are of no assistance in this proceeding because the statute there contained no definition of "conduct unbecoming" or of "professional misconduct" leaving to the court the duty to establish such a definition. Here the Legislature has expressly directed the Benchers to formulate such a definition. The appellant of course was under no misapprehension in advance of his advertising activities as to the policy of the Benchers in that regard. In the end, therefore, the proceedings find their origin in the simple challenge arising between the member Jabour and the Law Society as to the right of the Benchers to define and prohibit the type of advertising in which Jabour, as a member, engaged. The immediate issue therefore is the statutory authority granted by the province to the Benchers for its actions and I find this authority to be present.

This brings me then to an examination of the federal statute, the CIA, to determine if, on a proper interpretation, its terms and provisions reach the respondent in these proceedings.

Combines Investigations Act

This statute has had a long history commencing as component provisions in the Criminal Code. The present statute, its amendments and related statutes have been the subject of litigation in the courts since the late nineteenth century. By amendments made in 1975 it is said that the scope of the Act has been affected in a way material to these proceedings. The principal offence with reference to restraint on competition is found in s. 32:

32. (1) Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof,
- (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or
- (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for five years or a

fine of one million dollars or to both.

Section 2 defines certain terms including:

"product" includes an article and a service;

"service" means a service of any description whether industrial, trade, professional or otherwise;

"supply" means,

...

- (b) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service;

"trade, industry or profession" includes any class, division or branch of a trade, industry or profession.

Provisions specifically dealing with restraint on advertising are found in s. 32(2) and (3) the latter providing however that defences in subs. (2) are not applicable if the:

... conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

- (a) prices,
- (b) quantity or quality of production,
- (c) markets or customers, or
- (d) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

Subsection (6), which was added in 1975, raises a specific defence where the agreement relates to a profession:

(6) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement

relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

- (a) in the practice of a trade or profession relating to such service; or
- (b) in the collection and dissemination of information relating to such service.

The foregoing sets out the statute as it stood at the commencement of the proceedings in 1978.

In 1975 Parliament enacted c. 76 of the Statutes of Canada, 1974-75-76, as a comprehensive series of amendments to the CIA. Several of the 1975 amendments are said to deal with the extension of the Act to embrace the regulation of competition in the professions theretofore left to the provinces' administrative control. In s. 2, for example, the definition of "product" was extended to include "service". A definition of "service" was inserted, *supra*; a definition of "supply" was added, *supra*; and the word "profession" was added to the definition of "trade or industry", *supra*. In Part V entitled "Offences in Relation to Competition" the word "article" in the operative s. 32, which is set out above, was replaced by the word "product" which of course has been defined in the 1975 amendments to include the word "service". Subparagraph (d) which is set out in full earlier replaces a narrower provision which read:

- (d) to restrain or injure trade or commerce in relation to any article.

Subsections (2) and (3), relating to a defence and a limitation of that defence respectively, were revised by referring to a "profession" in addition to "trade and industry" in the pre-existing statute.

No reference has here been made to s. 32(4) and (5) as they relate to exports and do not concern us nor do they throw any light on the meaning of the balance of s. 32; nor to subs. (7) which is also unrelated to the issues at hand.

The authority of the Director to make the inquiry here launched is found in s. 8, the relevant portion of which reads as follows:

- 8. The Director shall

...

- (b) whenever he has reason to believe that

...

- (iii) an offence under Part V [which includes s. 32, *supra*] or section 46.1 has been or is about to be committed,

...

cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts.

Section 17(1) is a procedural or implementation section affording the Director the right to make application to the Restrictive Trade Practices Commission for an order for the examination of anyone in Canada and the production of the documents of such a person and for such examination the RTPC shall have the powers of a superior court for the enforcement of its subpoenas. Such a section of course presupposes a valid subject of inquiry and is not an independent source of a right to institute an inquiry under the statute.

Here the Director in at least two parts of the record has revealed the purpose of the inquiry concerning the Law Society. The application of the Director to the RTPC for an order establishing the hearing includes in para. 16 thereof:

16. The foregoing information gives me reason to believe that the Law Society of British Columbia and the Benchers of the Society have committed an offence under section 32 of the Act in that they have agreed or arranged to lessen competition unduly in the supply of legal services in the province of British Columbia by maintaining and enforcing an arrangement to restrict advertising. This arrangement has the effects of lessening competition unduly with respect to prices, quantity and quality of production, markets or customers, and channels and methods of distribution and has restricted and is likely to restrict any person from entering into and expanding his business in the profession. I believe that the person named in this application may give material evidence in this inquiry.

In a letter to the Law Society prior to the institution of the inquiry proceeding, the appellant Director stated:

At the same time, I must remind you that the provisions of Part V of the Act are criminal offences and under section 8(b) I am required to conduct an inquiry whenever I have reason to believe that an offence has been or is about to be committed. You can appreciate that I am obligated to carry out my statutory responsibilities.

In the letter to the Law Society from the appellant Director announcing the inquiry, the style, heading or reference at the opening of the letter used the following language:

In the Matter of the Combines Investigation Act

and

In the Matter of an Inquiry Relating to the Production, Purchase, Sale and Supply
of Legal Services and Related Products in the Province of British Columbia

The body of the letter included the following statement:

While the conduct of the Society will be inquired into in these hearings it is not possible to identify at this point the additional persons, if any, whose conduct will also be the subject of inquiry. It is expected that Donald Jabour and Victor Stephens will be among the witnesses examined. Any person who wishes to make application for representation during the examination or the examination of other witnesses may do so at the commencement of the hearings.

There is no doubt, nor was it otherwise contended before us, that the inquiry was launched for the purpose of inquiring into the possible commission of an offence by the respondents and perhaps others under s. 32 of the CIA, and specifically an offence relating to alleged lessening of "competition, unduly, in the supply of legal services in the province of British Columbia".

Taking s. 32 as an entity it is evident that the parliamentary intent in 1975 was to expand the ambit of the section to include at least some aspects of the professions and their activities. The respondents contend the amendments do not extend the reach of the section to their activities as a governing body. The appellants take the opposite view and assert that the effect of these amendments is to regulate the professions in the same way as "trade and industry" (save where specially prescribed defences may relate differently as between the categories of trade, industry and profession).

The Regulated Industries Cases

The relationship between provincial regulatory statutes and the federal law has been discussed repeatedly in the courts. These cases are generally referred to as the 'regulated industries cases'. The appellants rely on these authorities to demonstrate the paramount position of the federal authority, at least where:

- (a) the provincial statute does not expressly authorize the conduct of the public authority before the court, and
- (b) the federal statute expressly renders such conduct criminal.

The respondents on the other hand draw from these cases the conclusion that unless the federal statute clearly conflicts with the provincial regulatory statute, the proper interpretation is that which avoids any conflict. Some of the interveners counter the position of the appellants in (b) above and brief reference will be made to that later in these reasons.

These decisions generally deal with provincial marketing schemes for natural products and the courts have found that neither the provincial statute nor the action of the public agencies

administering them conflict with the federal competition legislation.

The earliest of these cases is *R. v. Chung Chuck*, [1929] 1 D.L.R. 756, a decision of the British Columbia Court of Appeal. The Court found a provincial statute establishing a marketing agency to regulate volume and prices of certain farm products offended neither the federal powers in trade and commerce nor criminal law, and specifically would not constitute an offence under s. 498 of the Criminal Code so as to conflict with that provision (as the forerunner of s. 32 then was). Macdonald J.A. for the court stated at p. 759:

Whether or not s. 498 is intra vires of the Dominion parliament, it cannot be said that to operate under an Act of the provincial legislature validly enacted enabling producers to market the products of the soil by orderly methods and under such restrictions as will tend to insure a fair return, is to commit a criminal offence within the meaning of s. 498 ...

Granted that the Act is intra vires following its provisions and acting under its sanction cannot constitute a criminal offence.

The principal thrust of the judgment was that adherence to the provincial statute could not amount to an intent "unduly" to limit production. The court went so far later in its judgment as to say that to the extent the two statutes were in conflict, s. 498 was ultra vires. In the end the Court of Appeal found that there was no conflict between the two statutes. It should be noted because of the argument by the appellants that the Benchers were essentially private in nature as compared to an agency staffed by provincial public servants, that the Marketing Committee in the *Chung Chuck* case was appointed by the Lieutenant Governor in Council but two of the three members were to be appointed from the growers of the produce being marketed or by shippers of that produce, and the third member was appointed by the Lieutenant Governor in Council from outside these classes. The majority of the Committee fixing volume and prices, therefore, appears to have been drawn from the members of the trade or industry in question, and the actions of this Committee were not subject to confirmation by the provincial government.

Under a Quebec statute a Commission appointed by the province established minimum prices for the sale of milk in the Province of Quebec. The Court in *R. v. Simoneau* (1935), 65 C.C.C. 19, followed the same line of reasoning as in *Chung Chuck* and found no conflict between the provincial and federal statutes, and further that compliance with a valid provincial statute could not result in an action contrary to the public interest. The Court did not consider the action of the Dairy Commission to be an 'agreement' as the term is used in the combines legislation, and concluded that the essential element of agreement amongst competitors was missing. The Saskatchewan Court of Appeal in *Cherry v. The King ex rel. Wood* (1937), 69 C.C.C. 219, had to consider provincial milk marketing legislation and again found no conflict between the local statute and the federal combines legislation. Martin J. A., as he then was, writing for the Court, considered the impact of s. 498 of the

Code at p. 226:

... as it is argued that the powers of the Milk Board particularly of fixing prices fall within the purview of the criminal law, one might well inquire who are the persons who conspire or combine in exercising the powers conferred upon the Board by the Legislature? The elements essential to a prosecution under s. 498 are not present in actions taken by the Board for the purpose of exercising the powers conferred upon it by the statute. Moreover, it surely cannot be successfully argued that a board, in exercising the powers conferred upon it by the Legislature and which are designed to regulate and control the production, processing and distribution of a commodity in the Province "having regard primarily to the interests of the public and to the continuity and quality of supply" renders itself liable to a prosecution under s. 498; if this were so the Province could not exercise the powers conferred upon it with respect to property and civil rights over which it has exclusive power.

The Court was there concerned with the practical problem of the presence or absence of 'intent' on the part of provincial administrators to breach the federal law. The judgment continued at p. 227:

There is no intent in the Milk Control Act to limit unduly the production, processing or distribution of milk or to unreasonably enhance the price thereof; there is no intent to restrict trade in milk to the oppression of individuals or to the injury of the public generally; on the contrary the object of the statute is to improve conditions in the production and sale of an important product with a regard primarily for the interests of the public. I can therefore see no ground for the suggestion that the Act conflicts with the Criminal Code.

It should be noted that in none of these cases so far has there been any requirement in the provincial statute for approval by the province of any regulations adopted by the statutory body for the control of the activities in question. Neither is there any uniformity about the appointment of the agencies or the relationship between members thereof and the community under the agencies' regulation. If the outcome of any of these cases depended upon the distance between the regulated and the regulator or his mode of appointment by the province, none of the courts have been moved to make comment.

This Court in *Ontario Boys' Wear Ltd. v. The Advisory Committee*, [1944] S.C.R. 349 examined at length an industrial labour regulatory scheme which established wages, hours and other conditions of work for "interprovincially competitive" industries in Ontario. The legislation provided for the appointment by the province of a board to collect assessments from participating employers and employees for defraying expenses of the regulatory scheme, and for advisory committees to enforce the schedule of wages and hours as adopted by employers and employees in

conferences in the various industries and in the various provincial regions brought under the regulatory impact of the statute. The combination of the Act, the regulations promulgated thereunder by the Board, and the Schedule adopted by the employers and employees in conference, represented a very comprehensive and detailed program concerning hours of work, wages, overtime and working conditions. Pertinent to this appeal the statute provided that the Schedule could "fix the minimum charge which may be paid, accepted or contracted ..." for the labour content of any service work and "the minimum charge which any employer or employee may contract for or accept for any service ..."

Kerwin J., as he then was, stated at p. 359:

As Kellock, J.A., points out, the legislature would undoubtedly have authority to enact anything which is found in the schedule and I agree with him that such legislation (and therefore the combined effect of the Act, regulations and schedule) cannot be said to be a "combine" within the meaning of the Dominion Act.

Chief Justice Kerwin returned to the Ontario Boys' Wear case in giving judgment in Reference re The Farm Products Marketing Act, [1957] S.C.R. 198, at pp. 205-06:

It was contended by Mr. Pepper that the Combines Investigation Act, R.S.C. 1952, c. 314, and ss. 411 and 412 of the Criminal Code, 1953-54 (Can.), c. 51, and the Agricultural Prices Support Act, R.S.C. 1952, c. 3, are relevant and prevent the Ontario Legislature from enacting clause (1) of subs. (1) of s. 3 of The Farm Products Marketing Act and therefore the administrative agencies provided for by that Act, from operating. The point is determined against that contention as to the Combines Investigation Act by the decision of this Court in Ontario Boys' Wear Limited et al. v. The Advisory Committee et al., [supra]. With respect to that Act and also to the sections of the Criminal Code referred to, it cannot be said that any scheme otherwise within the authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province.

The provincial statute established a Marketing Board and empowered it to approve marketing or regulatory schemes subject to Lieutenant Governor in Council approval, which schemes might include the establishment of local boards or a marketing agency for the actual conduct of marketing operations. The Board could then authorize the marketing agency to pool receipts from the sale of regulated products, to deduct therefrom expenses of the scheme, and to distribute the net proceeds of sale amongst the participating producers. Such a regulatory scheme was to be established when ten per cent of the producers of the product in question in the part or parts of the province in question petitioned for such a scheme. Rand J. dealt with the same point at pp. 219-20:

The Provincial statute contemplates coercive regulation in which both private

and public interests are taken into account. The provisions of the Combines Investigation Act and the Criminal Code envisage voluntary combinations or agreements by individuals against the public interest that violate their prohibitions. The public interest in trade regulation is not within the purview of Parliament as an object against which its enactments are directed.

Locke J. put the point in these words at p. 239:

In my opinion, neither the provisions of the Combines Investigation Act, R.S.C. 1952, c. 314, nor of s. 411 of the Criminal Code, 1953-54 (Can.), c. 51, are objections to the schemes in question to the extent that they are within the powers which may be validly granted by the Legislature under the terms of the British North America Act. It cannot be said, in my opinion, that within the terms of para. (a)(vi) of s. 2 of the Combines Investigation Act the scheme "is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others". Rather is it a scheme the carrying out of which is deemed to be in the public interest. Furthermore, the offence defined by s. 2 which renders a person subject to the penalties prescribed by s. 32 is a crime against the state. I think that to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state.

In *R. v. Can. Breweries Ltd.*, [1960] O.R. 601, McRuer C.J.H.C., in trying a charge under the merger provisions of the CIA, after referring to authorities founding its constitutional base, went on to say at p. 611:

From these 2 cases I conclude that when I apply the Act as an Act designed to protect the public interest in free competition, I am compelled to examine the legislation of the Provinces to see how far they have exercised their respective jurisdictions to remove the sale of beer from the competitive field and to see what areas of competition in the market are still open. Having made this examination I must then decide whether the formation or operation of the merger lessened or is likely to lessen competition to an unlawful degree in the areas where competition is permitted.

In all the Provinces the sale of beer is under direct government control. The extent to which control is exercised varies from Province to Province, but every provincial legislature has by statute assumed some definite control over the market.

The Court found that the provincial legislation authorized the fixing of the price at which all beer could be sold in the province:

There may, however, be areas of competition in the market that are not affected by the exercise of the powers conferred on the provincial body in which restraints on competition may render the operations of the combine illegal. In this case the only areas of competition that can be of any benefit to the consumer that are left open to the accused and its competitors, are in the matter of quality, taste, services and packaging. The evidence shows that in these limited areas, competition between the accused and others in the industry is without restraint. [p. 630.]

From these authorities the parties draw opposing conclusions. The appellants would limit the scope of the provincially-regulated industries cases to the marketing of natural products. I see no basis in any of the judgments relied upon or in constitutional law generally for such an arbitrary and narrow principle. In fact, in at least two of these cases (Ontario Boys' Wear and Can. Breweries, *supra*) the courts were concerned with other industries.

The appellants, the Attorney General for Canada et al., would limit the application of the principle enunciated in these cases to instances where the province in its statute promulgates a complete regulatory scheme. More precisely these appellants rely on the absence in the provincial statute here of any provision expressly dealing with advertising by members of the Law Society. The courts in these cases have said in various ways that compliance with the edicts of a validly enacted provincial measure can hardly amount to something contrary to the public interest. Since all the cases examined above approach the CIA on the basis of a criminal charge, actually or potentially arising under it, the element of public interest was always present. In *Can. Breweries, supra*, (p. 605) the Court proceeded on the basis that the word "unduly" in s. 32 connotes substantially the same meaning as the more general words in the same statute "operated or is likely to operate to the detriment or against the interest of the public". Even the 1975 amendments to s. 32 (*supra*), by the addition of subs. 1.1, did not remove "unduly" from the operative provision, s. 32(1). So long as the CIA, or at least Part V, is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest. It is this element of the federal legislation that, these cases all conclude, can be negated by the authority extended by a valid provincial regulatory statute.

Returning to the case at hand and the activities of the Benchers under the authority of the Legal Professions Act, *supra*, the question which arises is whether their actions could constitute an offence under Part V of the CIA, specifically s. 32(1). The operative words at the beginning of s. 32 are: "Every one who conspires, combines, agrees or arranges with another person". These words are broad enough to include all the Benchers acting as a group or individually or the Law Society as a corporate entity and any one or more of the Benchers or of its statutory officers, or indeed any one with whom the Law Society may have acted jointly. Consequently if any two of these persons, natural or legal, voluntarily entered into an agreement condemned by the CIA, the offence would be constituted, and on suspicion of such a situation an inquiry under s. 48 might well be ordered. What happened here, however, is something different in character both in fact and in law. In the words of

Rand J. in *Farm Products Reference*, supra, at pp. 219-20, the provincial statute is "coercive" as applied to members of the provincially regulated group, whereas the federal statute is directed towards "voluntary combinations or agreements". Here the 'agreement' was apparently the determination by the Discipline Committee that the appellant Jabour by advertising as he did was guilty of professional misconduct. In so 'agreeing', the Benchers are said not only to have been doing that which was permitted by their admittedly valid parent statute but were in fact discharging their assigned duties under that Act. Mention has already been made of the Professional Conduct Handbook. It is not a regulation with any statutory or regulatory base in law. There has been no regulation promulgated by the Benchers on the subject of advertising. The regulation of such conduct in the record in these appeals has been effected by disciplinary decision.

It was not so argued before us but the adoption of policies by the Benchers as discussed in the Handbook might be included in the alleged criminally conspiratorial conduct. That such determinations were made by the Benchers pursuant to and within the provincial statute was not contested. The question is therefore: by the taking of any of these actions and proceedings have the Benchers "conspire[d], combine[d], agree[d] or arrange[d] ... (c) to prevent, or lessen, unduly, competition in the ... supply of a product, ... or ... (d) to otherwise restrain or injure competition unduly"? I do not believe so. The Benchers were directed by the statute ("The Benchers shall appoint ... a discipline Committee", s. 43 supra) to establish a Discipline Committee with power to inquire into the conduct or competence of members. This duty is found in the context of a wide range of powers granted to the Law Society to govern the profession in the interest of the public and the members of the Society. The words adopted by Parliament in s. 32 and restated above are not ordinarily found in language directed to the actions of persons holding office under a provincially authorized regulatory body and discharging their responsibilities to the community pursuant to their constitutive statute. This is particularly so where the group said to be acting "conspiratorially" was in fact proceeding at the time in question as a deliberative body whose existence was mandated by a provincial statute. When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

I do not find the words adopted by Parliament in s. 32(1) taken by itself properly construed and applied to relate to the action taken by the Law Society acting in accordance with their legislative authority, as I have concluded, under a valid provincial statute. However, the appellants, as we have seen, contend that the addition of subs. (6) has enlarged the impact of s. 32 so as to include the respondents and their activities. The Court of Appeal concluded that it did not:

It has been argued that the exemption in s. 32(6) of an agreement that "relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public ..." demonstrates an intention to include governing bodies within the scope of the Act. The trial judge accepted that argument ... I am not able to agree with that reasoning. There are service industries that are not controlled by bodies with a statutory base. And

there are associations of professional persons apart from the statutory governing bodies. It is those other associations, and associations of non-professional persons who render services, that s. 32(6) has in mind. These bodies may deal with competence and integrity and if they do, s. 32(6) fixes the court with the responsibility of deciding reasonableness.

I do not think that the presence in the amendments of s. 32(6) indicates an intention to extend the Act to bodies established by valid provincial legislation to govern the professions.

I am not persuaded that Parliament intended by the 1975 amendments to take within the Act governing bodies of professions. Nor am I persuaded that the language is apt to describe the deliberations of persons holding office under provincial legislation. The language describes voluntary private agreements.

The learned trial judge took the opposite view concerning subs. (6) stating:

Essentially it is argued that on a fair reading of s. 32 there is no reference to the governing bodies of any self-regulating profession and therefore it must refer to private arrangements of individual members of the profession. The interpretation contended for is untenable. Section 32(6) affords a statutory defence to a prosecution where the agreement or arrangement relates only to standards of competence and integrity. Standards of competence and integrity are not set by individual members, they are set only by the governing body and therefore s. 32 must refer to the governing bodies as well as to private individual arrangements by members of the profession. If it were otherwise there would be no reason to include s. 32(6) in the Act.

Nor am I able to agree with the submission that s. 32(6) does not refer to the governing bodies because by that section the standards of competence and integrity are left to the trial judge and the defence afforded by this section does not relate to the standards as determined by the governing body. By that section the Court only determines whether the agreement or arrangement relates to standards of competence and integrity that in the opinion of the governing body are reasonably necessary for the protection of the public and not whether the governing body was right or wrong in that opinion. In short, the Court does not substitute its opinion for that of the governing body.

Counsel points out that in his examination for discovery, the defendant

Bertrand, admitted that it was a generally known circumstance that the legal profession in Canada was provincially regulated. Given the fact that Parliament had this knowledge, it was submitted that, had they wished to include the governing bodies, express words would have been used and Parliament would not have relied upon general words which could reasonably be construed to be limited to individuals. Implicit in Parliament's knowledge that the legal profession was provincially regulated was the knowledge that competence and integrity were matters over which only the governing bodies had jurisdiction. Thus by including s. 32(6) in the Act, Parliament thereby clearly expressed its intention to include the governing bodies.

In my view subs. (6) does not operate to make a fundamental change to the plain meaning of the main operating provision of the section, that is s. 32(1). By its own terms subs. (6) is a limited directive to a court hearing a charge under subs. (1). It is to subs. (1) that one must look to determine the breadth of the parliamentary grasp. Section 32 is criminal legislation, whatever basis other parts of the CIA may have constitutionally. A defence-creating provision is hardly an appropriate place to find an expansion of the charging provision. There are of course in our community endless associations, professional and otherwise, voluntarily established and embracing persons carrying on activities social, commercial, professional and otherwise, which have no statutory mandate in the sense of a governing body of a profession. It may well be that it was the intent of Parliament to include in subs. (6) (or subs. (1)) such non-statutory bodies. The defence thereby afforded would perhaps in such a circumstance have application to a charge brought against such a non-statutory group or body under subs. (1) of s. 32. That case of course we do not now have before us. I find no assistance in the authority relied upon by the appellants, *Pharmaceutical Society of Great Britain v. Dickson*, [1968] 2 All E.R. 686 (H.L.), to support a contrary interpretation of s. 32 including subs. (6). The courts of the United Kingdom do not have a federal separation of sovereignty to consider when examining statutes and are not concerned with the situation arising where otherwise valid operations of one level of government may or may not be included in the proper reach of the legislation of the other level of government. For example, in the Court of Appeal, Lord Denning M.R. stated (s(1967] 2 All E.R. 558, at p. 567):

If the council of a professional body should make a rule which is in restraint of trade, it is as much subject to the law of the land as anyone else.

That statement is of course as true here as it is in the United Kingdom, but that is not the issue before the Court. The professional body here has made a rule with reference to the discipline of a member in a manner and concerning a subject which is clearly within provincial competence. With this fact in mind the Court is then asked to construe s. 32 to determine whether or not the "offences in relation to competition" established by the federal Parliament include provincially authorized activities on the part of the governing body. There the defendant-council was not a statutory governing body. By analogy it was the equivalent of the Canadian Bar Association, and the statutory body, which was not before the Court, was equivalent to the Law Society of British

Columbia. The rules in question were not statutory. The defendant body had no public mandate. It was not a case of construing statutes which moved in opposite directions.

I conclude that on a proper construction of s. 32 taken as an entity, the section does not apply to the Law Society in the circumstances of this appeal.

American jurisprudence was advanced by the appellants in support of the federal jurisdiction over the Benchers' conduct. Two decisions of the United States Supreme Court have considered the relationship between federal anti-trust legislation and state action in the regulation of the practice of law. In *Goldfarb v. Virginia State Bar* (1975), 421 U.S. 773, the Court found the tariff of fees adopted by the voluntary Bar Association to be without the statutory authority of the state and therefore essentially a private, anti-competitive activity. The state statute accorded to the Supreme Court of the state, not the Bar Association, the power to regulate the practice of law. The state Court did not approve the tariff of fees in question; the federal statute therefore applied. The opposite result occurred in *Bates v. State Bar of Arizona* (1977), 433 U.S. 350. The disciplinary code adopted by the Supreme Court of Arizona prohibited advertising. The state Bar, through its Board of Governors, acting under the rule adopted by the Supreme Court, suspended the offending attorney. The Supreme Court of the United States found that such a rule did not violate the federal anti-trust statute since the rule imposing the restraint was an act of government, that is an action brought about by the State of Arizona acting in its sovereign capacity. Consequently, the action was not prohibited by the Sherman Act of the United States. Blackmun J. for the majority of the Court stated at p. 362:

The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behaviour. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policy-maker-- the Arizona Supreme Court--in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

The Supreme Court had been delegated in the State of Arizona statute the supervisory function here consigned in the British Columbia statute to the Law Society. The ultimate appeal in respect to the rules of procedure in Arizona lay to the Supreme Court. Here the appeal on disciplinary matters lies to the Court of Appeal of the province. (The lengthy discussion by the Court of the First Amendment of the United States Constitution dealing with free speech is not relevant to our purposes.)

In both of these cases the Court made reference to *Parker v. Brown* (1943), 317 U.S. 341, where a question arose as to the efficacy of a crop prorating program of the State of California in confrontation with the provisions of the Sherman Act regulating competition federally. At least from the point of view of statutory interpretation the case is useful to us. Chief Justice Stone at p.

351 stated:

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

and later in the judgment at p. 352:

... the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.

Of particular interest in this appeal is the observation of the Chief Justice at p. 351:

... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

The rule in the United States therefore seems to be that where the state legislatures take action directly or authorize a sub-agency to regulate the practice of law, the resultant actions do not offend the federal statute. Conversely where the state does not authorize the action taken by the governing agency purporting to regulate its members, the federal statute does apply. Beyond that the American decisions concern the Bill of Rights of the U.S. Constitution and are not here helpful. There seems to be something of a parallel between the Bates decision, *supra*, and the regulated industries cases, but beyond that the United States discussions are of little direct application here.

Question 2 says this:

2. If the Combines Investigation Act does apply, is it in that respect *intra vires* the Parliament of Canada?

In view of the answer given to question 1 it is not necessary to answer this question. The intervener, the Attorney General of Ontario, took the view that "the Criminal Law power cannot validly proscribe acts as criminal which the Legislature of a province has expressly authorized". In support of this proposition one might make reference to the comment of Locke J. in *Farm Products Reference*, *supra*, at p. 239. We are not called upon to decide this issue, however, if question 1 is to be answered in the negative.

The appellant, the Attorney General of Canada, placed the basis of the CIA in constitutional

law under the trade and commerce power in part, that is s. 91(2) of the Constitution Act, but made no submission as to how this would advance the position of the appellants with reference to a proceeding under s. 32. The interpretation of s. 32 will of course produce the same answer under question 1 whatever its constitutional base may be. In my view the discussion of the trade and commerce power does not advance the appellant's position.

There remains the third question in the *Jabour* action:

Does the ruling of the Benchers of the Law Society of British Columbia prohibiting the appellant from informing the public about the type and cost of legal services provided, violate the appellant's right to freedom of speech in Canada?

Freedom of speech has been valued as a fundamental right in this country, the United Kingdom and elsewhere for centuries. While the right to freedom of expression has on occasion been loosely described and sometimes insecurely planted in the law, reference can be found to it in such early formal documents as the Bill of Rights of 1689. Sometimes the right, as in that instance, was confined to freedom of debate in the Houses of Parliament; sometimes it is confined to freedom of the press; and sometimes the expression 'freedom of speech' or 'freedom of expression' is intended to connote the widest right of independence of expression free from unlawful suppression, interference or punishment. Where the right is not entrenched beyond the reach of Parliament or Legislature, as has been done for example in the First Amendment to the United States Constitution, the right is subject to curtailment by valid statute law.

These various rights of freedom of expression are discussed at length in this Court by Chief Justice Duff in the *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 132-33:

Under the constitution established by The British North America Act, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every

point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

His Lordship was there concerned of course with the need in the operations of the democratic community organized under The British North America Act for the freest possible discussion in order that Parliament would be constantly working under the influence of public opinion and public discussion. The Reference in question related to the operation of newspapers in the Province of Alberta and in the first instance therefore the Court was dealing with that version of the right to freedom of expression usually referred to as freedom of the press.

His Lordship continued at p. 133:

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth*, [[1936] A.C. 578], "freedom governed by law."

It might be helpful to set out Lord Wright's complete statement from the *James* case, *supra*, at p. 627:

"Free" in itself is vague and indeterminate. ... Free speech does not mean free speech; it means speech hedged in by the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law.

(Vide W.R. Lederman, *The Nature and Problems of a Bill of Rights*, 37 Can. Bar. Rev. 4.)

When all these broad discussions have been duly recorded we must return to the point of departure as I find it conveniently described by Beetz J. in *A.G. (Can.) and Dupond v. Montreal*, [1978] 2 S.C.R. 770, at p. 796:

None of the freedoms referred to [and reference had been made to freedom of speech] is so enshrined in the Constitution as to be above the reach of competent legislation.

The freedom of expression with which the Court is here concerned of course has nothing to do with the elective process and the operations of our democratic institutions, the House of Commons and the provincial Legislature. We are indeed speaking about the right of economic free speech, the right to commercial advertising. It can hardly be contended that the province by proper

legislation could not regulate the ethical, moral and financial aspects of a trade or profession within its boundaries. If the province were to declare that price advertising of legal services was to be controlled in the manner described in *Can. Breweries*, supra, in the case of beer advertising and beer sales, would not such provincial legislation be *intra vires*? Clearly the right of a licence-holding member of the law profession practising in the Province of British Columbia is subject to some provincial regulations. One of those regulations might amount to a curtailment of the ability of the licence holder to advertise his or her services. The same attack might be made upon the CIA where it would otherwise be applicable. A restriction in the form of misleading advertising as in s. 36 of that Act is just such a lawful regulatory restriction on freedom of expression or freedom of economic speech as has been alleged here. This being so we are returned to the initial question as to whether or not the Benchers were authorized by the provincial statute to do what it has done in the discipline action relating to the appellant Jabour. If the answer is "Yes" then the submissions advanced with reference to the freedom of speech are answered. If the answer is "No" it is unnecessary to answer the question raised with reference to the right to free speech. The regulations and rulings of the Benchers with reference to advertising have already been set forth. Some matters may, in accordance with those rulings, be made the subject of public announcement, others may not. According to the *factum* of the appellant Jabour on March 30, 1979 after these proceedings had been commenced, new rulings were passed by the Benchers permitting "certain advertising of services by lawyers". Similar comment is found in the *factum* of the Law Society in the appeal by the Attorney General of Canada. Reference is there made to "current rulings and resolutions of the Law Society under which fee and other advertising is permitted in British Columbia" Thus it can be seen from the submissions of both appellants and respondents that the regulation of advertising is an ongoing function of the Benchers under the provincial statute. If the consequence of this action, assuming it to be valid in law, is the reduction of the ability of the member of the Law Society to make public announcements concerning the practice of law, such a consequence does not, as a violation of an asserted right to freedom of speech, invalidate the otherwise valid provincially-delegated legislative action.

As I have already concluded for reasons advanced earlier that the action taken by the Benchers herein was authorized by the province of British Columbia, the answer to the third question in my view is "No".

In the result therefore, in the Law Society action on the appeal to this Court by the Attorney General of Canada, the Restrictive Trade Practices Commission and Bertrand, I would answer the first question "No"; the second question need not in the circumstances be answered; and the third question I would answer "No". In the Jabour action on the appeal of the appellant Jabour, I would answer the first question "No"; the second question need not in the circumstances be answered; and the third question I would answer "No".

For all these reasons I would dismiss both appeals. As the questions in each appeal raise identical issues, except question 3 in the Jabour appeal, I would allow the respondents costs in this Court against all appellants except that there shall be only one counsel fee recoverable for both

appeals in this Court, the same to be borne equally as between the appellants in the Law Society action and the appellant Jabour.

Appeals dismissed with costs.

TAB 2

Indexed as:

620 Connaught Ltd. v. Canada (Attorney General)

**620 Connaught Ltd., operating as Downstream Bar, 263053
Alberta Ltd., operating as Miss Italia Ristorante,
313769 Alberta Ltd., operating as Jasper House
Bungalows, 659510 Alberta Ltd., operating as Buckles
Restaurant and Saloon, Alex Holdings Ltd., operating as
Something Else Restaurant, Alpine Grill Ltd., operating
as Alpine Grill Restaurant, Athabasca Motor Hotel (1972)
Ltd., operating as Athabasca Hotel, Lina and Claudio
Holdings Ltd., operating as Beckers Gourmet Restaurant,
Cantonese Restaurant Ltd., Earls Restaurant (Jasper)
Ltd., Fiddle River Seafood Company Ltd., George Andrew &
Sons Ltd., operating as Astoria Hotel Company Limited,
Glacier International Ltd., operating as Whistlers Inn,
Husereau Restaurant Holdings Inc., operating as Tekarra
Restaurant, Jasper Inn Investments Ltd., operating as
The Inn Restaurant, Kabos Holding Ltd., operating as
Karouzios Steakhouse, Kontos Investments Ltd., operating
as Kontos Restaurant, L & W Vlahos Holdings Ltd.,
operating as L & W Restaurant, La Fiesta Restaurant
Ltd., Larry Holdings Ltd., operating as Mount Robson
Restaurant, Maligne Tours Ltd., Sawridge Enterprises
Inc., operating as Sawridge Inn & Conference Center,
T.C. Restaurants Ltd., operating as Villa Caruso Steak
House & Bar and Tonquin Prime Rib Village Ltd.,
Appellants;**

v.

**Attorney General of Canada, Minister of Environment,
Superintendent of
[page132]
Jasper National Park and Parks Canada Agency,
Respondents, and
Attorney General of Ontario, Intervener.**

[2008] S.C.J. No. 7

2008 SCC 7

File No.: 31661.

Supreme Court of Canada

Heard: November 16, 2007;

Judgment: February 29, 2008.

**Present: McLachlin C.J. and Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron and Rothstein JJ.**

(50 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Constitutional law -- Taxation -- Business licence fees -- Distinction between a tax and a regulatory charge -- Fees for licences required for businesses in national park selling liquor imposed pursuant to regulatory scheme under authority granted by statute to minister -- Licensing fee ultra vires minister's powers if a tax -- Whether annual business licence fees a tax or a regulatory charge -- Constitution Act, 1867, s. 53 -- Canada National Parks Act, S.C. 2000, c. 32, s. 16(1)(n), (r) -- Parks Canada Agency Act, S.C. 1998, c. 31, s. 24 -- National Parks General Regulations, SOR/78-213, s. 39 -- National Parks of Canada Business Regulations, SOR/98-455, s. 4.

Summary:

The appellants own hotels, restaurants and bars serving alcoholic beverages in Jasper National Park and must pay a fee in accordance with the Parks Canada Master List of Fees in order to have a business selling alcohol in the park. This fee is imposed under the authority granted to the Minister of Canadian Heritage pursuant to s. 24 of the *Parks Canada Agency Act*. The Agency's policy for the year in question was to attribute revenues generated in a park back to that park. At issue, given that s. 53 of the *Constitution Act, 1867* provides that only Parliament may impose a tax, is whether the National Parks Agency under the authority of the Minister imposed a regulatory charge or a tax. Both the [page133] Federal Court and the Federal Court of Appeal found the fee to be a regulatory charge and validly imposed.

Held: The appeal should be dismissed.

The business licence fees paid by the appellants in Jasper National Park are, in pith and substance, regulatory charges and *intra vires* the Minister's delegated power. The business licence fees have several of the attributes of a tax: they are (1) compulsory and enforced by law, (2) imposed under the authority of Parliament, (3) levied by a public official, the Minister, and (4) intended for a public purpose -- the operation of Jasper National Park. However, they are regulatory charges because they are connected to a regulatory scheme. [para. 24] [para. 29]

To determine if the governmental levy is connected to a regulatory scheme, the first step is to identify the existence of a relevant regulatory scheme and, if there is such a scheme, the second step is to find a relationship between the charge and the scheme itself. Here, the regulation of Jasper National Park qualifies as a relevant regulatory scheme: (1) the *Canada National Parks Act* and the *Parks Canada Agency Act* together with the accompanying regulations form a complete, complex and detailed code governing how Jasper National Park should operate; (2) the scheme is aimed at affecting individuals' behaviour; (3) it provides for a proper estimation of the costs of the operation of the park; and (4) the appellants benefit from the regulation in that a well-maintained National Park attracts more visitors and therefore the greater the potential volume of their businesses. Also, regulations limiting development and thus the number of businesses within the Park allow the appellants to participate in a restricted market in which they are not subject to unlimited competition. With respect to the second step, the necessary relevant relationship between the fees paid by the persons being regulated and the regulatory scheme exists because the fees are tied to the costs of the regulatory scheme. While the fee revenue should not exceed the regulatory costs in order to avoid rendering s. 53 of the *Constitution Act, 1867* meaningless, the government should be given some reasonable leeway. In this case, given the evidence, it can be inferred that the fee revenues generated in Jasper National Park likely did not exceed, and certainly did not significantly exceed, the cost of the regulatory scheme for the Park. Accordingly, [page134] the business licence fees are connected to the regulatory scheme governing the Park. [paras. 25-27] [paras. 30-34] [paras. 37-40] [paras. 44-45]

Cases Cited

Applied: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; **referred to:** *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929; *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] O.M.B.D. No. 553 (QL); *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536, aff'd (1997), 151 D.L.R. (4th) 575, leave to appeal refused, [1997] 3 S.C.R. vii.

Statutes and Regulations Cited

Bill of Rights, 1 Will. & Mar. sess. 2, c. 2, art. 4.

Canada National Parks Act, S.C. 2000, c. 32, ss. 4(1), 16(1)(n), (r), (3).

Constitution Act, 1867, ss. 53, 91(1A), 92(2), 125.

National Parks General Regulations, SOR/78-213, s. 39.

National Parks of Canada Businesses Regulations, SOR/98-455, s. 4.

Parks Canada Agency Act, S.C. 1998, c. 31, ss. 20(2)(c), 23, 24.

Authors Cited

Canada. House of Commons. Standing Committee on Environment and Sustainable Development. *Evidence*, Issue No. 40, 1st sess., 38th Parl., May 19, 2005, p. 7.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, 5th ed. Scarborough, Ont. Thomson/Carswell, 2007.

Hogg, Peter W., and Patrick J. Monahan. *Liability of the Crown*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Linden, Nadon and Evans JJ.A.), [2007] 2 F.C.R. 446, 271 D.L.R. (4th) 678, 352 N.R. 177, [2006] F.C.J. No. 1083 (QL), 2006 CarswellNat 1919, 2006 FCA 252, affirming a decision of Snider J. (2005), 274 F.T.R. 311, [2005] F.C.J. No. 1107 (QL), 2005 CarswellNat 1808, 2005 FC 886. Appeal dismissed.

[page135]

Counsel:

Jack N. Agrios, Q.C., and *Janice A. Agrios, Q.C.*, for the appellants.

Kirk N. Lambrecht, Q.C., and *Cheryl D. Mitchell*, for the respondents.

Janet E. Minor and *Michael S. Dunn*, for the intervener.

The judgment of the Court was delivered by

ROTHSTEIN J.:--

I. Introduction

1 The issue in this appeal is whether the annual business licence fee for the right to sell alcoholic beverages imposed on hotels, restaurants and bars in Jasper National Park is a regulatory charge or a tax. This business licence fee is imposed under the authority granted to the Minister of Canadian Heritage pursuant to s. 24 of the *Parks Canada Agency Act*, S.C. 1998, c. 31, to "fix the fees or the manner of calculating fees in respect of products, rights or privileges provided by the [Parks Canada] Agency".

2 Pursuant to s. 53 of the *Constitution Act, 1867*, only Parliament may impose a tax. If the business licence fee is, in pith and substance, a tax, it is *ultra vires* and beyond the jurisdiction of the Minister to impose. If the fee is, in pith and substance, a regulatory charge, it may validly be imposed under the authority of the Minister pursuant to s. 24 of the *Parks Canada Agency Act* ("*Parks Agency Act*").

3 Both Snider J. in the Federal Court and Evans J.A. in the Federal Court of Appeal found that the fee was a regulatory charge and therefore was validly imposed: (2005), 274 F.T.R. 311, aff'd [2007] 2 F.C.R. 446. I am of the same view and would therefore dismiss this appeal.

[page136]

II. The Power to Tax

4 Central to our concept of democracy is the principle that the Crown may not levy a tax except with the authority of Parliament or the legislature. This principle harkens back to the *Bill of Rights* of 1689, 1 Will. & Mar. sess. 2, c. 2, art. 4, and ensures not only "that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes (and vote supply)" (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 246).

5 This principle is found in s. 53 of the *Constitution Act, 1867*, which mandates that bills imposing any tax shall originate in the House of Commons. In *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, Major J. explained the rationale underlying s. 53, at paras. 30-32:

The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My

interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, "[t]he Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."

The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 *Ottawa L. Rev.* 25, at p. 41:

Through the centuries, the principle was maintained that taxation required representation and consent. [page137] The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.

6 The issue in this case is whether the Minister imposed a tax, which, in accordance with s. 53 of the *Constitution Act, 1867*, is beyond his statutory power since only Parliament may levy a tax.

III. Facts

7 The appellants own all or nearly all of the hotels, restaurants and bars in Jasper National Park serving alcoholic beverages. In order to operate these establishments, they require a business licence to sell alcohol for which they must pay a fee in accordance with the Parks Canada Master List of Fees. The 2003/2004 Master List provides that the fees for a business licence for the sale of alcohol are made up of a base fee of \$75 plus 3 percent of gross value purchased annually for the sale of spirits and wines, and 2 percent of gross value purchased annually for the sale of beer.

8 The total forecasted cost of operation of Jasper National Park in 2003/2004 was \$20.4 million. The total amount of business licence fees collected for the sale of alcoholic beverages in that period was \$87,625. The Agency's policy for the 2003/2004 year was to attribute revenues generated in a

park back to that park.

IV. Overview of Statutes and Regulations Governing National Parks

9 The relevant statutory and regulatory provisions are contained in the appendix attached to these reasons. Parliament has jurisdiction over national parks under s. 91(1A) of the *Constitution Act, 1867*. Two statutes and relevant subordinate [page138] regulations govern the management of all national parks in Canada. The *Canada National Parks Act*, S.C. 2000, c. 32 ("*National Parks Act*"), vests the Minister with control and management of Canada's national parks, including Jasper National Park. The second relevant statute is the *Parks Agency Act* which establishes the Parks Canada Agency as having the responsibility for the administration of the *National Parks Act* and its regulations.

10 The obligation to obtain a licence to sell alcoholic beverages in national parks and pay the applicable licence fees arises from a combination of the relevant statutes and regulations. Sections 16(1)(n) and 16(1)(r) of the *National Parks Act* provide that the Governor in Council may make regulations respecting the control of businesses and the determination of fees for the use of park resources. Section 16(3) of the *National Parks Act* authorizes the Superintendent of a park to issue licences in relation to any matter that is the subject of regulations. Section 39 of the *National Parks General Regulations*, SOR/78-213, prohibits the sale of any intoxicating beverage unless the vendor has obtained a licence under the *National Parks of Canada Businesses Regulations*, SOR/98-455. The procedures for obtaining a licence to sell alcohol are set out in s. 4 of the *National Parks of Canada Businesses Regulations*. The licence application must be accompanied by the applicable fee fixed under s. 24 of the *Parks Agency Act*. This section states that the Minister may fix fees or the manner of calculating fees regarding products, rights and privileges provided by the Agency.

11 The Agency has the authority to expend the revenues generated from park operations including those listed in s. 20(2)(c) of the *Parks Agency Act*, i.e. "proceeds from, including fees paid under any Act of Parliament in respect of, the provision by the Agency of a service, of the use of a facility or of a product, right or privilege".

[page139]

V. Appellants' Position

12 The appellants' complaint is with respect to the fees they are required to pay on the purchase of alcohol (3 percent on wine and spirits and 2 percent on beer). The percentage fee together with the base fee of \$75 amounted to \$87,625 in 2003/2004.

13 The appellants say that if, as found by the Federal Court and Federal Court of Appeal, the

regulatory scheme relevant to the business licence fees imposed on them was the administration and operation of Jasper National Park, the fees they pay are unconnected to the regulation of their businesses or even businesses generally in Jasper National Park. As such, they constitute a tax and not a regulatory charge. Alternatively, the appellants contend that a regulatory scheme must be more precisely defined in order for the amounts collected to be valid regulatory charges, such as the regulation of businesses generally or businesses selling alcoholic beverages in Jasper National Park. However, if this more precise regulatory scheme is considered, there would be no nexus between the cost of the scheme and the business licence fees collected since the revenues collected would disproportionally exceed the costs of the regulatory scheme. In either case, the charge qualifies as a tax which is *ultra vires* the Minister's powers.

VI. Respondent's Position

14 The government says that the business licence fees paid by the appellants are ancillary or adhesive to the regulatory scheme governing the administration and operation of Jasper National Park. The fees collected were used to defray the cost of administration and operation of the park. As such, they qualify as regulatory charges and not as taxes. The government does not rely on a narrower regulatory scheme regulating only businesses generally or businesses selling alcoholic beverages in the park.

[page140]

VII. Selecting the Appropriate Regulatory Scheme

15 The narrow scheme proposed by the appellants focuses exclusively on the regulation of the sale of alcoholic beverages, or alternatively the regulation of businesses, in Jasper National Park. However, the appellants benefit from such things as heritage presentations, visitors' services and highway maintenance in the park. To focus only on the regulation of the sale of alcohol or the regulation of businesses ignores the reality that the appellants' businesses benefit from their location in and the operation and regulation of the park as a whole. The *National Parks Act*, the *Parks Agency Act* and the regulations together comprise the regulatory scheme governing Jasper National Park. I conclude that the appropriate regulatory scheme to consider in this case is therefore the regulatory scheme governing the administration and operation of Jasper National Park.

VIII. Analysis

1. *Analysing Whether a Government Levy is a Tax or a Regulatory Charge*

16 The task for the Court is to identify whether the fees paid by the appellants are, in pith and substance, a tax or a regulatory charge. The pith and substance of a levy is its dominant or most

important characteristic. The dominant or most important characteristics are to be distinguished from its incidental features (P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 433-36). The fees in this case have characteristics of both a tax and regulatory charges. The Court must ascertain which is dominant and which is incidental.

17 In the context of whether a government levy is a tax or a regulatory charge, it is the *primary purpose* of the law that is determinative. Although the law may have incidental effects, its primary purpose will determine whether it is a tax or a regulatory [page141] fee. In *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, Gonthier J. described the pith and substance of a government levy in terms of its primary purpose. At para. 30, he stated:

In all cases, a court should identify the primary aspect of the impugned levy... . Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. [Emphasis deleted.]

There is no suggestion in this case that the levy is a user fee for the provision of government services or facilities. The sole question is whether in pith and substance the levy is a tax or a regulatory charge.

18 The issue of whether a levy is a tax or a regulatory charge has been considered on prior occasions by this Court. The issue was relevant when determining the constitutionality of a provincial levy that had indirect tendencies (*Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, and *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929). If it was a tax, it would be *ultra vires* the province whose taxing authority under s. 92(2) of the *Constitution Act, 1867* is restricted to direct taxes within the province. However, if it was a regulatory charge, the province was constitutionally competent to impose such charge. It was also relevant when deciding if a by-law of an Indian band enacted a system of taxation under the purported authority of the *Indian Act*, for if it was, it could not be applied to an agent of the provincial Crown by reason of s. 125 of the *Constitution Act, 1867* [page142] (*Westbank*). However, determining whether a government levy is *ultra vires* a Minister's delegated power has not yet been addressed by this Court.

2. *Regulatory Charges Distinguished From User Fees*

19 It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig*, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged

cannot exceed the cost to the government of providing the services or facilities. However, "courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice" (see *Eurig*, at para. 22).

20 By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, e.g. "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [or a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles" (see *Westbank*, at para. 29, referring to *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] O.M.B.D. No. 553 (QL), and *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) (aff'd (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), [page143] leave to appeal refused, [1997] 3 S.C.R. vii)).

21 There is no suggestion that the business licence fees in this case are user fees and the government does not take the position that the fees are set at a level so as to proscribe, prohibit or lend preference to certain conduct. Consequently, the question is whether, in pith and substance, the licence fees constitute a tax or a regulatory charge which is used to defray the costs of a regulatory scheme.

3. *The Characteristics of a Tax*

22 In *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, Duff J. (as he then was) identified the characteristics of a tax (pp. 362-63). In *Eurig*, Major J. summarized the *Lawson* characteristics of a tax at para. 15:

Whether a levy is a tax or a fee was considered in *Lawson*, *supra*. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

23 These characteristics will likely apply to most government levies. The question is whether these are the dominant characteristics of the levy or whether they are only incidental.

4. *Distinguishing a Regulatory Charge From a Tax*

24 The distinction between a tax and a regulatory charge was not the way in which the Court in *Lawson* dealt with the matter before it. To address that issue, Gonthier J. in *Westbank* added a fifth consideration to those articulated by Duff J. in *Lawson*: that the government levy would be in pith and substance a tax if it was "unconnected to any form of a regulatory scheme" (para. 43). This fifth

consideration provides that even if the levy has all [page144] the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme.

25 In *Westbank*, Gonthier J. established a two-step approach to determine if the governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. To do so:

[A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. [para. 44]

The first three considerations establish the existence of a regulatory scheme. The fourth consideration establishes that the regulatory scheme is relevant to the person being regulated.

26 Although this list of factors provides a useful guide, it is not to be treated as if the factors were prescribed by statute. As stated by Gonthier J., at para. 24:

This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

Nonetheless, there must be criteria establishing a regulatory scheme and its relevance to the person being regulated.

27 Provided that a relevant regulatory scheme is found to exist, the second step is to find a relationship between the charge and the scheme itself.

This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.

(*Westbank*, at para. 44)

[page145]

28 In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to

ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank*.

(a) Do the Business Licence Fees Have the Attributes of a Tax?

29 Certainly the business licence fees have the attributes of a tax. They are compulsory and enforced by law, imposed under the authority of Parliament, levied by the Minister, a public official, and intended for a public purpose -- the operation of Jasper National Park. However, it is still necessary to determine whether there is a relevant regulatory scheme and whether the fees are connected to that regulatory scheme, in which case the appellants' licence fees will be considered regulatory charges and not taxes.

(b) Are the Business Licence Fees Connected to a Regulatory Scheme?

Step 1:

The Criteria for Identifying the Existence of a Relevant Regulatory Scheme: Is the Regulatory Scheme Governing the Administration and Operation of Jasper National Park Relevant to the Appellants?

30 The first *Westbank* criterion is the presence of a "complete, complex and detailed code [page146] of regulation". Jasper National Park exists and operates under an overarching statutory scheme which includes the *National Parks Act* and the *Parks Agency Act*, together with the regulations. Some of these regulations apply only to specific parks; there are even regulations applying specifically to the town of Jasper. However, the majority of the regulations relate to the management of all national parks. These regulations range from wildlife management to traffic provisions. Read in conjunction with the two Acts, these regulations establish how services, rights and privileges are obtained, what is prohibited within the parks and to whom authority is delegated. Together, these statutes and the regulations form a complete and detailed scheme of how Jasper National Park should operate. Therefore, the first of the regulatory scheme criteria is satisfied.

31 The second criterion is whether the operation of Jasper National Park is a regulatory scheme which is aimed at affecting individuals' behaviour. The purpose of national parks is set out in s. 4(1) of the *National Parks Act*:

The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

The operation of Jasper National Park must be in accordance with this principle. The object of operating the park for the benefit, education and enjoyment of the people of Canada is intended to

encourage the use of the park by Canadians, while preserving the integrity of the park for the future. Regulation of the behaviour of current visitors to and businesses in the park so that they do not use the park in a manner which would impair enjoyment of the park by present and future generations helps to achieve these goals. The second criterion is satisfied.

[page147]

32 The third criterion for identifying a regulatory scheme is the presence of a proper estimation of the costs; in this case the cost of the operation of Jasper National Park. This criterion is satisfied. Snider J. found that the forecast of expenditures for the park in 2003/2004 was estimated to be \$20.4 million.

33 The evidence demonstrates that the regulation of Jasper National Park meets the first three criteria in *Westbank* and is therefore a regulatory scheme for purposes of the analysis.

34 The fourth criterion is the existence of a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation or benefits from it. In *Allard*, this Court recognized that companies that removed gravel benefited from the roads that were funded from the fees collected for the removal of gravel. In *Ontario Home Builders'*, the majority found that the benefit conferred on construction contractors was the creation of residential developments with adequate amenities. The same approach is applicable here. The appellants benefit from the existence of a well-maintained national park. The appellants' revenues are linked to the number of visitors coming each year to Jasper National Park. The more the park attracts visitors, the greater the potential volume of the appellants' business. Also, regulations limiting development and thus the number of businesses within the park allow the appellants to participate in a restricted market in which they are not subject to unlimited competition. These factors demonstrate that the appellants benefit from the regulation of Jasper National Park.

35 However, where a regulatory scheme is very broad, the scheme may not be sufficiently related to the persons being regulated either because the regulation does not benefit those persons, or because those persons do not cause the need for the regulation, except in a very indirect manner. In such a case, the fees may be found to be a tax. Evans J.A. [page148] recognized the need for a sufficient relationship in his reasons, at paras. 44-45:

The fees in the present case were not attributed to the operations of the Department of Canadian Heritage at large nor even, more specifically, to the administration of the entire system of national parks. The licence fees paid by the appellants were attributed to the operating budget of the very park, Jasper, in which the appellants conducted their businesses. Any aspect of the operation of Jasper National Park which makes it more attractive to visitors, including on-site heritage presentations, visitor services and through highways, increases the

appellants' potential customer base.

In contrast, the appellants obtain only a very indirect benefit at best from the operation of other national parks and from the central administration of the responsible Department and the Parks Canada Agency. In my opinion, the analogies relied on by the appellants would be more persuasive if the Crown were arguing that the relevant regulatory scheme was the operation and administration of the national parks system as a whole.

36 The safeguard against an insufficient relationship can be found in this *Westbank* criterion: "[The] relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation." Here, there is a close relationship between the appellants' businesses and the regulation of Jasper National Park.

37 Since all four of the *Westbank* criteria are met, the regulation of Jasper National Park qualifies as a relevant regulatory scheme.

Step 2:

The Relationship Between the Business Licence Fees and the Regulation of Jasper National Park

38 In order for a regulatory charge intended to defray the costs of a regulatory scheme to be "connected", the fee revenue must be tied to the costs of the regulatory scheme. The trial judge, at para. 16, found that "[i]n general, the imposition of fees is designed to offset the costs of operating and [page149] administering each of Canada's national parks", and the policy of the government in 2003/2004 was to attribute revenue generated in a park back to that park (Affidavit of Doug Tapley, Manager of Business Innovations for the Parks Canada Agency, October 25, 2004, at para. 11, Appellants' Record, at p. 82).

39 Section 23 of the *Parks Agency Act* specifies that the Minister cannot set a user fee for services or facilities that is higher than the cost to the government of providing them. On the other hand, s. 24 of the Act pertaining to regulatory fees for rights or privileges granted by the government does not contain such a limit. Nonetheless, where fees generated under a regulatory scheme are to be used to defray the costs of the scheme, as in this case, the fee revenue generated cannot exceed the costs of the scheme. In referring to a comprehensive and integrated regulatory scheme in *Ontario Home Builders'*, Iacobucci J. states, at para. 85:

The carefully designed mechanics of the scheme ensure that the power of indirect taxation will not extend beyond the regulatory costs; this is crucial in order to avoid rendering s. 92(2) of the *Constitution Act, 1867* meaningless.

In this case, it is equally necessary that the fee revenue not exceed the regulatory costs in order to

avoid rendering s. 53 of the *Constitution Act, 1867* meaningless.

40 However, as stated in *Allard*, at pp. 411-12, the government needs to be given some reasonable leeway with respect to the limit on fee revenue generation. While a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge and would be a strong indication that the levy was in pith and substance a tax, a small or sporadic surplus would not, as long as there was a reasonable attempt to [page150] match the revenues from the fees with the cost associated with the regulatory scheme.

41 The total amount collected in licence fees from businesses selling alcohol in Jasper National Park in 2003/2004 was \$87,625. It represents less than 0.5 percent of the total forecasted expenditures of Jasper National Park in 2003/2004 which amounted to \$20.4 million. Obviously, the fees paid by the appellants did not exceed the costs of regulating Jasper National Park.

42 However, it is not sufficient that fees collected under one regulation that is part of an overall regulatory scheme constitute only a small fraction of the costs of the overall regulatory scheme. An "apples to apples" comparison requires that all fees collected in respect of the operation of Jasper National Park by the Agency must be taken into account to ensure that the total of such fee revenues did not exceed the cost of the operation of the park. However, there is no specific evidence of the total amount of such fees collected in Jasper National Park in 2003/2004.

43 In the corporate plan of the Parks Canada Agency for 2004/2005 to 2008/2009, fee revenue from all of Canada's national parks in 2003/2004 amounted to approximately \$78 million against costs of \$519 million or approximately 15 percent of the costs (Respondent's Record, at pp. 63-66). Although fee revenue as a percentage of cost is very low overall, considering the revenue/cost relationship for all of Canada's parks is a tenuous basis for inferring the revenue/cost relationship in one particular park. However, Mr. Alan Latourelle, Chief Executive Officer of the Parks Canada Agency, speaking to a Parliamentary Committee in 2005, testified that "[Parks Canada] generate[s] about \$43 million in our [M]ountain [P]arks, and our actual expenditures -- total, including capital -- are about \$60 million" (House of Commons, Standing Committee on Environment and Sustainable [page151] Development, *Evidence*, 1st sess., 38th Parl., May 19, 2005, at p. 7). Although not clearly stipulated in the minutes of the Committee, from the context of the discussion and the date of his appearance, it appears Mr. Latourelle was referring to the revenues and expenditures for 2003/2004.

44 As stated in *Allard*, at pp. 411-12, the government must be given some leeway, as long as there is a reasonable attempt to match the revenues from the fees with the cost of the regulatory scheme. In the Mountain Parks, there was a \$17 million shortfall between the fees collected and the total expenditures in 2003/2004. Although the total fee revenue for Jasper National Park is not in evidence, I am prepared to infer from the information in the material before the Court relating to the Mountain Parks that the fee revenues from Jasper National Park likely did not exceed, and certainly did not significantly exceed, the cost of the regulatory scheme for the park. Accordingly, the

business licence fees are connected to the regulatory scheme governing the park.

45 Just as there had to be a relevant relationship between the regulatory scheme and the person being regulated under the first step of the *Westbank* approach, there must also be a relevant relationship at the second step, that is, between the fees paid by the persons being regulated and the regulatory scheme caused by those persons or from which those persons receive a benefit. The conditions were met in this case. However, I would note that if the fee revenues generated in Jasper National Park are not expended entirely within, or for the benefit of that park, the fees may well be "unconnected" and not in pith and substance a regulatory charge, but rather, a tax.

[page152]

46 Raising revenues is one of the most powerful tools of government. It involves the taking of property by the government. That is why taxes may be levied only by elected legislators in Parliament or the legislature of a province under the *Constitution Act, 1867*. Where the connection between the use of the revenues generated from a government levy and the persons being regulated is doubtful, the courts will scrutinize the facts to ensure that the Constitution is not circumvented by executive or bureaucratic edict.

47 In summary, the evidence discloses that the regulatory scheme governing the administration and operation of Jasper National Park is relevant to the appellants' businesses and that there is a relationship between the business licence fees paid by the appellants and that regulatory scheme. In the result, the pith and substance or dominant purpose of the business licence fees is as regulatory charges.

5. *Regulatory Charges to Proscribe, Prohibit or Lend Preference to Certain Conduct*

48 Whether the costs of the regulatory scheme are a limit on the fee revenue generated, where the purpose of the regulatory charge is to proscribe, prohibit or lend preference to certain conduct, is not an issue before the Court in this case, and it is not necessary to answer that question here.

6. *Proprietary Charges*

49 The intervener, the Attorney General of Ontario, says that a proprietary charge should be kept distinct from a regulatory charge or a tax. It was submitted that the Province of Ontario relies heavily on proprietary charges as a source of income and that certain fees on businesses in provincial parks are structured as proprietary charges. I agree that proprietary charges for goods and services supplied in a commercial context are distinct [page153] from either regulatory charges or taxes and may be determined by market forces. As explained by Professor Hogg in *Constitutional Law of Canada*, at pp. 870-71:

... [proprietary] charges are those levied by a province in the exercise of proprietary rights over its public property. Thus, a province may levy charges in the form of licence fees, rents or royalties as the price for the private exploitation of provincially-owned natural resources; and a province may charge for the sale of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way.

There is some question as to whether a licence fee for the right to occupy land inside the park for premises in which to sell alcohol can be characterized as a proprietary charge. However, the government has not sought to justify the business licence fees in this case as proprietary charges. Whether they could be is better left to be decided at a time when it is properly raised and argued by the parties.

IX. Conclusion

50 In pith and substance, the business licence fees paid by the appellants in Jasper National Park in 2003/2004 are regulatory charges and therefore are *intra vires* the delegated power of the Minister of Canadian Heritage. The appeal should be dismissed with costs.

* * * * *

APPENDIX

Constitution Act, 1867

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

[page154]

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --

...

1A. The Public Debt and Property.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, --

...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

Canada National Parks Act, S.C. 2000, c. 32

4. (1) The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

16. (1) The Governor in Council may make regulations respecting

...

(n) the control of businesses, trades, occupations, amusements, sports and other activities or undertakings, including activities related to commercial ski facilities referred to in section 36, and the places where such activities and undertakings may be carried on;

...

(r) the determination of fees, rates, rents and other charges for the use of park resources and facilities, [page155] the provision of works and services referred to in paragraph (i) and improvements referred to in paragraph (j), and the issuance and amendment of permits, licences and other authorizing instruments pursuant to subsection (3);

...

(3) Regulations made under this section may authorize the superintendent of a park, in the circumstances and subject to the limits that may be specified in the regulations,

(a) to vary any requirement of the regulations for purposes of public safety or the conservation of natural resources in the park;

(b) to issue, amend, suspend and revoke permits, licences and other authorizations in relation to any matter that is the subject of regulations and to set their terms and conditions; and

(c) to order the taking of any action to counter any threat to public health or to remedy the consequences of any breach of the regulations in the park.

Parks Canada Agency Act, S.C. 1998, c. 31

20. ...

(2) Notwithstanding subsection 29.1(1) of the *Financial Administration Act*, the Agency may, for the purposes referred to in subsection 19(1), spend amounts equal to revenues resulting from the conduct of its operations in that or subsequent fiscal years, including

...

(c) proceeds from, including fees paid under any Act of Parliament in respect of, the provision by the Agency of a service, of the use of a facility or of a product, right or privilege;

23. (1) The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix the fees or the manner of calculating the fees to be paid for a service or the use of a facility provided by the Agency.

(2) Fees for a service or the use of a facility that are fixed under subsection (1) may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility.

24. The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix the fees or the manner of

calculating [page156] fees in respect of products, rights or privileges provided by the Agency.

National Parks of Canada Businesses Regulations, SOR/98-455

3. No person shall carry on, in a park, any business unless that person is the holder of a licence or an employee of a holder of a licence.

4. ...

(2) An application must be accompanied by the applicable fee fixed under section 24 of the *Parks Canada Agency Act*.

National Parks General Regulations, SOR/78-213

39. No person shall sell any intoxicating beverage in a Park unless he has obtained a licence for such a sale under the *National Parks Businesses Regulations* and the sale

(a) is in accordance with the laws of the province in which the Park is situated; and

(b) has been approved by the director-general.

Solicitors:

Solicitor for the appellants: Jack N. Agrios, Edmonton.

Solicitor for the respondents: Attorney General of Canada, Edmonton.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

cp/e/qllls

TAB 3

Indexed as:

Canada (Attorney General) v. Hislop

**Attorney General of Canada, Appellant/Respondent on
cross-appeal;**

v.

**George Hislop, Brent E. Daum, Albert McNutt, Eric
Brogaard and Gail Meredith, Respondents/Appellants on
cross-appeal, and
Attorney General of Ontario, Attorney General of Quebec,
Attorney General of Alberta and Egale Canada Inc.,
Intervenors.**

[2007] 1 S.C.R. 429

[2007] S.C.J. No. 10

2007 SCC 10

File No.: 30755.

Supreme Court of Canada

Heard: May 16, 2006;

Judgment: March 1, 2007.

**Present: McLachlin C.J. and Bastarache, Binnie, LeBel,
Deschamps, Abella and Rothstein JJ.**

(165 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

*Constitutional law -- Charter of Rights -- Equality rights -- Sexual orientation -- Survivorship
pensions -- Whether provisions of Canada Pension Plan limiting eligibility for survivor benefits to*

same-sex partners of deceased contributors who died on or after January 1, 1998 infringe right to equality -- If so, whether infringement justified -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Canada Pension Plan, R.S.C. 1985, c. C-8, ss. 44(1.1), 72.

Constitutional law -- Charter of Rights -- Equality rights -- Sexual orientation -- Survivorship pensions -- Whether estate has standing to advance equality rights claim on behalf of deceased survivor -- Canadian Charter of Rights and Freedoms, s. 15(1) -- Canada Pension Plan, R.S.C. 1985, c. C-8, s. 60(2).

[page430]

Constitutional law -- Remedy -- Retroactive remedy -- Circumstances under which courts may limit retroactive remedy -- Constitution Act, 1982, s. 52.

Summary:

Following the 1999 decision of this Court in *M. v. H.*, the federal government amended the *Canada Pension Plan* ("CPP") in 2000 to extend survivor benefits to same-sex partners by changing the definition of "spouse" to conform with the equality rights provisions of s. 15(1) of the *Canadian Charter of Rights and Freedoms* and by adding new provisions. However, under s. 44(1.1) of the CPP, eligibility was limited to same-sex partners whose "spouse" died on or after January 1, 1998. Benefits were not retroactive to April 17, 1985, when s. 15(1) came into force, or the date of death of the "spouse", whichever occurred later. Section 72(2) of the CPP precluded payments to same-sex survivors for any month before July 2000, the month s. 72(2) came into force. The effect of s. 72(2) came to an end as of June 2001, because after that month, same-sex and opposite-sex survivors benefited from application of the general rule in s. 72(1), which limits survivors' arrears benefits to not more than 12 months prior to the month in which the application is received. Finally, s. 60(2) of the CPP, a general provision not affected by the 2000 amendments, limits the right of estates of survivors from obtaining benefits if the application for the benefits is not made within 12 months after the death of the survivor. A class action was commenced by same-sex survivors ("Hislop class"), challenging the constitutionality of the four sections. The Ontario Superior Court of Justice held that ss. 44(1.1) and 72(2) violated s. 15(1) and were not justified under s. 1 of the *Charter*. Same-sex survivors were granted a constitutional exemption from ss. 60(2) and 72(1). Survivors were entitled to benefits retroactive to the later of the date of death of their partner and April 17, 1985, with interest. The Court of Appeal affirmed the finding that ss. 44(1.1) and 72(2) were unconstitutional, but held that ss. 60(2) and 72(1) did not infringe s. 15(1). Sections 44(1.1) and 72(2) were struck down, leaving a same-sex surviving spouse entitled to survivor benefits subject only to the 12-month cap on arrears and the limitation on estate claims (as were all benefits claimants).

Held: The appeal and cross-appeal should be dismissed.

[page431]

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Abella and Rothstein JJ.: Essential to the question of differential treatment in the s. 15(1) analysis is the choice of comparator group. Under s. 44(1.1), the appropriate comparison is between same-sex and opposite-sex survivors whose partners died before January 1, 1998; under s. 72(2), it is between same-sex and opposite-sex survivors who applied for survivor's pensions between July 2000 and June 2001. To frame, as suggested by the government, the comparator group in terms of the express distinction made in ss. 44(1.1) and 72(2) between two groups of survivors of same-sex relationships, based on the date on which the relationship ended as a result of the death of one of the partners, would be to miss the fundamental reason for the 2000 *CPP* amendments -- namely, to remedy unequal treatment between same-sex and opposite-sex couples. Here, the Court of Appeal was right to conclude that ss. 44(1.1) and 72(2) infringe s. 15(1) of the *Charter*. Both provisions treat same-sex survivors differently from their comparator group; sexual orientation is recognized as an analogous ground of discrimination under s. 15(1), and the differential treatment discriminated in a substantive sense. [para. 24] [paras. 37-38] [para. 60]

Section 44(1.1) is not saved under s. 1 of the *Charter*. In an appropriate case, the matching of benefits conferred under the *CPP* with obligations imposed on same-sex partners under other legislation may be a pressing and substantial objective of limits on the extension of social benefit legislation as there are complex relationships between income tax credits, pensions, supplements and other entitlements, often based on conjugal relationships. It is not enough, however, to only make general reference to these relationships. There must be an explanation supported by relevant evidence as to what those relationships are, why they are relevant and why they justify the limit on the *Charter* right that has been found to be violated. In the absence of such evidence in this case, matching cannot be considered to be a pressing and substantial objective of s. 44(1.1). The absence of evidence also precludes a finding of rational connection between s. 44(1.1) and its objective and of minimal impairment of a *Charter* right. [para. 47] [paras. 52-54]

Likewise, the government has failed to establish a s. 1 justification for s. 72(2). Where the issue is solely whether *Charter* relief claimants should be entitled to the same retroactive benefits expressly available to their comparator group, absent cost considerations, it is difficult to see how denial of these benefits has a pressing and substantial objective. Here, there is an absence of [page432] evidence of cost justifying the provision. In the circumstances, there is no rational connection between s. 72(2) and its objective, nor does s. 72(2) minimally impair the *Charter* rights of the Hislop class. [paras. 65-66]

With respect to s. 60(2) of the *CPP*, the estates of those survivors who died more than 12 months before the coming into force of the 2000 amendments do not have standing to claim a s. 15(1)

Charter right on behalf of the deceased survivor. The use of the term "individual" in s. 15(1) was intentional and indicates that s. 15(1) applies to natural persons only. In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. Mr. Hislop's situation, however, is different. Although he died between the time his notice of appeal was filed in this Court and the hearing of this appeal, he obtained judgment while he was still alive. When a judgment is obtained, the cause of action upon which the judgment is based is merged in the judgment. Therefore, where a party dies pending appeal, the appeal survives even if the original cause of action would not. Although s. 15(1) rights are personal, the constitutional issues raised here are issues of public importance. Given the public interest in ensuring that questions of law related to such rights be correctly decided, an appeal from a judgment raising such issues must be allowed to survive the party's death pending the appeal. Moreover, it is a long-standing principle of law that a litigant should not be prejudiced by an act of the court. Accordingly, the estate of any class member who was alive on the date that argument concluded in the Superior Court of Justice and who otherwise met the requirements under the *CPP* is entitled to the benefit of this judgment. [paras. 71-77]

Although the Hislop class frames its s. 72(1) argument as an adverse effect discrimination claim, what it is seeking is a retroactive *Charter* relief. Since such a relief is unavailable in this case, it is not necessary to undertake a s. 15(1) analysis in respect of s. 72(1). Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling. However, where the law changes through judicial intervention, it may be appropriate for a court to limit the retroactive effect of its judgment. While a substantial change in the law is necessary, [page433] it is not sufficient to justify purely prospective remedies. Once the "substantial change" threshold is met, factors such as good faith reliance by governments, fairness to the litigants and the need to respect the constitutional role of legislatures must be considered to determine whether it is appropriate to limit the retroactive effect of the remedy. Here, the *M. v. H.* decision marked a departure from pre-existing jurisprudence on same-sex equality rights, and all the other relevant factors also weigh in favour of limiting retroactive relief. First, given the state of the jurisprudence prior to *M. v. H.*, the exclusion of same-sex partners from the former *CPP* was based on a reasonable understanding of the state of s. 15(1) jurisprudence as it existed at the relevant time. Second, the government did not act in bad faith in failing to extend survivors' benefits to same-sex couples prior to *M. v. H.* Third, in seeking payment of arrears back as far as 1985, the Hislop class effectively overlooks the evolution in the jurisprudence of same-sex equality rights. Its claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former *CPP*. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. [para. 69] [para. 86] [paras. 99-100] [paras. 107-117]

With respect to ss. 44(1.1) and 72(2), the appropriate remedy under s. 52 of the *Constitution Act*,

1982 is to strike down both provisions. Here, the extent of the inconsistency with the equality guarantee is co-extensive with the scope of these two provisions. As such, the inconsistency can be cured without distorting or interfering with the rest of the legislative scheme. A declaration that ss. 44(1.1) and 72(2) are of no force and effect is in keeping with the scheme and obvious purpose of the 2000 amendments to extend the survivors' benefit to same-sex survivors. Finally, a temporary suspension of the declaration of invalidity is not appropriate in the present case. Suspensions should only be used where striking down the legislation without enacting something in its place would pose a danger to the public, threaten the rule of law or where it would result in the deprivation of benefits from deserving persons without benefiting the rights claimant. None of these factors are present here. As a result, a class member who was precluded by s. 44(1.1) or s. 72(2) from receiving the survivor's benefit and who otherwise meets the [page434] eligibility requirements, will be entitled to payment of that benefit. The relevant date for the purpose of that payment is the date on which application was received or where no application was made because of the unconstitutional provisions, the date on which the statement of claim was filed. In no event are benefits payable in respect of a month prior to August 1999, which is the earliest month in respect of which a class member who applied for the survivor's benefit on the day the 2000 amendments came into force could have been eligible. [para. 121] [para. 134]

Lastly, pre-judgment interest is available in the instant case. The *CPP* is silent on the issue of pre-judgment interest and cannot, as such, reasonably be interpreted as creating an exception to the entitlement created by s. 31 of the *Crown Liability and Proceedings Act*. [para. 135]

Per Bastarache J.: Retroactivity of a constitutional remedy granted under s. 52(1) of the *Constitution Act, 1982* is generally the norm in our constitutional jurisprudence, and a decision to deny such remedy -- and the Hislop class's challenge to s. 72(1) of the *CPP* in this case -- should be based on the balancing of interests that must take place in any claim for relief from an unconstitutional law. Reliance on the existence of a substantial change of law is not an appropriate consideration in the context of *Charter* rights. Such an approach implies that these rights depend on judicial recognition of a new or newly recognized social environment for their genesis. By attaching importance to changing social conditions, it makes *Charter* rights dependent on how the majority of Canadians perceive the claimants' rights. Society's views of *Charter* claimants -- especially in the context of vulnerable minorities -- should not be a factor for determining whether a *Charter* right was part of the Constitution in 1985, or whether it sprung into existence later and thereby be a basis for denying retroactive relief. Our Constitution may change to correspond to new realities, but that does not mean that every time a new constitutional interpretation is adopted or a previous decision is overturned that the fundamental rights and freedoms guaranteed in our *Charter* have changed or that new ones have been created. There is a difference between changes in constitutional interpretation and actual constitutional change. Even if the existence of a substantial change in the law was an appropriate threshold criterion, no such change actually occurred in this case. A review of the case law after 1985 suggests that this Court did not upset established law when it handed down its decision in *M. v. H.* [para. 137] [para. 140] [paras. 143-147] [para. 157]

[page435]

The normal retroactive effect of judgments, however, may need to be tempered in certain circumstances in order to protect other legitimate interests. Reasonable reliance, good faith, fairness to litigants and Parliament's role are important considerations to be taken into account in deciding whether a retroactive constitutional remedy should be denied. Different considerations apply when deciding whether a suspended declaration of invalidity should be granted. A suspended declaration is a valid measure when a declaration of invalidity would pose a danger to the public, threaten the rule of law or deprive deserving persons of benefits without thereby benefiting the individual whose rights had been violated. A suspended declaration of invalidity is ultimately only a temporary limit on retroactivity; it does not determine whether governments are entitled to deny retroactive relief. It will not always be necessary to establish reasonable reliance in order to deny retroactive relief. In this case, given the state of the law pre-*M. v. H.*, it would be more accurate to emphasize the fact that the government was acting in good faith in the face of jurisprudential uncertainty. Finally, the nature of the constitutional violation is not relevant to deciding whether to deny a retroactive remedy. Subject to these clarifications, there is general agreement with how the majority has applied the other factors to this case. [paras. 159-164]

Cases Cited

By LeBel and Rothstein JJ.

Distinguished: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, 2007 SCC 1; **considered:** *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; **referred to:** *M. v. H.*, [1999] 2 S.C.R. 3; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Stinson Estate v. British Columbia* (1999), 70 B.C.L.R. (3d) 233, 1999 BCCA 761; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Lew v. Lee*, [1924] S.C.R. 612, aff'd [1925] A.C. 819; *Reid v. Batty*, [1933] O.W.N. 496, aff'd [1933] O.W.N. 817; *Turner v. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561; *Gunn v. Harper* (1902), 3 O.L.R. 693; *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495; *Monahan v. Nelson* (2000), 186 D.L.R. (4th) 193, 2000 BCCA 297; *In re Spectrum Plus Ltd. (in liquidation)*, [2005] 2 A.C. 680, [2005] UKHL 41; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3; [page436] *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *United States v. Johnson*, 457 U.S. 537 (1982); *Chevron Oil Co. v. Huson*, 404 U.S. 97

(1971); *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Tétrecault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

By Bastarache J.

Referred to: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *Jim Pattison Industries Ltd. v. The Queen*, [1984] 2 F.C. 954; *Davidson v. Davidson* (1986), 33 D.L.R. (4th) 161, leave to appeal refused, [1987] 1 S.C.R. vii; *Rath v. Kemp* (1996), 46 Alta. L.R. (3d) 1; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *R. v. Hess*, [1990] 2 S.C.R. 906; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79; *M. v. H.*, [1999] 2 S.C.R. 3, aff'g (1996), 96 O.A.C. 173; *Andrews v. Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258; *Vogel v. Manitoba* (1992), 90 D.L.R. (4th) 84, rev'd (1995), 126 D.L.R. (4th) 72; *Veysey v. Canada (Commissioner of the Correctional Service)*, [1990] 1 F.C. 321; *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Egan v. Canada*, [1995] 2 S.C.R. 513; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Kane v. Ontario (Attorney General)* (1997), 152 D.L.R. (4th) 738; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, 2007 SCC 1.

Statutes and Regulations Cited

Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999, S.O. 1999, c. 6, s. 68(2).

Canada Pension Plan, R.S.C. 1985, c. C-8, ss. 2(1) "common-law partner" [ad. 2000, c. 12, s. 42(2)], "spouse" [ad. c. 30 (2nd Supp.), s. 1(3); rep. 2000, c. 12, s. 42(1)], [page437] 42(1) "survivor" [ad. 2000, c. 12, s. 44(3)], 44(1)(d) [repl. *idem*, s. 45(1)], 44(1.1) [ad. *idem*, s. 45(2)], 60(2), 72 [am. *idem*, s. 54].

Canadian Charter of Rights and Freedoms, ss. 1, 15(1), 24(1).

Constitution Act, 1982, s. 52(1).

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 31.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

Modernization of Benefits and Obligations Act, S.C. 2000, c. 12, ss. 42, 45(2).

Authors Cited

Blackstone, William. *Commentaries on the Laws of England*, vol. 1. Oxford: Clarendon Press, 1765.

Canada. Parliament. Special Joint Committee on the Constitution of Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (1980-81), Issue No. 43, January 22, 1981, pp. 43:39-43:44; Issue No. 44, January 23, 1981, pp. 44:6-44:10; Issue No. 47, January 28, 1981, p. 47:88; Issue No. 48, January 29, 1981, pp. 48:4-48:49.

Choudhry, Sujit, and Kent Roach. "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 *S.C.L.R.* (2d) 205.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Driedger, Elmer A. "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264.

Fisch, Jill E. "Retroactivity and Legal Change: An Equilibrium Approach" (1997), 110 *Harv. L. Rev.* 1055.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (updated 2005, release 1).

Lord Reid. "The Judge as Law Maker" (1972-1973), 12 *J.S.P.T.L.* 22.

Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated 2006, release 13).

Sampford, Charles. *Retrospectivity and the Rule of Law*. Oxford: Oxford University Press, 2006.

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Charron, Feldman and Lang J.J.A.) (2004), 73 O.R. (3d) 641, 246 D.L.R. (4th) 644, 192 O.A.C. 331, 124 C.R.R. (2d) 1, 12 R.F.L. (6th) 71, [2004] O.J. No. 4815 (QL), setting aside in part a decision of Macdonald J. (2003), 234 D.L.R. (4th) 465, 114 C.R.R. (2d) 303, 50 R.F.L. (5th) 26, [2003] O.J. No. 5212 (QL). [page438] Appeal and cross-appeal dismissed.

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Nick Parker, for the intervener the Attorney General of Alberta.

Written submissions only by *Cynthia Petersen* for the intervener Egale Canada Inc.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Abella and Rothstein JJ. was delivered by

LeBEL AND ROTHSTEIN JJ.:--

I. Introduction

1 This is an appeal by the Attorney General of Canada ("government") from a decision of the Ontario Court of Appeal upholding in part the decision of the Ontario Superior Court of Justice and a cross-appeal by the respondents ("Hislop class"). The government appeals the finding of unconstitutionality of ss. 44(1.1) and 72(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("CPP"), as enacted by the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 ("MBOA"). The Hislop class cross-appeals the finding of constitutionality of ss. 72(1) and 60(2) of the CPP and the denial of a remedy with respect thereto. We propose to dismiss both the appeal and the cross-appeal.

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II. Overview

2 Under the CPP, the spouse of a contributor was entitled to apply for a survivor's pension after the death of the contributor. If the survivor's pension was approved, it would be payable for each month following the death of the contributor.

3 However, if the application of the survivor was not received by the government within 12 months of the death of the contributor, the arrears that could be claimed by the survivor were limited to a 12-month period preceding the receipt of the application. For example, if the contributor died in January 1995, and the survivor's application was not received by the government until March 1998, the maximum monthly pension arrears that could be claimed would be for 12 months

preceding March 1998.

4 Until July 2000, for purposes of entitlement to a survivor's pension under the *CPP*, the survivor had to have been married to the contributor or had to be a person of the opposite sex who was cohabiting with the contributor in a conjugal relationship at the time of the contributor's death. Same-sex conjugal relationships were not recognized and the survivor of a same-sex conjugal relationship was not eligible to receive a survivorship pension under the *CPP*.

5 In *M. v. H.*, [1999] 2 S.C.R. 3, this Court struck down the opposite-sex definition of spouse in the *Family Law Act*, R.S.O. 1990, c. F.3, as contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The declaration of invalidity was suspended for six months to give the Ontario government time to review the legislation. As a consequence of *M. v. H.*, the federal government and the governments of other provinces also amended a number of their statutes to address the constitutional deficiency. The federal government enacted the *MBOA*, which amended 68 pieces of legislation. This appeal involves a constitutional challenge to remedial amendments made to the *CPP* by the *MBOA* to recognize same-sex conjugal relationships for the purpose of entitlement to survivor's pensions under the *CPP*.

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6 The Hislop class commenced a class action claiming that the *MBOA*'s remedial amendments to the *CPP* were contrary to s. 15(1) of the *Charter* as being underinclusive. There are four issues to consider. First, the amendments restricted *eligibility* for survivor benefits under the *CPP* to survivors of same-sex conjugal relationships whose partners died on or after January 1, 1998. The Hislop class argued that survivors of contributing partners of same-sex conjugal relationships who died anytime after s. 15(1) of the *Charter* became effective (April 17, 1985) should be eligible to make an application for *CPP* survivorship benefits. The Ontario Court of Appeal agreed with the Hislop class and found that the *eligibility* restriction violated s. 15(1) of the *Charter* and that the restriction could not be justified under s. 1. In other words, survivors of same-sex conjugal relationships in which the contributors died any time after April 17, 1985 should be eligible to receive survivor's pensions. We agree with that conclusion.

7 Second, for eligible same-sex survivors, the *MBOA* remedial amendments granted monthly pension *payments* commencing in July 2000, when the amendments came into force. As such, the amendments did not grant benefits retroactively. Irrespective of when the same-sex survivor became eligible, the monthly pension payments would not commence before July 2000.

8 The Hislop class argued that survivors of same-sex conjugal relationships should be entitled to retroactive benefits from the time of death of the same-sex conjugal contributing partner. The Ontario Court of Appeal dismissed the Hislop class's claim for retroactive benefits.

9 The third and fourth issues are of less pervasive significance. In respect of the third issue, as explained earlier, general provisions of the *CPP* unaffected by *MBOA* amendments allowed for monthly pension arrears for up to 12 months preceding the receipt by the government of an application for benefits. The Ontario Court of Appeal found that the *MBOA* amendments that granted benefits commencing in July 2000, without entitling a [page441] same-sex survivor the opportunity of up to 12 months of arrears as was available to opposite-sex survivors, were contrary to s. 15 of the *Charter* and could not be justified under s. 1.

10 As to the fourth issue, the Ontario Court of Appeal held that estates of same-sex survivors have no standing to claim a remedy for breach of s. 15(1) of the *Charter*.

III. Statutory Provisions at Issue

11 Prior to the *MBOA*, "spouse" was defined in the *CPP* as:

Canada Pension Plan, R.S.C. 1985, c. C-8

2. (1) ...

"spouse", in relation to a contributor, means,

(a) except in or in relation to section 55,

- (i) if there is no person described in subparagraph (ii), a person who is married to the contributor at the relevant time, or
- (ii) a person of the opposite sex who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year, and

(b) in or in relation to section 55, a person who is married to the contributor at the relevant time,

and, in the case of a contributor's death, the "relevant time", for greater certainty, means the time of the contributor's death;

12 The *MBOA* came into force on July 31, 2000. Section 42(1) of the *MBOA* repealed the definition of spouse in the *CPP*. Section 42(2) of the *MBOA* substituted a definition of "common-law partner". In that definition there is no express or implied reference to the gender of the partners. The definition of "common-law partner" reads:

[page442]

2. (1) In this Act,

...

"common-law partner", in relation to a contributor, means a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor's death, the "relevant time" means the time of the contributor's death.

13 By a series of other *MBOA* amendments to the *CPP*, survivors of same-sex conjugal relationships became entitled to receive benefits under the *CPP*. However, by s. 45(2) of the *MBOA*, s. 44(1.1) of the *CPP* was added whereby no survivorship pension would be payable to survivors of same-sex conjugal relationships unless they became survivors on or after January 1, 1998. In other words, if the partner of the same-sex survivor died before January 1, 1998, the survivor would not be eligible for a survivorship pension under the *CPP*. Section 44(1.1) provides:

44. ...

(1.1) In the case of a common-law partner who was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension shall be paid under paragraph (1)(d) unless the common-law partner became a survivor on or after January 1, 1998.

14 A second provision added by the *MBOA* was s. 72(2) of the *CPP*. Section 72(2) operated to preclude payments to same-sex survivors for any month before July 2000, the month s. 72(2) came into force. Section 72(2) provides:

72. ...

(2) In the case of a survivor who was the contributor's common-law partner and was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension may be paid for any month before the month in which this subsection comes into force.

[page443]

15 The effect of s. 72(2) was to entirely preclude retroactive pension benefits to same-sex survivors. The Hislop class's position is that same-sex survivors should be entitled to retroactive benefits to the month following the death of their same-sex conjugal partner.

16 The incidental effect of s. 72(2) was to preclude for same-sex survivors the opportunity to seek up to 12 months of pension arrears prior to July 2000, an opportunity that was available to opposite-sex survivors under s. 72(1). Section 72(1) provides in relevant part:

72. (1) Subject to subsection (2) and section 62, where payment of a survivor's pension is approved, the pension is payable for each month commencing with the month following

...

but in no case earlier than the twelfth month preceding the month following the month in which the application was received.

The effect of s. 72(2) came to an end as of June 2001, because after that month, same-sex and opposite-sex survivors benefited from the application of the general rule in s. 72(1).

17 As indicated, s. 72(1) limits survivors' arrears benefits to not more than 12 months prior to the month in which the application is received. The Hislop class says that s. 72(1) imposes adverse effect discrimination on survivors of same-sex conjugal relationships. While s. 72(1) is facially neutral, access to survivorship pensions for same-sex survivors was not recognized until the enactment of the *MBOA*. Thus, even if s. 72(2) was struck down, the effect of s. 72(1) is to limit same-sex survivors from claiming benefits for more than 12 months prior to when their application was made. The Hislop class argues that s. 72(1) should be suspended to enable same-sex survivors to obtain payment of pension benefits back to when their same-sex partner died.

[page444]

18 Finally, s. 60(2) of the *CPP*, a general provision not affected by the *MBOA*, limited the right of estates of survivors from obtaining benefits if the application for the benefits is not made within 12 months after the death of the survivor. Section 60(2) provides:

60. ...

(2) Notwithstanding anything in this Act, but subject to subsections (2.1) and (2.2), an application for a benefit, other than a death benefit, that would have been payable in respect of a month to a deceased person who, prior to the person's death, would have been entitled on approval of an application to payment of that benefit under this Act may be approved in respect of that month only if it is made within 12 months after the death of that person by the estate, the representative or heir of that person or by any person that may be prescribed by regulation.

19 The Hislop class says that s. 60(2) should be suspended to enable estates of survivors of same-sex conjugal relationships to claim retroactive benefits for the period during which the survivor would have been entitled to benefits had same-sex survivors been recognized by the *CPP* as of the date of the death of the contributor. The suspension of s. 60(2) would only avail to the benefit of estates if ss. 44(1.1) and 72(2) are found to be unconstitutional.

IV. Judicial History

A. *Ontario Superior Court of Justice* (2003), 234 D.L.R. (4th) 465

20 Macdonald J. found that all the respondents in this case were in conjugal relationships with their same-sex partners for a number of years. She considered whether ss. 44(1.1) and 72(2) of the *CPP* breached s. 15(1) of the *Charter*, using the three-part analysis set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The comparator group chosen by the Hislop class was married heterosexual couples. The trial judge agreed and found that the legislation treats same-sex survivors differently than survivors of married or opposite-sex common-law [page445] relationships. She observed that in *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 13, it was found that "'sexual orientation' is an analogous ground under s. 15(1)". The judge also found that ss. 44(1.1) and 72(2) offended Hislop's human dignity. She concluded that ss. 44(1.1) and 72(2) infringed s. 15(1) of the *Charter*.

21 Macdonald J. considered the government's argument that the Hislop class's claim amounted to an impermissible claim for retroactive benefits for a breach of the *Charter*. She held that this Court's judgment in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, provided "a complete answer to the arguments raised by the Crown" (para. 99). In her view, "... discrimination was experienced after the coming into force of s. 15 of the *Charter*. The plaintiffs have actually experienced discrimination since before the passage of the *Charter*, but they seek to apply the *Charter* prospectively, to discrimination that took place after April 17, 1985" (*ibid.*). She held that the government had failed to demonstrate that the exclusion of same-sex survivors' pensions was a reasonable limit on the Hislop class's *Charter* rights under s. 1 of the *Charter*.

22 Macdonald J. held that ss. 44(1.1) and 72(2) violated s. 15(1) of the *Charter* and were not justified under s. 1. Under s. 52(1) of the *Constitution Act, 1982*, she granted same-sex survivors a

constitutional exemption from the two general sections (ss. 60(2) and 72(1)) of the *CPP*. She also awarded interest under s. 31 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, on the unpaid survivors' pensions from February 1, 1992 or one month after the death of the contributor, whichever is later. She also awarded costs at approximately \$1.3 million. She dismissed the Hislop class's claims for symbolic damages of \$20,000 for each class member under s. 24(1) [page446] of the *Charter*, and their claims for damages for breach of fiduciary duty and unjust enrichment.

B. *Ontario Court of Appeal (Charron, Feldman and Lang JJ.A.) (2004), 73 O.R. (3d) 641*

23 The Court of Appeal affirmed Macdonald J.'s decision with regard to the unconstitutionality of ss. 44(1.1) and 72(2). However, the court queried why the trial judge considered ss. 60(2) and 72(1) in her analysis of remedy but did not review them in her s. 15(1) or s. 1 analysis. The court was informed that the trial judge's remedy analysis followed the argument as presented at trial by the Hislop class's counsel. The court invited written submissions as to the constitutional validity of ss. 60(2) and 72(1). The court then found that it had the necessary factual foundation and jurisdiction to consider the constitutional validity of these sections and that they must be subjected to a s. 15 and a s. 1 *Charter* analysis.

24 The court concluded that ss. 44(1.1) and 72(2) offended s. 15(1) of the *Charter*. The court found that the appropriate comparator group is opposite-sex surviving partners and that, although the impugned sections contain temporal distinctions as the government argued, those distinctions apply only to same-sex surviving partners and not to opposite-sex survivors. Both ss. 44(1.1) and 72(2) treat same-sex survivors differently from their comparator group. The court said that sexual orientation is now recognized as an analogous ground under s. 15(1) of the *Charter*. The differential treatment discriminated in a substantive sense, and the discrimination could not be justified under s. 1.

25 In dealing with s. 60(2), the Court of Appeal held that estates could not make a s. 15(1) *Charter* application because s. 15(1) only applies to "[e]very [page447] individual". Survivors' estates enjoy no s. 15(1) rights and there was no basis to assess whether such rights were breached by s. 60(2).

26 With respect to s. 72(1), the court held that it did not limit same-sex survivors' rights. The court observed, at para. 106, that "[i]t is only once s. 44(1.1) and s. 72(2) are declared unconstitutional that s. 72(1) may have an adverse effect" on the Hislop class, by limiting pension entitlement to 12 months of arrears, no matter when the partner died. Most same-sex survivors did not apply for the survivor's pension when their partners died, because they were not eligible to apply under the *CPP*. The court held that s. 72(1) did not violate s. 15(1) of the *Charter* because, "in the context of the *MBOA*, it had no adverse effect on the claimants, and at this stage, it is not clear that it will have an adverse effect on the class" (para. 111). Therefore, there was no need to consider

s. 1.

27 The Court of Appeal upheld the declaration of invalidity in respect of ss. 44(1.1) and 72(2). The court held that the two general sections, ss. 60(2) and 72(1) of the *CPP*, do not breach s. 15(1) of the *Charter*. Consequently, there was no remedy to be granted in respect of those sections. The court set aside the constitutional exemption which was ordered by the trial judge with respect to ss. 60(2) and 72(1).

28 The Court of Appeal held that the trial judge properly exercised her discretion on pre-judgment interest. She was entitled to award pre-judgment interest and there is no basis to interfere with that disposition. Costs were awarded on a partial indemnity basis.

C. *Appeal and Cross-Appeal to This Court*

29 The government now appeals the declaration of invalidity of ss. 44(1.1) and 72(2) and the awarding of pre-judgment interest on pension arrears. The [page448] Hislop class cross-appeals the finding of the Court of Appeal which set aside the constitutional exemptions ordered by the trial judge with respect to ss. 60(2) and 72(1).

V. The Issues

30 On October 6, 2005, the Chief Justice stated the following constitutional questions:

1. Does s. 44(1.1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Does s. 72(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
5. Does s. 60(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
7. Does s. 72(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a [page449] free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

31 By way of cross-appeal, the Hislop class submitted three questions:

- (1) Can estates advance s. 15(1) rights?
- (2) Is there an entitlement to interest on survivor's pension arrears?
- (3) Did the Court of Appeal err in setting aside the constitutional exemption in respect of ss. 60(2) and 72(1)?

32 In essence, the issues are:

- (1) Should survivors of same-sex conjugal relationships in which the contributing partner died prior to January 1, 1998 be eligible to receive *CPP* survivorship benefits?
- (2) Should survivors of same-sex conjugal relationships in which the contributing partner died at any time after April 17, 1985 be entitled to retroactive *CPP* benefits from the month following the death of the contributing partner?
- (3) Should estates of deceased survivors be entitled to claim *Charter* relief which the survivors would have been entitled to claim?

VI. Analysis

33 The *MBOA* was enacted in response to this Court's decision in *M. v. H.* The Act seeks to eliminate from federal legislation distinctions based on sexual orientation. In the context of survivorship benefits under the *CPP*, the *MBOA* amendments entitle survivors of conjugal relationships, whether they be of the same or opposite sex, access to the same benefit regime. In other words, the gender of the parties to a conjugal relationship is now irrelevant in the survivorship provisions of the *CPP*. Even though the *MBOA* is remedial legislation, the [page450] complaint is that the relief granted by the *MBOA* does not go far enough, in that it fails to confer eligibility on survivors whose same-sex partner died prior to January 1, 1998 and fails to grant retroactive relief.

A. *Section 44(1.1)*

34 It will be convenient to first deal with the eligibility restriction. The *MBOA* recognized that the former *CPP* regime violated s. 15(1) of the *Charter* because it failed to recognize survivors of same-sex conjugal relationships. Section 44(1.1) continues to fail to recognize survivors of same-sex conjugal relationships whose contributing partner died before January 1, 1998.

35 Section 15(1) of the *Charter* provides:

Equality Rights

15. (1) Every individual is equal before and under the law and has the right

to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

36 The test applicable to s. 15(1) of the *Charter* was articulated by this Court in *Law*. In short, there must be (1) differential treatment on the basis of a personal characteristic, (2) that is an enumerated or analogous ground, (3) which is discriminatory in purpose or effect.

(1) Differential Treatment

37 As the Court of Appeal observed, essential to the question of differential treatment is the choice of comparator group. Throughout this litigation, the government has argued that s. 44(1.1) draws a temporal distinction only. The government's position is that the provisions of the *MBOA* do not differentiate between same-sex couples and opposite-sex couples, but rather, between two groups of survivors of same-sex relationships, based on the date their relationships ended as a result of one partner's death. It cannot, therefore, violate s. 15(1) because a temporal basis for a distinction is not an enumerated or [page451] recognized analogous ground of discrimination. In our opinion, the courts below were correct in rejecting this argument.

38 To frame the comparator group in terms of the express distinction made in s. 44(1.1) between survivors whose partners died before January 1, 1998 and those whose partners died on or after that date would be to miss the fundamental reason for the enactment of the *MBOA*. In *M. v. H.*, this Court held that the distinction in the spousal support regime between same-sex and opposite-sex couples was unconstitutional and that it could not be saved under s. 1. The *MBOA* was expressly intended to extend equal treatment to same-sex partners in a wide range of statutes. It is the purpose of the *MBOA* itself that determines the appropriate comparator group. What must be compared is the subset of same-sex survivors that remains excluded from the *CPP* survivor's benefits, i.e., those whose partners died before January 1, 1998, and similarly situated opposite-sex survivors. The appropriate comparator group in respect of the s. 44(1.1) analysis is survivors of opposite-sex conjugal relationships whose partners died before January 1, 1998.

39 If the government was correct, remedial legislation intended to address the constitutional infirmity of existing legislation, but which limited eligibility for relief on a temporal basis, could never be the subject of a successful s. 15(1) *Charter* challenge. That is because a temporal basis of distinction is not one based upon grounds enumerated in s. 15(1) or grounds analogous thereto. When the government enacts remedial legislation, that legislation may still violate s. 15(1) requirements. The fact that it is remedial legislation does not immunize it from *Charter* review.

40 In this Court, the government's primary challenge to the s. 15(1) decision of the Court of Appeal was based on the choice of comparator group. We find the Court of Appeal did not err in the selection of comparator group.

41 The government cursorily argued that the *Charter* should be interpreted in a manner

recognizing the evolution of societal opinions and [page452] the incremental recognition of analogous grounds. The government says the *MBOA* amendments restricting eligibility to survivors whose partners died on or after January 1, 1998 are consistent with that evolution. With respect, we do not see how the evolution of societal opinions and the incremental recognition of analogous grounds bear on whether s. 44(1.1) continues the discrimination which the *MBOA* amendments are intended to remedy. The question is not whether there was recognition of same-sex discrimination prior to 1998. Rather, the question is whether the prior discrimination which was recognized by the *MBOA* is or is not now being remedied. If survivors of same-sex conjugal relationships whose partners died before 1998 continue to be ineligible for *CPP* survivorship pensions, the prior discrimination that has been recognized by Parliament in enacting the *MBOA* continues for such survivors. For these reasons, we do not accept the government's evolution argument as a valid response to the s. 15(1) claim in respect of s. 44(1.1).

42 This disposes of the government's s. 15(1) arguments. The government did not argue any other error in the *Charter* analysis of the Court of Appeal. We agree with that analysis and need not duplicate it here.

(2) Section 1

43 Section 1 of the *Charter* provides:

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Under s. 1, the government has the burden to demonstrate that a discriminatory provision is a reasonable limit on a s. 15(1) *Charter* right. If it meets this burden, the law will be saved as being [page453] a demonstrably justified reasonable limit on that right.

44 The framework for a s. 1 analysis is the well-known *Oakes* test (see *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-40). The *Oakes* test may be formulated as two main tests with subtests under the second branch, but it may be easier to think of it in terms of four independent tests. If the legislation fails under any one test, it cannot be justified. The four tests ask the following questions:

- (1) Is the objective of the legislation pressing and substantial?
- (2) Is there a rational connection between the government's legislation and its objective?
- (3) Does the government's legislation minimally impair the *Charter* right or freedom at stake?
- (4) Is the deleterious effect of the *Charter* breach outweighed by the salutary

effect of the legislation?

45 As the *MBOA* was the legislative response to this Court's decision in *M. v. H.*, the Act obviously has a pressing and substantial purpose. However, in *M. v. H.*, the Court also held that "when dealing with underinclusive legislation it is important also to consider the impugned omission when construing the objective" (para. 100).

46 It is therefore necessary to consider whether the objective of s. 44(1.1) is pressing and substantial. The effect of s. 44(1.1) is to limit eligibility for *CPP* survivorship pensions in the case of survivors of same-sex conjugal relationships. No survivorship pension is payable where the partner died prior to January 1, 1998.

47 The government's pressing and substantial objective argument in this Court is different than in the Ontario courts. In the Ontario courts, the government's pressing and substantial argument was based on the evolutionary recognition of *Charter* rights and that, prior to *M. v. H.*, there would have [page454] been no rights to same-sex partners. In this Court, the government argues that the pressing and substantial objective of s. 44(1.1) is the matching of benefits conferred under the *CPP* with obligations imposed on same-sex partners under other legislation.

48 In the government's factum and in its oral argument there was no reference to evidence before the trial judge supporting the matching of benefits and obligations argument. The reasons of the trial judge and the Court of Appeal make no reference to the matching argument. It appears that this argument was raised for the first time in this Court.

49 We acknowledge that there may be cases in which the pressing and substantial objective of legislation and the impugned provisions are obvious and may be deduced from the legislation itself. However, in the majority of cases, in order to satisfy the pressing and substantial objective test, the government must adduce some evidence to support its argument.

50 In the case of s. 44(1.1), the issue is one of eligibility only. It is not a provision that purports to make benefits retroactive or that would confer a lump-sum windfall on a survivor. Therefore, it is not obvious why the matching argument supports the limitation imposed by s. 44(1.1).

51 The government seems to relate the January 1, 1998 eligibility date in the *CPP* to provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), allowing for a three-year limitation period for the government to re-assess or the individual to refile individual tax returns under that Act. Again, it is not clear why re-assessment or re-filing under the *Income Tax Act* would have any relation to eligibility under the *CPP*. The eligibility date of January 1, 1998 in the *CPP* has no bearing on income of years prior to 2000 which is the first year in which same-sex survivors would actually receive *CPP* benefits. Therefore the matching argument relying on limitation periods in the *Income Tax Act* is perplexing.

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52 If there was something to the matching argument in respect of eligibility, one would think that s. 44(1.1) would not have made the eligibility date January 1, 1998, but rather would have related it to the date the legislation came into force, July 2000. The fact that the government saw no difficulty in granting eligibility as of January 1, 1998 suggests that matching cannot be considered to be a pressing and substantial objective of s. 44(1.1).

53 We do not say that in an appropriate case the matching of benefits and obligations may not be a pressing and substantial objective of limits on the extension of social benefit legislation. We also acknowledge the government's argument that there are complex relationships between income tax credits, pensions, supplements and other entitlements, often based on conjugal relationships. But it is not enough to make general reference to these relationships. There must be an explanation supported by relevant evidence as to what those relationships are, why they are relevant and why they justify the limit on the *Charter* right that has been found to be violated.

54 The absence of evidence justifying the matching argument also precludes a finding of rational connection between s. 44(1.1) and its objective. Without evidence, it is impossible to understand why s. 44(1.1) is rationally connected to the matching of benefits and obligations. For the same reason there is no evidence as to why s. 44(1.1) is minimally impairing of the s. 15 right to which same-sex survivors have been found to be entitled.

55 More than a vague argument raised for the first time in this Court by the government will be necessary if a s. 1 argument is to succeed. It cannot succeed in this case. Because the government has failed to establish the pressing and substantial objective of the provision, its rational connection to its objective and that it minimally impairs the Hislop class's *Charter* rights, its argument fails in respect of s. 44(1.1) of the *CPP*.

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B. Section 72(2)

56 Section 72(2) became effective in July 2000. The earliest month for which survivorship benefits may be payable to a survivor of a same-sex relationship is therefore July 2000.

57 The Hislop class says that s. 72(2) is to be contrasted with s. 72(1) which is the provision which applies generally to all survivors eligible for *CPP* survivorship pensions. Section 72(1) provides that, in the general case, survivorship pension arrears are payable for a period of up to 12 months preceding the month following the month in which the application for the pension was

received.

58 After June 2001, survivors of same-sex and opposite-sex relationships are equally entitled to up to 12 months of arrears benefits under s. 72(1). However, s. 72(2) provides that, in the transitional period from July 2000 to June 2001, same-sex survivors could not access arrears prior to July 2000. By reason of s. 72(2), same-sex and opposite-sex survivors are treated differently in that transitional period.

59 The government makes the same "comparator group" argument in respect of s. 72(2) as it did in respect of s. 44(1.1). It says the *MBOA* amendments did not differentiate between same-sex and opposite-sex couples but rather between two groups of survivors of same-sex relationships based on the date on which the relationship ended as a result of the death of one of the partners.

60 The government is correct that s. 72(2) creates a temporal distinction. But that does not make its choice of comparator group correct. The appropriate comparison is between same-sex and opposite-sex survivors who applied for the survivor's pensions between July 2000 and June 2001. As with s. 44(1.1), the government's challenge to the s. 15(1) decision of the Court of Appeal is based solely on the choice of comparator group and the evolutionary recognition of analogous grounds. For the reasons we have expressed in our analysis of the s. 15(1) arguments in respect of s. 44(1.1), we do [page457] not find merit in the government's submissions in respect of s. 72(2).

61 With respect to s. 1, the government seems to make two arguments in support of s. 72(2). One is that the general principle is that legislation operates from the time of enactment forward and that this approach is consistent with prior amendments to the *CPP*. The other is that the focus was to fix the liability of the *CPP* as of July 2000.

62 We agree that remedial legislation generally operates prospectively. However, the only effect of striking down s. 72(2) is to render s. 72(1) applicable to survivors of same-sex conjugal relationships during the July 2000 to June 2001 period. For those same-sex survivors who applied for survivors' pensions during that time, they, like opposite-sex survivors, could be entitled to up to 12 months of arrears depending upon when the contributor died.

63 The effect of s. 72(1) applying to same-sex survivors during the period from July 2000 to June 2001 means that survivors who applied during that period could be entitled to arrears, at most, back to August 1999. While the striking down of s. 72(2) will grant access of up to 12 months of pension arrears, this is a result of retroactive benefits which Parliament itself granted by enacting s. 72(1).

64 We recognize that costs may be a factor in a s. 1 analysis. The government says that July 2000 was selected in order to fix the liability of the *CPP* as of that date. However, as of July 2000, the *CPP* had to anticipate up to 12 months of arrears liability arising from opposite-sex relationships. The government did not refer to evidence to suggest that cost was the reason to deny same-sex survivors up to [page458] 12 months of benefit arrears during the transitional period.

65 We are not persuaded that, in the circumstances of this case, s. 72(2) is justified under s. 1 of the *Charter*. Access of up to 12 months of arrears payments prior to July 2000 is provided by existing legislation, namely s. 72(1). Parliament itself has provided for limited retroactive benefits. Where the issue is solely whether *Charter* relief claimants should be entitled to the same retroactive benefits expressly available to their comparator group, absent cost considerations, it is difficult to see how denial of these benefits has a pressing and substantial objective. Here, there is an absence of evidence of cost justifying the provision. In the circumstances, we cannot find there is a rational connection between s. 72(2) and its objective, or indeed, that s. 72(2) minimally impairs the *Charter* rights of the Hislop class.

66 The government has failed to establish a s. 1 justification for s. 72(2).

C. Section 72(1)

67 Because we have found that s. 72(2) violates s. 15(1) and is not saved by s. 1 of the *Charter*, same-sex survivors will be entitled to up to 12 months of pension arrears for the period from August 1999 to July 2000, pursuant to s. 72(1).

68 However, the Hislop class takes issue with s. 72(1) itself. The Hislop class argues that although s. 72(1) is facially neutral, its 12-month limitation on pension arrears has an adverse effect on same-sex survivors. It says that same-sex survivors were unable, prior to July 2000, to make a claim for survivorship benefits. Based upon s. 44(1.1) and s. 72(2) being struck down, it is argued that same-sex survivors [page459] should be entitled to claim retroactive benefits from the time they became survivors after April 17, 1985 when s. 15(1) of the *Charter* came into force. For example, if an individual became a survivor of a same-sex relationship in 1995, the survivor should be entitled to a lump sum of benefits for the period from 1995 to the time the application was received. The Hislop class argues that the operation of s. 72(1) should be suspended for same-sex survivors to enable them to obtain those retroactive benefits.

69 Although the Hislop class frames the s. 72(1) argument as an adverse effect discrimination claim, the issue which the argument raises is, in fact, one of remedy. What the Hislop class is seeking is retroactive *Charter* relief. Their request for a constitutional exemption from the limitation on arrears in s. 72(1) is, in effect, a request for a remedy in respect of their exclusion from the survivors' benefits by the pre-*MBOA CPP* between 1985 and 2000. As will be explained hereafter, this Court has been explicit in restricting entitlement to retroactive *Charter* relief of this nature. Because the remedy sought by the Hislop class is unavailable in any event, it is not necessary to undertake a s. 15(1) analysis in respect of s. 72(1).

D. Section 60(2)

70 Where a survivor entitled to a survivor's *CPP* pension dies without making application for that pension, the survivor's estate may apply and obtain the pension benefit to which the survivor would have been entitled, provided the estate makes application within 12 months after the death of the

survivor. The Hislop class submits that, because some same-sex survivors had been deceased for over 12 months when the *MBOA* amendments to the *CPP* came into effect, their estates should be able to apply for the benefits to which the survivors would have been entitled and that the 12-month limitation in s. 60(2) should be suspended so as not to bar such estate claims.

[page460]

71 The threshold issue is whether the estates of those survivors who died more than 12 months before the coming into force of the *MBOA* amendments to the *CPP* may have standing to claim a s. 15(1) *Charter* right on behalf of the deceased survivor. Only if they have such standing may the Court even entertain an argument that s. 60(2) should not apply to such estates. The Hislop class relies on *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 322-23. *Big M Drug Mart* dealt with s. 2 of the *Charter* which uses the term "[e]veryone". The term used in s. 15(1) is more precise and narrower, as it allows rights to "[e]very individual".

72 The government submits, on the basis of the British Columbia Court of Appeal judgment in *Stinson Estate v. British Columbia* (1999), 70 B.C.L.R. (3d) 233, 1999 BCCA 761, that s. 15(1) rights cannot be enforced by an estate because those rights are personal and terminate with the death of the affected individual. The government also submits that estates are not individuals but artificial entities incapable of having their human dignity infringed. In addition, the government relies on the Special Joint Committee on the Constitution (see *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (1980-81), Issue No. 43, January 22, 1981, at pp. 43:39-43:44; see also Issue No. 44, January 23, 1981, at pp. 44:6-44:10; Issue No. 47, January 28, 1981, at p. 47:88; and Issue No. 48, January 29, 1981, at pp. 48:4-48:49), which substituted the words "every individual" for "everyone" in s. 15(1) in response to the Minister of Justice's desire "to make it clear that this right would apply to natural persons only" (p. 43:41). The government further argues that this Court has held that s. 15(1) rights could not be claimed by other entities such as corporations (see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1382, *per* La Forest J.).

73 In our opinion, the government's submissions have merit. In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be [page461] infringed. The use of the term "individual" in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) *Charter* claims. In this sense, it may be said that s. 15 rights die with the individual.

74 Mr. Hislop's individual situation, however, is different. Although he died between the time his notice of appeal was filed in this Court and the hearing of this appeal, he obtained judgment while he was still alive.

75 When a judgment is obtained, the cause of action upon which the judgment is based is merged in the judgment: *Lew v. Lee*, [1924] S.C.R. 612, aff'd on this point [1925] A.C. 819 (P.C.); *Reid v. Batty*, [1933] O.W.N. 496 (H.C.J.), aff'd [1933] O.W.N. 817 (C.A.). In *Lew*, Anglin C.J. explained that, because of the doctrine of merger, the issue in an appeal is not the original cause of action but rather the legality and validity of the judgment. As such, where a party dies pending appeal, the appeal survives even if the original cause of action would not.

76 It should be noted that Anglin C.J. relied in part on a provision in the British Columbia *Supreme Court Rules* (currently r. 15(2)), which provided that whether a cause of action survives or not, the death of either party between verdict or finding of the issues of fact and judgment will not give rise to abatement and that judgment may be entered notwithstanding death. He reasoned that, *a fortiori*, the right to enforce a judgment or defend it on appeal must also survive. In our view, his analysis is applicable in the instant case irrespective of any legislative provision. Although s. 15(1) rights are personal, the constitutional issues raised here are issues of public importance. Given the public interest in ensuring that questions of law related to such rights be correctly decided, an appeal from a judgment raising such issues must be allowed to survive the party's death pending the appeal.

[page462]

77 Although the preceding comments are sufficient to dispose of the issue in relation to Mr. Hislop himself, because this is a class action, it is appropriate to clarify with more precision the time at which s. 15(1) rights crystallize. Merger, as we have explained, occurs when judgment is entered. Nevertheless, it is a long-standing principle of law that a litigant should not be prejudiced by an act of the court (*actus curiae neminem gravabit*): *Turner v. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561. Based on this principle, in cases where a plaintiff has died after the conclusion of argument but before judgment was entered, courts have entered judgment *nunc pro tunc* as of the date that argument concluded: see *Gunn v. Harper* (1902), 3 O.L.R. 693 (C.A.); *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495 (B.C.S.C.); *Monahan v. Nelson* (2000), 186 D.L.R. (4th) 193, 2000 BCCA 297. We affirm the correctness of this approach and conclude that the estate of any class member who was alive on the date that argument concluded in the Ontario Superior Court, and who otherwise met the requirements under the *CPP*, is entitled to the benefit of this judgment.

E. Remedies

78 We now turn to the question of remedy. In challenging s. 72(1) of the *CPP*, the appellants seek a fully retroactive remedy. They argue that a declaration of invalidity under s. 52 of the *Constitution Act, 1982* necessarily operates back to the coming into force of s. 15 of the *Charter*. In order to determine the validity of this claim, we must first consider the nature of constitutional

remedies and the circumstances under which courts may limit a retroactive remedy and craft a prospective remedy. In the present appeal, we conclude that a prospective remedy would be appropriate. A retroactive remedy would be unwarranted in respect of s. 72(1) *CPP*. We will also determine the appropriate remedies in respect of s. 44(1.1) and s. 72(2) *CPP*.

79 In substance, the position of the appellants is predicated on the traditional -- often called Blackstonian -- view that judges never make law, [page463] but merely discover it. In this perspective, the courts are said to apply the law as it really was or has been rediscovered. As a consequence of the declaration of nullity, the appellants claim that they are entitled to the full benefits of the law, in conformity with an understanding of the Constitution, which is deemed to have never changed.

80 The supremacy clause, now enshrined at s. 52, is silent about the remedies which may flow from a declaration of nullity. Does it mean that such a declaration is always both prospective and retroactive? This does not appear to have been the position of our Court throughout the incremental development of the law of constitutional remedies after the adoption of the *Charter*. A body of jurisprudence now accepts the legitimacy of limiting the retroactive effect of a declaration of nullity and of fashioning prospective remedies in appropriate circumstances.

(1) Retroactive and Prospective Remedies Under the *Charter*

81 The Constitution empowers courts to issue constitutional remedies with *both* retroactive and prospective effects: see, e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 719. Section 24(1) of the *Charter* enables individuals who have had their *Charter* rights violated to seek redress for those past wrongs and "obtain such remedy as the court considers appropriate and just". Section 24(1) may also, in some situations, enable the claimant to recover damages, which are necessarily retroactive: *Schachter*, at pp. 725-26.

82 Section 52(1) instructs courts to declare unconstitutional legislation of no force or effect. When a court issues a declaration of invalidity, it declares that, henceforth, the unconstitutional law cannot be enforced. The nullification of a law is thus prospective. However, s. 52(1) may also operate retroactively so far as the parties are concerned, reaching into the past to annul the effects of the unconstitutional law: see, e.g., *Miron v. Trudel*, [1995] 2 S.C.R. 418.

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83 This Court has applied in many cases the "declaratory approach" to constitutional remedies, which implies that s. 52(1) remedies are often given retroactive effect. See, for example, *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 28, Gonthier J. On this view, s. 52(1) remedies are deemed to be fully retroactive because the legislature never had the authority to enact an unconstitutional law. In the words of Professor Hogg,

a declaration of constitutional invalidity "involves the nullification of the law from the outset" (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 55-2 (emphasis added)). If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past.

84 As mentioned above, the declaratory approach is derived from Blackstone's famous aphorism that judges do not create law but merely discover it: W. Blackstone, *Commentaries on the Laws of England* (1765), vol. 1, at pp. 69-70. It reflects a traditional and widespread understanding of the role of the judiciary in a democratic state governed by strong principles of separation of powers between courts, legislatures and executives. In this perspective, courts grant retroactive relief applying existing law or rediscovered rules which are deemed to have always existed. On the other hand, legislators fashion new laws for the future.

85 Blackstone's declaratory approach has not remained unchallenged in modern law. Commentators and courts have pointed out that judges fulfill a legitimate law-making function. Judges do not merely declare law; they also make law. These critics argue that Blackstone's view is a fiction as judges make law, especially in the common law world. See, e.g., Lord Reid, "The Judge as Law Maker" (1972-1973), 12 *J.S.P.T.L.* 22. They say such a fiction should not be turned into an ironclad principle.

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86 However, this acknowledgement does not require abandoning Blackstone's declaratory approach altogether. The critique of the Blackstonian approach applies only to situations in which judges are fashioning new legal rules or principles and not when they are applying the existing law. In instances where courts apply pre-existing legal doctrine to a new set of facts, Blackstone's declaratory approach remains appropriate and remedies are necessarily retroactive. Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling: see S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 *S.C.L.R.* (2d) 205, at pp. 211 and 218. There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than a retroactive remedy. The question then becomes what kind of change and which conditions will justify the crafting of judicial prospective remedies.

87 The House of Lords recently adopted this view in the course of its discussion of prospective

overruling: *In re Spectrum Plus Ltd. (in liquidation)*, [2005] 2 A.C. 680, [2005] UHKL 41. The words of Lord Nicholls at para. 34 are particularly apt:

[Blackstone's declaratory] theory is still valid when applied to cases where a previous decision is overruled as wrong when given. Most overruling occurs on this basis. These cases are to be contrasted with [those] where the later decision represents a response to changes in social conditions and expectations. Then, on any view, the declaratory approach is inapt. In this context [this] approach has long been discarded. It is at odds with reality.

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88 Although Lord Nicholls' statement arose in the common law context, this Court has implicitly adopted a similar line of reasoning in constitutional law. Despite this Court's endorsement of the Blackstonian declaratory approach, in its development of the law of constitutional remedies, it has frequently seen fit to temper the retroactive effect of s. 52(1) remedies and adopt a position similar to that of Lord Nicholls. On occasion, this Court has expressly stated that the s. 52(1) remedy would "apply prospectively" only: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 18. In that reference, the Court held that the provinces' remuneration scheme for provincial judges violated the right to a trial before an independent and impartial tribunal. In fashioning its remedy, the Court side-stepped Blackstonian doctrine and provided for a "transition period of one year before th[e] requirement [took] effect" (para. 18).

89 The use of the "transition period" after a finding of unconstitutionality is inconsistent with the declaratory approach. It keeps in force by judicial decision a law that was deemed never to have been of force or effect. Thus, the fact that this Court has occasionally prescribed transition periods, intended to give a s. 52(1) remedy prospective effect only, suggests that this Court is not wedded to the declaratory approach in all *Charter* cases.

90 In another type of situation, which arises more frequently, the Court has held that providing immediate and retroactive judicial remedies may be "inappropriate" when "doing so would create a lacuna in the regime before Parliament would have a chance to act": *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46, at para. 57. In such cases, the Court has temporarily suspended the declaration of invalidity of the unconstitutional legislation to avoid creating a "legal vacuum" or "legal chaos" before Parliament or the legislature has the opportunity to enact something in place of the unconstitutional legislation: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 ("*Manitoba Language Rights Reference*"), at p. 747; *Schachter*. [page467] In *Schachter*, this Court held that the suspended declaration of invalidity was appropriate when giving immediate retroactive effect to the Court's declaration of invalidity would (a) "pose a danger to the public"; (b) "threaten the rule of law"; or (c) "result in the deprivation of benefits from deserving persons", such as when

the legislation was "deemed unconstitutional because of underinclusiveness rather than overbreadth": *Schachter*, at p. 719.

91 Like transition periods and other purely prospective remedies, the suspended declaration of invalidity is not fully consistent with the declaratory approach. By suspending the declaration of invalidity, the Court allows the constitutional infirmity to continue temporarily so that the legislature can fix the problem. In other words, the Court extends the life of a law which, on the Blackstonian view, never existed.

92 Although if the legislature fails to comply with the Court's order within the period of suspension, the Court's declaration would apply retroactively, the purpose of a suspended declaration of invalidity can be to facilitate the legislature's function in crafting a prospective remedy. The temporal delay in striking down the law also has the effect of extending the life of an unconstitutional law. In such cases, to allow the claimants to recover concurrent retroactive relief would be at cross-purposes with the Court's decision to grant a suspended declaration of invalidity: *Schachter*, at p. 720.

93 The determination of whether to limit the retroactive effect of a s. 52(1) remedy and grant a purely prospective remedy will be largely determined by whether the Court is operating inside or outside the Blackstonian paradigm. When the Court is declaring the law as it has existed, then the Blackstonian approach is appropriate and retroactive relief should be granted. On the other hand, when a court is developing new law within the broad confines of the Constitution, it may be appropriate to limit the retroactive effect of its judgment.

94 The approach which our Court has adopted in respect of the crafting of constitutional remedies [page468] also flows from its understanding of the process of constitutional interpretation, which the "living tree" metaphor neatly describes. From the time Lord Sankey L.C. used these words to characterize the nature of the Canadian Constitution, courts have relied on this expression to emphasize the ability of the Constitution to develop with our country (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). This Court has often stated that the Canadian Constitution should not be viewed as a static document but as an instrument capable of adapting with the times by way of a process of evolutionary interpretation, within the natural limits of the text, which "accommodates and addresses the realities of modern life": *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79, at para. 22; see also *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at p. 1029; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 723; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at p. 365; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155.

95 It is true that the "living tree" doctrine is not wedded to a particular model of the judicial function. At times, its application may reflect the fact that, in a case, the Court is merely declaring the law of the country as it has stood and that a retroactive remedy is then generally appropriate. In other circumstances, its use recognizes that the law has changed, that the change must be

acknowledged and that, from a given point in time, the new law or the new understanding of some legal principle will prevail.

96 The question is no longer the legitimacy of prospective remedies, but rather when, why and how judges may rule prospectively or restrict the retroactive effect of their decisions in constitutional matters. The key question becomes the nature and effect of the legal change at issue in order to determine whether a prospective remedy is appropriate. The legitimacy of its use turns on the answer to this question.

97 There must be change, but what kind of change will be enough? Given the often incremental nature [page469] of changes in judge-made law in a common law system, the question is bound to raise difficulties. Various formulas have been suggested. For example, at a time when it appeared to be moving towards a broad recognition of prospective overruling, the U.S. Supreme Court relied on a notion of a "clear break with the past". The limitation on proactive remedies could be considered after litigants had established such a change (see *United States v. Johnson*, 457 U.S. 537 (1982), at p. 549).

98 On other occasions, the same court crafted different formulas. In an earlier case, in 1971, it relied on a test which tended to look at both the nature of the change and of some of its consequences (*Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), at pp. 106-7). It identified three relevant considerations:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed... Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." ... Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

See also: J. E. Fisch, "Retroactivity and Legal Change: An Equilibrium Approach" (1997), 110 *Harv. L. Rev.* 1055, at pp. 1060-63; C. Sampford, *Retrospectivity and the Rule of Law* (2006), at pp. 211-12.

99 Change in the law occurs in many ways. "Clear break with the past" catches some of its diversity. It can be best identified with those situations where, in Canadian law, the Supreme Court departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision. Such clear situations would justify recourse to prospective [page470] remedies in a proper context. But other forms of substantial change may be as relevant, especially in constitutional adjudication, where courts must give content to broad, but previously undefined, rights, principles

or norms. The definition of a yet undetermined standard or the recognition that a situation is now covered by a constitutional guarantee also often expresses a substantial change in the law. The right may have been there, but it finds an expression in a new or newly recognized technological or social environment. Such a legal response to these developments properly grounds the use of prospective remedies, when the appropriate circumstances are met. A substantial change in the law is necessary, not sufficient, to justify purely prospective remedies. Hence, we must now turn to what else must be considered once legal change has been established.

100 Although the list of such factors should not be considered as closed, some of them appear more clearly compelling. They may include reasonable or in good faith reliance by governments (*Miron*, at para. 173; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 78), or the fairness of the limitation of the retroactivity of the remedy to the litigants. Courts ought also consider whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources (*Benner*, at para. 103; *Schachter*, at p. 710).

101 A careful consideration of reliance interests is critical to this analytical process. Although legal mechanisms, such as the *de facto* doctrine, *res judicata* or the law of limitations, may mitigate the consequences of declaratory rulings in certain circumstances, they do not address every situation. Fully retroactive remedies might prove highly disruptive in respect of government action, which, on the basis of settled or broadly held views of the law as it stood, framed budgets or attempted to design [page471] social programs. Persons and public authorities could then become liable under a new legal norm. Neither governments nor citizens could be reasonably assured of the legal consequences of their actions at the time they are taken.

102 The strict declaratory approach also hardly appears reconcilable with the well-established doctrine of qualified immunity in respect of the adoption of unconstitutional statutes which our Court applied, for example, in cases such as *Mackin* and *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347. Where legislation is found to be invalid as a result of a judicial shift in the law, it will not generally be appropriate to impose liability on the government. As Gonthier J. wrote in *Mackin*, it is a general rule of public law that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional" (para. 78). The rationale for this qualified immunity, which applies equally to actions for damages based on the general law of civil liability and to claims for damages under s. 24(1) of the *Charter*, was aptly expressed by Gonthier J.:

Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the

effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded. [para. 79]

The same principles will apply in respect of claims for retroactive benefits under s. 15 of the *Charter*. [page472] Whether framed as a remedy under s. 52 or s. 24(1), it may be tantamount to a claim for compensatory damages flowing from the underinclusiveness of the legislation.

103 People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other.

104 Having regard to the above-mentioned criteria, it is possible to distinguish this case from some cases where fully retroactive remedies were granted. *Miron* provides an example of when it would *not* be appropriate for courts to limit the retroactive effect of a s. 52(1) remedy. In *Miron*, the appellant was injured while a passenger in a vehicle driven by an uninsured driver. He made a claim for accident benefits against the insurance policy of his unmarried partner but his claim was denied on the basis that the policy covered only legally married spouses. Writing for the majority, McLachlin J. (as she then was) held that the distinction based on marital status was discriminatory under s. 15(1) of the *Charter*. She concluded that retroactive reading-up of the legislation was an appropriate remedy, which entitled the appellant to the retroactive benefit of his partner's insurance policy.

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105 In *Miron*, it would not have been appropriate for the Court to limit the retroactive effect of the remedy and grant a purely prospective remedy. First, the government did not meet the threshold factor of showing a substantial change from the existing law. As early as 1980, the Ontario Legislature was able to agree on a formula to extend death benefits to certain unmarried persons. And in 1981, in the context of the Ontario *Human Rights Code*, the Legislature agreed on a

definition of "spouse" as the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage. In other words, Ontario's vehicle insurance legislation was out of step with the evolving understanding of "spouse" as it existed in other Ontario statutes. Therefore, the Court's holding in *Miron* -- that the vehicle insurance legislation's definition of "spouse" violated s. 15 -- was not a substantial change from the existing law. To the contrary, it reflected an understanding of s. 15 of the *Charter* that was already understood by the Ontario Legislature in the context of the Ontario *Human Rights Code* and other provincial legislation. Because the finding of a s. 15 infringement in *Miron* did not represent a substantial change in the law, it would have been inappropriate to limit the retroactive effect of its decision.

106 However, even if the government had succeeded in meeting the substantial change requirement, other factors militated against limiting the retroactive effect of the remedy. In reaching her conclusion, McLachlin J. drew support from three observations. First, she observed that the legislature had, since the accident occurred, amended the applicable legislation to include unmarried partners, thus allaying any concerns about interfering unduly with legislative objectives. The amended legislation provided "the best possible evidence of what the Legislature would have done had it been forced to face the problem the appellants raise[d]" (para. 180). Second, considerations of fairness to the successful litigant also weighed in favour of retroactivity, as providing a retroactive remedy in this case [page474] was the only means of "cur[ing] an injustice which might otherwise go unremedied": *ibid.* Third, McLachlin J. noted that the distinction based on marital status was unreasonable, *even at the time the impugned legislation was enacted* (para. 173). Because the Legislature ought to have known that the vehicle insurance legislation was out of step with a modern understanding of "spouse", it could not reasonably exclude common law spouses from insurance coverage.

107 It should be noted that, in *Miron*, all of the factors discussed above -- good faith reliance by governments, fairness to the litigants and the need to respect the constitutional role of legislatures -- favoured a retroactive remedy. In a number of cases, however, these factors may pull in different directions, with some factors favouring a retroactive remedy and others favouring a purely prospective remedy. In such cases, once the "substantial change" threshold criterion is met, it may be appropriate to limit the retroactive effect of the remedy based on a *balancing* of these other factors. This balance must be struck on a case-by-case basis.

108 A second situation that must be distinguished was considered by this Court in its recent judgment in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, 2007 SCC 1, wherein it held that taxes collected pursuant to an *ultra vires* regulation are recoverable by the taxpayer. The difference between the result in *Kingstreet* and the type of situation in the present case may be understood in terms of a basic distinction between cases involving moneys collected by the government and benefits cases. Where the government has collected taxes in violation of the Constitution, there can be only one possible remedy: restitution to the taxpayer. In contrast, where a scheme for benefits falls foul of the s. 15 guarantee of equal benefit under the law, we normally do

not know what the legislature would have done had it known that its benefits scheme failed to comply with the *Charter*. In benefits cases, a range of options is open to government. The excluded group could simply be included [page475] in the existing benefit scheme as was the result in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. It could also be included in a modified benefit scheme, adopted by legislative amendments, as occurred in *Schachter*. Also, in *Schachter*, the Court alluded to the possibility of an elimination of the benefit (p. 702). In our political system, choosing between those options remains the domain of governments. This principle points towards limiting the retroactive effect of remedies in s. 15 benefits cases in which the other above-mentioned criteria are met.

(2) The Appropriate Remedy in This Case

(a) *Limits on the Retroactive Effect of the Remedy in the Context of This Case*

109 Same-sex equality jurisprudence since 1985 is illustrative of the sort of legal shift that gives rise to new law and justifies consideration of prospective remedies. The factors mentioned above also weigh in favour of limiting the retroactive effect of the remedy in the context of this case.

(i) The Substantial Change in the Law

110 This Court's decision in *M. v. H.* marked a departure from pre-existing jurisprudence on same-sex equality rights. In 1995, a majority of this Court upheld the exclusion of same-sex partners from old age security legislation in *Egan*, with four judges finding no s. 15(1) violation, and one judge concluding that the scheme was contrary to s. 15(1) but that it could be justified under s. 1. Four years later in *M. v. H.*, eight members of this Court held that the exclusion of same-sex partners from the spousal support provisions under the *Family Law Act* was contrary to s. 15(1) and could not be saved under s. 1. *M. v. H.* thus marks a clear shift in the jurisprudence of the Court, where it moved away from the plurality's holding in *Egan* and came [page476] to a new understanding of the scope of equality rights.

111 Bastarache J. disagrees with our conclusion on the nature of the change brought about by *M. v. H.* He cites lower court decisions rendered prior to *Egan* and before *M. v. H.* to show that the law on same-sex equality rights remained unsettled until *M. v. H.* However, in our system, the Supreme Court has the final word on the interpretation of the Constitution: *Manitoba Language Rights Reference*, at p. 745. A majority of the Court in *Egan* rejected the appellants' claim for equal benefits under the law. It was a fact that this Court held in *Egan* that the Constitution did not require equal benefits for same-sex couples. This fact changed only after *M. v. H.* when this Court held that it was unconstitutional to exclude same-sex couples from the definition of spouse in the *Family Law Act*. The threshold requirement for limiting the retroactive effect of the remedy has been satisfied. The Court must now consider other relevant factors. In this case, reliance interests, fairness concerns, the government's good faith, and the need to respect Parliament's legislative role all weigh in favour of limiting retroactive relief.

(ii) Reasonable Reliance

112 Given the state of the jurisprudence prior to *M. v. H.*, the exclusion of same-sex partners from the former *CPP* was based on a reasonable understanding of the state of s. 15(1) jurisprudence as it existed after *Egan* and before *M. v. H.* Admittedly, the Court in *Egan* was divided over whether to extend old age security benefits to same-sex couples, with four judges dissenting. After *M. v. H.*, it became apparent that the *Egan* dissent had prevailed. [page477] However, the benefit of hindsight does not undermine the government's reasonableness in relying on *Egan*.

113 In holding that the government reasonably relied on the pre-*M. v. H.* jurisprudence, we do not seek to justify the slowness of legislatures and courts alike in recognizing *Charter* rights. Rather, we acknowledge the fact that although the Constitution embodies the supreme law and the enduring values of this country, it is up to the courts to interpret and apply those provisions. In *Manitoba Language Rights Reference*, this Court held:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails. [p. 745]

114 The text of the Constitution establishes the broad confines of the supreme law, but it is up to the courts to interpret and apply the Constitution in any given context. The inviolability of the Constitution ensures that our nation's most cherished values are preserved, while the role of the courts in applying the Constitution ensures that the law is sufficiently flexible to change over time to reflect advances in human understanding. But it also means that the Constitution, at any snapshot in time, is only as robust as the court interpreting it. If the judiciary errs or is slow to recognize that previous interpretations of the Constitution no longer correspond to social realities, it must change the law. However, in breaking with the past, the Court does not create an automatic right to redress for the Court's prior ruling. Where the government's reliance on the unconstitutional law was reasonable because it was [page478] relying on this Court's jurisprudence, it will be less likely that a right to retroactive relief will flow from a subsequent declaration of invalidity of the unconstitutional law.

(iii) Good Faith

115 Our comments above indicate that the government did not act in bad faith in failing to extend survivors' benefits to same-sex couples prior to *M. v. H.* It is significant that the survivors' benefit scheme under the former *CPP* was never struck down by a court of competent jurisdiction. Rather, recognizing the likely implications of this Court's ruling in *M. v. H.* for that scheme, Parliament

endeavoured to pre-emptively correct the constitutional deficiencies therein by enacting remedial legislation. Because the government acted in good faith by attempting pre-emptively to correct a constitutional infirmity soon after it was discovered, it would be inappropriate to reach back further in time and impose a retroactive remedy.

(iv) Fairness to Litigants

116 In seeking payment of arrears back as far as 1985, the Hislop class effectively asks this Court to overlook the evolution in the jurisprudence of same-sex equality rights that has taken place and to declare that the understanding to which we have come over that period of time was in fact the law in 1985. This position cannot be sustained. Although *M. v. H.* declares what the Constitution requires, it does not give rise to an automatic right to every government benefit that might have been paid out had the Court always interpreted the Constitution in accordance with its present-day understanding of it. *M. v. H.* was not a case like *Miron* where limiting the retroactive effect of the s. 52(1) remedy would have granted the "successful" claimant a hollow victory. In contrast, a *purely prospective remedy* in *M. v. H.* was not meaningless. *M. v. H.* resulted in wide-scale amendments to federal and provincial legislation across the country to extend government benefits to same-sex couples. Equally important, *M. v. H.* helped usher in a new era of understanding of the equal human dignity [page479] of same-sex couples. One could not say that *M. v. H.* granted those litigants only a Pyrrhic victory.

(v) Respecting Parliament's Role

117 Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that *Charter* remedies will be directed more toward government action in the future and less toward the correction of past wrongs. In the present case, the Hislop class's claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former *CPP*. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.

(vi) Conclusion

118 For the foregoing reasons, the retroactive relief sought by the Hislop class is unavailable under the law applicable to constitutional remedies. It is not therefore necessary to carry out a s. 15(1) analysis in respect of s. 72(1).

(b) *Remedies Arising From the Specific Provisions: Sections 44(1.1) and 72(2)*

119 We turn now to a consideration of the appropriate remedy for the specific constitutional

violations that have been identified in this case.

120 Writing for a majority of the Court in *Schachter*, Lamer C.J. explained that three questions must be answered when s. 52 of the *Constitution Act, 1982* is engaged: (1) what is the extent of the inconsistency between the impugned provision and the [page480] *Charter*; (2) can that inconsistency be dealt with alone, by way of severance or reading in, or is it too inextricably linked to other parts of the legislation; and (3) should a declaration of invalidity be temporarily suspended?

121 In the present case, ss. 44(1.1) and 72(2), although found within remedial legislation, restrict the availability of that legislation to a marginalized group. The extent of the inconsistency with the equality guarantee is co-extensive with the scope of these two provisions. As such, the inconsistency can be cured without distorting or interfering with the rest of the legislative scheme. A declaration that ss. 44(1.1) and 72(2) are of no force and effect is in keeping with the scheme and obvious purpose of the *MBOA* to extend the survivors' benefit to same-sex survivors. Finally, a temporary suspension of the declaration of invalidity is not appropriate in the present case. As Lamer C.J. noted in *Schachter*, at p. 716, such suspensions are "serious matter[s] from the point of view of the enforcement of the *Charter*" because they allow an unconstitutional state of affairs to persist. Suspensions should only be used where striking down the legislation without enacting something in its place would pose a danger to the public, threaten the rule of law or where it would result in the deprivation of benefits from deserving persons without benefiting the rights claimant (p. 719). None of these factors are present in the case at bar.

122 Throughout these proceedings, the Crown has taken the position that the specific provisions are constitutionally unassailable because they merely ensure that the remedial provisions in the *MBOA* apply prospectively (i.e., not retroactively) from the time of the enactment. Further, the Crown has relied on the argument that same-sex equality rights, as they are understood today, are not what they were in 1985. In effect, it is the Crown's position that striking down the specific provisions would be tantamount to applying today's legal understanding of equality rights to past situations.

123 As we have explained above, the specific provisions violate s. 15(1) and cannot be justified under [page481] s. 1. The constitutional analysis related to these provisions does not depend on any particular conception of the equality rights of same-sex survivors prior to the enactment of the *MBOA*. The specific provisions, as applied to same-sex survivors *today*, are discriminatory.

124 Any concerns about retroactivity in respect of s. 44(1.1) are misplaced because they mistakenly construe the survivor's benefit as a payment in respect of a past event, namely the death of the survivor's spouse or common law partner, rather than the ongoing status of being a survivor. In our view, the principles articulated by this Court in *Benner* are a complete answer to the Crown's s. 44(1.1) argument.

125 *Benner* involved a challenge to provisions of the *Canadian Citizenship Act* that afforded different treatment to applicants for Canadian citizenship, where those applicants were born before

February 14, 1977, based on whether they were born of Canadian mothers or Canadian fathers. Children of Canadian fathers were automatically entitled to Canadian citizenship upon registration of their birth, while children of Canadian mothers were required to apply for citizenship, swear an oath and pass a security check. Benner challenged the legislative distinction on s. 15(1) grounds, while the Crown resisted the claim in part on the basis that Benner's claim involved an impermissible retroactive application of the *Charter* to events that had taken place before the *Charter* came into force. Writing for a unanimous court, Iacobucci J. rejected the Crown's argument and, in so doing, provided a useful clarification of the concepts of retroactivity, retrospectivity and prospectivity.

126 It should be noted that *Benner* engaged questions related to the retroactive application of the *Charter*, while the instant case raises questions related to the retroactive application of ordinary legislation and to the availability of retroactive remedies for unconstitutional legislation. Although retroactivity raises different concerns in the two contexts, the basic conceptual distinctions between [page482] retroactivity, retrospectivity and prospectivity remain. As such, Iacobucci J.'s elucidation of these concepts is directly relevant to the present case.

127 First, Iacobucci J. addressed the difference between retroactivity and retrospectivity, citing, at para. 39, E. A. Driedger's explanation from "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

Next, Iacobucci J. turned to the difference between retrospectivity and prospectivity, again citing Professor Driedger. He reproduced the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 192, at para. 42 of his reasons:

These past facts may describe a status or characteristic, or they may describe an event. It is submitted that where the fact-situation is a status or characteristic (the being something), the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact-situation is an event (the happening of or the becoming something), then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty or disability to an event that took

place before the enactment. [Emphasis added.]

[page483]

It is true, as Iacobucci J. observed, that the distinction between situations involving discrete events and those involving ongoing conditions is not always clear. For example, while the death of a spouse or common law partner is an event, the fact of "being a survivor" is an ongoing condition. The challenge lies in determining whether, in all the circumstances, a particular legislative scheme relates primarily to the past event or the current condition resulting from it (para. 46).

128 On the facts before the Court in *Benner*, Iacobucci J. concluded that the appellant's claim did not involve a retrospective application of the *Charter* because it was a claim flowing from Benner's ongoing status as the child born outside Canada of a Canadian mother before the specified date. The date on which Benner first acquired that status was, in Iacobucci J.'s view, immaterial.

129 The same reasoning is controlling in the present case. As the Court of Appeal found, the purpose of the *CPP* is "to provide a secure government-controlled pension for retired persons in their senior years, and thereafter to provide for their surviving spouses and partners" (para. 55). The basis for the survivor's benefit is the continuing status of being a survivor. As Iacobucci J. observed in *Benner*, at para. 56, "the important point is not the moment at which the individual acquires the status in question, it is the moment at which that status is held against him or disentitles him to a benefit". There is, as such, no merit to the government's argument that striking down s. 44(1.1) would be tantamount to requiring retroactive remedies for *Charter* violations. The remedy for the class members in relation to s. 44(1.1) is prospective in that it entails granting equal benefit of the law, prospectively, to people who are survivors of same-sex partners.

130 The government raises the additional argument that the Court should not strike down s. 44(1.1) because doing so would have the unintended effect of excluding same-sex survivors from eligibility for the survivor's benefit. The Crown's argument is predicated on the view that the survivor's benefit is paid in respect of a past event such [page484] that any entitlement to it crystallizes at the time that the survivor's partner dies and that, but for s. 44(1.1), no benefit would be payable to any survivor whose same-sex common-law partner died before July 2000. As we have stated, this is an untenable view of what the survivor's benefit is and how entitlement to it works. A close look at the July 2000 amendments to the *CPP* reveals that s. 44(1.1) is in fact a limiting provision, such that simply striking it down leaves a coherent provision that provides for equal treatment, in terms of eligibility, of opposite-sex survivors and same-sex survivors.

131 As part of the 2000 amendments, the opposite-sex definition of "spouse" in s. 2(1) of the *CPP* was repealed. In its place, a definition for "survivor" that includes both opposite-sex and same-sex spouses was added to Part II, "Pensions and Supplementary Benefits", in s. 42(1). Finally, s. 44(1)(d), which sets out the basic entitlement to the survivor's benefit, was amended by replacing

reference to the statutory definition of "spouse" with reference to the new statutory definition of "survivor". The amended provision provides that "subject to subsection (1.1), a survivor's pension shall be paid to the survivor of a deceased contributor ...".

132 Once eligibility is understood in terms of the current status of being a survivor, it becomes clear that the effect of the amendments listed above is to extend entitlement to the survivor's benefit under s. 44(1)(d) to same-sex survivors. The function of s. 44(1.1) is purely restrictive: it limits that entitlement based on the date on which the applicant became a survivor. As such, striking down s. 44(1.1) has no unintended or undesirable effect.

133 The analysis in relation to s. 72(2) is somewhat different. Prior to the enactment of the *MBOA*, it is true that same-sex survivors had no right to the survivor's benefit. Striking down s. 72(2) admittedly alters the legal consequences of having been a survivor (a past situation) in the 12 months preceding July 2000, when the *MBOA* came into force. [page485] To the extent that this involves a retroactive change in the law, it flows necessarily from the fact that Parliament has included in the *CPP* a right to up to 12 months of arrears. It is clearly open to Parliament to legislate retroactively, which it has done in s. 72(1). The *Charter* simply requires that same-sex survivors receive equal treatment as their opposite-sex counterparts. To the extent that s. 72(2) withholds from same-sex survivors a right to arrears to which similarly situated opposite-sex survivors are entitled, it is of no force and effect.

134 In conclusion, class members who were precluded by s. 44(1.1) or s. 72(2) from receiving the survivor's benefit, and who otherwise meet the eligibility requirements, will be entitled to payment of that benefit. In the circumstances, the relevant date for the purpose of that payment is the date on which application was received or where no application was made because of the unconstitutional provisions, the date on which the statement of claim was filed. In no event are benefits payable in respect of a month prior to August 1999, which is the earliest month in respect of which a class member who applied for the survivor's benefit on the day the *MBOA* came into force could have been eligible.

VII. Interest

135 For the reasons given by the Court of Appeal, we reject the government's contention that pre-judgment interest is not available in the instant case. In short, s. 31 of the *Crown Liability and Proceedings Act* provides that, subject to an express provision in another enactment, successful litigants are entitled to pre-judgment interest from the Crown in the same way that they would be so entitled as against any other litigant. The *CPP* is silent on the issue of pre-judgment interest and cannot, as such, reasonably be interpreted as creating an exception to the entitlement created by s. 31 of the *Crown Liability and Proceedings Act*.

VIII. Disposition

136 The appeal and cross-appeal are dismissed without costs. The constitutional questions are answered as follows:

1. Does s. 44(1.1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Does s. 72(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

5. Does s. 60(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

No.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

[page487]

7. Does s. 72(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

The following are the reasons delivered by

137 BASTARACHE J.:-- I have read the joint reasons of my colleagues Justices LeBel and Rothstein, and, while I agree with their disposition of this appeal, I cannot fully agree with their approach to the question of retroactive constitutional remedies. In my view, their reliance on the existence of a substantial change of law is an inappropriate consideration in the context of rights guaranteed by the *Canadian Charter of Rights and Freedoms* and is, in any event, inapplicable to this appeal. The decision to deny retroactive relief, and the appellants' challenge to s. 72(1) of the *Canadian Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"), specifically, should be based purely on the balancing of interests that must take place in any claim for relief from an unconstitutional law.

The Retroactivity of Constitutional Remedies

138 It is important to be clear about the nature and reasons for retroactive constitutional remedies. The general and well-established rule is that remedies for constitutional violations apply retroactively (S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 *S.C.L.R.* (2d) 205, at p. 211). The basis for general retroactivity [page488] is not Blackstone's declaratory theory, but the Constitution itself. Section 52(1) of the *Constitution Act, 1982* establishes that any law which is inconsistent with the

Constitution of Canada "is, to the extent of the inconsistency, of no force or effect". The Constitution exists independently of judicial decisions and, as such, any law which is inconsistent with it is invalidated from the moment the law came into effect. Gonthier J. explained this principle clearly in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 28:

The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. [Emphasis added.]

(See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 55-2; K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 14.920.)

139 This rule applies equally in the context of the *Charter*. Laws which violate *Charter* guarantees are invalid from the date that the provisions of the *Charter* came into force: *Jim Pattison Industries Ltd. v. The Queen*, [1984] 2 F.C. 954 (T.D.), at p. 957; *Davidson v. Davidson* (1986), 33 D.L.R. (4th) 161 (B.C.C.A.), at p. 170, leave to appeal refused, [1987] 1 S.C.R. vii; *Rath v. Kemp* (1996), 46 Alta. L.R. (3d) 1 (C.A.), at para. 25. In the case of a violation of s. 15, this would mean that, in theory, a law which violates the *Charter* would be invalid as of April 17, 1985 or the date of its adoption, if later.

140 The general norm of retroactivity has been reaffirmed many times by this Court. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, the finding that the Province of Manitoba has been constitutionally required since 1890 to enact its laws both in English and in French applied not only [page 489] for the future, but also retroactively to all of its laws that had been enacted in English only since 1890. The declaration of invalidity was suspended in order to preserve the rule of law, but there was no doubt that a finding of unconstitutionality applied retroactively. In *Miron v. Trudel*, [1995] 2 S.C.R. 418, a violation of s. 15(1) of the *Charter* was cured by reading the excluded group into the legislation, a remedy that applied retroactively. In *R. v. Hess*, [1990] 2 S.C.R. 906, the Court severed an offending portion of the *Criminal Code*, R.S.C. 1985, c. C-46, and ordered a new trial on the basis of the provision as amended even though, strictly speaking, it was not the law of the land when the alleged crime had been committed. These cases are only examples, but they confirm that retroactivity of a constitutional remedy granted under s. 52(1) is the norm in our constitutional jurisprudence, not the exception.

141 With respect, my colleagues ignore the fact that Blackstone's comments on the nature of judicial law making were made in the context of the common law and find only limited application in the constitutional context. As it pertains to the common law, Blackstone's declaratory theory is

necessarily a fiction because there is no independent source for common law rules. The common law is by definition judge-made. It does not exist in some jurisprudential ether for judges to discover. Therefore when judges overturn precedents or establish a new common law rule, they are undoubtedly making new law.

142 The same cannot be said for judicial decisions which interpret and apply the Constitution. The Constitution exists independently of judicial decisions. Judges do not "make" the Constitution every time they interpret its provisions. Interpretations of what the Constitution requires may change, but the underlying rights and freedoms endure. *Charter* rights are not created every time a court expressly overrules or implicitly repudiates a prior decision or gives "content to broad, but previously undefined, rights, principles or norms" (LeBel and Rothstein JJ., at para. 99). The rights and freedoms [page490] in the *Charter* were guaranteed to all Canadians from the moment the *Charter* came into force.

143 By justifying the denial of retroactive relief in part on the existence of a "substantial change in the law", my colleagues give *Charter* rights an uncertain status. I cannot accept an approach that, for remedial purposes, implies that *Charter* rights can be here one day and gone the next or, conversely, that they depend on judicial recognition of "a new or newly recognized technological or social environment" (para. 99) for their genesis. Such reasoning represents a watering down of the promise made to all Canadians when the *Charter* was enacted. By attaching importance to changing social conditions, it makes *Charter* rights dependent on how the majority of Canadians perceive the claimants' rights. With respect, I cannot see why society's views of *Charter* claimants -- especially in the context of vulnerable minorities -- should be a factor for determining whether a *Charter* right was part of the Constitution in 1985, or whether it sprung into existence later and thereby be a basis for denying retroactive relief.

144 I should note that I am not advocating for a view of the Constitution that says that it is frozen in time. The "living tree" metaphor aptly describes how through time our Constitution may change to correspond to new realities. But that does not mean that every time a new constitutional interpretation is adopted or a previous decision is overturned that the fundamental rights and freedoms guaranteed in our *Charter* have changed or that new ones have been created. There is a difference between changes in constitutional interpretation and actual constitutional change. Furthermore, the "living tree" doctrine is a doctrine of "progressive interpretation" (*Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79, at paras. 22-23 (emphasis added)), necessary to ensure that our Constitution does not become rigid and unresponsive to Canadian society. It should not be used as a justification for denying relief to a particular group of *Charter* claimants .

145 For these reasons, I cannot accept my colleagues' critique of the declaratory approach as a basis for denying retroactive relief. As will be explained below, there are important reasons for denying retroactive relief in certain circumstances. I am largely in agreement with my colleagues on what they are. But I cannot agree that they have anything to do with the success or failure of the "Blackstonian paradigm" in the context of constitutional law.

146 The dangers of my colleagues' approach are adequately evidenced when applied to the claimants in this appeal. The starting point of their analysis is that there was a substantial change in the law between 1985, when s. 15(1) of the *Charter* came into force, and this Court's decision in *M. v. H.*, [1999] 2 S.C.R. 3. The implication is that the right of same-sex spouses not to be excluded from survivor benefits did not form part of the Constitution until 1999. To put it bluntly, s. 15(1) of the *Charter* did not extend to same-sex couples until this Court said it did. I note that my colleagues are not simply saying that this Court's *interpretation* of the Constitution had changed between 1985 and 1999. If that were the case, it would be sufficient to base their denial of retroactive relief solely on the good faith reliance of the government. Instead, by relying on a critique of the declaratory theory and the "living tree" doctrine, my colleagues assert, in essence, that the Constitution actually changed between 1985 and 1999 and that the claimants, unlike other Canadians, were not entitled to its protection in 1985. Such an approach runs counter to the spirit of the *Charter* and should not be countenanced.

147 Furthermore, it is not at all clear that a substantial change in the law actually occurred sufficient to trigger a departure from the norm of retroactivity under my colleagues' threshold approach. A review of the case law before and after *Egan* suggests that it was not the "final word" on s. 15(1) and discrimination of same-sex couples.

[page492]

148 Courts did not begin pronouncing on the extent of protection that s. 15 afforded to same-sex couples until the late 1980s, and then with conflicting results. In *Andrews v. Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258, the Ontario High Court of Justice held that it was not discriminatory to deny provincial health insurance benefits to same-sex dependants based on the definition of "spouse" in the applicable legislation. In *Vogel v. Manitoba* (1992), 90 D.L.R. (4th) 84 (Man. Q.B.), exclusion of a same-sex partner from an employer's spousal benefit plan was held not to be discriminatory.

149 In other cases, the opposite result was achieved. In *Veysey v. Canada (Commissioner of the Correctional Service)*, [1990] 1 F.C. 321, the Federal Court -- Trial Division found that it was an infringement of s. 15(1) to deny visitation rights to the same-sex partner of an inmate and that the infringement could not be saved under s. 1. In *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.), in direct opposition to *Andrews*, regulations

excluding same-sex dependants from claiming provincial health insurance benefits were found to be an unjustified infringement of s. 15(1) and a declaration that same-sex couples be read into the definition of "spouse" was made.

150 This Court first came close to the issue in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, which involved a provision of a collective agreement that restricted bereavement leave to members of an employee's "immediate family". The complainant had sought to have the day he took off work to attend the funeral of his same-sex partner's father count as bereavement leave. The majority (in a 4-3 decision) decided the issue on the narrow ground that the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, did not include sexual orientation as a ground of discrimination. Lamer C.J. noted, however, that the case could have been argued on the basis that the *Charter* required [page493] sexual orientation to be read into the *Canadian Human Rights Act*. Because the *Charter* argument had not been made, he felt the Court had to apply the Act as it stood. He made it clear that he would have perhaps decided the case differently if sexual orientation had been a prohibited ground of discrimination (p. 582).

151 The next time this Court dealt with the issue was in *Egan v. Canada*, [1995] 2 S.C.R. 513. In a narrow 5-4 decision, this Court held that the definition of "spouse" under the *Old Age Security Act*, R.S.C. 1985, c. O-9, for the purposes of spousal allowances under the Act, was an infringement of s. 15(1), but was saved under s. 1. Sopinka J. cast the deciding vote. Central to his reasoning was that governments should be accorded some leeway in extending social benefits. In this regard, he agreed with La Forest J.'s suggestion in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, that governments should be allowed time to take incremental measures to deal with discrimination (para. 105).

152 It was soon clear that *Egan* was not the final word on the matter. The Manitoba Court of Appeal rendered its judgment in *Vogel v. Manitoba* (1995), 126 D.L.R. (4th) 72, a few months after *Egan*. It reversed the trial judge's decision and held that it was discriminatory under provincial human rights legislation to exclude same-sex partners from employee benefit plans on the basis that same-sex partners were not included in the term "spouse". Helper J.A. and Scott C.J.M. relied on *Egan* to find that the eligibility criteria of the scheme were discriminatory. A little more than a year later, the Ontario Court of Appeal released its decision in *M. v. H.* (1996), 96 O.A.C. 173. Charron J.A. (as she then was) found that the definition of "spouse" contained in the *Family Law Act*, R.S.O. 1990, c. F.3, and which excluded same-sex couples, was a violation of s. 15(1) and could not be saved under s. 1. Although she took notice of this Court's decision in *Egan*, she was of the view that it was not [page494] determinative since the objectives of the legislation in each case were different (para. 84). The Court of Appeal's decision in *M. v. H.* was relied upon in *Kane v. Ontario (Attorney General)* (1997), 152 D.L.R. (4th) 738 (Ont. Ct. (Gen. Div.)), to hold that the exclusion of same-sex partners from the definition of "spouse" in Ontario's *Insurance Act*, R.S.O. 1990, c. I.8, was also unconstitutional.

153 In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, this Court rejected the incrementalist approach

that was relied upon in part by Sopinka J. in *Egan* to find that the constitutional violation in that case was saved under s. 1.

154 Relying on its own jurisprudence and this Court's decision in *Vriend*, the Ontario Court of Appeal held in *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577, that a provision of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), that limited the definition of "spouse" to opposite sex couples was unconstitutional.

155 Finally, in *M. v. H.*, this Court upheld the Ontario Court of Appeal's decision that the exclusion of same-sex couples from the definition of spouse in the *Family Law Act* was unconstitutional. Iacobucci J. distinguished this Court's holding in *Egan* on the same grounds as the Court of Appeal had, namely that the legislative objectives at issue were entirely different (para. 75). It was in response to this decision that the federal government decided to enact the amendments to federal legislation, including the *CPP*, contained in the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12.

156 As can be seen, the majority of cases both before and after *Egan* indicated that differential treatment of same-sex couples was discriminatory and could not be justified under s. 1. It is true that this Court has the final word on the interpretation of the Constitution. However, I find it difficult to believe that *Egan* was the final word -- even for a time -- [page495] on the application of s. 15(1) to same-sex couples. *Egan* was decided on the basis of s. 1 arguments that were tailored to the specific legislative objectives at issue in that case. After *Egan*, it was far from clear whether its reasoning would apply outside the realm of social assistance schemes such as Old Age Security. Indeed, a number of decisions, including this Court's decision in *M. v. H.*, distinguished *Egan* on this basis. It did not stand for the application of s. 15(1) to all instances of legislative exclusions of same-sex couples. Given the *CPP*'s status as an insurance-based scheme, where contributions are paid by employers and employees, it is difficult to see how *Egan* definitely settled the issue with regard to the exclusion of same-sex couples from survivor's benefits under the *CPP*.

157 Furthermore, given the contradictory decisions both before and after *Egan*, the closeness of the decision in that case, and the difficult nature of the issues at stake, it is difficult to see *Egan* as definitively establishing what the Constitution required. The reality is that it was for a time unclear exactly how s. 15(1) would apply to same-sex couples. The judicial process can be slow. It took time for this Court and others to articulate the correct constitutional principles to be applied to legislative exclusions of same-sex couples. That does not mean that this Court was upsetting established law when it handed down its decision in *M. v. H.* In short, even if the existence of a substantial change in the law was an appropriate threshold criterion, no such change actually occurred in this case. We must therefore look to other reasons for denying retroactive relief.

The Correct Approach to Retroactive Remedies in This Case

158 It is well established in Canadian constitutional law that courts will seek to balance competing interests when devising remedies for constitutional violations (Roach, at paras. 3.680 to

3.780). The starting point is that past constitutional violations [page496] should be corrected. This recognizes the grave nature of constitutional infringements:

Constitutional remedies are matters of considerable importance. Constitutional law expresses the most fundamental restraints and obligations of governments. Violations of constitutional rights are a serious matter both for those who suffer from the violation and the public in general.

(Roach, at para. 1.10)

Retroactive constitutional remedies ensure that the claimants who have brought the successful action, as well as similarly situated claimants, can benefit from the judgment (Choudhry and Roach, at p. 210).

159 However, the normal retroactive effect of judgments may need to be tempered in certain circumstances in order to protect other legitimate interests (see Choudhry and Roach, at pp. 209-11). The use of transition periods and suspended declarations of invalidity are accepted ways of temporarily limiting the retroactive effect of constitutional remedies in order to prevent legal vacuums and introduce new procedural requirements. They are not evidence of the Court operating outside of the Blackstonian paradigm, but rather a recognition that in certain circumstances other legitimate interests may require retroactivity to be limited.

160 The question is what legitimate interests should be taken into account in deciding to deny a retroactive constitutional remedy. For the most part, I agree that reasonable reliance, good faith, fairness to litigants and Parliament's role are important considerations. I would simply like to add what I see as a few points of clarification.

161 First, the question of whether to deny a retroactive remedy is different from deciding whether to grant a suspended declaration of invalidity; the same considerations do not apply to both. The latter will be a valid measure when a declaration of invalidity would pose a danger to the public, threaten the rule of law or deprive deserving persons of benefits without thereby benefiting the individual whose [page497] rights had been violated (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 719). A suspended declaration of invalidity is ultimately only a temporary limit on retroactivity; it does not determine whether governments are entitled to deny retroactive relief to the claimants in acting to cure the constitutional defect. Reasonable reliance, good faith, fairness to litigants and Parliament's role will be appropriate to consider when courts are confronted with the question of what remedy the claimant is entitled to. This will occur, for example, when deciding whether a remedy of "reading in" should apply retroactively or whether a legislative provision enacted in response to a declaration of invalidity which limits retroactive relief should be read down or severed.

162 Second, to my mind, establishing reasonable reliance will not always be necessary in order to deny retroactive relief. In this case, even on my colleagues' analysis, the government's reliance on

Egan could not be a justification for denying relief *before Egan* was decided. Indeed, although it was not entirely clear, most of the case law before *Egan* suggested that governments could not justifiably exclude same-sex couples. Given the state of the law pre-*M. v. H.*, it would be more accurate to emphasize the fact that the government was acting in good faith in the face of jurisprudential uncertainty. Although not determinative, this should be taken into account in deciding whether to depart from the norm of retroactive relief.

163 Finally, my colleagues seem to suggest in their discussion of this Court's recent decision of *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3, 2007 SCC 1, that the nature of the constitutional violation is relevant to deciding whether to deny a retroactive remedy. I do not agree. A government has no more right to discriminate in the provision of benefits than it does to collect unconstitutionally levied taxes. In *Kingstreet*, there were no legitimate concerns with [page498] applying the general rule of retroactivity. The legislature retained the ability to enact remedial legislation to cure any adverse effects (para. 25), and a purely prospective remedy would have left the claimant empty-handed.

164 These clarifications made, I am in general agreement with how my colleagues have applied the other factors to this appeal. Particularly relevant, it seems to me, is the fact that the *Modernization of Benefits and Obligations Act* was enacted in response to this Court's decision in *M. v. H.* In that case, a suspension of the declaration of invalidity was ordered so as to allow the Ontario government flexibility to cure the constitutional defect. That flexibility implicitly included the ability to limit the retroactive effect of any remedial legislation. Indeed, this is what the Ontario legislature chose to do. The remedial legislation was made prospective from November 20, 1999 (*Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*, S.O. 1999, c. 6, s. 68(2)). Similar flexibility should be accorded to the Canadian government in this case. The legislative branch is better able to deal with distributional concerns than are courts, and its choices should be respected so long as they fall within the limits of the Constitution.

Conclusion

165 For these reasons, I agree that the appeal and cross-appeal should be dismissed without costs.

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cp/e/qllls

TAB 4

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**Canadian Pacific Railway Co. v. Saskatchewan (Attorney
General)**

**Canadian Pacific Railway Company et al. (Plaintiffs),
Appellants; and
The Attorney General for the Province of Saskatchewan and the
Minister of Natural Resources and Industrial Development of
the Province of Saskatchewan (Defendants), Respondents; and
The Attorney General for the Province of Alberta, Intervenant.**

[1952] 2 S.C.R. 231

Supreme Court of Canada

1952: February 27, 29, March 3, 4 / 1952: June 30.

**Present: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock,
Estey, Locke, Cartwright and Fauteux JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law -- Mineral Taxation -- Imposition of tax on owner of minerals -- Tax based on acreage and assessed value -- Whether direct or indirect -- Whether land tax -- Whether intention to have it passed on -- Severability -- Mineral Taxation Act, 1948 (Sask.), c. 24, ss. 3, 6, 22 -- B.N.A. Act, 1867, s. 92(2).

By virtue of the Mineral Taxation Act, 1948, c. 24 and amendments, the Province of Saskatchewan purported to impose an annual tax on each owner of minerals within the Provinces regardless of whether minerals were or were not present within, upon or under the land. "Owner" was defined as a person registered in a land title office as the owner of any minerals. "Mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land.

The Act provided that in a "non producing area", the tax would be at the rate of 3 cents per acre of land. The Lieutenant-Governor was given the power to declare any area in the province a

"producing area", and provision was made for the assessment at their fair value of minerals in a producing area. Until an assessment was made the owner was liable to pay at the rate of 50 cents per acre of land and fraction thereof in such an area. Following an assessment, the owner would be liable to pay a tax at the rate prescribed from time to time by the Lieutenant-Governor in Council but exceeding ten mills on the dollar of the assessed value of the minerals. Non-payment of the tax resulted in forfeiture of the minerals to the Crown.

The trial judge held that the Act was *intra vires* as imposing direct taxation. The Court of Appeal for Saskatchewan held that the 3 cent tax was a direct tax, but that the 50 cent tax and the mill rate tax were indirect.

Held (the Chief Justice dissenting), that the appeal should be dismissed and the cross-appeal allowed.

Each of the three taxes is a land tax, is clearly direct taxation and not imposed with the intention that it should be passed on to someone else.

Cases Cited

City of Halifax v. Fairbanks' Estate [1928] A.C. 117; *A.G. for B.C. v. Esquimalt and Nanaimo Ry. Co.* [1950] A.C. 87; *A.G. for B.C. v. C.P.R.* [1927] A.C. 934; *A.G. for Manitoba v. A.G. for Canada* [1925] A.C. 561 and *Glenwood Lumber Co. v. Philips* [1904] A.C. 405 referred to.

APPEAL and CROSS-APPEAL from the judgment of the Court of Appeal for Saskatchewan [[1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.] which had reversed the judgment of the trial judge and had declared the Act *ultra vires* in part.

E.C. Leslie, I.D. Sinclair and Allan Findlay for appellants. The Act is not in pith and substance in relation to direct taxation and is therefore beyond provincial competence. The tax is imposed upon the owner in respect of mineral rights and in respect of the minerals themselves. A tax thus imposed is analogous to a tax on the producer of a commodity in respect of a commodity and such a tax is indirect taxation: *Bank of Toronto v. Lambe* [12 A.C. 575.]; *The Security Export Co. v. Hetherington* [[1923] S.C.R. 539.]. It appears from the reasoning in the judgment of *Caledonian Collieries v. The King* [[1928] A.C. 358.] that had the tax been imposed in respect of the coal before its sale or while it was still in the ground, there could have been no question that it would be an indirect tax because an allowance would be made for such a tax in the price charged. This view is also supported by the case of *Esquimalt* [[1948] S.C.R. 403.] in this Court. And in the privy Council [[1950] A.C. 87.] it would have been quite unnecessary for Lord Greene to have drawn the careful distinction he did between a land tax and a tax on standing timber if a tax on standing timber was regarded as a direct tax.

If a tax in respect of minerals which have been removed is an indirect tax, a tax in respect of the

right to remove the minerals is also an indirect tax, because here also, an allowance would be made for the tax in the price of sale.

The validity of the submission that the tax is direct because it will not in fact be passed on will disappear when the operation of the legislation is examined. But the fact that it may not be possible in a given case to pass it on does not effect the general tendency of the tax on mineral rights which is that it will be passed on. The legislature contemplated that this would be its normal effect and tendency. *The Security Export Co. v. Hetherington* (supra), *Esquimalt* (supra), *Grain Futures Case* [[1925] A.C. 561.]; *The A.G. for British Columbia v. C.P.R.* [[1927] A.C. 934.]; *The A.G. for Manitoba v. The A.G. for Canada* [[1925] A.C. 561.] and *the City of Charlottetown v. Foundation Maritime Limited* [[1932] S.C.R. 589.]. This is not as contended, a land tax within the case of *City of Halifax v. Fairbanks' Estate* [[1928] A.C. 117.].

The interest in land in respect of which the tax in question is imposed is the right to extract or produce from the land a commodity which will be the subject of commercial transactions. Such an interest in land cannot be considered as falling within the well recognized class of land taxes that have always been regarded as direct taxes. The situation here is analogous with the tax on growing crops of the *Agricultural Land Relief Act* case [[1938] 4 D.L.R. 28.].

Licenses which have been held to be a tax may be supported under section 92 para. 9 even though it be an indirect tax: *Lawson v. Interior Tree Fruit* [[1931] S.C.R. 357.] and *Shannon v. Lower Mainland Dairy Products Board* [[1938] A.C. 708.].

The provisions imposing the 3 cent rate are not severable and accordingly if the two other rates are ultra vires, the entire enactment is ultra vires. It is apparent from a consideration of the Act as a whole that it was intended to work out a single comprehensive scheme of taxation. If parts of it are invalid, the remaining parts cannot stand unless it can be assumed that the legislature would have enacted such remaining parts without the invalid parts and the converse is true. *The A.G. for Alberta v. The A.G. for Canada* [[1947] A.C. 503.]; *The A.G. for Manitoba v. The A.G. for Canada* [[1925] A.C. 561.] and *The A.G. for British Columbia v. The A.G. for Canada* [[1937] A.C. 377.].

M.C. Shumiatcher, Q.C. for the respondent, Minister of Natural Resources. The Act is clearly a taxing statute intended to raise a revenue for the purposes of the province. The tax is imposed with respect to property or alternatively, the tax is imposed upon property. The cases of *Glenwood Lumber Co. v. Phillips* [[1904] A.C. 405.], *Macpherson v. Temiskaming* [[1913] A.C. 145.], *Clarkson v. Bouchard* [[1913] A.C. 828.] and *Gowan v. Christie* [L.R. 2 H.L. 283.] are relied on.

Minerals being land or an interest in land, a mineral tax of the type here imposed is not new or unusual. Mineral rights have been the subject of taxation for a considerable number of years in Saskatchewan, Alberta, Ontario and British Columbia. The impost under the Act in pith and substance constitutes direct taxation. There is no relation between the tax and the amount of product produced, therefore it cannot be a tax on a commodity. The tax is on capital, i.e. the value of the land. *Bank of Toronto v. Lambe* [12 A.C. 575.]. The effect of the judgment in *City of Halifax v.*

Fairbanks' Estate [[1928] A.C. 117.] is that a tax upon land and interest in land is a direct tax. The situation here is somewhat similar to the *Brewers Case* [[1897] A.C. 231.]. There is a difference between a growing crop and minerals, the time limit being so short in the crop case as to be immaterial. The tax is directed at the crop which is a chattel in contemplation of severance. Timber and minerals are an interest in the land. The crops, whether growing or not, are chattels. The fact that the tax or a portion thereof may be said to be passed on in no way alters the fact that, being a tax upon property or an interest in property, it is direct taxation. The *A.G. for British Columbia v. Kingcome Navigation Co. Ltd.* [[1934] A.C. 45.]; *The King v. Caledonian Collieries Ltd.* [[1928] A.C. 358.] and the *Agricultural Land Relief Act* case [[1938] 4 D.L.R. 28.]. There is no such tendency as in the case of *Charlottetown v. Foundation Maritime Ltd.* [[1932] S.C.R. 589.] inherent in the provisions of the present statute since there exists no relationship between the tax and the marketable commodity. The Mineral Tax Act provides for a levy upon or in respect of the land and contemplates payment by the owner of that land. No passing on is contemplated. Furthermore, if the tax was a direct tax when set at 1 cent per acre, it did not become an indirect tax when it was increased to 3 cents per acre. The nature of a tax does not alter with its quantum.

The acreage tax in *R.M. Bratts v. Hudson's Bay Co.* [[1919] A.C. 1006.] was held to be a direct tax. The cases of *Rattenbury v. Land Settlement Board* [[1929] S.C.R. 52.] and the *City of Montreal v. The A.G. for Canada* [[1923] A.C. 136.] are also of assistance.

P.G. Makaroff, Q.C. for the respondent, the A.G. for Saskatchewan. The tax is taken directly from the registered owner of minerals apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making or stand to make profits from the ownership of mineral rights. The difference in the three taxes is not in character but only in the method of assessment. The validity of a taxing statute is not affected by the method of assessment.

There is a presumption at law that the legislature has not exceeded its power.

The principles of severability are well known and reference is made to *Toronto v. York Township* [[1938] A.C. 415.] and the *Rattenbury* case [[1929] S.C.R. 52.]. If there is any doubt as to the constitutional validity of any one of the procedures adopted or capable of adoption and application, such is clearly severable in the event that one procedure is held to be ultra vires, that provision ought to be severed from the balance of the statute which, read as a whole, is a taxing statute imposing direct taxation in the province. As the 3 cent tax is a blanket tax over the whole of the province, the two other taxes may be taken away and the Act will still be complete. The legislature would have enacted the Act just for the 3 cent tax.

J.J. Frawley, Q.C. for the Intervenant, the A.G. for Alberta, adopted the arguments advanced on behalf of the respondents.

E.C. Leslie, I.D. Sinclair and Allan Findlay, for the appellants.

M.C. Shumiatcher, Q.C., for the respondent, Minister of Natural Resources.

P.G. Makaroff, Q.C., for the respondent, the Attorney General for Saskatchewan.

J.J. Frawley, Q.C., for the Intervenant, the Attorney General for Alberta.

Solicitor for the appellants: E.H.M. Knowles.

Solicitor for the A.G. of Saskatchewan: Makaroff, Carter and Carter.

Solicitors for the Minister of Natural Resources and Industrial Development: Shumiatcher & McLeod.

Solicitor for the A.G. for Alberta: H.J. Wilson.

RINFRET C.J. (dissenting):-- The appellant sought to have the Minerals Taxation Acts and Amendments of the Province of Saskatchewan declared ultra vires. There were other conclusions in their statement of claim and some of them were passed upon by the Court of Appeal of the Province of Saskatchewan [[1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.], but before this Court the only point discussed was whether the tax imposed ought to be classed as an indirect tax and, therefore, outside the powers of the Legislature of the Province of Saskatchewan.

The task of deciding the point, to my mind, is not an easy one. In *City of Halifax v. Estate of J.P. Fairbanks* [[1928] A.C. 117.], Viscount Cave, delivering the judgment of their Lordships of the Privy Council, insisted upon the fact that in considering the question raised it was important to bear in mind that the problem to be solved was one of law and that the framers of the British North America Act evidently regarded taxes as divisible into two separate and distinct categories -- namely, those that are direct and those which cannot be so described. From this he inferred that the distinction between direct and indirect taxation was well known before the passing of the British North America Act and, he says, it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Viscount Cave stated that the well known formula of John Stuart Mill no doubt was valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed.

That judgment was handed down in 1928, but the Judicial Committee in *Attorney General for British Columbia v. Esquimalt and Nanaimo Ry. Co.* [[1950] A.C. 87 at 119.] said this about Viscount Cave's judgment in the Fairbanks case:--

Lord Cave, in delivering the judgment of the Board, used expressions which, if not correctly understood, might appear to lay down too rigid a test for the classification of taxes; but, as is pointed out by Lord Simon L.C. in the judgment of the Board in the later case of *Atlantic Smoke Shops, Ltd. v. Conlon*

(1943) A.C. 550, those expressions "should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article".

In *Bank of Toronto v. Lambe* [12 A.C. 575.], Lord Hobhouse, delivering the judgment of the Board, made some useful observations as to the mode in which the question should be approached, and stated that the drafters of the British North America Act "must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies".

This language was approved by the Board in *The King v. Caledonian Collieries, Ltd.* [[1928] A.C. 358.].

In view of these pronouncements of the Judicial Committee, I feel that Lord Cave's suggested classifications should not be strictly adhered to.

In *City of Charlottetown v. Foundation Maritime, Ltd.* [[1932] S.C.R. 589 at 593.], this Court said:--

The question of "direct taxation" as defining the sphere of provincial legislation has often been the subject of pronouncements by this Court and by the Judicial Committee of the Privy Council. The effect of the decisions, when analyzed, is substantially as follows:

In every case, the first requisite is to ascertain the inherent character of the tax, whether it is in its nature a direct tax within the meaning of section 92, head 2, of the British North America Act, 1867 (*Attorney General for British Columbia v. McDonald Murphy Lumber Co. Ltd.* (1930) A.C. 357 at 363 and 364). The problem is primarily one of law; and the Act is to be construed according to the ordinary canons of construction: the court must ascertain the intention of Parliament when it made the broad distinction between direct and indirect taxation.

These taxes (in 1867) had come to be placed respectively in the category of direct or indirect taxes according to some tangible dividing line referable to and ascertainable by their general tendencies.

As applied, however, to taxes outside these well recognized classifications,

the meaning of the words "direct taxation", as used in the Act, is to be gathered from the common understanding of these words which prevailed among the economists who had treated such subjects before the Act was passed (*Attorney General for Quebec v. Reed* (1884) 10 A.C. 141 at 143); and it is no longer open to discussion, on account of the successive decisions of the Privy Council, that the formula of John Stuart Mill (*Political Economy* ed. 1886, vol. 11, p. 415) has been judicially adopted as affording a guide to the application of section 92, head 2. Mill's definition was held to embody "the most obvious indicia of "direct and indirect taxation" and was accepted as providing a logical basis for the distinction to be made between the two. The expression "indirect taxation" connotes the idea of a tax imposed on a person who is not supposed to bear it himself but who will seek to recover it in the price charged to another. And Mill's canon is founded on the theory of the ultimate incidence of the tax, not the ultimate incidence depending upon the special circumstances of individual cases, but the incidence of the tax in its ordinary and normal operation. It may be possible in particular cases to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on (*The King v. Caledonian Collieries, Ltd.*, (1928) A.C. 358). It is the normal or general tendency of the tax that will determine, and the expectation or the intention that the person from whom the tax is demanded shall indemnify himself at the expense of another might be inferred from the form in which the tax is imposed or from the results which in the ordinary course of business transactions must be held to have been contemplated.

In the present case there are really only two sections of The Mineral Taxation Act (Chapter 24 of the Statutes of Saskatchewan, 1948, as amended by Chapter 23 of the Statutes of 1949 and Chapter 22 of the Statutes of 1950) which have to be considered. These are section 3 imposing a tax at the rate of three cents for every acre on "every owner of minerals" . . . "not situated within the producing area", and section 22 imposing a tax at the rate of fifty cents for every acre of land on the "owner of minerals within, upon or under any land situated within a producing area".

By force of section 5 of the Act "producing areas" are those which are so declared by order of the Lieutenant Governor in Council, and the latter may designate the mineral or minerals in respect of which the portion of the province therein described is constituted a "producing area". For those areas so designated assessors are provided to assess "at their fair value all minerals, within, upon or under any parcel of land so constituted". They prepare an assessment roll in which shall be set out as accurately as may be a brief description of each such parcel of land, a brief description of the minerals assessed, the names and addresses of the owners of the minerals and the assessed value thereof.

Section 7 deals with the method of assessment and section 6, dealing with the imposition of the tax, states:

Every owner whose name appears on the assessment roll mentioned in section 7 shall be liable for and shall on or before the thirty-first day of December in each year pay to the minister a tax at such rate as the Lieutenant Governor in Council may from time to time prescribe not exceeding ten mills on the dollar of the assessed value of his minerals as shown on the assessment roll subject to any changes made on appeal.

We were told that so far no assessment has been made under these sections and we need not trouble ourselves with the question as to how the assessors are to arrive at the "fair value" of minerals which are within, upon or under the land and, indeed, which may not exist at all, for, it should be mentioned, that apparently the Act is to apply whether there are or are not minerals within, upon or under the land.

What we have to consider for the purpose of this appeal is, therefore: What is the true nature of the tax imposed under section 3 or under section 22 of the Act, the first applying to every owner at the rate of three cents for every acre, and the second to the owners of minerals, within a producing area, at the rate of fifty cents for every acre of land in respect of which they are such owners? Of course, we are not concerned about the question of how the Act may be made to work, or even whether it is workable at all. The only point is whether it is ultra vires of the Legislature of Saskatchewan. The answer to be given is not helped by the definition of the word "mineral" in the Act. Subsection 4 of section 2 is as follows:--

"Mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land . . .

Then there are certain exceptions with which we need not concern ourselves for the purpose of the present decision.

The peculiarity of that definition is:

- (1) It comprises an incorporeal right and a corporeal thing, to wit, the right to work, win and carry away minerals and also the mineral itself.
- (2) It proceeds to define "mineral" by the same word.

We are told that "mineral" is a "mineral" and while one might say that such a definition is clearly insufficient, it might also be pointed out that defining a word by the same word is hardly a way of indicating the meaning of the word.

On the other hand, the word "land" is not defined in the Act and I fail to see how, for the purpose of knowing what the Legislature had in mind, we may go to some other statute where that word may be defined. In the latter case the definition is evidently that given as usual for the purpose of that particular Act and it may not be imported into The Mineral Tax Act of 1948. It does not matter that the "certificate of title" as set out in subsection 2 of section 2 is stated to mean "a certificate of title granted pursuant to the provisions of The Land Titles Act". We are asked to say that the tax provided for by the legislation which is the subject of the appeal is a tax on land, and when "land" is not defined in the statute under consideration it seems to me to be contrary to the usual canons of construction to look for the meaning of the word "land" in a different statute.

Here we are dealing with The Mineral Tax Act, 1948, and, therefore, with taxation on minerals. The least that we can say is that the attempt to tax a right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, is certainly a tax which, at the time of Confederation, could not find its place in the two categories of taxation spoken of in the Fairbanks case; and from all points of view it should be considered as a new species of taxation, sufficient to satisfy Viscount Cave in the Fairbanks case and obliging the Court to apply the Mill's formula "as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed" (*City of Halifax v. Fairbanks' Estate* [[1928] A.C. 117 at 125.]). It is clearly a tax which does not belong to the "established classification of the old and well known species of taxation" and which "makes it necessary to apply a new test to every particular member of those species".

We are not called upon here to transfer a tax universally recognized as belonging to one class to a different class of taxation in accordance with the Mill's formula. It is undoubtedly a new form of taxation, the nature of which must be ascertained in order to decide whether it is direct or indirect.

As I said before, the obvious intention of the Act is to tax minerals. Not only must we gather this from the title of the Act itself, but from its whole purport. Of course, the owner of the minerals is taxed and that is in accordance with the observations of Lord Thankerton in *Provincial Treasurer of Alberta v. Kerr* (1), where he says:--

Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interests in property or in respect of transactions or actings of the taxpayer. It is at least unusual to find a tax imposed on property and not on persons . . .

But it is clear from the Act that the subject matter of the tax is not the person of the owner, but the minerals and, in the circumstances, I find some difficulty in assimilating the tax with which we are concerned to a tax on land. With respect, I repeat that we cannot, for that purpose, look for

the definition of the word "land" in some other statute. The Mineral Tax Act does describe the words "parcel of land", but the definition there given applies to a different subject.

If it is correct to look at the tax as a tax on minerals and not as a tax on land, then it cannot be taken as belonging to the obvious category of direct taxation; and the nature of the tax is rather to be assimilated to what was under consideration in the Caledonian Collieries case *supra*. Indeed, as it happened in that case, coal was the subject matter of the tax, and both in this Court and in the Judicial Committee the tax was considered to apply to a commodity and to the sale of that commodity. At p. 362 of the judgment of the Privy Council it is stated:--

Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

Much reliance was placed by the respondents on the decision of the Privy Council in *Attorney General for British Columbia v. Esquimalt and Nanaimo Railway Co.* [[1950] A.C. 87.]. I may say that I am not at all embarrassed by the decision of the Judicial Committee in that appeal. First, it must be remembered that that judgment was given on a reference and it has been invariably stated that judgments on references are not necessarily binding, because in a concrete case the circumstances might alter the general application of the principle laid down in such judgments; and, secondly, in the Nanaimo case the reference was not made on existing legislation, but the question was only whether the proposed legislation might be adopted by the Legislature of British Columbia along the lines of the report of Chief Justice Sloan. As to that Lord Greene had this to say at p. 114:--

In construing questions of this nature, which do not purport to give more than an outline of the proposed legislation, the method applicable in construing a statute must not, in their Lordships' opinion, be too rigidly applied. In the completed legislation many sections of an explanatory or machinery nature would be included. Ambiguities would be cleared up, gaps would be filled, and it may often be necessary in construing what is no more than a "projet de loi" to assume a reasonable intention in that regard on the part of the legislature.

And at p. 113 Lord Greene repeated:--

The answer to the question whether the tax is or is not a direct tax is to be found in their opinion primarily by an examination of the nature and effect of the tax as collected from the language describing it.

Moreover, the Nanaimo judgment insists upon the fact that judicial committee is there dealing with what was undoubtedly a tax on land:--

It will be the owner of the land and not the owner of the timber who will be liable to the Crown for the tax.

(p. 116).

The conclusion, therefore, at which their Lordships have arrived is that the tax is in reality a tax on land and not a timber tax.

(p. 118).

This case, in their Lordships view, affords a good example of the caution with which the "pith and substance" principle ought to be applied. The object of that principle is to discover what the tax really is; it must not be used for the purpose of holding that what is really a direct tax is an indirect tax on the ground that an equivalent result could have been obtained by using the technique of indirect taxation. The use of the word "camouflage" in the argument of the respondents appears to their Lordships to be due to a misapplication of the principle.

(p. 120).

It will be seen, therefore that the foundation of the judgment in the Nanaimo case was that their Lordships came to the conclusion that it was the land which was to be assessed and that the tax was imposed on the land; and they quoted from the judgment of O'Halloran J.A., who dissented in the Court of Appeal for British Columbia, as follows:--

Because land bears a tax which is measured by the reflected value of its products is no reason to say that the tax on the land is a colourable tax on its products, and that such a tax is not in truth a tax on the land itself.

All that was said because the contention on behalf of the respondent, The Esquimalt and Nanaimo Rly. Co. -- a contention which found favour in this Court [[1948] S.C.R. 403.], was that it was in reality a tax on timber and not a tax on land. On the contrary, in the present case there is no question of taxing the land. The acreage tax under section 3 is upon the owner of minerals and not upon the owner of land, and so it is under section 5 and still more so under sections 6 and 7, because what the assessor is to ascertain is the "fair value of all minerals within, upon or under any parcel of land situated within a producing area". The assessor is to give a "brief description of the minerals assessed"; and the tax prescribed by section 6, if the occasion should occur, is to be at a certain rate "not exceeding ten mills on the dollar of the assessed value of his minerals as shown on the assessment roll". Then, if we turn to section 22, we find that "every owner of minerals . . . shall be

liable for and shall, on or before the thirty-first day of December in each year in which such minerals have not been assessed under the provisions of this Act, pay to the minister a tax at the rate of fifty cents for every acre and every fraction of an acre of such land in respect of which he is such owner". This remark is strengthened by the very definite definition of the word "mineral" in subsection 4 of section 2, where it is stated to mean "the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land"

I would think that it is significant that the Act itself does not give any definition of the word "land". It is to the "minerals" and not to the "land" that the Act is directed. I am of the opinion, therefore, that the present case is distinguishable from the Nanaimo judgment and, on the contrary, falls within the Caledonian Collieries judgment. If that be so, as I think it is, I would agree with Gordon J.A., in the Court of Appeal for Saskatchewan, and declare the Act in toto ultra vires of the legislature of the Province of Saskatchewan. Of course, incidentally I also agree with that part of the judgment of Martin C.J., concurred in by Proctor J.A., insofar as they declare ultra vires that part of the Act which relates to the "producing area."

In view of my conclusion it becomes unnecessary to pass upon the question of severability.

I would, therefore, allow the appeal with costs throughout and dismiss the cross-appeal with costs against the respondent.

The judgment of Kerwin, Taschereau, Cartwright and Fauteux, JJ. was delivered by:

KERWIN J.:-- The appellants are the Canadian Pacific Railway Company and certain other companies who brought an action against the respondents, the Attorney General for the Province of Saskatchewan and the Minister of Natural Resources and Industrial Development of the Province of Saskatchewan, in the King's Bench in Saskatchewan, for a declaration that The Mineral Taxation Act of Saskatchewan, being chapter 27 of the Statutes of 1944 (2nd Session) and amendments were ultra vires the legislature of the province, and for certain other relief. At the date of the trial this Act and the amendments thereto had been repealed and replaced by The Mineral Taxation Act, being chapter 24 of the 1948 Statutes and the appellants were permitted to amend their statement of claim so that the important question raised was whether the last mentioned Act (as amended in 1949, after the commencement of the action but before the trial) was ultra vires. In 1950, after the conclusion of the trial and before judgment, other amendments were enacted but it is not contended that the latter are not relevant since, by express provision, they were made retroactive. What we are called upon to decide, therefore, is whether the 1948 Act as thus amended in 1949 and 1950 is ultra vires.

The trial judge and the Court of Appeal [[1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21.] dealt with several other matters raised by the parties who, however, have now abandoned their contentions with respect thereto. The appellants no longer claim (a) that the delegation of certain powers to the Lieutenant-Governor in Council by subsections 1 and 2 of section 5, is ultra vires; (b)

that even if the 1948 Act is intra vires in all respects, it is inoperative in respect of the appellant Canadian Pacific Railway Company. On the other hand, the respondents abandoned their claim that the action was not properly brought against the Attorney General and the Minister of Natural Resources and Industrial Development.

The 1948 Mineral Taxation Act and the amendments thereto of 1949 and 1950 (hereafter referred to compendiously as the Act) provide for the imposition of taxes. Under the general scheme of the Act all the land in the Province of Saskatchewan may be divided into two categories, one of which, for convenience, may be termed the non-producing area, and the other of which will mean producing areas or a producing area. In the non-producing area a tax is imposed by section 3 on the owner of minerals within, upon, or under any land, at the rate of three cents per acre or fraction thereof.

A producing area is established by a declaration of the Lieutenant-Governor in Council under the authority of subsection 1 of section 5, which also delegates to that body the power to increase, decrease or abolish any producing area. In any such declaration, the Lieutenant-Governor in Council may, by virtue of subsection 2 of section 5, designate the mineral or minerals in respect of which the designated area is being, or was, constituted a producing area. Provision is made for the appointment of an assessor who, by section 7, is to assess at their fair value all minerals upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced. By section 6, everyone whose name appears on the assessment roll, prepared by the assessor, shall be liable for and shall on or before the thirty-first day of December in each year pay to the Minister a tax at such rate as the Lieutenant-Governor in Council may from time to time prescribe, not exceeding ten mills on the dollar of the assessed value of his minerals. By section 22, every owner of minerals within, upon or under any land situated within a producing area shall be liable for and shall, on or before December 31st, in each year in which such minerals have not been assessed, pay to the Minister a tax at the rate of fifty cents per acre or fraction thereof. What happened was that by successive orders of the Minister of Natural Resources and Industrial Development upon whom the powers were conferred by the 1944 Act (and also the 1948 Act before amendment), a certain area was declared a producing area; that area was increased; coal was designated as the only mineral; and, finally, the producing area was decreased. No assessment was every made in the producing area. In the result, therefore, under section 22 a tax was imposed of fifty cents per acre on every "owner" of the "mineral" coal in the producing area, while in the non-producing area, in which is included all other owners, a tax of three cents per acre became payable under section 3. However, the terms of the Act providing for a tax at an annual rate on the dollar must be considered together with the other relevant provisions.

The trial judge, Thomson J., declared that all classes of taxation were valid and in the Court of Appeal [[1951] 2 W.W.R. (N.S.) 424; 4 D. L. R. 21.], Culliton J.A. (with whom McNiven J.A. agreed) came to the same conclusion. The Chief Justice (with whom Proctor J.A. agreed) considered that only the taxation in the non-producing area was valid while Gordon J.A. considered

the Act ultra vires in toto.

The main contention is that the Act does not impose direct taxation within the Province under section 92(2) of the British North America Act but in my view that argument is not sound. Dealing first with a non-producing area, section 3 imposes the three cents per acre tax upon "every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land." By paragraph 6 of subsection 1 of section 2, "owner" means a person who is registered in a land titles office as the owner of any mineral or minerals whether or not the title thereto is severed from the title to the surface;" By paragraph 4 of subsection 1 of section 2:--

"mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land,

By paragraph 2 of subsection 1 of section 2:-- "'certificate of title' means a certificate of title granted pursuant to The Land Titles Act." The Land Titles Act is presently R.S.S. 1940, chapter 98, and under section 2(1) thereof "certificate of title" means the certificate (Form A) granted by the registrar and entered and kept in the register." By section 10 of The Land Titles Act:--

10. "Land" or "lands" means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether such estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements, appertaining thereto, and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted;

These provisions make it plain that the tax in the non-producing area is imposed upon the owner of any mineral or minerals within, upon or under any land, or the owner of the right to work, win and carry away such minerals. Where a person appears from a certificate of title under The Land Titles Act as the owner of the mines or minerals or has the right to work, win and carry them away, he is liable to the tax of three cents per acre whether there be minerals in the land or not. This is a land tax and is clearly direct taxation: *Halifax v. Fairbanks* [[1928] A. C. 177.], *Attorney General for British Columbia v. Esquimalt and Nanaimo Railway Co.* [[1950] A.C. 87.]. In substance this is the view of all, save one, of the members of the Courts below who have considered the matter.

If, in the Act, no provisions had been made in producing areas for an assessment roll and the imposition of a tax at an annual rate on the dollar, and section 22 had merely provided that every owner of minerals within a producing area should pay a tax at the rate of fifty cents per acre, the same result would follow. The mere fact that provision is made for an assessment roll, etc., does not in my opinion change the character of the tax. Section 7 provides that the assessor is to assess at

their fair value all minerals within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced, or to the knowledge of the assessor have at any time been produced. In such assessment roll there is to be set out, among other things, a brief description of each such parcel of land and of the minerals assessed. "Parcel of land" is defined by paragraph 7 of subsection 1 of section 2 as meaning:--

7. "parcel of land" means all the separately described areas, within the boundaries of a section according to the system of surveys under The Land Surveys Act or within the boundaries of a river lot, which are contiguous and in respect of which the same person is the owner of the minerals. For the purpose of this paragraph, separately described areas which have at least part of their boundaries in common or which are separated only by a highway, road or railway right of way shall be deemed to be contiguous, and separately described areas adjoining at only one point shall be deemed to be not contiguous;

This is not a tax on production. In the Esquimalt case, [[1950] A.C. 87.], Lord Greene, speaking for the judicial committee, adopted, at page 115, as correct what had been said by O'Halloran J.A. in that case:--

Because land bears a tax which is measured by the reflected value of its products is no reason to say that the tax on the land is a colourable tax on its products, and that such a tax is not in truth a tax on the land itself.

These remarks apply with equal force to the problem now under consideration and it was for these reasons that the trial judge and McNiven J.A. and Culliton J.A. came to the same conclusion.

Finally, there is nothing to indicate that the legislature was not in truth doing what it purported to do, that is, impose a direct tax for the raising of a revenue for provincial purposes. On this point I am content to adopt the reasoning of those members of the Courts below who so held.

The appeal of the plaintiffs should be dismissed with costs and the cross-appeal of the defendants should be allowed with costs. The judgment at the trial should be restored. The defendants are entitled to the costs of the appeal by the plaintiffs to the Court of Appeal but there should be no costs of the cross-appeals to that Court.

RAND J.:-- This is an appeal arising out of The Mineral Taxation Act, 1948, of Saskatchewan. The province has purported to tax all minerals within its boundaries except those within, upon or under railway lands, the land within any city, town or village, or within any registered subdivision of lots for residential or business purposes or for a cemetery.

"Mineral" is defined by sec. 2(4) as meaning "the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any

land."

The tax scheme imposes, first, a general annual levy of three cents on every taxable acre or fractional part of an acre not within what may be declared to be a "producing area". The language of sec. 2, providing this initial tax, is:--

Every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land not situated within a producing area, shall be liable for and shall on or before the thirty-first day of December in each year pay to the minister a tax at the rate of three cents for every acre and every fraction of an acre of such land in respect of which he is such owner.

Then, by sec. 5, the Governor-in-Council is authorized from time to time to declare any portion of the province to constitute a "producing area", and, in any manner, to modify or abolish such an area.

Sec. 7 directs an assessment each year "at their fair value" of all minerals "within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced, and shall prepare an assessment roll in which shall be set out as accurately as may be a brief description of each such parcel of land, a brief description of the minerals assessed, the names and addresses of the owners of the minerals and the assessed value thereof". Subsection (2) authorizes him to resort to all available information pertinent to that value. Section 2(7) defines "parcel of land" to mean:--

... all the separately described areas, within the boundaries of a section according to the system of surveys under The Land Surveys Act or within the boundaries of a river lot, which are contiguous and in respect of which the same person is the owner of the minerals. For the purpose of this paragraph, separately described areas which have at least part of their boundaries in common or which are separated only by a highway, road or railway right of way shall be deemed to be contiguous, and separately described areas adjoining at only one point shall be deemed to be not contiguous;

Finally, by section 22, it is provided that:--

Subject to subsection (2) of section 5, every owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land situated within a producing area shall be liable for and shall on or before the thirty-first day of December in each year in which such minerals have not been assessed under the provisions of this Act, pay to the minister a tax at the rate of fifty cents

for every acre and every fraction of an acre of such land in respect of which he is such owner.

The appellants are the owners of minerals, both severed and unsevered in title from the fee simple, and have brought this action for a declaration that the statute is ultra vires; and the narrow question presented is whether the annual tax of mineral in situ, as a component of the soil, having a special discrete value to be realized upon some manner of removal from the soil, is direct taxation within the meaning of these words as used in head 2 of section 92 of the British North America Act.

The argument assumed that there is mineral of some nature and quantity in all lands, and the tax has, therefore, in fact in all cases a real subject-matter. The contention of the appellants is, moreover, that the three categories of tax must stand or fall together. Mr. Leslie, in his able and frank argument, urged that, although for the purposes of taxing land as such, the value of all its component parts, ascertained by some means or other, may be reflected, yet when a mineral component is segregated as a subject-matter of tax, that becomes equivalent to the taxation of an article in commerce, an article, in effect, on its way to market, in which the tax is gathered up as part of the charges intended and expected to be recouped in the price.

That, for the purposes of a land tax, the assessed value of land can reflect the value of its products, such as timber, even though the timber represents substantially the entire value, was laid down by the judicial committee in the case of *British Columbia v. Esquimalt & Nanaimo Railway Company* [[1950] A.C. 87.]. This Court [[1948] S.C.R. 403.] had held the proposed imposts to be a tax in substance on the timber as and when severed, but that view was rejected. I can see no difference, for this purpose, between the reflected value of a "growing" product and one, such as mineral, of a somewhat desperate character and of a limited quantity or existence: they are all, in contemplation of law, part of the soil.

The reflected value of a severable portion of land can only be determined, in a practical sense, by estimating its worth in situ in relation to its market worth as a commodity, after making allowance for all costs and risks: to which, for the total tax on the land, would be added the residual value of the soil, that is, of such part as was not involved in realizing the value of the severable portion: at least, counsel could suggest no other means or method by which, as in the Nanaimo case, the land tax could be computed, and none has occurred to me; and the market price of the land as an entirety would be based on the same factors. If, then, these can be so combined and treated as a single tax on the land, what is there in the nature of taxation or the subject-matter of taxation to prevent the two components from having their individual value ascertainties carried right into the same or different assessments so long as the tax is against each only as it is in situ? Since a mineral occupies space, its taxation includes the space it fills, and in every sense is directed against the land.

In *Esquimalt*, Lord Greene takes as a significant consideration the fact that the tax was charged upon the land only and did not attach to the severed timber. That is the effect of section 23(a) here: the tax is in respect of materials in situ, and only against them as they form part of the

land does the charge apply.

Lord Greene in the same case speaks of the "fundamental difference" between the "economic tendency" of an owner to try to shift the incidence of a tax and the "passing on" of the tax regarded as the hallmark of an indirect tax. In relation to commodities in commerce, I take this to lie in the agreed conceptions of economists of charges which fall into the category of accumulating items: and the question is, what taxes, through intention and expectation, are to be included in those items? If the tax is related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market. However much, in any case, these may be actually "intended" or "expected" to be passed on, it is now settled that they are to be so treated: *Attorney-General for British Columbia v. C.P. Railway Company* [[1927] A.C. 934.]; *R. v. Caledonian Collieries* [[1928] A.C. 358.].

In the case, on the other hand, of any large public undertaking, the taxes on its fixed assets might wipe out any operating profit and its revenue have to be increased to avoid such a result; but that, obviously, would not convert them into indirect taxes.

Here we have an intermediate case: a capital asset which, in the course of its business exploitation, becomes used up. The tax is not in any way related to the course of that exploitation. It is an annual levy on the total quantity then existing; and that capital tax could not, in the sense of a general tendency, be taken to be intended and expected to be passed on to the consumer as an element of the price: it might be paid for years before a ton of mineral was removed. There might be the "economic tendency" to transfer some of it to price, but that is as irrelevant here as in *Esquimalt*.

The tax, at the moment of imposition, is in fact against land; it is an annual impost; the charge securing it is limited to land; and it is not an item related to or recognized as reflected in the cluster of charges intended and expected to be recouped in the price of the marketed commodity. It is of the nature of a fixed asset tax rather than a transaction tax; and it is therefore direct. That being so in the case of the tax based on an annual assessment of value, it is much more clearly so in the cases of the flat acreage rates.

I would therefore dismiss the appeal, allow the cross-appeal and restore the judgment at trial. The respondents will be entitled to their costs in this Court and in the Court of Appeal.

KELLOCK J.:-- In my opinion, the question involved in this appeal does not lend itself to extended discussion and it is unnecessary to re-state the nature of the legislation under which it arises. The legislation is said to be ultra vires the provincial legislature on the ground that, properly understood, its effect is to impose taxation on an article of commerce and is thus indirect.

It is well settled that ownership of mineral in situ as an interest in land may be severed from ownership of the "surface" rights. There is in principle no reason, in my opinion, why, although taxation in respect of the unity of ownership is direct, and taxation of the "surface" rights is also

direct, taxation in respect of the mineral rights should be regarded in any other light. The tax here in question is an annual levy, payable notwithstanding that the mineral never becomes a commodity. Such a tax, in my opinion, is simply a land tax.

I would dismiss the appeal of the plaintiffs and allow the appeal of the defendants, both with costs. The defendants should have the costs of the appeal by the plaintiffs to the Court of Appeal. There should be no costs of the cross-appeals to that court.

ESTEY J.:-- The appellants, owners of the mineral rights under a large acreage in Saskatchewan, submit that by the enactment of The Mineral Taxation Act (S. of S. 1948, c. 24, as amended 1949, c. 23, and 1950, c. 22) the Province of Saskatchewan has imposed indirect taxation and, therefore, acted beyond its authority within the meaning of s. 92(2) of the British North America Act. Section 92(2) reads:

92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,--

2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

Under the foregoing section, therefore, the Province can impose only those taxes which are properly classified as direct. Since 1887 (*Bank of Toronto v. Lambe*, 12 App. Cas. 575; 1 Cam. 378.), John Stuart Mill's definition of direct and indirect taxes has been adopted as an appropriate basis upon which, in a legal sense, particular taxes may be classified under one or other of these headings. This definition reads:

A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. Such are the excise or customs.

Whether a tax is direct or indirect within the meaning of Mill's definition is determined "primarily by an examination of the nature and effect of the tax as collected from the language describing it." *A.G. for B.C. v. Esquimalt and Nanaimo Ry Co.*, [1950] A.C. 87.

The statute imposing the tax is entitled The Mineral Taxation Act. In s. 2(4) the word "mineral" is defined and the material part thereof reads as follows:

4. "mineral" means the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or

minerals within, upon or under any land, ...

The certificate of title here referred to is that defined in s. 2(1) of The Land Titles Act (1940 R.S.S., c. 98) as "the certificate (form A) granted by the registrar and entered and kept in the register." By s. 61 of the same act, once "a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land . . ." "Land" is then defined by s. 2(10) to include mines and minerals.

Sections 3, 6 and 22 are the charging sections of this Mineral Taxation statute. In each the tax is imposed upon the owner of minerals. "Owner" is defined in s. 2(6) and the relevant portion thereof reads:

6. "owner" means a person who is registered in a land titles office as the owner of any mineral or minerals whether or not the title thereto is severed from the title to the surface;

Section 3 imposes a flat rate of three cents per acre upon the owner of minerals in a non-producing area of the province. This area includes the entire province except that which from time to time may be declared by the Lieutenant-Governor in Council, under s. 5, a producing area.

When an area has been declared to be a producing area the statute contemplates that each owner of minerals therein shall pay the tax computed upon one or other of two methods. Under s. 7

the assessor shall . . . assess at their fair value all minerals within, upon or under any parcel of land situated within a producing area and within the boundaries of which land minerals are then being produced or to the knowledge of the assessor have at any time been produced . . .

Then under s. 6

Every owner whose name appears on the assessment roll mentioned in section 7 shall . . . pay to the minister a tax . . . not exceeding ten mills on the dollar of the assessed value of his minerals

However, any owner in a producing area whose name does not appear on the assessment roll mentioned in s. 7 and, therefore, not subject to the tax under s. 6, comes within the provisions of s. 22, under which he shall pay

to the minister a tax at the rate of fifty cents for every acre and every fraction of an acre of such land in respect of which he is such owner.

Section 23(a) provides that the tax imposed shall be a special lien upon the mineral or

minerals in respect of which it is payable. This feature was regarded as of great significance by the judicial committee in *A.G. for B.C. v. Esquimalt and Nanaimo Ry. Co.* supra at p. 115.

Under s. 27, if the owner leases any mineral or minerals to another person, or grants the right to work the minerals in his land, he shall remain liable for this tax and any agreement to the contrary "shall be null, void and of no effect." It is then provided that any such lessee or other person in the section mentioned may pay the tax and realize the same as a debt owing to him from the owner.

This statute imposes a tax upon every person "registered in a land titles office as the owner of any mineral." As "land" is defined in The Land Titles Act (R.S.S. 1940, c. 98, s. 2(10)) to include mines and minerals, it follows that the language of the statute imposes a tax upon an interest in land. The intention of the legislature to levy a tax upon an interest in land is found not only in the language adopted in this act, but by the fact that at the same session it amended the City, Town, Village and Rural Municipality Acts (respectively chapters 126, 127, 128 and 129, R.S.S. 1940), by which the municipal bodies could no longer impose a tax upon that interest in land subject to taxation under The Mineral Taxation Act. As minerals are, in effect, presumed to exist within, upon, or under the areas described in the certificates of title throughout the province, there is here created a provincial tax upon an interest in land, while the municipal bodies continue to impose taxes upon the remaining interest therein.

The appellants contend that granting the ownership of minerals in situ constitutes an interest in land and, in that sense, a tax imposed upon that interest is a land tax, it does not necessarily follow that the tax here in question is a direct tax. The mere designation of a tax as a tax on land, or an interest therein, does not, of course, make it a land tax, but if, in substance, it is a tax upon land or an interest therein then it has consistently been classified as a direct tax. The appellants, in support of their contention, submit that the mineral, as an interest in land, has no value until such time as it may be removed from the land and become a commodity of commerce. It is true that a mineral has no value in use until it is extracted, but a contention that it has no value while a constituent part of the land cannot be accepted as accurate. It is rather more in accord with fact to suggest that with respect to such a mineral in situ it is in itself a matter of value which increases as the certainty of the quantity and the quality of the mineral becomes known. This value, so long as the flat rates of three and fifty cents per acre are imposed (and these alone have so far been imposed), would not enter into the computation of this tax. It would, of course, where the computation is upon the assessment basis, as provided under ss. 6 and 7. Even if we assume that this assessment value reflects the productive value of the land, that would not preclude its remaining a taxation upon land. *A.G. for B.C. v. Esquimalt and Nanaimo Ry. Co.* supra.

The tax here in question is a tax upon an interest in land and, both within and without the producing area, is imposed irrespective of whether the mineral is being removed or not. The tax within the producing area is higher and in that area may be computed upon an assessment basis or a flat rate of fifty cents per acre, but no distinction is made in either case between the owner removing

the mineral and the owner allowing it to remain in situ.

Four of the learned judges in the Court of Appeal, [1951] 2 W.W.R. (N.S.) 424; 4 D.L.R. 21, were of the opinion that the tax, as here imposed in a non-producing area, of three cents per acre was direct, Chief Justice Martin stating:

The tax of three cents per acre imposed in Section 3 of the Act is in respect of the taxpayer's particular interest in the property and it is intended and desired that he should pay it though it may be possible for him to pass the burden to someone else.

The majority of the learned judges were of the opinion that the tax as imposed in a producing area, whether computed on either the assessed value or as a flat rate of fifty cents per acre, was, however, indirect. Neither the increase from three to fifty cents, nor the change to a computation of the tax upon an assessment basis, with the greatest possible respect, alters or affects the true nature and character of the tax, which remains the same in both the producing and non-producing areas, which, as already stated, include the entire province. The majority of the learned judges appear to have been influenced by the decision of *The King v. Caledonian Collieries, Limited*. [1928] A.C. 358; 2 Cam. 494. There the province of Alberta imposed a percentage tax upon the gross revenues from coal mines and this gross revenue was interpreted to mean "the aggregate of sums received from sales of coal," and to be "indistinguishable from a tax upon every sum received from the sale of coal." The parties contesting the validity of the tax in that case were producers of coal and the tax was, therefore, upon coal as a commodity in commerce rather than as it rested undisturbed in the soil. In the case at bar the tax is in relation to the mineral or minerals which constitute an interest in land and is imposed upon the owners without regard to whether that interest, or any part of it, will every be removed from the land. It would, therefore, appear, with great respect, that the Collieries case is quite distinguishable.

Counsel for the appellants argues that the taxpayer of this tax will seek to pass it on. That may well be true. It is usually true that the taxpayer seeks to do so, but that is not the test. The true test is whether, by virtue of its nature and character, the tax is of a type such that, having regard to its normal tendencies, it will be passed on. As stated by Lord Hobhouse in *Bank of Toronto v. Lambe* supra at p. 582:

The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

In *The King v. Caledonian Collieries, Limited* supra it was contended that the tax there imposed upon the gross revenue received by the mine owner was not indirect, inter alia because it could not be passed on. Their Lordships stated:

Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

An analysis of The Mineral Taxation Act indicates that the legislature here imposes a tax upon an owner of an interest in land rather than in relation to any commodity or commercial transaction. Taxes in respect of the latter have been held ultra vires the provinces. *Attorney-General for Manitoba v. Attorney-General for Canada*, [1925] A.C. 561; 2 Cam. 381; *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.*, [1927] A.C. 934; 2 Cam. 441; *The King v. Caledonian Collieries, Limited*, supra; *Attorney-General of British Columbia v. McDonald Murphy Lumber Co. Ltd.*, [1930] A.C. 357; Plax. 43. Taxes in relation to the former have been held to be direct and, therefore, within the competence of the province to impose. *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117; 2 Cam. 477. In the latter case Lord Cave, speaking on behalf of the Privy Council stated at p. 126:

It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity; and, judged by that test, the business tax imposed on an owner under s. 394 is a direct tax.

Newcombe J., writing the judgment of the majority of the Court, stated in *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52 at 73:

Therefore, within the authority of the *Fairbanks* case, [1928] A.C. 117, as I interpret it, taxation upon land and upon the owner of the land is within the category of direct taxation, ...

Both parties cited *A.G. for B.C. v. Esquimalt and Nanaimo Ry. Co.* supra. In that case their Lordships of the Privy Council stressed the fact, as already intimated, that the nature and character of the tax should be determined from the language of the statute creating it.

There was a distinction, in their Lordships' opinion, between the tax there in question and an ordinary land tax, in that it was an impost to be discharged once and for all. Here, however, that distinction is not present and the tax is in its nature identical with the ordinary land tax. As stated by Mr. Justice Thomson:

It is a re-occurring tax against the "owner of minerals" levied annually against the same person as long as he continues the owner and without regard to whether any attempt is ever made to lease or work the minerals or not.

The references of their Lordships to a timber tax must be read in relation to the contention there made that, though the language creating the tax described it as a land tax, in effect it was a tax upon timber as and when cut. Their Lordships did not accept this contention and in the course of

their reasons stated at p. 117:

It is natural that the legislature in imposing a tax of this nature should give the assessee the opportunity to defer payment until such time as he could provide himself with the necessary money by reaping the produce of his land.

and at p. 118:

... the tax is in reality a tax on land and not a timber tax. The existing land tax imposed by provincial legislation is imposed on both timber-bearing lands and non-timber-bearing lands.

Once it is determined that the true nature and character of the tax is in relation to land, that case holds that the mere fact it is computed upon the productive capacity of the land does not alter or change its nature and character.

The appeal on the part of the appellants should be dismissed with costs, the respondents' cross-appeal should be allowed with costs and the judgment at trial restored. In the Court of Appeal the respondents should have their costs upon the appeal but no costs as to their cross-appeals.

LOCKE J.:-- The appellant companies are the owners of the mineral rights in something more than three and a half million acres of land in the province of Saskatchewan. With unimportant exceptions, these lands are part of those conveyed to the various companies by the Crown as grants in connection with the construction of the lines of railway forming part of the Canadian Pacific Railway system. To what extent the title to these properties originally vested in the companies by letters patent from the Crown have been brought under the provisions of the Land Titles Act (cap. 98, R.S.S. 1940) is not disclosed by the evidence. As shown by one of the exhibits filed, the letters patent vested in the grantee an estate in fee simple reserving only to the Crown the free use, passage and enjoyment of all navigable waters flowing through the land. As to such parts of the land as were brought under the operation of the Land Titles Act, a certificate of title filed shows that when the surface rights were sold a new certificate of title was issued to the purchaser, the title of the railway company to the minerals being then evidenced either by the certificate of title bearing an endorsement showing it to be cancelled as to the surface rights or by the issue of a new certificate of title for the mineral rights. Not all of the mineral rights remained in the companies in all of the lands but the rights retained in all are such that would be affected by the taxation imposed by the Mineral Taxation Act 1948.

Section 3 of that Act imposes a tax of three cents an acre and every fraction of an acre upon the:--

owner of minerals, whether of all kinds or only one or more kinds, within, upon or under any land, not situated within a producing area.

By section 22 a tax of fifty cents for every acre and fraction thereof is imposed upon every such owner of minerals situated within a producing area, in each year in which such minerals have not been assessed under the provisions of section 7 of the Act. Where the Minister has declared that any portion of the province shall constitute a producing area, the mineral or minerals to be assessed in such area may be designated by him, and after their value has been assessed under the provisions of section 7 every owner whose name appears on the assessment roll shall be liable to a tax at such rate as the Lieutenant-Governor in Council may prescribe, not exceeding ten mills on the dollar of the assessed value.

"Owner" is defined by subsection 6 of section 2 as a person who is registered in a land titles office as the owner of any mineral or minerals whether or not the title thereto is severed from the title to the surface. Subsection 4 of section 2 defines "mineral" as meaning:--

the right existing in any person by virtue of a certificate of title to work, win and carry away any mineral or minerals within, upon or under the area described in the certificate of title, and also any mineral or minerals within, upon or under any land.

I respectfully agree with the learned trial judge that whatever may be the meaning of the first part of this so-called interpretation section, it cannot restrict the effect of the latter part, and that the words "mineral or minerals within, upon or under any land," must be construed in their natural and ordinary sense. In view of the fact that the appellants are the owners of some or all of such minerals as may be contained in all of the lands in question, nothing is to be gained by considering the question as to whether a tax upon the right to work, win and carry away such minerals can be supported as direct taxation.

The right of the owner of minerals found on or under the surface of land, whether held in conjunction with the ownership of the surface rights or separately from such rights, is an interest or estate in land. It is in respect of the ownership of such interest that this taxation is imposed. A tax so imposed is not to be distinguished, in my opinion, from a tax upon the interest of the owner of the surface of the land in the sense of being direct unless, under the guise of taxing that interest, the legislature is really attempting to impose a tax upon the minerals as commodities after they have been mined. The question is not, in my opinion, concluded by the language of the taxing section and the fact that the tax is imposed in respect of an interest in land, since, as was said by Viscount Haldane in *Attorney-General for Manitoba v. Attorney-General for Canada*, [1925] A.C. 561 at 566, the question of the nature of a tax is one of substance and does not turn only upon the language used by the local legislature which imposes it, but on the provisions of the Imperial Statute of 1867.

This is on the face of it a tax upon land and thus a tax of a kind which was at the time of the passing of the British North America Act everywhere treated as a direct tax. The tax is imposed annually and whether or not such minerals as exist may ever be mined or removed. In like manner the taxes imposed by municipalities upon owners of surface rights are payable, whether or not the

land be put to any use. While it may well be true that as and when the minerals or the right to mine them are sold by the present owners, the tendency will be to endeavour to obtain recoupment of the amounts paid as mineral tax to the province by increasing the price demanded this fact does not of itself establish that the legislation contemplated that the tax be thus borne in whole or in part by others or be in any sense imposed upon the minerals or commodities as and when they were removed.

Taxes of a like nature have been imposed by several of the provinces of Canada and in one for a long period of years. By the Placer Mining Act of British Columbia (sec. 152, cap. 136, R.S.B.C. 1897) there was imposed upon the owner of every mineral or placer claim of which a Crown grant had been issued an annual tax of twenty-five cents on every acre and fractional part of an acre conveyed by the grant. Taxation of this nature has been continuously imposed in that province since that time and is now imposed upon every owner of a mineral claim, with certain defined exceptions by the Taxation Act (sec. 55 and 56, cap. 332, R.S.B.C. 1948). An acreage tax was imposed upon the owners of all mining rights in Ontario by the Mining Tax Act (cap. 26, R.S.O. 1914, sec. 15). In Manitoba, by the Mining Tax Act, the owner, holder, lessee or occupier of every mineral claim is liable to an annual tax of \$5.00 (sec. 3 cap. 207, R.S.M. 1940). In Alberta, by the Mineral Taxation Act 1947, taxation of a similar nature to that imposed by the Saskatchewan Statute here in question is imposed. The fact that the legislation in British Columbia, Ontario and Manitoba has not, so far as I am aware, been attacked on the ground that it is ultra vires as being indirect taxation, does not, of course, establish its validity. It is not without significance, however, that a tax of this nature is apparently regarded by those engaged in the mining industry as a proper exercise of provincial powers to tax land and interests in land and as a direct tax.

I think the decision of the judicial committee in *Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Company*, [1950] A.C. 87, does not assist in determining the present matter. The proposed taxes referred to in Questions 5 and 6 which are mentioned at pages 93 and 94 of the report were to be imposed upon the land but in the case of Question 5 to be payable only as and when the merchantable timber was cut and severed from the land, and in the case of Question 6 at the election of the taxpayer only as the timber was cut. The time at which these taxes were to become payable and the fact that if the timber was not cut they would never become payable lent support to the view that, while expressed as a land tax, the real intention was to impose taxation upon the commodity after it had been severed from the land. Had it been proposed that the taxes be levied annually and upon the owner in respect of its ownership of the timber and the right to cut and remove it as an incidence of that ownership and thus a tax upon an interest in land (*Glenwood Lumber Company v. Phillips*, [1904] A.C. 405, 408), the decision in the matter would have directly touched the question with which we are concerned.

With great respect for the contrary opinion of the majority of the learned judges of the Court of Appeal, it is my view that each of the three taxes in question is a direct tax and not imposed with the intention that it should be passed on to someone else and that the province is not by this legislation attempting indirectly to impose a tax on the minerals as and when they are mined and

sold. I would accordingly dismiss the appeal with costs and allow the cross-appeal with costs. There should be no costs of the cross-appeal in the Court of Appeal.

Appeal dismissed and cross-appeal allowed; both with costs.

TAB 5

Indexed as:
Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)

Cuddy Chicks Limited, appellant;
v.
Ontario Labour Relations Board and United Food and
Commercial Workers International Union, Local 175,
respondents, and
The Attorney General of Canada, the Attorney General for
Ontario, the Attorney General for Saskatchewan, Canada
Employment and Immigration Commission and Marcelle
Tétreault-Gadoury, interveners.

[1991] 2 S.C.R. 5

[1991] S.C.J. No. 42

File No.: 21675.

Supreme Court of Canada

1990: November 7 / 1991: June 6.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (26 paras.)

Constitutional law -- Administrative tribunals -- Jurisdiction -- Board granted power to consider questions of law -- Whether Board can make constitutional determination regarding its own enabling legislation -- Canadian Charter of Rights and Freedoms, s. 24(1) -- Constitution Act, 1982, s. 52 -- Labour Relations Act, R.S.O. 1980, c. 228, ss. 2(b), 106(1), 124.

Administrative law -- Boards -- Jurisdiction -- Board granted power to consider questions of law -- Whether Board can make constitutional determination regarding its own enabling legislation -- Canadian Charter of Rights and Freedoms, s. 24(1) -- Constitution Act, 1982, s. 52 -- Labour Relations Act, R.S.O. 1980, c. 228, ss. 2(b), 106(1), 124.

Respondent union filed an application for certification before the Ontario Labour Relations Board relating [page6] to employees at the chicken hatchery of Cuddy Chicks Ltd. Section 2(b) of the Labour Relations Act, however, provided that the Act did not apply to persons employed in agriculture and the appellant maintained that the employees in question should be so designated. On filing the application, the union gave notice that it would request the Board to hold s. 2(b) invalid as being contrary to ss. 2(d) and 15 of the Canadian Charter of Rights and Freedoms if the employees were found to be agricultural employees.

Prior to the commencement of the hearing, Cuddy Chicks disputed the jurisdiction of the Board to subject its enabling statute to Charter scrutiny. At that point, a separate hearing was convened to determine whether the panel had jurisdiction to entertain the Charter issues raised by the Union. The first panel found the employees to be in the agricultural sector so that the Act did not apply. A majority of the panel then held that the Board had jurisdiction to rule on the Charter issue because the Board was a "court of competent jurisdiction" within the meaning of s. 24(1) of the Charter and because s. 52 of the Constitution Act, 1982 imposed an obligation on the Board to ensure that the law it applies is consistent with the supreme law of Canada. The Board, under s. 106(1) of the Act, has jurisdiction to decide questions of law relevant to the proceedings before it.

The Divisional Court held that the Board had jurisdiction to deal with the Charter issue. A majority of the Court of Appeal held that s. 52(1) of the Constitution Act, 1982 conferred jurisdiction on the Board to decide the constitutionality of its enabling statute. At issue here were: (1) whether s. 52 of the Constitution Act, 1982 conferred the right and duty on an administrative agency such as the OLRB to decide the constitutional validity of its enabling statute; (2) whether the OLRB had the jurisdiction to decide the constitutional validity of s. 2(b) of its enabling statute by applying the Charter as part of its duty to consider statutes bearing on proceedings before it; and, (3) whether the OLRB was a "court of competent jurisdiction" under s. 24(1) of the Charter.

Held: The appeal should be dismissed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.: An administrative [page7] tribunal which has been given the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. It must respect the Constitution as the supreme law because of the principle of supremacy of the Constitution confirmed by s. 52(1) of the Constitution Act, 1982.

Section 52(1) of the Constitution Act, 1982 neither specifies which bodies may rule on Charter questions nor confers jurisdiction on an administrative tribunal. Jurisdiction over the whole of the matter -- the parties, subject matter and remedy sought -- must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. An administrative tribunal, however, need not be a court of competent jurisdiction within the meaning of s. 24(1) of the Charter in order to have the necessary authority to subject its enabling statute to Charter scrutiny. The relevant

inquiry in this case was not whether the tribunal was a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the Charter.

In conducting this inquiry, it first must be determined whether the tribunal has jurisdiction over the whole of the matter before it. Here, the issue centred on the Board's jurisdiction over the subject matter and remedy. The subject matter was not simply an application for certification, which fell squarely within the Board's authority, but one requiring the Board to subject s. 2(b) of the Act to Charter scrutiny in order to determine whether the application for certification was properly before it. Similarly, the remedy of certification required the Board to refuse to give effect to s. 2(b) of the Act because of inconsistency with the Charter. The authority to apply the Charter had to be found in the Board's enabling statute because the subject matter and remedy were premised on the application of the Charter.

The Act expressly, and without reservation, granted the Board the authority to decide points of law and to determine questions of law and fact relating to its own jurisdiction. This authority with respect to questions of law encompasses the question of whether a law violates the Charter. The Board therefore had the authority to rule on the constitutionality of s. 2(b) of its enabling statute in the course of considering the Union's application for certification.

[page8]

The jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions. Further, a formal declaration of invalidity is not a remedy which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, which is a remedy exercisable only by the superior courts, the ruling of the Board on a Charter issue does not constitute a binding legal precedent but is limited in its applicability to the matter in which it arises.

Per Wilson and L'Heureux-Dubé JJ.: The reasons of La Forest J. were concurred with subject to the qualification that the absence of legislative authority to deal with the Charter issue in the governing statute is not necessarily determinative of a tribunal's jurisdiction, since the authority and obligation to apply the law may be grounded elsewhere.

Cases Cited

By La Forest J.

Considered: Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; referred to: Mills v. The Queen, [1986] 1 S.C.R. 863; Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22; Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; Northern Telecom Canada Ltd. v.

Communication Workers of Canada, [1983] 1 S.C.R. 733; *The Queen v. Ontario Labour Relations Board, Ex parte Dunn* (1963), 39 D.L.R. (2d) 346; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031.

By Wilson J.

Referred to: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *McLeod v. Egan*, [1975] 1 S.C.R. 517; *Mills v. The Queen*, [1986] 1 S.C.R. 863.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(d), 15, 24(1).
Constitution Act, 1982, s. 52(1).

[page9]

Labour Code, R.S.B.C. 1979, c. 212.

Labour Relations Act, R.S.O. 1980, c. 228, ss. 2(b), 106(1), 124.

APPEAL from a judgment of the Ontario Court of Appeal (1989), 70 O.R. (2d) 179, 62 D.L.R. (4th) 125, 35 O.A.C. 94, 44 C.R.R. 75, 89 C.L.L.C. para. 14,051, 39 Admin. L.R. 48, dismissing an appeal from a judgment of the Divisional Court (1988), 66 O.R. (2d) 284, 32 O.A.C. 7, 88 C.L.L.C. para. 14,053, 33 Admin. L.R. 304, dismissing an appeal from a judgment of the Ontario Labour Relations Board. Appeal dismissed.

George W. Adams, Q.C., Patrick E. Hurley and Ralph N. Nero, for the appellant.

Stephen T. Goudge, Q.C., and Christopher M. Dassios, for the respondent, Ontario Labour Relations Board.

Douglas J. Wray, for the respondent, United Food and Commercial Workers International Union, Local 175.

Gaspard Côté, Q.C., and Carole Bureau, for the interveners, Canada Employment and Immigration Commission and the Attorney General of Canada.

Robert E. Charney, for the intervener, the Attorney General for Ontario.

Robert G. Richards and Ross MacNab, for the intervener, the Attorney General for Saskatchewan.

Jean-Guy Ouellet and Gilbert Nadon, for the intervener, Marcelle Tétreault-Gadoury.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. was delivered by

1 LA FOREST J.:-- This appeal concerns the jurisdiction of the Ontario Labour Relations Board to determine the constitutionality of a provision of its enabling statute, the Labour Relations Act, R.S.O. 1980, c. 228, in the course of proceedings before it.

[page10]

Facts

2 In April 1987, the United Food and Commercial Workers International Union, Local 175, filed an application for certification before the Ontario Labour Relations Board (OLRB) relating to employees at the chicken hatchery of Cuddy Chicks Limited. Section 2(b) of the Labour Relations Act states that the Act does not apply "to a person employed in agriculture". On filing the application, the Union gave notice that, if the employees were found to be agricultural employees, it would request the Board to hold s. 2(b) invalid as being contrary to ss. 2(d) and 15 of the Canadian Charter of Rights and Freedoms. The position of Cuddy Chicks was that the employees in question were agricultural employees.

3 Prior to the commencement of the hearing into this matter, Cuddy Chicks disputed the jurisdiction of the Board to subject its enabling statute to Charter scrutiny. At that point, in February 1988, a separate hearing was convened to determine whether the panel had jurisdiction to entertain the Charter issues raised by the Union. The decision of this second panel was reserved. The hearing by the first panel proceeded in March and April 1988. At the conclusion of this hearing, the panel unanimously held that the employees at the Cuddy Chicks hatchery were employed in agriculture, and therefore the Act did not apply. A majority of the panel then held that the Board had jurisdiction to rule on the Charter issue because, in the majority's view, the Board is a "court of competent jurisdiction" within the meaning of s. 24(1) of the Charter and because s. 52 of the Constitution Act, 1982 imposes an obligation on the Board to ensure that the law it applies is consistent with the supreme law of Canada. Under s. 106(1) of the Act, the Board has jurisdiction to decide questions of law relevant to the proceedings before it:

106.--(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision [page11] of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Judicial History

Divisional Court

4 The Divisional Court held that the Board had jurisdiction to deal with the Charter issue, on three grounds. First, the Board was a court of competent jurisdiction under s. 24(1) of the Charter, since it had jurisdiction over the parties, subject matter and remedy and thus met the test set out in *Mills v. The Queen*, [1986] 1 S.C.R. 863. Second, it had jurisdiction to consider Charter issues under s. 52(1) of the Constitution Act, 1982. The court noted that prior to the Charter, labour boards were held competent to determine constitutional questions, such decisions being subject always to judicial review. The third basis on which the court found jurisdiction in the Board was the common law duty of labour boards to construe external statutes in the course of rendering decisions on labour matters before them.

Court of Appeal (Grange, Finlayson and McKinlay JJ.A.) (1989), 70 O.R. (2d) 179

5 A majority of the Court of Appeal (Grange and McKinlay JJ.A.) held that s. 52(1) of the Constitution Act, 1982 conferred jurisdiction on the Board to decide the constitutionality of its enabling statute. In construing the Charter in favour of the Union in the present case, the Board would not be issuing a declaration of invalidity, but merely including agricultural workers within its broad jurisdiction under the Act to certify unions. Accordingly, a remedy was available in the ordinary course of proceedings, and resort to s. 24 of the Charter was unnecessary. It was also [page12] unnecessary to address the issue of common law duty.

6 Finlayson J.A. in dissent held that the Board was not a court of competent jurisdiction under s. 24(1) of the Charter. While it had jurisdiction over the union and employer, as well as the remedy of certification, once the Board determined that the employees at the Cuddy Chicks hatchery were agricultural employees, it had no jurisdiction over the subject matter of the application and exhausted its jurisdictional competence. McKinlay J.A. agreed that the Board was not a court of competent jurisdiction, although in her view, it was unnecessary to decide that issue.

7 As to whether s. 52 of the Constitution Act, 1982 alone confers authority on the Board to apply the Charter, Finlayson J.A. held that although that provision does give the Board the authority to apply the Charter, it does not give it jurisdiction to strike down, ignore or treat as inoperative any provision of its enabling statute by reference to the Charter.

8 Following its unsuccessful appeals in the Ontario courts, Cuddy Chicks obtained leave to appeal to this Court. Interventions were filed by the Attorneys General for Ontario and Saskatchewan. In addition, the parties to *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, an appeal which originally was to be heard together with the present appeal, were permitted to intervene by order of the Chief Justice.

Issues

9 The issues as framed by the parties are as follows:

1. Did the Ontario Court of Appeal err in holding that s. 52 of the Constitution Act, 1982 conferred the right and duty on an administrative agency such as the OLRB to decide the constitutional validity of its enabling statute?

[page13]

2. Did the Ontario Court of Appeal err in holding that the OLRB has the jurisdiction to decide the constitutional validity of s. 2(b) of its enabling statute by applying the Charter as part of a duty it has to consider statutes bearing on proceedings before it?
3. Was the Ontario Court of Appeal correct in holding that the OLRB was not a "court of competent jurisdiction" under s. 24(1) of the Charter?

Discussion

10 The essential issue before this Court is whether and on what basis the Board has jurisdiction to determine the constitutional validity of s. 2(b) of the Labour Relations Act, its enabling statute. This Court was not called upon to decide the substantive issue of whether s. 2(b) of the Act violates the Charter.

11 The power of an administrative tribunal to consider Charter issues was addressed recently by this Court in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. That case concerned the jurisdiction of an arbitration board, appointed by the parties under a collective agreement in conjunction with the British Columbia Labour Code, to determine the constitutionality of a mandatory retirement provision in the collective agreement. In ruling that the arbitrator did have such jurisdiction, this Court articulated the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. This conclusion ensues from the principle of supremacy of the Constitution, which is confirmed by s. 52(1) of the Constitution Act, 1982:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Distilled to its basics, the rationale for recognizing jurisdiction in the arbitrator in the *Douglas College* case is that the Constitution, as the supreme law, [page14] must be respected by an administrative tribunal called upon to interpret law. In addition, the practical advantages of having

constitutional issues decided at first instance by an expert tribunal confirm if not compel this conclusion. Practical considerations were canvassed at length in *Douglas College* and I need not repeat that discussion here. I would simply note the relevance of such considerations to the determination of whether, in the end, it makes sense for an administrative tribunal to decide whether a particular law is invalid because it violates the Charter.

12 It is essential to appreciate that s. 52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution but is silent on the jurisdictional point per se. In other words, s. 52(1) does not specify which bodies may consider and rule on Charter questions, and cannot be said to confer jurisdiction on an administrative tribunal. Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a Charter issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought. While this analytical framework mirrors the requirements for a court of competent jurisdiction under s. 24(1) of the Charter as outlined in *Mills v. The Queen*, supra, as was the case in *Douglas College*, it is unnecessary to have recourse to s. 24(1) to determine whether the Board has jurisdiction over Charter issues. An administrative tribunal need not meet the definition of a court of competent jurisdiction in s. 24(1) of the Charter in order to have the necessary authority to subject its enabling statute to Charter scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to [page15] confer on the tribunal the power to interpret and apply the Charter.

Application to this Case

13 It first must be determined whether the Board has jurisdiction over the whole of the matter before it. It is clear that it has jurisdiction over the employer and the union. The issue here centres on its jurisdiction over the subject matter and remedy. The subject matter before the Board cannot be characterized simply as an application for certification, which would certainly fall within the authority of the Board. This is an application which requires the Board to subject s. 2(b) of the Act to Charter scrutiny in order to determine whether the application for certification is properly before it. Similarly, the remedy of certification requires the Board to refuse to give effect to s. 2(b) of the Act because of inconsistency with the Charter. Since the subject matter and remedy in this case are premised on the application of the Charter, the authority to apply the Charter must be found in the Board's enabling statute.

14 Section 106(1) of the Labour Relations Act stipulates that the Board has exclusive jurisdiction "to determine all questions of fact or law that arise in any matter before it" The legislature expressly, and without reservation, conferred authority on the Board to decide points of law. In addition, the Act confers powers on the Board to determine questions of law and fact relating to its own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The

issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the Charter. It is clear to me that a Charter issue must constitute a question of law; indeed, the Charter is part of the supreme law of Canada. This comports with the view expressed in *Douglas College* that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the Charter. In the result, the Board has the authority to apply the Charter and to rule on the constitutionality [page16] of s. 2(b) of its enabling statute, in the course of the Union's application for certification.

Practical Considerations

15 The discussion of practical considerations in the *Douglas College* decision entailed an analysis of the institutional characteristics of administrative tribunals, such as their narrow range of expertise and the speed with which they deal with matters, in relation to the fundamental and often complex nature of Charter issues. This analysis concerned administrative tribunals in general, and the ultimate conclusion that practical concerns favour the finding of jurisdiction in administrative tribunals holds in the present case. My purpose here is not to rehearse that comprehensive discussion, but simply to identify those considerations which are more pronounced in the particular case of the Board.

16 The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-36, Dickson J. (as he then was) characterized the particular competence of labour boards as follows:

The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

It must be emphasized that the process of Charter decision making is not confined to abstract ruminations on constitutional theory. In the case of Charter matters which arise in a particular regulatory context, [page17] the ability of the decision maker to analyze competing policy concerns is critical. Therefore, while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases; see, for example, *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733.

17 That having been said, the jurisdiction of the Board is limited in at least one crucial respect: it

can expect no curial deference with respect to constitutional decisions. Furthermore, a formal declaration of invalidity is not a remedy which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts, the ruling of the Board on a Charter issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises.

18 An additional practical consideration which bears mention here is whether the Attorney General of the province will participate in proceedings before an administrative tribunal. Before the courts, a provision to obtain this participation exists. Finlayson J.A. commented that this sort of participation may be inappropriate in the case of tribunals established by government, but at the same time the lack of participation of the Attorney General unfairly places the burden of defending legislation on the parties. However, the Attorney General for Ontario expressed a willingness to intervene and make submissions in appropriate cases, and has in the past done so before [page 18] the Board on issues of federalism under the Constitution Act, 1867. To the extent that the Attorney General will intervene, the relative disadvantage of administrative tribunals versus courts is lessened.

19 It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of Charter issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the Charter challenge to its enabling statute, particularly at the s. 1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the Labour Relations Act.

20 This view also makes sense within the larger context of Canadian constitutional jurisprudence. The capacity of labour boards to consider constitutional questions relating to their own jurisdiction has long been recognized. An early expression of this principle is found in *The Queen v. Ontario Labour Relations Board, Ex parte Dunn* (1963), 39 D.L.R. (2d) 346 (Ont. H.C.), a case which was cited by Estey J. in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, supra, at p. 756, in support of the jurisdictional competence of labour boards in constitutional matters:

McRuer C.J.H.C., in giving judgment, made reference at p. 307 to the limited but important role to be played by the administrative agency in the determination of the constitutional questions:

The Board cannot judicially determine constitutional questions but it has power to entertain an objection to its jurisdiction on constitutional grounds and to have the grounds of the objection stated.

[page19]

See also *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, and *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031.

21 What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of Charter challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the Charter is simply a natural progression of a well established principle.

Disposition

22 In the application for certification brought by the Union, the Board had jurisdiction over the parties, subject matter and remedy. In the exercise of this jurisdiction, it was required to respect the supremacy of the Constitution as expressed in s. 52(1) of the Constitution Act, 1982 and had a duty to subject its enabling statute to Charter scrutiny. It is unnecessary to consider whether the Board is a court of competent jurisdiction within the meaning of s. 24(1) of the Charter.

23 I would dismiss the appeal with costs.

The reasons of Wilson and L'Heureux-Dubé JJ. were delivered by

24 WILSON J.:-- In my concurring reasons in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, I agreed with my colleague Justice La Forest that an Arbitration Board appointed by the parties under the Labour Code, R.S.B.C. 1979, c. 212, had jurisdiction, by virtue of s. 52(1) of the Constitution Act, 1982, to determine the Charter [page20] issue raised by the grievance and that it was not necessary in that case to determine whether the Board was a "court of competent jurisdiction" within the meaning of s. 24(1) of the Canadian Charter of Rights and Freedoms. I added the following qualification to my concurrence at pp. 606-7:

I would, however, prefer to leave open the question whether a tribunal may have such jurisdiction even in the absence of specific provisions in the governing legislation and in the collective agreement such as those heavily relied on by my colleague.

25 In the present appeal my colleague has re-stated the position he took in *Douglas College* that the authority to apply the Charter must be found in the tribunal's enabling statute and he has found once again that its jurisdiction is found there, that the broad jurisdiction conferred on the Board by

s. 106(1) of the Labour Relations Act, R.S.O. 1980, c. 228, includes the authority to interpret the Charter.

26 In concurring with my colleague in the present appeal I would accordingly wish once again to add the qualification which I added to my concurrence in *Douglas College*. The absence of legislative authority to deal with the Charter issue in the governing statute is not, in my view, necessarily determinative of a tribunal's jurisdiction, since the authority and obligation to apply the law may be grounded elsewhere: *McLeod v. Egan*, [1975] 1 S.C.R. 517. Additionally, it may be necessary to proceed to s. 24(1) of the Charter and decide whether, on the basis of the tests set out in *Mills v. The Queen*, [1986] 1 S.C.R. 863, the tribunal is a court of competent jurisdiction to decide a Charter issue arising in the context of the relief claimed.

Solicitors for the appellant: Fasken, Campbell, Godfrey, Toronto.

Solicitors for the respondent, Ontario Labour Relations Board: Gowling, Strathy & Henderson, Toronto.

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Solicitors for the respondent, United Food and Commercial Workers International Union, Local 175: Caley & Wray, Toronto.

Solicitor for the interveners, Canada Employment and Immigration Commission and the Attorney General of Canada: John Tait, Ottawa.

Solicitor for the intervener, the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitor for the intervener, the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitors for the intervener, Marcelle Tétreault-Gadoury: Campeau, Ouellet, Nadon & Lussier, Montréal.

qp/i/qlcvd

TAB 6

Distinguished. Re BARNATO (decd.)
[1948] 2 All E.R. 585.

Distinguished. Re BARNATO (decd.)
[1949] 1 All E.R. 515.

Applied in *GOURIET v UPOW* [1977]
1 All ER 696

Distinguished in GOURIET v UPW
[1977] 3 All ER 70

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[IN THE COURT OF APPEAL.]

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DYSON v. ATTORNEY-GENERAL.

Nov. 28 ;

Dec. 10.

Practice—Striking out Pleadings—Reasonable Cause of Action—Relief against the Crown—Declaratory Judgment—Attorney-General Defendant—Action or Petition of Right—Rules of Supreme Court, 1883, Order XXV., rr. 4, 5—Finance (1909-1910) Act, 1910 (10 Edw. 7, c. 8), Form IV.

Order xxv., r. 4,—which enables the Court or a judge to strike out any pleading on the ground that it discloses no reasonable cause of action—was never intended to apply to any pleading which raises a question of general importance, or serious question of law.

The Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the action is to affect the rights of the Crown in favour of the plaintiff.

Hodge v. Attorney-General, (1839) 3 Y. & C. Ex. 342, examined and approved.

A declaratory judgment can, under Order xxv., r. 5, be made against the Attorney-General, as defendant representing the Crown, and a plaintiff is not bound in such a case to proceed by petition of right.

APPEAL from a decision of Lush J. in chambers.

This action was brought against the Attorney-General to test the validity of the notices issued by the Commissioners of Inland Revenue under the Finance (1909-1910) Act, 1910, and commonly known as Form IV. The main question argued was whether the Attorney-General could properly be made a defendant to an action of this nature.

The plaintiff's statement of claim was (so far as material) as follows :—

The plaintiff is the owner and occupier of (a) a house and premises with gardens, orchards, and agricultural land of some thirty acres attached, and (b) also of some forty acres of agricultural land with a farmhouse and buildings on it, situate in the parish of Weeton, in the county of York.

On August 9 last Form IV., dated August 4, was left on the plaintiff's premises, requiring the occupier to deliver the returns to "the appointed officer, Hugh Bateson, Kirby Overblow, Gannall, S.O.," within thirty days from the date of the notice,

Distinguished. Re
BARNATO.
[1949] 1 Ch. 21

Distinguished. Re
BARNATO.
[1949] 1 Ch. 258

Considered.
EALING L.B.C. v.
RACE RELATIONS
BOARD
[1971] 1 Q.B. 309

Applied. GOURIET
v. UNION OF POST
OFFICE WORKERS
[1977] 2 W.L.R.
310

Applied. GOURIET
v. U.P.W.
[1977] Q.B. 729,
C.A.

i.e., from August 4, 1910, under a penalty in the event of failure not exceeding 50*l*. On September 20 last the plaintiff commenced this action against the Attorney-General, and on October 15 delivered a statement of claim in which he made the following allegations :—

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“ 3. The said notice and forms purported to be issued by the said F. Atterbury by the directions of the Commissioners of Inland Revenue under the provisions of the Finance (1909-1910) Act, 1910 (10 Edw. 7, c. 8).

“ 4. The said Hugh Bateson carries on the trade of a village blacksmith at Kirby Overblow aforesaid, a village adjacent to the said parish of Weeton, and is not in the employment of the said Commissioners.

“ 5. The forms accompanying the said notice required the recipient to comply with the following requisition, viz. :—

Annual value.

£

“(i.) If the person making the return is also the occupier, state the annual value—i.e., the sum for which the property is worth to be let to a yearly tenant, the owner keeping it in repair’

“ 6. The said notice and forms aforesaid are illegal, unauthorized, and ultra vires the said Act, as appears from the contents thereof.

“ 7. Amongst other matters so illegal, unauthorized, and ultra vires are the following :—

“(a) By the terms of the said Act the said Commissioners have no power to require the plaintiff to deliver the said forms to the said Hugh Bateson. The said Act requires the return to be furnished to the said Commissioners.

“(b) The plaintiff is required under requisition (i.) of the said forms aforesaid set out to supply matters which are not such matters as are set forth in section 26 (2.) of the said Act, and which, moreover, cannot properly be required under the said Act, and, further, the said matter is not such as it is in the plaintiff's power to give within the meaning of the said Act.

“(c) The plaintiff was not given the lawful time for making the said returns provided in section 26 (2.) of the said Act.

C. A. "8. The said Commissioners have threatened to enforce the
1910 said penalty for failure to make the said returns."

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The plaintiff accordingly claimed a declaration:—

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"(1.) That he is under no obligation to comply with the said notice dated the 4th August, 1910, or to furnish any of the said particulars to the said Hugh Bateson or at all.

"(2.) The plaintiff is entitled to furnish any returns which he may be lawfully required to make under the said Act to the Commissioners of Inland Revenue and not to make it to the said Hugh Bateson, if the plaintiff so desires.

"(3.) The plaintiff is not under any obligation to comply with the said requisition (i.) aforesaid."

The Attorney-General thereupon took out a summons under Rules of Supreme Court, Order xxv., r. 4, to strike out the statement of claim as disclosing no reasonable cause of action, and Lush J., affirming a previous decision of the Master, made an order in the terms of the summons.

The plaintiff appealed. The appeal was heard on November 28.

Danckwerts, K.C., Felix Cassel, K.C., and Neilson, for the appellant. This statement of claim raises an important question of law, and is not the kind of pleading which was intended to be dealt with under Order xxv., r. 4, which was to stop cases obviously frivolous or vexatious: *Attorney-General of the Duchy of Lancaster v. London and North Western Ry. Co.* (1), where the rule is clearly stated and explained.

[FLETCHER MOULTON L.J. The only question would seem to be whether an action of this kind can be brought against the Attorney-General. Order xxv., r. 4, cannot apply to this action.]

The Attorney-General can be sued as a defendant as representing the Crown, and in such a suit relief can be given against the Crown: *Hodge v. Attorney-General.* (2) That the Attorney-General can be sued as a defendant is clear from the following cases:—*Pawlett v. Attorney-General* (3); *Laragoity v.*

(1) [1892] 3 Ch. 274.

(2) 3 Y. & C. Ex. 342.

(3) (1667) Hardres' Rep. 465.

Attorney-General (1); *Reeve v. Attorney-General* (2); *Casberd v. Attorney-General* (3); *Peto v. Attorney-General* (4); *Deare v. Attorney-General* (5); *Craufurd v. Attorney-General* (6); *Ex parte Colebrooke, Bart.* (7); *Colebrooke v. Attorney-General*. (8)

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It would seem from *Reg. v. Prosser* (9) that the Court has the same control over the Attorney-General as over any other suitor. Lush J. seems to have been misled by *Barraclough v. Brown* (10), but that case is not applicable.

There is now jurisdiction under Order xxv., r. 5, to make a declaratory order whether any consequential relief is or could be claimed or not. It is not necessary to proceed by petition of right. The Attorney-General is according to the above authorities a proper party to this action, and the pleading should be allowed to stand, leaving it to the Attorney-General to raise such defence as he may be advised by his statement of defence in the usual way.

Sir J. Simon, K.C., S.-G., and Rowlatt, for the respondent. The authorities relied on by the appellant have no application except in cases in which the rights of the Crown are only incidentally concerned; in all cases where the rights of the Crown are the immediate and sole object of the suit the application must be by petition of right: *Mitford on Pleading*, 5th ed. [30].

[FARWELL L.J. referred to *Kirk v. Reg.* (11)]

There is no justification or precedent for this form of action, and it is a very inconvenient way of obtaining a decision as to the plaintiff's liability to the penalty in default of compliance with the notice. If an action of this kind will lie against the Crown there will be innumerable other actions for declarations as to the meaning of numerous other Acts of Parliament which impose a penalty, thus adding greatly to the labours of the law officers.

The plaintiff has no right to ask for a declaration that he is not under any obligation to comply with this notice. The

(1) (1816), 2 Price, 172.

(2) (1741) 2 Atk. 223.

(3) (1819) 6 Price, 411, 477.

(4) (1827) 1 Y. & J. 509.

(5) (1835) 1 Y. & C. Ex. 197.

(6) (1819) 7 Price, 1.

(7) (1803) 7 Price, 87.

(8) (1807) 7 Price, 146.

(9) (1848) 11 Beav. 306, 314.

(10) [1897] A. C. 615.

(11) (1872) L. R. 14 Eq. 558, at p. 563.

C. A. plaintiff may have a good defence if the Attorney-General
1910 proceeds by information to recover the penalty, but he has no
right to bring an action of this kind; it is turning the procedure
upside down.
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The equity jurisdiction of the Court of Exchequer as a Court of Revenue was not taken away by 5 Vict. c. 5: *Attorney-General v. Halling* (1); and in that Court a declaratory judgment could not have been obtained. [*Sir Thomas Cecil's Case* (2) was also referred to.]

Order xxv., r. 5, does not apply to proceedings on the Revenue side, and Order LXVIII., r. 1 (c), excludes declaratory judgments under the rules on the Revenue side of the King's Bench Division.

Danckwerts, K.C., in reply.

Cur. adv. vult.

Dec. 10. COZENS-HARDY M.R. This is an appeal from an order of Lush J. in chambers confirming an order of the Master dismissing the action with costs. The application in chambers was made under Order xxv., r. 4, and the action relates to what is known as "Form IV." under the Finance Act. The statement of claim alleges that a notice was served upon the plaintiff, signed by the secretary to the Commissioners of Inland Revenue, requiring him to deliver certain returns within thirty days under a penalty not exceeding 50*l*. It alleges that certain requisitions in the said form are illegal and unauthorized, and that the Commissioners have threatened to enforce the penalty for failure to make the return, and the plaintiff claims a declaration that he is not under any obligation to comply with the notice. It will be observed that the plaintiff does not seek to divest any property of the Crown or to enforce any pecuniary claim against the Crown.

It might be sufficient to say that Order xxv., r. 4, was not intended to take the place of a demurrer, and that it ought not to be applied to an action involving serious investigation of ancient law and questions of general importance, and on this ground alone I think the plaintiff is entitled to have the action proceed to trial in the usual way, leaving the Attorney-General

(1) (1846) 15 M. & W. 687.

(2) (1598) 7 Rep. 89.

to make any objection he may be advised to raise by his statement of defence. As, however, the case has been elaborately argued before us, I think it better that we should state our views upon the interesting question whether the Attorney-General can be sued in a case like this.

I start with this proposition, that the penalty which is threatened to be enforced against the plaintiff is one which the Attorney-General must sue for in this Court: Inland Revenue Regulations Act, 1890, ss. 21 and 22. This suggests that the Attorney-General ought to be liable to an action in so far as he threatens to enforce a penalty based upon non-compliance with an unauthorized notice.

It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a defendant as representing the Crown, and that in such a suit relief could be given against the Crown. *Pawlett v. Attorney-General* (1) is a very early authority on this point. *Laragoity v. Attorney-General* (2) is a case where this matter was a good deal discussed. In *Deare v. Attorney-General* (3) the Attorney-General demurred to such a bill. Lord Abinger (4) said: "I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is threatened. Therefore a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned," and the demurrer was overruled. But it is said that these authorities have no application except in cases in which the Crown rights are only incidentally concerned, and that where the rights of the Crown are the immediate and sole object of the suit the application must be by petition of right: see Mitford on Pleading, p. 30. I do not think the distinction thus suggested is supported by authority, nor do I think the distinction would avail the Attorney-General in the present case. The case of *Hodge v. Attorney-General* (5) is an important decision. I have examined the record, which fully bears out

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(1) Hardres' Rep. 465.

(3) 1 Y. & C. Ex. 197.

(2) 2 Price, 172.

(4) Ibid. at p. 208.

(5) 3 Y. & C. Ex. 342.

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the report, with one exception. The plaintiffs were equitable mortgagees by deposit of the title deeds of certain leasehold premises. George Bailey, who had deposited the deeds, was convicted of felony, the result of which was that the legal title was vested in the Crown. The plaintiffs filed their bill in the Exchequer, making the Attorney-General sole defendant. It came on before Alderson B., "sitting in equity," as he himself stated. The Court declared the plaintiffs entitled to an equitable mortgage or lien, and referred it to the Master to take an account of what was due to the plaintiffs for principal, interest, and costs; and the decree proceeded to order, "By consent of Her Majesty's Attorney-General," that the plaintiffs should hold certain premises until they should be fully satisfied what the Master should find to be due to them, and the tenants were directed to attorn. This seems to me a distinct authority that the Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs. The only doubt raised in argument was due to the circumstance that the Crown had the legal estate, and that the Crown could not be compelled to convey that legal estate. But Alderson B. in a considered judgment expressly held that he had jurisdiction to make a declaration and to direct an account, and also to decree that the plaintiffs should hold possession until they were repaid, although it is true that in the decree itself the last part of the relief, but not the earlier parts, was by the consent of the Attorney-General. So far as I can discover, the authority of *Hodge v. Attorney-General* (1) has never been challenged, and I think it ought to be followed. It was suggested that there was something peculiar in the jurisdiction of the old Court of Exchequer which might account for such a decision. I cannot adopt this view. No doubt the Court of Exchequer on the Revenue side had peculiar functions which are not transferred by the Judicature Act to all branches of the High Court, but its equity jurisdiction had nothing peculiar as distinguished from the Court of Chancery, to which by statute this jurisdiction was transferred. What the

(1) 3 Y. & C. Ex. 342.

old Court of Chancery could do can now be done by both Divisions of the High Court.

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But then it is urged that in the present action no relief is sought except by declaration, and that no such relief ought to be granted against the Crown, there being no precedent for any such action. The absence of any precedent does not trouble me. The power to make declaratory decrees was first granted to the Court of Chancery in 1852 by s. 50 of 15 & 16 Vict. c. 86, under which it was held that a declaratory decree could only be granted in cases in which there was some equitable relief which might be granted if the plaintiff chose to ask for it: see *Rooke v. Lord Kensington*. (1) The jurisdiction is, however, now enlarged, for by Order xxv., r. 5, "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment, or order, is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not." I can see no reason why this section should not apply to an action in which the Attorney-General, as representing the Crown, is a party. The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. I can, however, conceive many cases in which a declaratory judgment may be highly convenient, and I am disposed to think, if all other objections are removed, this is a case to which r. 5 might with advantage be applied. But I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The Court may well say "Wait until you are attacked and then raise your defence," and may dismiss the action with costs. This may be the result in the present case. That, however, is not a matter to be dealt with on an interlocutory application. It is pre-eminently a matter for the trial. In my opinion the plaintiff may assert his rights in an action against the Attorney-General and is not bound to proceed by petition of right.

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(1) (1856) 2 K. & J. 753.

C. A. It is needless to say that I have not expressed, nor have I
1910 formed, any opinion as to the substance of the case alleged by
DYSON the plaintiff. I have dealt only with the question of form. In
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ATTORNEY- my opinion the appeal must be allowed and the order discharged.
GENERAL. In fairness to the learned judge from whose order the appeal
Cozens-Hardy is brought, I would add that the authorities bearing on the case
M R were not, and could not be, called to his attention in chambers.

FLETCHER MOULTON L.J. In this case the plaintiff has received a paper from the Commissioners of Inland Revenue (known ordinarily as Form No. IV.) making certain inquiries and threatening him with a penalty unless the inquiries are answered by a certain date, and he is desirous of testing the legality of the procedure, and for that purpose has brought an action against the Attorney-General for a declaration that he is under no obligation to comply.

The law advisers to the Crown, being of opinion that this course was not open to the plaintiff, took out a summons to dismiss the action on the ground that it was frivolous and vexatious and disclosed no reasonable cause of action. The Master and the judge approved of their contention, and it is from this decision of the judge in chambers that the present appeal is brought.

Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant

challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

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The objection taken by the Crown in the present case was solely that there was no justification or precedent for the form of the action. Neither side has discussed the merits either here or at chambers. Mr. Rowlatt on behalf of the Crown frankly stated that in chambers he relied solely on a paragraph in Mitford on Pleading, which he considered to support his contention, and the Master and the judge took his view. In my opinion the passage does not bear the interpretation which he puts upon it. If it does bear that meaning it does not accurately state the law at the time, for it would be inconsistent with the case of *Hodge v. Attorney-General* (1), where an action was brought against the Attorney-General as sole defendant as representing the Crown in order to obtain a declaration affecting the rights of the Crown and consequent relief. Moreover, even if the statement of Mitford could have been supported in the then state of the law (which did not permit of actions for declarations unless the Court could also grant specific relief), I should not be prepared to hold that it is correct in the present state of the law which permits of an action whose sole object is a declaratory judgment.

The question in what branch of the jurisdiction of the old Court of Exchequer the case of *Hodge v. Attorney-General* (1)

(1) 3 Y. & C. Ex. 342.

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was decided has been hotly contested before us in the argument in this case. I do not propose to enter into this question. The very fact that the parties agree that the answer we give in so recondite a matter may have an important, and in one alternative decisive, effect on the right to bring the present action, shews conclusively to my mind that it is not a case for the exercise of these exceptional powers. For, as I have said, an order of this kind ought not to be made where there is any reasonable ground for argument as to the maintainability of the action. Moreover it is unfair on the judge at chambers himself to require him to decide a question involving such an investigation of old authorities none of which are or can be properly called to his notice.

The sole question for our decision on the present occasion is whether or not this order should have been made in this case, and therefore I have no hesitation in coming to the conclusion that this appeal ought to be allowed.

FARWELL L.J. Order xxv., r. 4, was never intended to apply to a case of this kind, and we might well have allowed the appeal on this ground alone, but the case raises a question of public importance, and as we have had it fully argued I think that we ought now to decide it.

The Attorney-General contends that he is not the proper defendant, that no such declaration as is asked could ever have been obtained in any Court against any defendant, and that, therefore, none such can now be obtained in the High Court, and that the subject has no remedy, but can only defend actions for penalties when he is sued.

Now the action asks for no declaration in respect of any penalty; the complaint is that the Legislature has entrusted to a Government department (the Commissioners of Inland Revenue) the performance of the duty of making certain specific inquiries in a specific manner from landowners and of requiring answers to be sent to themselves, and has imposed a 50% penalty for disobedience. The plaintiff alleges that the Commissioners have exceeded their powers by making inquiries not authorized to be made, by not giving proper time to answer, and by requiring answers to be sent to a person not authorized to receive them

and to whom it is injurious to the plaintiff's interest to send them. This appeal has been heard as if it were on demurrer under the old practice, and the allegations must therefore be taken as true for the present purpose. It is obviously a question of the greatest importance; more than eight millions of Form IV. have been sent out in England, and the questions asked entail much trouble and in many cases considerable expense in answering; it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty. I am, however, of opinion that the Attorney-General's contention is not well founded.

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1. In a case like the present the Attorney-General is properly made defendant. It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side (see *Deare v. Attorney-General* (1)), could and did make declarations and orders which did affect the rights of the Crown. The two cases of *Pawlett v. Attorney-General* (2) and *Hodge v. Attorney-General* (3) on the one hand and *Reeve v. Attorney-General* (4) on the other are good illustrations of the distinction. It has not, since the Commonwealth at any rate, been the practice of the Crown to attempt to defeat the rights of its subjects by virtue of the prerogative; in 1667 Baron Atkyns in *Pawlett v. Attorney-General* (5) says: "The party ought in this case to be relieved against the King; because the King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either; it would derogate from the King's honour to imagine that what is equity against a common

(1) 1 Y. & C. Ex. 197, at p. 208.

(3) 3 Y. & C. Ex. 342.

(2) Hardres' Rep. 465.

(4) 2 Atk. 223.

(5) Hardres' Rep. at p. 469.

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person should not be equity against him." So too, in the case where a petition of right is required, that proceeding "exists only for the purpose of reconciling the dignity of the Crown and the rights of the subject and to protect the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights": per Lord Cottenham in *Monckton v. Attorney-General*. (1) It is very unusual for the responsible minister to refuse to authorize the indorsement "let right be done," and it would be unjustifiable to refuse in any case where a plausible claim is made out. As Lord Langdale says in *Ryves v. Duke of Wellington* (2), "I am far from thinking that it is competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right." The present is not a case for a petition of right at all; the Crown is not directly affected, but the plaintiff seeks a declaration from the Court of the true construction of an Act which imposes burdensome and expensive inquiries upon him, and for non-compliance with which he is threatened with fines. The argument on behalf of the Attorney-General admits for this purpose the illegality of the inquiries, but claims for a Government department a superiority to the law which was denied by the Court to the King himself in Stuart times.

2. Then it was argued that there is no precedent for such an order as is asked in this action. That may very well be, because before the Judicature Act the Court of Chancery would not make declarations of right where the plaintiff did not, or at any rate could not, ask for consequential relief. Order xxv., r. 5, has altered this, and declarations of right can now be obtained in cases where the Court of Chancery would have refused to make them. Then it was objected that the penalty made the neglect to answer the questions a criminal or quasi-criminal offence and that the Court of Chancery would not interfere in such a case, and this may very well have been true before the Judicature Acts: *Prudential Assurance Co. v. Knott* (3); but it is otherwise since those Acts: *Bonnard v. Perryman*. (4)

(1) (1850) 2 Mac. & G. 402, at p. 412.

(3) (1875) L. R. 10 Ch. 142.

(2) (1846) 9 Beav. 579, at p. 600.

(4) [1891] 2 Ch. 269.

3. The next argument on the Attorney-General's behalf was "ab inconvenienti"; it was said that if an action of this sort would lie there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers. But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. Within the present year in this Court alone there have been no less than three such cases. In *Rex v. Board of Education* (1) the Board, while abandoning by their counsel all argument that the Education Act, 1902, gave them power to pursue the course adopted by them, insisted that this Court could not interfere with them, but that they could act as they pleased. In *In re Weir Hospital* (2) the Charity Commissioners were unable to find any excuse or justification for the misapplication of 5000*l.* of the trust funds committed to their care. In *In re Hardy's Crown Brewery* (3) the Commissioners of Inland Revenue, who are entrusted by s. 2, sub-s. 1, of the Licensing Act, 1904, with the judicial duty of fixing the amount of compensation under the Act, fixed the sum *mero motu* without any inquiry or evidence and without giving the parties any opportunity of meeting objections, and claimed the right so to act without interference by any Court. Bray J. and the Court of Appeal held that they had acted unreasonably and ordered them to pay costs. In all these cases the defendants were represented by the law officers of the Crown at the public expense, and in the present case we find the law officers taking a preliminary objection in order to prevent the trial of a case

C. A.

1910

DYSON

v.

ATTORNEY-
GENERAL.

Farwell L.J.

(1) [1910] 2 K. B. 165.

(2) [1910] 2 Ch. 124.

(3) [1910] 2 K. B. 257.

C. A. 1910
DYSON
v.
ATTORNEY-
GENERAL.
Farwell L.J.

which, treating the allegations as true (as we must on such an application), is of the greatest importance to hundreds of thousands of His Majesty's subjects. I will quote the Lord Chief Baron in *Deare v. Attorney-General* (1): "It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred." I venture to hope that the former salutary practice may be resumed. If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.

I agree that this appeal should be allowed, but it is only fair to the learned judge to add that this is not a case which could be properly argued in chambers, and that his attention was not called to all the cases cited to us, but reliance was really placed on the passage in Mitford on Pleading, which is not quite accurate.

Appeal allowed.

Solicitors: *Simpson, Thomas & Clark, for Simpson, Thomas & Curtis, Leeds; Solicitor for Inland Revenue.*

(1) 1 Y. & C. Ex. at p. 208.

W. C. D.

TAB 7

Indexed as:

Finlay v. Canada (Minister of Finance)

**The Minister of Finance of Canada, the Minister of
National Health and Welfare of Canada and the Attorney General
of Canada, appellants;**

v.

Robert James Finlay, respondent.

[1986] 2 S.C.R. 607

[1986] S.C.J. No. 73

Also reported at 33 D.L.R. (4th) 321

File No.: 17775.

Supreme Court of Canada

1985: February 22 / 1986: December 18.

**Present: Dickson C.J. and Beetz, McIntyre, Chouinard,
Wilson, Le Dain and La Forest JJ.**

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Actions -- Standing -- Non-constitutional challenge by private individual to the statutory authority for federal public expenditure -- Person in need within the meaning of the Canada Assistance Plan seeking a declaration that cost-sharing payments by Canada to Manitoba pursuant to the Plan are illegal and an injunction to stop the payments because of provincial non-compliance with the conditions and undertakings imposed by the Plan -- Plaintiff claiming to be prejudiced by the provincial non-compliance -- Whether plaintiff has standing to seek the declaratory and injunctive relief -- Whether statement of claim discloses reasonable cause of action.

The respondent alleges that he is a resident of Manitoba and a person in need within the meaning of the Canada Assistance Plan ("the Plan") whose sole support is the social allowance he receives under the Manitoba Social Allowances Act; that for a period of forty-six months an amount was

deducted from his monthly social allowance in payment of a debt owing by him to the Crown for overpayment of allowance; and that prior to receiving social allowance he received municipal assistance, which by The Municipal Act of Manitoba is made a debt owing by the respondent to the municipality. The respondent contends that the continued payments by Canada to Manitoba of contributions under the Plan are illegal, as being contrary to the statutory authority conferred by s. 7(1) of the Plan, because they contribute to the cost of a provincial system of assistance to persons in need which is in breach, in several respects, of the conditions and undertakings [page608] to which such payments are made subject by s. 7(1). He contends that s. 20(3) of The Social Allowances Act, which authorizes the deduction from a social allowance payment of an amount to repay an overpayment of allowance, is contrary to the provincial undertaking to provide assistance to any person in need in an amount or manner that takes into account his basic requirements because such deduction has the effect of reducing the amount of a social allowance payment below the cost of basic requirements; that s. 444 of The Municipal Act, which makes the cost of any municipal assistance to a person in need a debt owing to the municipality, is in breach of the provincial undertaking to provide assistance to a person in need; and that the authority conferred on municipalities by s. 11(5)(b) of The Social Allowances Act to fix the amount of assistance required to meet the cost of basic requirements is contrary to the indication in the Plan that such authority shall be exercised by the provincial authority designated in the agreement made pursuant to the Plan.

The respondent sues for a declaration that the federal cost-sharing payments are illegal and an injunction to stop them as long as the provincial system of assistance to persons in need fails to comply with the conditions and undertakings imposed by the Plan. On a motion to strike by the appellants under Federal Court Rule 419(1) the respondent's statement of claim was struck out in the Trial Division of the Federal Court on the grounds that the respondent lacked the requisite standing to bring his action and the statement of claim did not disclose a reasonable cause of action. A majority of the Federal Court of Appeal allowed an appeal from this order and restored the respondent's statement of claim. The appellants appeal from that judgment, and the issues in the appeal are whether the respondent should be recognized as having standing to bring his action, and if he has the requisite standing, whether the statement of claim discloses a reasonable cause of action.

Held: The appeal should be dismissed.

The respondent does not have a sufficiently direct, personal interest in the legality of the federal cost-sharing payments, as distinct from provincial compliance with the conditions and undertakings imposed by the Plan, to bring him within the general requirement for standing to sue, without the consent of the Attorney General, for a declaration or an injunction to challenge an exercise of statutory authority. He should, however, be recognized, as a matter of judicial discretion, as having public interest standing to bring his action. The approach to public interest standing reflected in the judgments of this Court in *Thorson*, *McNeil* and [page609] *Borowski*, in which there was a

challenge to the constitutionality or operative effect of legislation, should be extended to a non-constitutional challenge by an action for a declaration to the statutory authority for public expenditure or other administrative action. The respondent meets the criteria laid down for the discretionary recognition of public interest standing in *Thorson*, *McNeil* and *Borowski*. His action raises justiciable issues. The issues are serious ones, and the respondent has a genuine interest in them. If the respondent were denied standing there would be no other way in which the issues could be brought before a court. The respondent should be recognized as having standing to sue for the injunctive, as well as the declaratory, relief prayed for in his statement of claim. The alternative contention that the statement of claim does not disclose a reasonable cause of action should be rejected. It is not plain and obvious that the respondent cannot succeed with his contentions.

Cases Cited

Applied: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; referred to: *MacIlreith v. Hart* (1908), 39 S.C.R. 657; *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1982] A.C. 617; *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.J. 257; *London County Council v. Attorney-General*, [1902] A.C. 165; *Carota v. Jamieson*, [1977] 1 F.C. 19; *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435; *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109; *London Passenger Transport Board v. Moscrop*, [1942] A.C. 332; *Cowan v. Canadian Broadcasting Corp.*, [1966] 2 O.R. 309; *Rosenberg v. Grand River Conservation Authority* (1976), 69 D.L.R. (3d) 384; *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331; *Flast v. Cohen*, 392 U.S. 83 (1968); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Re Lofstrom and Murphy* (1971), 22 D.L.R. (3d) 120; *LeBlanc v. City of Transcona*, [1974] S.C.R. 1261; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441.

Statutes and Regulations Cited

Canada Assistance Plan, R.S.C. 1970, c. C-1, ss. 2 "person in need", "provincial authority", 4, 6(2)(a), 7(1), 9(1)(g).
 Federal Court Rules, C.R.C. 1978, c. 663, R. 419(1).
 Municipal Act, S.M. 1970, c. 100, s. 444. [page610]
 Social Allowances Act, R.S.M. 1970, c. S160, ss. 11(5)(b), 20(3) [en. 1980, c. 37, s. 10].

Authors Cited

Cromwell, Thomas A. *Locus Standi: A Commentary on the Law of Standing in Canada*. Toronto: Carswells, 1986.
 Thio, S.M. *Locus Standi and Judicial Review*. Singapore: Singapore University Press, 1971.
 Zamir, Itzhac. *The Declaratory Judgment*. London: Stevens & Sons Ltd., 1962.

APPEAL from a judgment of the Federal Court of Appeal, [1984] 1 F.C. 516, 146 D.L.R. (3d) 704, 48 N.R. 126, allowing respondent's appeal from a judgment of Nitikman D.J. of the Trial Division striking out respondent's statement of claim. Appeal dismissed.

T.B. Smith, Q.C., Harry Gliner and Susan D. Clark, for the appellants.
G. Patrick S. Riley and A.J. Roman for the respondent.

Solicitor for the appellants: R. Tassé, Ottawa.
Solicitor for the respondent: G. Patrick S. Riley, Winnipeg.

[Quicklaw note: An errata was published at [1986] 2 S.C.R., page iv. The change indicated therein has been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of the Court was delivered by

1 LE DAIN J.:-- This appeal raises the question whether a private individual has standing to sue for a declaration that certain payments out of the Consolidated Revenue Fund of Canada are illegal on the ground that they are not made in accordance with the applicable statutory authority. More specifically, the question is whether a recipient of provincial assistance to persons in need, who claims to be prejudiced by certain provisions of the provincial legislation respecting such assistance, should be recognized as having standing to seek a declaration that payments by the federal government to the provincial government of contributions to the cost of such assistance, pursuant to the Canada Assistance Plan, R.S.C. 1970, c. C-1 (hereinafter referred to as "the Plan"), are illegal, as being contrary to the authority conferred by the Plan, because the provincial legislative provisions complained of do not comply with the conditions and undertakings to which the federal cost-sharing payments are made subject by the Plan. There is also the issue, raised alternatively, whether, if [page611] there is the requisite standing to sue, the statement of claim discloses a reasonable cause of action.

2 The appeal is by leave of this Court from the judgment of the Federal Court of Appeal (Thurlow C. J. and Lalande D.J.; Heald J. dissenting), on April 25, 1983, [1984] 1 F.C. 516, allowing an appeal from the order on November 17, 1982 of Nitikman D.J. in the Trial Division, who, on a motion to strike under Federal Court Rule 419 (1), struck out the respondent's statement of claim on the grounds that the respondent lacked standing and the statement of claim did not disclose a reasonable cause of action.

I

3 The respondent's statement of claim contains the following allegations of fact. The respondent is a resident of Manitoba who by reason of illness and disability is unable to provide adequately for

himself and is therefore a person in need within the meaning of the Plan. His sole source of support is the social allowance he receives under The Social Allowances Act, R.S.M. 1970, c. S160, of Manitoba. For a period of forty-six months an amount equal to 5 per cent of the respondent's social allowance was deducted from his monthly allowance in payment of a debt owing by him to the Crown for overpayment of allowance. Prior to receiving social allowance the respondent received municipal assistance, which, by s. 444 of The Municipal Act, S.M. 1970, c. 100, of Manitoba, is made a debt owing by the respondent to the municipality.

4 The respondent contends that the continued payments by Canada to Manitoba of contributions under the Plan are illegal, as being contrary to the statutory authority conferred by s. 7(1) of the Plan, because they contribute to the cost of a provincial system of assistance to persons in need which is in breach, in several respects, of the conditions and undertakings to which such payments are made subject by s. 7 (1). Section 7 (1) reads as follows:

[page612]

7. (1) Contributions or advances on account thereof shall be paid, upon the certificate of the Minister, out of the Consolidated Revenue Fund at such times and in such manner as may be prescribed, but all such payments are subject to the conditions specified in this Part and in the regulations and to the observance of the agreements and undertakings contained in an agreement.

5 The respondent contends that s. 20(3) of The Social Allowances Act, which authorizes the deduction from a social allowance payment of an amount to repay an overpayment of allowance, is contrary to the provincial undertaking to provide assistance to any person in need in an amount or manner that takes into account his basic requirements because such deduction has the effect of reducing the amount of a social allowance payment below the cost of basic requirements. The provincial undertaking is required as a condition of contributions under the Plan by s. 6 (2)(a) thereof and is contained in clause 2 of the agreement of March 20, 1967 (hereinafter referred to as "the Agreement") entered into by the Government of Canada and the Government of Manitoba pursuant to s. 4 of the Plan.

6 The respondent further contends that s. 444 of The Municipal Act, which makes the cost of any municipal assistance to a person in need a debt owing to the municipality, is in breach of the provincial undertaking, as required by the Plan, to "provide" such assistance to a person in need. In the respondent's submission, the word "provide" requires, in view of the federal contribution to the cost of such assistance, that the assistance be provided in the form of a gift rather than a loan.

7 Finally, the respondent contends that the authority conferred on municipalities by s. 11(5)(b) of The Social Allowances Act to fix the amount of assistance required to meet the cost of basic

requirements is contrary to the intention indicated in the definition of "person in need" in s. 2 of the Plan that such authority shall be exercised by "the provincial authority", as defined by s. 2 of the Plan and designated by clause 1 (b) of the Agreement, which states that the Minister of Welfare is the provincial Minister charged with the administration of the provincial law.

[page613]

8 The respondent's action is brought against the Minister of Finance, as the Minister responsible for payments out of the Consolidated Revenue Fund, and against the Minister of National Health and Welfare, as the Minister responsible for certificates under s. 7 of the Plan, and concludes for the following relief: (a) a declaration that the certificates and the payments of contribution under the Plan are illegal so long as the provincial legislation respecting assistance to persons in need fails to comply, in the manner indicated above, with the conditions and undertakings to which such payments are made subject by the Plan; (b) an injunction to stop such certificates and payments; and (c) a declaration that the payments of contribution to Manitoba since March 20, 1967 constitute overpayment within the meaning of s. 9 (1)(g) of the Plan.

9 The appellants' notice of motion under Federal Court Rule 419 (1) for an order striking out the respondent's statement of claim sets out the following grounds: (a) the respondent "does not have the requisite standing in law to maintain his action"; and (b) in the alternative, if the respondent does have the requisite standing, the statement of claim "does not disclose any reasonable grounds for obtaining the relief sought".

10 The motions judge of the Federal Court, Trial Division, struck out the respondent's statement of claim on both of the above grounds, without giving reasons.

11 A majority of the Federal Court of Appeal, in reasons by Thurlow C.J. and Lalande D.J., allowed the appeal and restored the respondent's statement of claim on the grounds that the respondent should be granted standing, as a matter of judicial discretion, and that the statement of claim disclosed a reasonable cause of action. Heald J., dissenting, was of the view that the respondent lacked the requisite standing.

12 The Federal Court of Appeal also had before it at the same time appeals from two other orders of the Trial Division on applications by the respondent against the appellants: (a) an order dismissing an application by originating notice of motion [page614] under s. 18 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, for an injunction to restrain the appellants from continuing to make payments under the Plan to the province; and (b) an order dismissing an application for an interim injunction to the same effect in the action for a declaration and injunction. The judgments of the Federal Court of Appeal dismissing the appeals from both of these orders are not in issue in this appeal. In its judgment allowing the appeal from the order of the Trial Division striking out the respondent's statement of claim the Federal Court of Appeal did not refer, at least

explicitly, to the respondent's standing and cause of action to obtain the injunctive relief prayed for in the statement of claim. It allowed the appeal and restored the statement of claim on the basis that the respondent had the requisite standing and a reasonable cause of action to seek the declaratory relief.

II

13 The issue of standing in this appeal, as I conceive it, may be approached by asking the following questions:

1. Does the respondent have a sufficient personal interest in the legality of the federal cost-sharing payments to bring him within the general requirement for standing to challenge an exercise of statutory authority by an action for a declaration or an injunction?
2. If not, does the Court have a discretion to recognize public interest standing in the circumstances of the present case?
3. If the Court does have such a discretion should it be exercised in favour of the respondent?

14 These questions involve a consideration of the discretionary control over standing to assert a purely public right or interest by an action for a declaration or an injunction that has traditionally vested in the Attorney General and the extent to which that control has been displaced or qualified [page615] by the judgments of this Court in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575. More specifically, they involve a consideration of whether the approach to public interest standing reflected in those cases, in which there was a challenge to the constitutionality or operative effect of legislation, applies to a non-constitutional challenge to the statutory authority for administrative action.

15 In the course of his submissions on the issue of standing counsel for the appellants also raised an issue of justiciability. He contended that the question of provincial compliance with the conditions of federal cost-sharing was not an issue appropriate for determination by a court, but was rather one that should be left to government review and inter-governmental resolution. The respondent contended that the particular questions of provincial non-compliance raised by the statement of claim were questions of law appropriate for judicial determination. Justiciability was held by this Court in *Thorson* to be a central consideration in the exercise of the judicial discretion to recognize public interest standing in certain cases. I propose to consider it in that context.

16 Finally, before examining the question of standing, something should perhaps be said concerning the assumption underlying the judgments below and the argument in this Court that the issue of standing can be properly determined with final effect in this case as a preliminary matter on a motion to strike. This question, which involves the relationship between standing and the merits of a case, was briefly alluded to by Thurlow C.J., who noted that no objection had been taken to the

determination of standing as a preliminary matter, based on the view expressed by Collier J. in *Carota v. Jamieson*, [1977] 1 F.C. 19, at p. 25. There, on a motion to strike under Federal Court Rule [page616] 419 (1), Collier J. expressed the opinion that the question of standing should not be determined on a preliminary motion of that kind, but should be "the subject of full evidence, argument and deliberation at trial" or at least of "a formal hearing on a point of law, after all relevant facts for determination of that point have been established." The stage of the proceedings at which the issue of standing is best considered had earlier been the subject of comment by this Court in *McNeil*, *supra*, where, the question of standing to bring an action for a declaration of legislative invalidity having been raised and determined in the courts below as a preliminary matter, Laskin C.J. said at p. 267: "In granting leave, this Court indicated that where, as here, there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing." A similar view was expressed by the House of Lords in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1982] A.C. 617. There the question arose in the context of an application for judicial review under R.S.C. Ord. 53, r. 3 (5), which required that an applicant have "a sufficient interest in the matter to which the application relates." The members of the House of Lords were of the view that it was necessary to consider the merits of the application in order to determine the matter to which the application related. This question was also considered by the High Court of Australia in *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, where the opinion was expressed that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether to determine the question of standing with final effect as a preliminary matter or to reserve it for consideration on the merits. The Court held that for reasons of cost and convenience the judge had properly exercised that discretion in dealing with the question of standing as a preliminary matter and striking out the statement of claim. Assuming that the question whether an issue of standing to sue [page617] may be properly determined as a preliminary matter in a particular case is one which a court should consider, whether or not it has been raised by the parties, I agree with the view expressed in the *Australian Conservation Foundation* case. It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted. In my opinion the present case is one in which the question of standing can be properly determined on a motion to strike. The nature of the respondent's interest in the substantive issues raised by his action is sufficiently clearly established by the allegations and contentions in the statement of claim and the statutory and contractual provisions relied on without the need of evidence or full argument on the merits.

III

17 I turn to the question whether the respondent has a sufficient personal interest in the legality of the federal cost-sharing payments to bring him within the general requirement for standing to challenge an exercise of statutory authority by an action for a declaration or an injunction. The

nature of the interest required by a private individual for standing to sue for declaratory or injunctive relief where, as in the present case, a question of public right or interest is raised, has been defined with reference to the role of the Attorney General as the guardian of public rights. Only the Attorney General has traditionally been regarded as having standing to assert a purely public right or interest by the institution of proceedings for declaratory or injunctive relief of his [page618] own motion or on the relation of another person. His exercise of discretion as to whether or not to give his consent to relator proceedings is not reviewable by the courts. See *London County Council v. Attorney-General*, [1902] A.C. 165, and *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435. In such a case a private individual may not sue for declaratory or injunctive relief without the consent of the Attorney General unless he can show what amounts to a sufficient private or personal interest in the subject matter of the proceedings. It is in this sense that I have referred to the discretionary control of the Attorney General over public interest standing. *Thorson*, *McNeil* and *Borowski* represent a departure from or exception to that general rule, but before considering their application in the present case it is necessary to consider whether the respondent has a sufficient interest in the legality of the federal cost-sharing payments to bring him within the general rule.

18 The general rule was laid down in cases involving the private action for public nuisance but it has been applied in a variety of public law contexts where an issue of public right or interest has been raised. The statement of the rule that has been most often cited is that of Buckley J. in *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109, in which the issue was whether the plaintiff, a private individual, could bring an action, without the consent of the Attorney General, for an injunction to restrain a public authority from erecting an obstruction in an open space that interfered with the access of light to the windows of the plaintiff's property. The case involved the public right to the open space and the private right to access of light to private property. It was held that the plaintiff could sue without joining the Attorney General because, although the right to the open space was a public right, the plaintiff sought to restrain an interference with his private right to access of light to his property, and he also suffered special damage peculiar to himself from the interference with the public right. Buckley J. stated the rule as follows at p. 114:

[page619]

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of the premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from end to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right,

suffers special damage peculiar to himself from the interference with the public right.

19 That statement has been treated as an authoritative expression of the rule and applied on several occasions to actions for a declaration as well as actions for an injunction, most notably by the House of Lords in *London Passenger Transport Board v. Moscrop*, [1942] A.C. 332, and *Gouriet*, *supra*. Examples of its application in Canada to cases involving issues of statutory authority are the judgments of the Ontario Court of Appeal in *Cowan v. Canadian Broadcasting Corp.*, [1986] 2 O.R. 309, and *Rosenberg v. Grand River Conservation Authority* (1976), 69 D.L.R. (3d) 384. While the authority of the rule is well established the precise nature of the two exceptions stated by Buckley J. -- interference with a private right and special damage peculiar to oneself -- has been the subject of a variety of commentary and expression. The "private right" referred to by Buckley J. has been said to be "a right the invasion of which gives rise to an actionable wrong within the categories of private law, for example, a breach of contract or trust or the commission of a tort": S.M. Thio, *Locus Standi and Judicial Review* (1971), p. 161. It has also been observed that the exception for private rights applies not only to common law rights but to a right created by statute for the benefit of a plaintiff: I. Zamir, *The Declaratory Judgment* (1962), p. 269. The nature of the interest reflected by the words "special damage peculiar to himself" in the second exception in *Boyce* has been variously characterized in the cases. For a convenient reference to the conflicting meanings given to these words in the private action for public nuisance see T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (1986), pp. 24-27. In *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331, [page620] which was considered by this Court in *Thorson*, Duff J. referred to the general rule as follows at p. 337: "An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act." In *Cowan*, *supra*, in which the standing requirement laid down in *Boyce* was applied by the Ontario Court of Appeal to an action for declaratory and injunctive relief alleging that the Canadian Broadcasting Corporation had exceeded its statutory authority by operating a French language broadcasting station, Schroeder J.A. said at p. 311:

A plaintiff, in attempting to restrain, control or confine within proper limits, the act of a public or quasi-public body which affects the public generally, is an outsider unless he has sustained special damage or can show that he has some "special interest, private interest, or sufficient interest". These are terms which are found in the law of nuisance but they have been introduced into cases which also involve an alleged lack of authority. Therefore, in an action where it is alleged that a public or quasi-public body has exceeded or abused its authority in such a manner as to affect the public, whether a nuisance be involved or not, the right of the individual to bring the action will accrue as it accrues in cases of nuisance on proof that he is more particularly affected than other people.

In *Australian Conservation Foundation*, *supra*, in which the High Court of Australia applied the rule in *Boyce* to deny public interest standing to challenge the validity of administrative procedures

respecting a requirement for an environmental impact statement, Gibbs J., at p. 268, made the following observations concerning the meaning to be given to the words "special damage peculiar to himself" in *Boyce*:

Although the general rule is clear, the formulation of the exceptions to it which Buckley J. made in *Boyce v Paddington Borough Council* is not altogether satisfactory. Indeed the words which he used are apt to be misleading. His reference to "special damage" cannot be limited to actual pecuniary loss, and the words "peculiar to himself" do not mean that the plaintiff, and no one else, must have suffered damage. However, the expression [page621] "special damage peculiar to himself", in my opinion should be regarded as equivalent in meaning to "have a special interest in the subject matter of the action".

In *Borowski*, supra, Laskin C.J., dissenting, referred to the general rule as follows at p. 578: "Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society."

20 The precise nature of the respondent's interest in the legality of the federal cost-sharing payments is not easy to characterize in terms of the general rule. The respondent sues as a person in need within the meaning of the Plan who claims to have been prejudiced by the alleged provincial non-compliance with the conditions and undertakings to which the federal cost-sharing payments are made subject by the Plan. He alleges the prejudice caused by the deduction from his monthly social allowance payment of an amount to repay an overpayment of allowance, which he contends was caused by administrative error. Counsel for the appellants conceded that the deduction reduced the amount of the respondent's monthly social allowance payment below that required to meet the cost of basic requirements or necessities. The respondent alleges the further prejudice arising from the fact that he remains indebted for the municipal assistance which he received prior to qualifying for social allowance. Although the Plan was enacted for the benefit of persons in need it does not confer any rights on such persons; their entitlement to assistance arises under the provincial legislation. Nor can the federal cost-sharing payments be said to affect such entitlement directly. The respondent contends, however, that the continued payment of the federal contributions, despite the alleged provincial non-compliance with the conditions [page622] and undertakings imposed by the Plan, is in effect a cause of such non-compliance and the resulting prejudice to the respondent. He argues that it is the federal failure to insist on provincial compliance with the conditions and undertakings imposed by the Plan that permits or encourages such continued non-compliance by the province. What the respondent seeks by a declaration that the federal payments are illegal and an injunction to stop them is to compel the province to comply with the conditions and undertakings imposed by the Plan.

21 Counsel for the appellants contended that there was an insufficient "nexus" between the

alleged provincial non-compliance with the conditions and undertakings imposed by the Plan and the alleged illegality of the federal payments to satisfy the general requirement for standing to bring an action for a declaration. The term "nexus" was apparently borrowed from American cases on standing to which we were referred in the course of argument. As formulated in *Flast v. Cohen*, 392 U.S. 83 (1968), a case of taxpayer's standing to challenge the constitutionality of federal public expenditure, the nexus requirement has a two-fold aspect of a special nature based on particular features of the American Constitution. The term "nexus" is used in a more general sense in other cases, such as *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), to refer to the causative relationship that must exist between the injury or prejudice complained of and the action attacked. The action attacked must have been a cause of the injury or prejudice complained of, and the plaintiff must have a personal stake in the outcome of the litigation -- that is, stand to benefit in his personal interests from the relief sought. It is in this general sense that I understood counsel for the appellants to use the word "nexus". The American requirement of "nexus" or "directness", as it is sometimes referred to (cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), per Frankfurter J. at pp. 152-53), stems from the special constitutional requirement of case or controversy for federal jurisdiction under Article III of the Constitution, and for this reason the American cases on standing must be treated with some caution. I am of the opinion, however, that a similar requirement of directness or causal relationship between the alleged prejudice or grievance and the challenged action is implicit in the notions of interference with private right and special damage. I note that Thio, op. cit., pp. 5-6, refers to [page623] the general requirement for standing in administrative law as being that of a "direct, personal interest". In *Australian Conservation Foundation*, supra, Gibbs J., referring to the general rule, stated the requirement of a personal stake in the outcome of the litigation as follows at p. 270:

A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

22 There is no doubt that the respondent has a direct, personal interest in the alleged provincial non-compliance with the conditions and undertakings imposed by the Plan. A declaration that the federal cost-sharing payments are illegal would necessarily involve a finding that the province had failed to comply with the conditions and undertakings imposed by the Plan, but this would not affect the validity of the provincial legislative provisions about which complaint is made. Cf. *Re Lofstrom and Murphy* (1971), 22 D.L.R. (3d) 120 (Sask. C.A.) See also *LeBlanc v. City of Transcona*, [1974] S.C.R. 1261, per Spence J. at p. 1268. It cannot be asserted for a certainty that the province would feel compelled by such a finding to change the offending legislative provisions. The effect on provincial action of a declaration that the federal payments are illegal and even an injunction to stop them is also necessarily a matter of speculation. For a somewhat analogous relationship between the prejudice suffered and the action attacked that was held to be too speculative for standing see *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26

(1976). Although I have experienced some difficulty on this question, I am on balance of the view that the relationship between the prejudice allegedly caused to the respondent by the provincial non-compliance with the conditions and undertakings imposed by the Plan and the alleged illegality of the federal payments [page624] is too indirect, remote or speculative to be a sufficient causative relationship for standing under the general rule. The respondent must therefore in my opinion rely for standing on what is essentially a public interest in the legality of the federal cost-sharing payments, albeit that of a particular class of the public defined by the Plan as persons in need. It is accordingly necessary to consider whether the respondent should be recognized as having standing, as a matter of judicial discretion, by application of the principle or approach reflected in the decisions of this Court in Thorson, McNeil and Borowski.

IV

23 Opinion has differed as to the scope and implications of what was held by this Court in Thorson, McNeil and Borowski. The two questions that are particularly relevant to the issue of standing in this appeal may be summarized as follows: (a) Does the approach to public interest standing in those cases apply to a non-constitutional challenge to the statutory authority for administrative action; and (b) As a result of what was said in those cases about *MacIlreith v. Hart* (1908), 39 S.C.R. 657, in which this Court affirmed the standing of a municipal ratepayer to challenge the legality of municipal expenditure, does the principle of that case apply by analogy to a challenge to the legality of federal public expenditure?

24 In the Federal Court of Appeal, Thurlow C.J. appears to have relied particularly on *MacIlreith v. Hart* and generally on the approach reflected in Thorson, McNeil and Borowski for his conclusion that the respondent should be recognized as having standing, as a matter of judicial discretion. In one passage of his reasons, which I quote below, there is possibly a suggestion that he may have considered the respondent to have a sufficient personal interest in the legality of the federal payments for standing, but I read his reasons as a whole as basing standing in this case on what is essentially a public interest. In his analysis of the issue of reasonable cause of action, which he undertook [page625] first and which perhaps unavoidably overlapped with his discussion of standing, he referred to the present case as one falling directly within the class of *MacIlreith v. Hart*. He was referring there to the distinction noted by Laskin C.J. in his dissenting judgment in Borowski, which I also quote below, between an issue of the legality of federal or provincial public expenditure arising incidentally to an issue of the constitutionality of legislation and such an issue arising "per se". After saying at p. 525 that *MacIlreith v. Hart* varied from the present case "only in that it is a federal expenditure which is alleged to be illegal and in that the appellant does not assert standing as a taxpayer", Thurlow C.J. made the following statements at p. 526, which although made with reference to the issue of reasonable cause of action, suggest, I think, the nature of the interest which he considered sufficient for standing in this case: "Once it is accepted for the purposes of this appeal that the allegations of the statement of claim are true, and it is not inconceivable that they may be true, one may at once wonder how the citizenry can put a stop to such illegal action otherwise than by the declaration of a court of competent jurisdiction"; and

"What is at stake is the right of the citizens of Canada to have the Consolidated Revenue Fund of Canada applied in accordance with the law." Referring explicitly to the issue of standing in the light of the judgments of this Court in Thorson, McNeil and Borowski, Thurlow C.J. expressed his conclusion in the following passages of his reasons for judgment at pp. 527-28 respectively:

In such circumstances one may wonder why the law should prevent a person who is one of the class of intended beneficiaries of the Canada Assistance Plan and who alleges that he is not getting the standard of assistance it intends because Manitoba does not provide it, from bringing an action to have the issue of the legality of payments to Manitoba under the Act resolved. In seeking to maintain this action he is by no means a mere busybody and it seems to me that his interest in having the matter determined is at least as strong as that of the respondent in the Borowski case.

...

[page626]

The issue here is not like any of these. It is not so striking as any of them. Even so, it seems to me to be one of sufficient importance that in the interest of the appellant, of the class of persons intended to have the benefit of the Plan and of the public in general the appellant should be allowed to raise it.

25 Heald J., dissenting, was of the view that the respondent did not have a sufficient personal interest in the legality of the federal cost-sharing payments and that he did not fall within the public interest exception recognized by Thorson, McNeil and Borowski because, in his view, the principle affirmed in those cases applied to an issue of legislative validity and not to a non-constitutional issue of administrative validity, as in the present case. As he put it at pp. 534-35: "As I perceive the test above enunciated in the Thorson, McNeil and Borowski cases, *supra*, status is to be accorded only in actions where a declaration of invalidity is sought in respect of certain legislation. The case at bar is not such a case. The declaration herein sought, as stated *supra*, relates to the validity of administrative action...."

26 In Borowski, Martland J., delivering the judgment of the majority, summed up what Thorson and McNeil stood for as follows at p. 598:

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that

there is no other reasonable and effective manner in which the issue may be brought before the Court.

27 I take that to be an indication that the Court was not purporting in Thorson, McNeil and Borowski to lay down a rule or principle respecting public interest standing that extended beyond a challenge to the constitutionality of legislation. In Thorson and McNeil the challenge was to the constitutionality of federal and provincial legislation respectively. In Borowski, the substantive question raised by the action for a declaration was whether the abortion provisions of the Criminal [page627] Code were rendered inoperative by conflict with the Canadian Bill of Rights. The majority and the minority were in agreement that no distinction should be drawn, for purposes of the issue of standing, "between a declaratory action to obtain a decision on validity under the British North America Act and a declaratory action to obtain a decision on operative effect in the face of the Canadian Bill of Rights." I take that to mean that a question of operative effect under the Canadian Bill of Rights was assimilated for purposes of public interest standing to a question of constitutionality in the strict sense. As Laskin C.J. observed in Borowski, the issue of the legality of public expenditure raised by the pleadings in those cases turned on the issue of the constitutionality or operative effect of the legislation.

28 That the Court in Thorson, McNeil and Borowski was not concerned to formulate a rule of public interest standing that would have application beyond the sphere of constitutionality is further indicated, I think, by the repeated insistence in Thorson on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation. That, as I read the judgment of Laskin J. (as he then was), was the dominant consideration of policy in Thorson. It is reflected in several passages in his judgment which I shall not quote at length. It is sufficient to refer to his statements at p. 145 that a "telling consideration" for him was "whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute" and that "it would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication." To similar effect he said at p. 161: "On the other hand, where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayer's action and [page628] denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits." The same consideration of policy is further reflected in his statement at p. 150 that the discretionary control of the Attorney General over public interest standing is not a principle appropriate for application in a federal state to a challenge to the constitutionality of legislation; in the doubt expressed by him at p. 146 as to whether, in view of the Attorney General's responsibility to defend the government's legislation, it is even appropriate that a request for the intervention of the Attorney General should be regarded as a condition precedent to the recognition of public interest standing to challenge the constitutionality of legislation; and in his reference at pp. 151-52 to the well-established principle that neither Parliament nor a provincial legislature can bar access to the courts to challenge the constitutionality of legislation by requiring the prior consent of some official or by imposing some

other condition precedent.

29 At the same time Laskin J. drew support in Thorson for his conclusion that the Court must have a discretion to recognize public interest standing to bring an action for a declaration to challenge the constitutionality of legislation, where there is no other way in which the issue could be brought before a court, from what he appears to have regarded as the essential significance of *MacIlreith v. Hart*. The feature of that case to which he appears to have attached particular importance was not the view expressed by the judges in that case that a municipal ratepayer fell within the special damage exception in *Boyce* because an illegal expenditure could affect the amount of taxes that he would be liable to pay, but the implication that where the corporation refused to act, as in that case, there must be some way in which an ultra vires municipal expenditure could be challenged in the courts. This is reflected in the following statement at p. 157: "It is quite clear [page629] that obeisance to the special damage requirement was purely formal, and that at least equally important was the fact that ultra vires expenditures were involved which the municipal council was unwilling to reclaim". It is further reflected in the statement on p. 158, where, after observing that if the Attorney General refused to act in such a case and a ratepayer was not recognized as having standing that would end the matter, he said: "I am unable to appreciate how an argument of principle can be made that such a wrong, an illegality which is certainly justiciable, should go uncorrected at law, whatever may eventuate as political redress." To similar effect, in distinguishing *Smith and MacIlreith v. Hart*, he said at p. 158 that "in *MacIlreith v. Hart*, there was a public right involved which had no punitive aspects for any particular ratepayer or class of ratepayers, and it would beget wonder that, in such a case, there should be no judicial means of recovering or controlling an illegal expenditure of public money."

30 In certain passages of his reasons Laskin J. did suggest the possibility that the special interest of the municipal ratepayer recognized in *MacIlreith v. Hart* should be applied by analogy to the interest of a taxpayer to challenge the legality of federal or provincial public expenditure, but I do not read his judgment as finally being made to rest on that view. The emphasis in *Thorson* was on the public interest in constitutionality rather than on the particular interest of a taxpayer, as indicated in the following statement of Laskin J. in the conclusion of his judgment on p. 163: "It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question." While *Thorson* is referred to as a taxpayer's suit, what was really recognized was citizen's standing in certain circumstances to challenge the constitutionality of legislation. This was acknowledged by Martland J. in the passage which I have quoted above from *Borowski*, where he said that it is sufficient for a plaintiff to show, among [page630] other things, that he has "a genuine interest as a citizen in the validity of the legislation". The particular significance which Laskin J. attached to the exception to the general rule represented by *MacIlreith v. Hart*, which he regarded as a different exception from that of *Thorson*, was further indicated in his dissenting opinion in *Borowski*, where as Chief Justice he said at pp. 579-80:

There are exceptions to the general rule and to the policy. One of the

earliest recognized has been a municipal taxpayer action to restrain an allegedly illegal municipal expenditure: see *MacIlreith v. Hart*. An explanation of this exception is that it involved a public right to see that municipal expenditures were lawfully made, being expenditures which were limited by considerations that do not apply to a province or to Canada. No municipal taxpayer could raise a *lis* in the ordinary sense or court a penalty or other sanction in respect of an allegedly illegal municipal expenditure and, hence, unless a taxpayer action was permitted the illegality would go unchallenged and unchallengeable.

In the provincial and federal field, the issue of an illegal, or perhaps unconstitutional, expenditure would not likely arise *per se* but, in the main, only (as is alleged in this case) in connection with the operation of challenged legislation; the challenge to the expenditure would thus depend on the outcome of the challenge to the legislation.

Another exception (but a more limited one in view of the discretion associated with it) is shown in the judgment of this Court in *Thorson v. Attorney General of Canada*....

31 The foregoing indicates, in my view, that the judgments of this Court in *Thorson*, *McNeil* and *Borowski* cannot be regarded as providing clear and direct authority for the recognition of public interest standing, as a matter of judicial discretion, to bring a non-constitutional challenge by an action for a declaration to the statutory authority for public expenditure or other administrative action. It is fair to say, however, that they do not clearly exclude such recognition. The issue, then, [page631] as I see it, is whether the principle reflected in *Thorson*, *McNeil* and *Borowski* should be extended by this Court to such cases. This question raises again the policy considerations underlying judicial attitudes to public interest standing, and in particular, whether the same value is to be assigned to the public interest in the maintenance of respect for the limits of administrative authority as was assigned by this Court in *Thorson*, *McNeil* and *Borowski* to the public interest in the maintenance of respect for the limits of legislative authority.

32 In my view an affirmative answer should be given to this question. The recognized standing of the Attorney General to assert a purely public interest in the limits of statutory authority by an action of his own motion or on the relation of another person is a recognition of the public interest in the maintenance of respect for such limits. For the reasons indicated in *Thorson*, I do not think that his refusal to act in such a case should bar a court from the recognition, as a matter of discretion in accordance with the criteria affirmed in *Borowski*, of public interest standing in a private individual to institute proceedings. The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of

issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson*, *McNeil* and *Borowski*. I shall deal with each of them in relation to the question of the respondent's standing in the present case.

[page632]

33 The concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability, which Laskin J. held in *Thorson* to be central to the exercise of the judicial discretion whether or not to recognize public interest standing. Of course, justiciability is always a matter of concern for the courts, but the implication of what was said by Laskin J. in *Thorson* is that it is a matter of particular concern in the recognition of public interest standing. As I indicated earlier in these reasons, counsel for the appellants raised the issue of justiciability with reference to judicial review of a question of provincial compliance with the conditions of federal cost-sharing. The requirement of justiciability was considered by this Court in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, where reference was made to both the institutional and constitutional aspects of justiciability. The question of justiciability in that case was considered in the context of a challenge, based on the Canadian Charter of Rights and Freedoms, to the constitutionality of a decision of the executive government of Canada in the realms of foreign policy and national defence. As I read the reasons of Wilson J., with whom Dickson J. (now C.J.) concurred on the question of justiciability, they affirm that where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government. That was, of course, said in the context of the judicial duty to rule on issues of constitutionality under the Charter, but I take it to be equally applicable to a non-constitutional issue of the limits of statutory authority. There will no doubt be cases in which the question of provincial compliance with the conditions of federal cost-sharing will raise issues that are not appropriate for judicial determination, but the particular issues of provincial non-compliance raised by the respondent's statement of claim are questions of law and as such clearly justiciable. The same is, of course, true of the issue of statutory authority under s. 7 of the Plan. I am, therefore, of the opinion that the recognition of public [page633] interest standing in this case should not be refused on the ground of justiciability.

34 The judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody is addressed by the requirements affirmed in *Borowski* that there be a serious issue raised and that a citizen have a genuine interest in the issue. I think the respondent meets both of these requirements. The issues of law raised with respect to the alleged provincial

non-compliance with the conditions and undertakings to which the federal cost-sharing payments are made subject by the Plan and with respect to the statutory authority for such payments are in my opinion far from frivolous. They merit the consideration of a court. The status of the respondent as a person in need within the contemplation of the Plan who complains of having been prejudiced by the alleged provincial non-compliance shows that he is a person with a genuine interest in these issues and not a mere busybody.

35 The judicial concern that in the determination of an issue a court should have the benefit of the contending views of the persons most directly affected by the issue -- a consideration that was particularly emphasized by Laskin C.J. in *Borowski* -- is addressed by the requirement affirmed in *Borowski* that there be no other reasonable and effective manner in which the issue may be brought before a court. In *Thorson*, *McNeil* and *Borowski* that requirement was held to be satisfied by the nature of the legislation challenged and the fact that the Attorney General had refused to institute proceedings although requested to do so. In *Borowski*, the majority and the minority differed essentially, as I read their reasons, on the question whether there was anyone with a more direct interest than the plaintiff who would be likely to challenge the legislation. Here it is quite clear from the nature of the legislation in issue that there could be no one with a more direct [page634] interest than the plaintiff in a position to challenge the statutory authority to make the federal cost-sharing payments. In so far as a prior request to the Attorney General to intervene might be considered to be necessary in certain cases to show that there is no other way in which the issue may be brought before a court, I do not think it should be regarded as necessary in a case such as this one, where it is clear from the position adopted by the Attorney General in the case that he would not have consented to the institution of proceedings. I am accordingly of the view that the respondent meets the requirement that there should be no other reasonable and effective manner in which the issue of statutory authority raised by the respondent's statement of claim may be brought before a court.

36 For all of these reasons I am of the opinion that the respondent should be recognized as having standing to bring his action for a declaration to challenge the legality of the federal cost-sharing payments under s. 7 of the Plan.

37 As I indicated above, the Federal Court of Appeal did not, at least explicitly, address the question of standing to seek the injunctive relief prayed for by the respondent, as distinct from standing to seek the declaratory relief. The Court dismissed the appeals from the orders in the Trial Division refusing an injunction by way of originating notice of motion and an interim injunction in the action on the ground, as I read the reasons of Thurlow C.J., of lack of urgency and not lack of standing. In his reasons for judgment Thurlow C.J. referred throughout to standing to seek a declaration. After giving his reasons for dismissing the appeals from the orders refusing an injunction, he said at p. 522: "That leaves for consideration the questions whether the appellant has standing to bring the action and whether the statement of claim disclosed a reasonable cause of action for declaratory relief." In this Court counsel for the appellants did not contend that there was a significant distinction to be drawn, for purposes of the issue in the appeal, between standing for a declaration [page635] and standing for an injunction. Indeed, that question was simply not

addressed in argument. The Federal Court of Appeal and counsel in this Court may well have proceeded on the assumption that there is no significant difference between these remedies, in so far as standing is concerned, as distinct from the conditions of entitlement to them in a particular case. If so, that is in my opinion a sound assumption. It is essential to distinguish, I think, between standing, or the right to seek particular relief, and the entitlement to such relief. The general rule respecting standing to seek a declaration or an injunction, to which I have referred above, has generally been regarded as essentially the same for the two forms of relief. Cf. *Cromwell*, op. cit., pp. 157-58. I can see no sound reason why the exceptional recognition of public interest standing, as a matter of judicial discretion, which is being affirmed in these reasons should not apply to injunctive as well as declaratory relief. If the respondent is recognized as having standing to seek the declaratory relief then I cannot see why he should not be recognized as also having standing to seek the ancillary injunctive relief. Whether a plaintiff should be granted either declaratory relief or injunctive relief in a particular case is a matter of judicial discretion to be exercised according to criteria and considerations which are somewhat different for the two forms of relief. In the exercise of that discretion in the present case consideration would have to be given to the role of injunction as a public law remedy, including the question whether it will lie against Ministers of the Crown. Those are questions to be left to the trial court. The respondent should in my opinion be recognized as having standing to seek the injunctive relief prayed for in his statement of claim.

V

38 As I indicated at the outset of these reasons, the appellants contended, as an alternative ground in their motion to strike, that the statement of claim did not disclose a reasonable cause of action. I may [page636] say that as I understood the argument of counsel for the appellants in this Court he did not press this contention. The emphasis was on the question of standing and the related question of justiciability. The issues of standing and reasonable cause of action are obviously closely related, and as acknowledged by counsel for the appellants, tend in a case such as this to merge. Indeed, I question whether there is a true issue of reasonable cause of action distinguishable, as an alternative issue, from that of standing. With respect, I think that is perhaps reflected in the reasons of Thurlow C.J. on the question of reasonable cause of action in which there is reference to cases on standing in support of his conclusion. Clearly, if a plaintiff has the requisite standing an action will lie for a declaration that an administrative authority has acted without statutory authority. What I understand to be the reasonable cause of action issue, if the respondent is held to have standing, is whether it is plain and obvious that the respondent cannot succeed with his contentions in respect of the alleged provincial non-compliance with the conditions and undertakings imposed by the Plan and the alleged illegality of the federal payments. I agree with Lalande D.J. in the Federal Court of Appeal that this is not the case, and I would accordingly reject the contention that the respondent's statement of claim does not disclose a reasonable cause of action.

39 I would dismiss the appeal with costs.

* * * * *

Errata, published at [1986] 2 S.C.R., page iv

[1986] 2 S.C.R. p. 609, line f-6 of the English version. Read
"Canadian Broadcasting Corp." instead of "Canadian Brodcasting Corp".

qp/qlmem/qlhbb

TAB 8

Indexed as:

Canada (Minister of Justice) v. Borowski

**The Minister of Justice of Canada and the Minister of Finance
of Canada (Defendants), Appellants; and
Joseph Borowski (Plaintiff), Respondent; and
The Attorney General of Ontario, the Attorney General of
British Columbia and the Attorney General of Alberta,
Interveners.**

[1981] 2 S.C.R. 575

Supreme Court of Canada

1981: May 27, 28 / 1981: December 1.

**Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz,
Estey, McIntyre, Chouinard and Lamer JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Courts -- Standing -- Respondent seeking declaration that abortion provisions of Criminal Code violating Canadian Bill of Rights and therefore invalid -- Respondent's only interest that of concerned citizen -- Whether respondent should be given standing -- Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6) -- Canadian Bill of Rights, R.S.C. 1970, Appendix III, ss. 1(a), 2(e), (g).

Respondent, a prominent crusader against abortion, sought a declaration in Saskatchewan's Court of Queen's Bench that s. 251(4), (5), (6) of the Criminal Code permitting procurement of miscarriage were invalid and inoperative in that they abridged the right to human life contrary to the Canadian Bill of Rights. Appellant's argument that jurisdiction lay exclusively with the Federal Court was rejected in an order of the Court of Queen's Bench and on appeal from that order. This Court considered not only the issue of jurisdiction but also, on agreement of counsel, whether respondent had the legal standing necessary to maintain the action--a matter denied by the appellant but not addressed in previous proceedings.

Held (Laskin C.J. and Lamer J. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Dickson, Beetz, Estey, McIntyre and Chouinard JJ.: To establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its validity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. Respondent met this test. As the legislation provides exemption from criminal liability, it would be difficult to find a class of person directly affected or exceptionally prejudiced by it who would have cause to attack the legislation. This issue could not reasonably be brought into Court unless proceedings were launched by an interested citizen.

The jurisdictional issue did not differ materially from two cases heard immediately prior to this case and its disposition should be the same.

Per Laskin C.J. and Lamer J., dissenting: The jurisdictional issue should be disposed of as in two earlier and similar cases.

Generally, it is not open to a person as a citizen and/or taxpayer to invoke the jurisdiction of a competent court to obtain a ruling on the interpretation or application of legislation or its validity, when the person is not directly affected by the legislation or threatened by sanctions for its breach. While exceptions to this general rule exist, none applies to respondent's case. The legislation here did not affect all members of the public alike, and this fact was a central consideration to the court's exercising its discretion against giving respondent standing. The difficulty of reaching a judicial conclusion in the time following satisfaction of statutory requirements for therapeutic abortion but before birth or abortion was not preclusive; the point should be decided at the instance of a person having a greater interest than that of citizen and taxpayer, such as the doctors involved or the husband of a woman planning to have an abortion.

Cases Cited

[Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265, applied; Smith v. Attorney General of Ontario, [1924] S.C.R. 331; MacIlreith v. Hart (1908), 39 S.C.R. 657, referred to.]

APPEAL from a decision of the Saskatchewan Court of Appeal [[1981] 1 W.W.R. 1; (1980), 6 Sask. R. 218], dismissing appellant's appeal from a ruling of Hughes J. on a special motion, dealing with jurisdiction, in an action before the Court of Queen's Bench. Appeal dismissed, Laskin C.J. and Lamer J. dissenting.

W.I.C. Binnie, Q.C., for the appellants.

Morris C. Shumiatcher, Q.C., for the respondent.

John Cavarzan, Q.C., for the intervener the Attorney General for Ontario.

William Henkel, Q.C., for the intervener the Attorney General for Alberta.

E.R.A. Edwards, for the intervener the Attorney General of British Columbia.

Solicitor for the appellants: R. Tassé, Ottawa.

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Solicitor for the intervener the Attorney General for Ontario: H. Allan Leal, Toronto.

Solicitor for the intervener the Attorney General for Alberta: William Henkel, Edmonton.

Solicitor for the intervener the Attorney General of British Columbia: E. Robert A. Edwards, Victoria.

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

THE CHIEF JUSTICE (dissenting):-- This appeal, which is here by leave of this Court given on terms as to costs, arises out of a taxpayer's action brought in the Court of Queen's Bench of Saskatchewan. The purpose of the action was to obtain a declaration against the appellants, the Minister of Justice of Canada and the Minister of Finance of Canada, that the so-called abortion provisions of Criminal Code, s. 251(4), (5) and (6) are inoperative as offending subss. 1(a) and 2(e) and (g) of the Canadian Bill of Rights and that any expenditure of public money to support therapeutic abortions under the aforesaid provisions of the Criminal Code is consequently illegal. Issue was taken by the defendants appellants as to the jurisdiction of the Court of Queen's Bench to entertain the action, the contention being that exclusive jurisdiction resided in the Federal Court of Canada under ss. 17 and 18 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10. In their statement of defence, the defendants also challenged the standing of the plaintiff to maintain the action, regardless, apparently, of the appropriateness of the forum.

The issue of jurisdiction was made the subject of a special motion which was heard and determined adversely to the defendants by Hughes J. An appeal to the Saskatchewan Court of Appeal failed. The leave given to come here related only to the issue of jurisdiction but, during the course of the hearing in this Court, counsel for the respective parties agreed to argue the question of the plaintiff's standing before this Court and formally asked the Court to hear them on that point. The Court agreed and argument was heard accordingly.

It is unnecessary to embark here on an examination of the issue of jurisdiction. This very issue, namely, whether exclusive jurisdiction resides in the Federal Court of Canada because of the character of the defendants, was raised and fully argued in two cases heard together immediately preceding the hearing in the present case. It was conceded that there were no material differences between those cases, Attorney General of Canada et al. v. The Law Society of British Columbia and Victor McCallum and Donald Jabour v. The Law Society of British Columbia et al. and Attorney General of Canada heard on May 25, 26, 27, 1981 and the present one, so far as the claim of

exclusive jurisdiction in the Federal Court of Canada is concerned. The disposition in the two British Columbia cases on the point will be equally dispositive here. I turn, therefore, to the issue of standing, which arises whatever be the proper forum for the action if it is one maintainable by the plaintiff.

I start with the proposition that, as a general rule, it is not open to a person, simply because he is a citizen and a taxpayer or is either the one or the other, to invoke the jurisdiction of a competent court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a ground upon which to seek the assistance of a court. Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society. This is especially true of the criminal law. For example, however passionately a person may believe that it is wrong to provide for compulsory breathalyser tests or wrong to make mere possession of marijuana an offence against the criminal law, the courts are not open to such a believer, not himself or herself charged or even threatened with a charge, to seek a declaration against the enforcement of such criminal laws.

The rationale of this policy is based on the purpose served by courts. They are dispute-resolving tribunals, established to determine contested rights or claims between or against persons or to determine their penal or criminal liability when charged with offences prosecuted by agents of the Crown. Courts do not normally deal with purely hypothetical matters where no concrete legal issues are involved, where there is no *lis* that engages their processes or where they are asked to answer questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law. Special legislative provisions for references to the courts to answer particular questions (which may be of a hypothetical nature) give that authority to governments alone and not to citizens or taxpayers. Merely because a government may refuse a citizen's or taxpayer's request to refer to the courts a question of interest to the taxpayer does not *per se* create a right in the citizen or taxpayer to invoke the court's process on his or her own, or by way of a class action on behalf of all citizens or taxpayers with the same interest.

There are exceptions to the general rule and to the policy. One of the earliest recognized has been a municipal taxpayer action to restrain an allegedly illegal municipal expenditure: see *MacIlreith v. Hart* [(1908), 39 S.C.R. 657]. An explanation of this exception is that it involved a public right to see that municipal expenditures were lawfully made, being expenditures which were limited by considerations that do not apply to a province or to Canada. No municipal taxpayer could raise a *lis* in the ordinary sense or court a penalty or other sanction in respect of an allegedly illegal municipal expenditure and, hence, unless a taxpayer action was permitted the illegality would go unchallenged and unchallengeable.

In the provincial and federal field, the issue of an illegal, or perhaps unconstitutional,

expenditure would not likely arise per se but, in the main, only (as is alleged in this case) in connection with the operation of challenged legislation; the challenge to the expenditure would thus depend on the outcome of the challenge to the legislation.

Another exception (but a more limited one in view of the discretion associated with it) is shown in the judgment of this Court in *Thorson v. Attorney General of Canada* [1975] 1 S.C.R. 138]. That case involved a taxpayer's class action to obtain a declaration of the invalidity of the Official Languages Act, now R.S.C. 1970, c. 0-2, and of the illegality of the appropriation of money to administer it. It was clear that a justiciable question was raised by the claim of invalidity, namely, whether Parliament had respected the limits of its legislative authority under the British North America Act. Again, the Official Languages Act was not a regulatory type of statute nor a penal one but rather, uniquely, a declaratory and directory statute, a statute which created no offences and imposed no penalties. Unless, therefore, a citizen or taxpayer action was permitted to question its validity, there would be no way in which its validity could be tested unless the federal Attorney General did so through a reference and a request to this end had been denied.

In allowing the taxpayer suit to proceed in the *Thorson* case, this Court made it clear that it did so in the exercise of a controlling judicial discretion which related to the effectiveness of process. It went on to say, *inter alia*, that "Central to that discretion is the justiciability of the issue sought to be raised" and that "Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide ... that a member of the public ... is too remotely affected to be accorded standing" (at p. 161). The Court concluded on this note (at p. 161):

On the other hand, where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits.

The Criminal Code provisions whose operation is challenged here are of a different order from the legislation with which the *Thorson* case was concerned. They are, moreover, exculpatory provisions which exclude criminality that is prescribed under s. 251(1) and (2) for the intentional procurement of a miscarriage. A distinction is made under s. 251 between unlawful abortions and permitted abortions. It is the latter which the plaintiff attacks as violative of the Canadian Bill of Rights. No attack is made on the constitutionality of any part of s. 251, it being recognized that what Parliament may validly proscribe under its criminal law power may at the same time be limited by fixing conditions under which the proscription is lifted. That is the case with the abortion provisions of s. 251. The plaintiff objects to any alleviating provisions that would (and in this case do) relieve against criminality for procuring abortions. Far from objecting that the criminal provisions are too strict in the face of the Canadian Bill of Rights, his objection is that they are too lax.

There is, in this respect, in the permissive provisions of s. 251(4), (5) and (6), some similarity perhaps to the directory features of the legislation in the Thorson case. However, these provisions are part of a scheme which embraces sanctions as well, and I do not find the similarity to be sufficient to put the legislation here on the same level as the statute involved in the Thorson case. Indeed, to borrow from the words of this Court in the Thorson case, the present case is not one where all members of the public are affected alike. This, in my view, is a central consideration in the exercise of the Court's discretion against giving standing here to the plaintiff respondent.

It is contended on the plaintiff's behalf that if he cannot bring himself within the Thorson case, his position as to standing is as strong as that of the respondent in this Court's follow-up decision to Thorson in *Nova Scotia Board of Censors v. McNeil* [[1976] 2 S.C.R. 265]. That was also a case where a taxpayer action challenging the validity of legislation, provincial legislation in that case, was held to be maintainable. The statute attacked in the McNeil case was a regulatory statute and not merely a declaratory one as in the Thorson case. This, however, was held, in the circumstances of the McNeil case, not to be a controlling distinction that should, in itself, be sufficient to deny standing, "especially [to use the words of the Court, at p. 269] in the light of the reserve of discretion in the Court, and more especially because the word or term 'regulatory' is not a term of art, not one susceptible of an invariable meaning which would in all cases serve to distinguish those in which standing to a taxpayer or citizen would be granted and those in which it would not".

The Theatres and Amusements Act of Nova Scotia, whose validity was challenged in the McNeil case, was a regulatory statute directed to film exchanges, theatre owners and cinematograph in operators and apprentices. It also provided for the appointment of a Board, empowered to apprentices and in respect of theatre performances. Unfettered discretion to suspend or revoke any licence was vested in the Board. It had, to put it shortly, complete control over the exhibition of films and over theatres in the Province. Although there was a statutory right of appeal to the Lieutenant Governor in Council, it was not open to a member of the public.

The Nova Scotia courts, before whom the question of standing came, and this Court on appeal, construed the challenged statute as involving members of the public in so far as the Board had the power to determine what members of the public were entitled to view in theatres and other places of public entertainment. This Court assessed the matter as follows (at p. 271):

Since the issue of validity does not fall for determination here and, indeed, has not even been argued in relation to the question of standing, I would not, in this case, go beyond the tentative conclusion that there is an arguable case under the terms of the challenged legislation that members of the Nova Scotia public are directly affected in what they may view in a Nova Scotia theatre, albeit there is a more direct effect on the business enterprises which are regulated by the legislation. The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the

members of the public in one of its central aspects.

In my view, this is enough, in the light of the fact that there appears to be no other way, practically speaking, to subject the challenged Act to judicial review, to support the claim of the respondent to have the discretion of the Court exercised in his favour to give him standing.

This passage underlines at least one important difference between the situation in McNeil and the present case. In McNeil, the plaintiff could legitimately complain (on this Court's construction of the challenged statute) that he was a person within its terms who was being deprived of a right to view a film because of an allegedly unconstitutional exercise of legislative and administrative power. In the present case, there is no deprivation under or by reason of the challenged legislation of which the plaintiff can complain. In short, the plaintiff here is not in the same position under the legislation which he challenges as was McNeil in his case. There he was a person within the compass of the enactment that he was challenging; the plaintiff is outside the Criminal Code provisions that he is attacking.

I am of the opinion that the plaintiff in this case cannot bring himself within the McNeil case nor within the Thorson case, so far as concerns the character of the legislation involved here as compared with the legislation in those cases. It was urged, however, that he was, nonetheless, in as favourable a position to warrant the exercise of discretion to accord him standing. This was because there was no other way in which the alleged inoperability of s. 251(4), (5) and (6) of the Criminal Code in the face of the Canadian Bill of Rights could be tested; the plaintiff was not seeking to challenge the prohibitions of s. 251--and, presumably, as a mere taxpayer, not threatened by any sanction, he could not do so--but rather was seeking to challenge the exculpatory provisions.

I would not draw any distinction between a declaratory action to obtain a decision on validity under the British North America Act and a declaratory action to obtain a decision on operative effect in the face of the Canadian Bill of Rights. Justiciable issues are presented in both situations. The only question that remains is whether, neither the Thorson case nor the McNeil case being strictly applicable according to the character of the legislation there and here, this is an appropriate case for the Court to exercise its discretion to accord standing. My reason for distinguishing the legislative situation is that here there are persons with an interest in the operation of s. 251(4), (5) and (6) who might challenge it as offending the Canadian Bill of Rights. I refer to doctors and to hospitals, both having a clearer interest in the operation of s. 251(4), (5) and (6) than does the plaintiff. Husbands who might object to their pregnant wives seeking a therapeutic abortion also have a clearer interest. It may be that in their case there would be a dilemma, having regard to the inexorable progress of a pregnancy. In short, even if the statutory requirements for a therapeutic abortion were satisfied, it might be difficult to initiate and exhaust the judicial processes to obtain a ruling as to the compatibility of s. 251(4), (5) and (6) with the Canadian Bill of Rights before the abortion or birth, as the case might be, takes place. In principle, however, this should not be

preclusive; the point will have been decided at the instance of a person having an interest and not at that of a person having no interest other than as a citizen and taxpayer.

It may be urged, however, that because doctors who perform therapeutic abortions under proper auspices are protected from criminal liability, they would have no reason to challenge the provisions for such abortions, and correlatively doctors who do not would also have no reason to challenge them. So too with respect to hospitals through which therapeutic abortion committees are set up or not set up. In my opinion, these aspects of the matter do not affect the direct interest of hospitals and doctors in the authorization and performance of abortions or in challenging them. Apart from what may be subsidiary questions of budgeting and operating space, which are important to hospitals, there is the doctor-patient relationship to be considered. Patients may seek advice from doctors even if the doctors themselves do not perform abortions, or the doctors may be moved because of their relationship with patients to wish to perform abortions unless they cannot lawfully be done. The willingness or refusal of a hospital board to establish a therapeutic abortion committee can create tensions, whatever the outcome. The interest of hospitals and of doctors is, in my view, a direct interest arising from the Criminal Code provisions under challenge here, but at worst is a more compelling and immediate interest than that asserted by the plaintiff. His interest is not connected with the administration of the legislation but with an emotional response to its operation. I see nothing in such a response which should persuade this Court to open its judicial doors to him.

The position of doctors, hospitals and husbands under s. 251(4), (5) and (6) is not unlike the position of the plaintiffs in *Blaikie, Durand and Goldstein v. Attorney General of Quebec* [[1978] C.S. 37, aff'd [1979] C.A. 351, aff'd [1978] 2 S.C.R. 1016]. This case was put forward by the plaintiff as a case where standing was granted in circumstances not too different from those here. There is, in fact, a considerable difference between the *Blaikie* case, the Bill 101 case, and the present case. It is true that the question of the plaintiff's interest or standing in attacking the validity of Chapter III of Title I of the Charter of the French Language, 1977 (Que.), c. 5, was put in issue by the Attorney General of Quebec in his defence. The plaintiffs had alleged in their declaration that they were members of the legal profession engaged in litigation in the courts of Quebec and before quasi-judicial tribunals, and that they represented clients whose ordinary language was English. They were entitled, they said, to plead in English and to have the Statutes of Quebec published in English as well as in French, relying of course on s. 133 of the British North America Act. Deschênes C.J., in granting the declaration, dealt preliminarily with a number of points, including the question of standing.

In his reasons on this issue he said that the plaintiffs possessed a sufficient interest to satisfy art. 55 of the Quebec Code of Civil Procedure. That article reads as follows:

55. Whoever brings an action at law, whether for the enforcement of a right which is not recognized or is jeopardized or denied, or otherwise to obtain a pronouncement upon the existence of a legal situation, must have a sufficient

interest therein.

Chief Justice Deschênes went on to say that in the circumstances the Attorney General of Quebec, in the course of the hearing, abandoned the paragraph of his defence which contested the plaintiffs' standing. The issue of standing was, consequently, not pursued in the Quebec Court of Appeal nor in this Court.

The present case lacks concreteness despite the fact that it raises a highly charged issue. Moreover, it appears to me that to permit the issue to be litigated in as abstract a manner as would be the case in having the plaintiff alone carry it against two Ministers of the Crown would hardly do justice to it, absent even any interveners who might, with the same obsessiveness on the opposite side of the issue, argue for the valid operation of the challenged provisions. Even accepting, as is probable, that if standing was accorded to the plaintiff, other persons with an opposite point of view might seek to intervene and would be allowed to do so, the result would be to set up a battle between parties who do not have a direct interest, to wage it in a judicial arena.

I would hold, therefore, that not only has the plaintiff failed to establish any judicially cognizable interest in the matter he raises but, on any view of this case, the discretion of the Court should be exercised to deny him standing. It follows that his action should be dismissed. In accordance with the terms of the order granting leave, the appellants will pay to the respondent his costs of the appeal to this Court on the solicitor and client basis. There will be no other order as to costs.

The judgment of Martland, Ritchie, Dickson, Beetz, Estey, McIntyre and Chouinard JJ. was delivered by

MARTLAND J.:-- The respondent brought action against the appellants seeking, primarily, a declaration that subss. (4), (5) and (6) of s. 251 of the Criminal Code were, by reason of the operation of the Canadian Bill of Rights, invalid and inoperative. These subsections were added to s. 237 (now s. 251) of the criminal Code by s. 18 of the Criminal Law Amendment Act, 1968-69, 1968-69 (Can.), c. 38. Prior to this amendment, s. 237 consisted of three subsections. Subsections (1) and (2) provided as follows:

237.(1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

Subsection (3) was a definition section.

The subsections in issue in these proceedings provided for exceptions to the application of subss. (1) and (2) cited above. Subsection (4) provided:

- (4) Subsections (1) and (2) do not apply to
 - (a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or
 - (b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

- (c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and
 - (d) has caused a copy of such certificate to be given to the qualified medical practitioner.

Subsection (5) enabled the Minister of Health of a province to obtain a copy of a certificate and additional information from a therapeutic abortion committee and from a medical practitioner who has procured a miscarriage of a female person named in a certificate. Subsection (6) defined, inter alia, the words "accredited hospital", "approved hospital" and "therapeutic abortion committee". Subsection (6) defined such a committee as follows:

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

It is the contention of the respondent that the permission which is given by subss. (4), (5) and (6) for the procurement of a miscarriage, in the circumstances provided, abridges the human right to life declared in s. 1 of the Canadian Bill of Rights and is therefore invalid and inoperative by virtue of s. 2 of the Canadian Bill of Rights. Section 1 provides that:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

Section 2 provides that, unless it is expressly declared that it shall operate notwithstanding the Canadian Bill of Rights, every law of Canada shall be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights declared.

The issue raised is a difficult and important one, involving the question as to whether the human rights declared in the Canadian Bill of Rights protect a human foetus.

In his statement of claim, the respondent states that he is a citizen of Canada and a taxpayer to the Government of Canada. He goes on to state in the following paragraphs of the statement of claim:

- 3. On February 20, 1969 the Plaintiff was elected by the voters of the provincial constituency of Thompson, Manitoba to represent them in the Legislative Assembly of Manitoba, a position he maintained until June 28, 1973. In his capacity as taxpayer, elected representative of the people in the Legislative Assembly, a member of the governing party in the Legislative Assembly of Manitoba and Minister of and adviser to Her Majesty the Queen in Right of the Province of Manitoba, the Plaintiff has continuously promoted and defended the rights of individual human foetuses, including their right to life.
- 4. The Plaintiff has canvassed all practicable means to invoke action on the part of both Provincial and Federal Governments to repeal or to impugn the validity of the abortion sections of the Criminal Law Amendment Act, Statutes of Canada, 1968-69, chapter 38, section 18, (now section 251, subsections (4), (5) and (6), of the Criminal Code of Canada, hereinafter referred to as "the abortion section of the Criminal Code") and to cease and desist from spending public funds to abort and destroy individual human

foetuses.

5. The steps taken by the Plaintiff included:

- (a) His resignation, on or about September 9, 1971, inter alia, because as Minister of and adviser to Her Majesty the Queen, he "could not be a party to, or accept, child-destroying legislation in which we (are) involved";
- (b) His address in the Legislative Assembly of Manitoba, on May 4, 1973, opposing adoption of the budget presented by the Provincial Treasurer that proposed to finance the abortion and destruction of individual human foetuses by the expenditure of public funds;
- (c) His continuous objections over a term of years to payment of his personal income tax to the Federal Government to protest its expenditures of public moneys collected by personal income taxes, to finance and to promote the abortion and destruction of individual human foetuses, and his conviction and sentence to terms in jail for his stand;
- (d) His personal correspondence with the Premier and Cabinet of the Province of Manitoba, with the Prime Minister of Canada and with Members of his Cabinet including the Minister of National Health and Welfare, the Minister of Justice, the Minister of Finance, and the Solicitor-General of Canada requesting that they take appropriate legal action to protect the rights of individual human foetuses;
- (e) His request addressed to the Official Guardian of Manitoba in the year 1977, to take legal proceedings on behalf of individual human foetuses to prevent their abortion and destruction, and to protect their right to life.

In every instance, the efforts of the Plaintiff to move public officials to impugn the validity of the abortion provisions referred to in paragraph 4 hereof by judicial proceedings met with negative response. No one undertook to subject these provisions, of great public importance, to judicial review.

For the purpose of these proceedings, all of these statements must be accepted as being true.

The proceedings were commenced in the Court of Queen's Bench of the Province of Saskatchewan. In their defence, the appellant pleaded that the Court lacked jurisdiction because exclusive jurisdiction in the matter belonged to the Federal Court of Canada. It was also stated that the appellants did not admit that the respondent had the legal standing necessary to maintain the action.

The respondent then moved for an order that the Court of Queen's Bench did have the necessary jurisdiction. This order was granted and an appeal from the order by the appellants was dismissed. The issue of the respondent's legal standing was not raised in these proceedings. Leave to appeal to this Court was granted.

On the argument before this Court, the issue of legal standing was raised and counsel on both sides finally agreed that the issue of legal standing should be determined by this Court.

In order to decide whether the respondent should be recognized as having legal standing, it is necessary to consider the two leading decisions of this Court dealing with that issue. The first of these is *Thorson v. Attorney General of Canada* [[1975] 1 S.C.R. 138]. The real purpose of the proceedings in that action was to obtain a declaration that the Official Languages Act, 1968-69 (Can.), c. 54, was unconstitutional. The action was framed as being brought by a taxpayer on his own behalf and on behalf of all taxpayers and a declaration was also sought in relation to the Appropriation Acts providing money to implement the legislation. A preliminary issue of law was raised as to the legal standing of the plaintiff to bring the action. The plaintiff's action was dismissed by Houlden J. (as he then was) on the ground that the plaintiff did not have status to challenge the constitutional validity of the statute. In his reasons, he referred to and relied upon the judgment of this Court in *Smith v. Attorney General of Ontario* [[1924] S.C.R. 331], and he distinguished the judgment of this Court in *MacIlreith v. Hart* [(1908), 39 S.C.R. 657]. His reasons are reported in [1972] 1 O.R. 86 and his conclusion is stated at p. 90 as follows:

While the plaintiff has argued this application with great force and his memorandum of law is most comprehensive, I cannot agree with his submissions. In my judgment, the principle stated in the *Smith* case is one of general application. This principle is that an individual has no status or standing to challenge the constitutional validity of an Act of Parliament in an action of this type unless he is specially affected or exceptionally prejudiced by it: see also *Grant v. St. Lawrence Seaway Authority*, [1960] O.R. 298 at p. 303, 23 D.L.R. (2d) at 252 at p. 256; *Cowan v. Canadian Broadcasting Corp.*, [1966] 2 O.R. 309 at p. 311, 56 D.L.R. (2d) 578 at p. 580, and *Burnham v. A.-G. Can.* (1970), 15 D.L.R. (2d) 6 at pp. 11-2, 74 W.W.R. 427. The fact that the taxes of the plaintiff and the taxes of every taxpayer in Canada will be raised as a result of the implementation of the Official Languages Act is not, in my opinion, sufficient to constitute special damage or prejudice to the plaintiff so as to enable the plaintiff to bring this action.

The Court of Appeal agreed with this judgment and dismissed the appeal. The three dissenting judges in this Court were of the same view.

The appeal to this Court was allowed. It was recognized that the claim to legal standing could not be founded solely on the damage resulting from an illegal expenditure of public funds. Laskin J.

(as he then was), who delivered the majority reasons, said at pp. 162-63:

I recognize that any attempt to place standing in a federal taxpayer suit on the likely tax burden or debt resulting from an illegal expenditure, by analogy to one of the reasons given for allowing municipal taxpayers' suits, is as unreal as it is in the municipal taxpayer cases. Certainly, a federal taxpayer's interest may be no less than that of a municipal taxpayer in that respect. It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.

At page 161 he said this:

In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised, a point that could be said to be involved (although the case was not decided on that basis) in *Anderson v. Commonwealth* [(1932), 47 C.L.R. 50], where the High Court of Australia denied standing to a member of the public to challenge the validity of an agreement between the Commonwealth and one of the States. Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide, as it did in the *Smith* case, that a member of the public, and perhaps even one like *Smith*, is too remotely effected to be accorded standing. On the other hand, where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits.

It was pointed out that the plaintiff had sought unsuccessfully to have the Attorney General of Canada take appropriate proceedings to test the validity of the Official Languages Act. It was also noted that that Act was not a regulatory type of statute, but was declaratory and directory in respect of the use of English and French by and in federal authorities and agencies and did not, itself, create offences or impose penalties. There was thus no person or class of persons particularly aggrieved who might raise the issue of its constitutional validity.

The plaintiff was recognized as having status to make his challenge to the statute and was permitted to proceed with his action. In substance, the case was decided on the basis that the validity of the legislation raised a serious constitutional issue and there was no reasonable way to have its validity tested unless an individual citizen could proceed in the manner sought by the plaintiff. This was a decision of major importance in that it recognized that although a person might not be specially affected or exceptionally prejudiced by the legislation which he sought to attack, he might be able to seek a declaratory judgment in the circumstances described.

The Thorson case was followed shortly afterwards by the case of Nova Scotia Board of Censors v. McNeil [[1976] 2 S.C.R. 265].

In that case the plaintiff sought to challenge the constitutional validity of certain sections of the Theatres and Amusements Act, R.S.N.S. 1967, c. 304 and certain regulations made thereunder. He was a resident and taxpayer in the Province of Nova Scotia. He was concerned about the powers of censorship provided in that Act. He had attempted to appeal to the Lieutenant Governor in Council from the decision of the Board of Censors to prohibit the exhibition of a particular film but was not recognized as having any right of appeal. He had also sought, without success, to have the Attorney General of Nova Scotia test the constitutional validity of certain sections of the Act and certain regulations. He then commenced action for a declaratory judgment.

Preliminary objection was taken to his status to institute the proceeding but this failed in both courts in Nova Scotia. An appeal to this Court was dismissed.

This case differed from the Thorson case. The legislation under attack was regulatory legislation. The Theatres and Amusements Act provided for the appointment of a Board empowered to permit or prohibit the use or exhibition in Nova Scotia for public entertainment of any film or any performance in a theatre. Provision was made for licensing regulations in respect of theatres and film exchanges and in respect of cinematograph operators. Regulations could be enacted in respect of the exhibition, sale, lease and exchange of films. A licence from the Board was necessary for a film exchange to exhibit any film. The Board was given complete power over the showing of films. Penalties were prescribed for breaches of the Act or the regulations.

It is obvious that in this case certain classes of persons were directly affected by the operation of the Act and the regulations, i.e. film exchanges, theatre owners and cinematograph operators. A theatre owner who wished to challenge the validity of the Act could have done so by showing a film whose exhibition had been refused by the Board and, thereafter, resisting the imposition of a penalty.

Notwithstanding these circumstances, the plaintiff was recognized by this Court as having the necessary legal standing to seek a declaration that the legislation was constitutionally invalid. Chief Justice Laskin, who delivered the reasons of the Court, said at p. 271:

Since the issue of validity does not fall for determination here and, indeed,

has not even been argued in relation to the question of standing, I would not, in this case, go beyond the tentative conclusion that there is an arguable case under the terms of the challenged legislation that members of the Nova Scotia public are directly affected in what they may view in a Nova Scotia theatre, albeit there is a more direct effect on the business enterprises which are regulated by the legislation. The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the members of the public in one of its central aspects.

In my view, this is enough, in the light of the fact that there appears to be no other way, practically speaking, to subject the challenged Act to judicial review, to support the claim of the respondent to have the discretion of the Court exercised in his favour to give him standing.

This decision went beyond the Thorson judgment in that it recognized the possibility of a person having status to attack the validity of legislation in the circumstances defined in that case even though there existed classes of persons who were specially affected and who might be exceptionally prejudiced by it.

In both the Thorson and McNeil cases, the challenge to the legislation in question was founded upon their alleged constitutional invalidity. In the present case, the challenge is based upon the operation of the Canadian Bill of Rights. I agree with the view expressed by the Chief Justice that no distinction should be made between a declaratory action to obtain a decision on validity under the British North America Act and a declaratory action to obtain a decision on the operative effect in the face of the Canadian Bill of Rights.

The legislation under attack here is not declaratory or directory as in the case of the Official Languages Act nor is it regulatory as in the case of the Theatres and Amusements Act. It is exculpatory in nature. It provides that in certain specified circumstances conduct which otherwise would be criminal is permissible. It does not impose duties, but instead provides exemption from criminal liability. That being so, it is difficult to find any class of person directly affected or exceptionally prejudiced by it who would have cause to attack the legislation.

Doctors who perform therapeutic abortions are protected by the legislation and would have no reason to attack it. Doctors who do not perform therapeutic abortions have no direct interest to protect by attacking it, and, consequently, an attack by a doctor in that category would be no different from that made by any other concerned citizen. The same thing applies to hospitals. A hospital which appoints a therapeutic abortion committee has no reason to attack the legislation. A hospital which does not appoint such a committee has no direct reason to attack the legislation.

There is no reason why a pregnant woman desirous of obtaining an abortion should challenge the legislation which is for her benefit. The husband of a pregnant wife who desires to prevent an

abortion which she desires may be said to be directly affected by the legislation in issue in the sense that by reason of that legislation she might obtain a certificate permitting the abortion if her continued pregnancy would be likely to endanger her life or health and thus prevent the abortion from constituting a crime. However, the possibility of the husband bringing proceedings to attack the legislation is illusory. The progress of the pregnancy would not await the inevitable lengthy lapse of time involved in court proceedings leading to a final judgment. The abortion would have occurred, or a child would have been born long before the case had been finally terminated, perhaps in this Court.

The legislation proposed to be attacked has a direct impact upon the unborn human foetuses whose existence may be terminated by legalized abortions. They obviously cannot be parties to proceedings in court and yet the issue as to the scope of the Canadian Bill of Rights in the protection of the human right to life is a matter of considerable importance. There is no reasonable way in which that issue can be brought into court unless proceedings are launched by some interested citizen.

In the light of the Thorson and McNeil cases, it is my opinion that the respondent should be recognized as having legal standing to continue with his action. In the Thorson case, the plaintiff, as an interested citizen, challenged the constitutional validity of the Official Languages Act. The legislation did not directly affect him, save in his position as a taxpayer. He had sought, without avail, to have the constitutional issue raised by other means. He was recognized to have status. The position is the same in the present case. The respondent is a concerned citizen and a taxpayer. He has sought unsuccessfully to have the issue determined by other means.

In the McNeil case, the plaintiff was concerned about censorship of films in Nova Scotia. He had sought by other means to have the validity of the Theatres and Amusements Act tested, but without success. In that case there were other classes of persons directly affected by the legislation who might have challenged it. Nonetheless, he was recognized as having legal standing because it also affected the rights of the public. The position of the respondent in this case is at least as strong. There are in this case no persons directly affected who could effectively challenge the legislation.

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

The issue which alone was raised in the courts below was as to whether exclusive jurisdiction to deal with the issue rested in the Federal Court of Canada because of the character of the appellants. The same issue is before the Court arising out of two other cases heard immediately prior to the hearing of the present appeal. These cases were Attorney General of Canada et al. v.

The Law Society of British Columbia and Victor McCallum and Donald Jabour v. The Law Society of British Columbia et al. and The Attorney General of Canada. It is conceded that there are no material differences between those cases and the present one in respect of that issue. The disposition of this issue in the present case should be the same as its disposition in those cases.

Under the terms of the order which granted leave to appeal, the respondent is entitled to the costs of this appeal on a solicitor and client basis.

Appeal dismissed with costs, LASKIN C.J. and LAMER J. dissenting.

TAB 9

Indexed as:

**Nova Scotia (Workers' Compensation Board) v. Martin;
Nova Scotia (Workers' Compensation Board) v. Laseur**

Donald Martin , appellant;

v.

**Workers' Compensation Board of Nova Scotia and Attorney
General of Nova Scotia , respondents, and
Nova Scotia Workers' Compensation Appeals Tribunal,
Ontario Network of Injured Workers Groups, Canadian
Labour Congress, Attorney General of Ontario, Attorney
General of British Columbia and Workers' Compensation
Board of Alberta, interveners.**

And between

Ruth A. Laseur , appellant;

v.

**Workers' Compensation Board of Nova Scotia and Attorney
General of Nova Scotia , respondents, and
Nova Scotia Workers' Compensation Appeals Tribunal,
Ontario Network of Injured Workers Groups, Canadian
Labour Congress, Attorney General of Ontario, Attorney
General of British Columbia and Workers' Compensation
Board of Alberta, interveners.**

[page505]

[2003] 2 S.C.R. 504

[2003] S.C.J. No. 54

2003 SCC 54

File Nos.: 28372, 28370.

Supreme Court of Canada

Heard: December 9, 2002;

Judgment: October 3, 2003.

**Present: McLachlin C.J. and Gonthier, Iacobucci, Major,
Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.**

(122 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Catchwords:

Administrative law -- Workers' Compensation Appeals Tribunal -- Jurisdiction -- Charter issues -- Constitutional validity of provisions of Appeals Tribunal's enabling statute -- Whether Appeals Tribunal has jurisdiction to apply Canadian Charter of Rights and Freedoms -- Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B -- Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Constitutional law -- Charter of Rights -- Equality rights -- Workers' compensation legislation excluding chronic pain from purview of regular workers' compensation system and providing in lieu of benefits normally available to injured workers four-week functional restoration program beyond which no further benefits are available -- Whether legislation infringes s. 15(1) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B -- Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Administrative law -- Boards and tribunals -- Jurisdiction -- Constitutional issues -- Powers of administrative tribunals to determine questions of constitutional law -- Appropriate test.

Summary:

The appellants, L and M, both suffer from the disability of chronic pain attributable to a work-related injury. M worked as a foreman and sustained a lumbar sprain. In the following months, he returned to work several times, but recurring pain required him to stop. He attended a work conditioning and hardening program. During this period, the Workers' Compensation Board of Nova Scotia provided him with temporary disability benefits and rehabilitation [page506] services. When his temporary benefits were discontinued, M sought review of this decision, but his claim was denied by the Board. L was employed as a bus driver and injured her back and her right hand when she slipped and fell from the bumper of her bus. She received temporary disability benefits. Although L attempted to return to work on several occasions, she found that performing her duties aggravated her condition. She was denied a permanent partial disability award and vocational rehabilitation assistance. M and L appealed the Board's decisions to the Workers' Compensation Appeals Tribunal on the ground that the Functional Restoration (Multi-Faceted Pain Services) Program Regulations and portions of s. 10B of the Workers' Compensation Act infringed

s. 15(1) of the Canadian Charter of Rights and Freedoms. These provisions exclude chronic pain from the purview of the regular workers' compensation system and provide, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program beyond which no further benefits are available. The Board challenged the Appeals Tribunal's jurisdiction to hear the Charter argument.

The Appeals Tribunal affirmed its jurisdiction to apply the Charter and allowed M's appeal on the merits, holding that the Regulations and s. 10B(c) of the Act violated s. 15 of the Charter and that these violations were not justified under s. 1. M was awarded temporary benefits from August 6 to October 15, 1996. In L's appeal, the Appeals Tribunal concluded, based on the reasons given in M's appeal, that s. 10A and s. 10B(b) and (c) of the Act also violated s. 15(1) of the Charter and were not saved by s. 15(2) or s. 1; however, the Appeals Tribunal found that while L suffered from chronic pain attributable to her work injury, her permanent medical impairment rating under the applicable guidelines was 0 percent, thus barring her from obtaining permanent impairment or vocational rehabilitation. The Board appealed the Appeals Tribunal's Charter conclusions, M cross-appealed the cut-off of benefits as of October 15, 1996, and L cross-appealed the refusal to award benefits. The Court of Appeal allowed the Board's appeals and dismissed the cross-appeals. The court found that the Appeals Tribunal did not have jurisdiction to consider the constitutional validity of the Act and that, in any event, the chronic pain provisions did not demean the human dignity of [page507] the claimants and thus did not violate s. 15(1) of the Charter.

Held: The appeals should be allowed. Section 10B of the Act and the Regulations in their entirety infringe s. 15(1) of the Charter and the infringement is not justified under s. 1. The challenged provisions are of no force or effect by operation of s. 52(1) of the Constitution Act, 1982. The general declaration of invalidity is postponed for six months from the date of this judgment. In M's case, the decision rendered by the Appeals Tribunal is reinstated. L's case is returned to the Board.

The Constitution is the supreme law of Canada and, by virtue of s. 52(1) of the Constitution Act, 1982, the question of constitutional validity inheres in every legislative enactment. From this principle of constitutional supremacy flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. To allow an administrative tribunal to decide Charter issues does not undermine the role of the courts as final arbiters of constitutionality in Canada. Administrative tribunal decisions based on the Charter are subject to judicial review on a correctness standard. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the Charter is not binding on future decision-makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases.

The Court of Appeal erred in concluding that the Appeals Tribunal did not have jurisdiction to

consider the constitutionality of the challenged provisions of the Act and the Regulations. Administrative tribunals which have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. In applying this approach, there is no need to draw any distinction between "general" and "limited" questions of law. Explicit jurisdiction must be found in the terms of the statutory grant of authority. [page508] Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. The party alleging that the tribunal lacks jurisdiction to apply the Charter may rebut the presumption by pointing to an explicit withdrawal of authority to consider the Charter; or by convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the Charter (or a category of questions that would include the Charter, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations. To the extent that Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, is inconsistent with this approach, it should no longer be relied upon.

The Appeals Tribunal could properly consider and decide the Charter issue raised in this case. The legislature expressly conferred on the Appeals Tribunal the authority to decide questions of law by providing, in s. 252(1) of the Act, that it "may confirm, vary or reverse the decision of a hearing officer" exercising the authority conferred upon the Board by s. 185(1) of the Act to "determine all questions of fact and law arising pursuant to this Part". Other provisions of the Act also confirm the legislature's intention that the Appeals Tribunal decide questions of law, including s. 256(1), which provides for a further appeal to the Court of Appeal "on any question of law". This suggests that the Appeals Tribunal may deal initially with such questions. The Appeals Tribunal thus has explicit jurisdiction to decide questions of law arising under the challenged provisions, a jurisdiction which is presumed to include the authority to consider their constitutional validity. This presumption is not rebutted in this case, as there is no clear implication arising from the Act that the legislature intended to exclude the Charter from the scope of the Appeals Tribunal's authority. Even if there had been no express provision endowing the Appeals Tribunal with authority to consider and decide questions of law arising under the Act, an examination of [page509] the statutory scheme set out by the Act would lead to the conclusion that it has implied authority to do so.

The Court of Appeal also erred in concluding that the challenged provisions of the Act and the Regulations did not infringe s. 15(1) of the Charter. The appropriate comparator group for the s. 15(1) analysis in this case is the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their employment-related injuries. By entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the

applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the Act and the Regulations clearly impose differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the Charter. The view that since both the claimants and the comparator group suffer from physical disabilities, differential treatment of chronic pain within the workers' compensation scheme is not based on physical disability must be rejected. Differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated. Distinguishing injured workers with chronic pain from those without is still a disability-based distinction. Although, under the current guidelines, L would be found to have a 0 percent impairment rating and would thus be denied benefits anyway, deprivation of access to an institution available to others, even though the individual bringing the claim would not necessarily derive immediate benefits from such access, constitutes differential treatment. In the context of the Act, and given the nature of chronic pain, the differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession. A reasonable person in circumstances similar to those of L and M, fully apprised of all the relevant circumstances and taking into account the relevant contextual factors, would [page510] conclude that the challenged provisions have the effect of demeaning the dignity of chronic pain sufferers.

The infringement of L's and M's equality rights cannot be justified under s. 1 of the Charter. The first objective of maintaining the financial viability of the Accident Fund is not pressing and substantial. Budgetary considerations in and of themselves cannot justify violating a Charter right, although they may be relevant in determining the appropriate degree of deference to governmental choices based on a non-financial objective. Likewise, the second objective of developing a consistent legislative response to chronic pain claims cannot stand on its own. Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a Charter right. This objective only becomes meaningful when examined with the third objective of avoiding fraudulent claims based on chronic pain. Developing a consistent legislative response to the special issues raised by chronic pain claims -- such as determining whether the pain is actually caused by the work-related accident and assessing the relevant degree of impairment -- in order to avoid fraudulent claims is a pressing and substantial objective. The challenged provisions of the Act and the Regulations are rationally connected to this objective. It is obvious, however, that the blanket exclusion of chronic pain from the workers' compensation system does not minimally impair the rights of chronic pain sufferers. The challenged provisions make no attempt whatsoever to

determine who is genuinely suffering and needs compensation, and who may be abusing the system. They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program. The fourth objective is to implement early medical intervention and return to work as the optimal treatment for chronic pain. Assuming that this objective is pressing and substantial and that the challenged provisions are rationally connected to it, they do not minimally impair the rights of chronic pain sufferers. No evidence indicates that an automatic cut-off of benefits regardless of individual needs is necessary to achieve that goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights [page511] to re-employment and accommodation. Moreover, the legislation deprives workers whose chronic pain does not improve as a result of early medical intervention and who return to work from receiving any benefits beyond the four-week Functional Restoration Program. Others, like L, are not even admissible to this program because of the date of their injuries. The deleterious effects of the challenged provisions on these workers clearly outweigh their potential beneficial effects.

Cases Cited

Overruled: *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; discussed: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; referred to: *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392, rev'd [2001] 3 F.C. 481; *Canada (Minister of Citizenship and Immigration) v. Reynolds* (1997), 139 F.T.R. 315; *McLeod v. Egan*, [1975] 1 S.C.R. 517; *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; Reference re Workers' Compensation Act, 1983 (Nfld.), [1989] 1 S.C.R. 922; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; [page512] *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *R. v. Swain*, [1991] 1 S.C.R. 933; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; Reference re Remuneration of Judges of the

Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3; Schachter v. Canada, [1992] 2 S.C.R. 679; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; White v. Slawter (1996), 149 N.S.R. (2d) 321; Marinelli v. Keigan (1999), 173 N.S.R. (2d) 56.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 15, 24(1).

Constitution Act, 1982, s. 52(1).

Constitutional Questions Act, R.S.N.S. 1989, c. 89.

Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96, ss. 2(b), 3, 4, 5, 6, 7, 8.

Public Inquiries Act, R.S.N.S. 1989, c. 372.

Workers' Compensation Act, S.N.S. 1994-95, c. 10, ss. 10(1), 10A [ad. 1999, c. 1, s. 1], 10B [idem], 10E [idem], 28, 84, 90, 91, 113, 178(1), 180, 183 [am. idem, s. 19], 183(5A) [ad. idem], 185(1), 199(1), (2), 200(1), 202(a), 238(5), 240, 243 [rep. & sub. idem, s. 30], 245(1)(d), 246(1), (3) [ad. idem, s. 31], 248(1), (3), 252(1), 253(1), 256(1) [am. idem, s. 36].

Authors Cited

Canada. Association of Workers' Compensation Boards of Canada. Compensating for Chronic Pain -- 2000. Mississauga, Ont.: AWCBC, 2000.

McAllister, Debra M. "Administrative Tribunals and the Charter: A Tale of Form Conquering Substance", in L.S.U.C. Special Lectures 1992 -- Administrative Law: Principles, Practice and Pluralism. Scarborough, Ont. : Carswell, 1993, 131.

Murray, T. J. Chronic Pain. Report prepared for the Workers' Compensation Board of Nova Scotia. Halifax: Workers' Compensation Board of Nova Scotia, 1995.

Ontario. Workplace Safety and Insurance Board. Chronic Pain Initiative: Report of the Chair of the Chronic Pain Panels. Toronto: WSIB, 2000.

[page513]

Roman, Andrew J. "Case Comment: Cooper v. Canada (Human Rights Commission)" (1997), 43 Admin. L.R. (2d) 243.

History and Disposition:

APPEALS from judgments of the Nova Scotia Court of Appeal (2000), 192 D.L.R. (4th) 611, 188 N.S.R. (2d) 330, 587 A.P.R. 330, 26 Admin L.R. (3d) 90, 84 C.R.R. (2d) 246, [2000] N.S.J. No. 353 (QL), 2000 NSCA 126, allowing the appeals and dismissing the cross-appeals from the decisions of the Workers' Compensation Appeals Tribunal. Appeals allowed.

Counsel:

Kenneth H. LeBlanc, Anne S. Clark, Anne Derrick, Q.C., and Patricia J. Wilson, for the appellants.

Brian A. Crane, Q.C., David P. S. Farrar and Janet Curry, for the respondent the Workers' Compensation Board of Nova Scotia.

Catherine J. Lunn, for the respondent the Attorney General of Nova Scotia.

John P. Merrick, Q.C., and Louanne Labelle, for the intervener the Nova Scotia Workers' Compensation Appeals Tribunal.

Ena Chadha and William Holder, for the intervener the Ontario Network of Injured Workers Groups.

Steven Barrett and Ethan Poskanzer, for the intervener the Canadian Labour Congress.

Robert Earl Charney, for the intervener the Attorney General of Ontario.

Kathryn L. Kickbush, for the intervener the Attorney General of British Columbia.

Written submissions only by Curtis Craig, for the intervener the Workers' Compensation Board of Alberta.

The judgment of the Court was delivered by

GONTHIER J.:--

I. Introduction

1 Chronic pain syndrome and related medical conditions have emerged in recent years as one of the [page514] most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is

no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians. Ruth Laseur and Donald Martin are the appellants in this case. Both suffer from the disability of chronic pain.

2 Courts are not the appropriate forum for an evaluation of the available medical evidence concerning chronic pain for general scientific purposes. Nevertheless, because disability is an enumerated ground in s. 15(1) of the *Canadian Charter of Rights and Freedoms*, the question whether the way in which a government handles chronic pain in providing services amounts to discrimination is a proper subject of judicial review. More specifically, these appeals concern the constitutional validity of s. 10B of the *Nova Scotia Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended by S.N.S. 1999, [page515] c. 1 (the "Act"), and of the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96 (the "FRP Regulations"), adopted under that Act. These provisions exclude chronic pain from the purview of the regular workers' compensation system and provide, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration (Multi-Faceted Pain Services) Program (the "Functional Restoration Program") beyond which no further benefits are available. A preliminary issue is whether the Nova Scotia Workers' Compensation Appeals Tribunal (the "Appeals Tribunal"), an administrative tribunal set up to hear appeals from decisions of the Workers' Compensation Board of Nova Scotia (the "Board"), had jurisdiction to decline to apply the challenged provisions to the appellants on the ground that these provisions violate the *Charter*.

3 In my view, the Nova Scotia Court of Appeal erred in concluding that the Appeals Tribunal did not have jurisdiction to consider the constitutionality of the challenged provisions of the Act and the FRP Regulations. I am of the view that the rules concerning the jurisdiction of administrative tribunals to apply the *Charter* established by this Court in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, ought to be reappraised and restated as a clear set of guidelines. Administrative tribunals which have jurisdiction -- whether explicit or implied -- to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law. To the extent that the majority reasons in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, are [page516] inconsistent with this approach, I am of the view that they should no longer be relied upon.

4 Here, the Nova Scotia legislature expressly conferred on the Appeals Tribunal the authority to decide questions of law by providing, in s. 252(1) of the Act, that it "may confirm, vary or reverse the decision of a hearing officer" exercising the authority conferred upon the Board by s. 185(1) of the Act to "determine all questions of fact and law arising pursuant to this Part". Other provisions of the Act also confirm the legislature's intention that the Appeals Tribunal decide questions of law, for instance by allowing the Chair, under certain circumstances, to direct cases involving "important or novel questions or issues of general significance" or issues of "law and general policy" to the Appeals Tribunal for consideration (s. 199(1) and (2)), and by providing for a further appeal to the Nova Scotia Court of Appeal "on any question of law" (s. 256(1)). The Appeals Tribunal thus has explicit jurisdiction to decide questions of law arising under the challenged provisions, a jurisdiction which is presumed to include the authority to consider their constitutional validity. This presumption is not rebutted in this case, as there is no clear implication arising from the Act that the legislature intended to exclude the *Charter* from the scope of the Appeals Tribunal's authority.

5 In my view, the Nova Scotia Court of Appeal also erred in concluding that the challenged provisions of the Act and the FRP Regulations did not violate s. 15(1) of the *Charter*. By entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the Act and the FRP Regulations clearly impose differential treatment upon injured workers [page517] suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the *Charter*. In the context of the Act, and given the nature of chronic pain, this differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession, and demeans the essential human dignity of chronic pain sufferers. The challenged provisions clearly violate s. 15(1) of the *Charter*.

6 Finally, I am of the view that this violation cannot be justified under s. 1 of the *Charter*. On the one hand, budgetary considerations in and of themselves cannot justify violating a *Charter* right, although they may be relevant in determining the appropriate degree of deference to governmental choices based on a non-financial objective. On the other hand, developing a consistent legislative response to the special issues raised by chronic pain claims -- such as determining whether the pain is actually caused by the work-related accident and assessing the relevant degree of impairment -- in order to avoid fraudulent claims is a pressing and substantial objective. However, it is obvious that the blanket exclusion of chronic pain from the workers' compensation system does not minimally impair the rights of chronic pain sufferers. The challenged provisions make no attempt whatsoever

to determine who is genuinely suffering and needs [page518] compensation and who may be abusing the system. They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program. A last alleged objective of the legislation is to implement early medical intervention and return to work as the optimal treatment for chronic pain. Assuming that this objective is pressing and substantial and that the challenged provisions are rationally connected to it, however, they do not minimally impair the rights of chronic pain sufferers. No evidence indicates that an automatic cut-off of benefits regardless of individual needs is necessary to achieve that goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights to re-employment and accommodation.

7 I thus conclude that the challenged provisions violate the *Charter* and should be struck down.

II. Facts

A. *The Laseur Appeal*

8 The appellant Ruth A. Laseur was employed as a bus driver by the Metropolitan Authority (Metro Transit Division) in Halifax, Nova Scotia. On November 13, 1987, she injured her back and her right hand when she slipped and fell from the bumper of her bus while attempting to clean the windshield. The accident was reported to the Board and she continued to work until February 16, 1988, with occasional days off due to back pain. She received temporary disability benefits for various periods between February 16, 1988, and October 30, 1989, when the benefits were terminated. Although Ms. Laseur attempted to return to work on several occasions, she found that performing her duties aggravated her condition.

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9 Ms. Laseur continued to pursue her workers' compensation claim and returned to work part-time on February 23, 1990. A summary report by the Board on February 21, 1990, noted that she had "fallen into the usual chronic pain picture" and considered that there was "no objective evidence to justify a PMI (permanent medical impairment) examination". She worked part-time until April 10, 1990, when her employer required her to return to full-time hours. This aggravated her back pain. She stopped work on April 18, then shortly returned on a part-time basis until July 30. Later, after numerous treatments for her back pain remained ineffective, her family physician ordered her to stop working again.

10 Ms. Laseur appealed the Board's decision to terminate her temporary disability benefits to the Workers' Compensation Appeal Board (as it was then called). In October 1990, the Board awarded

her further temporary disability benefits until July 30, 1990, which were to be continued beyond that date until an assessment could be carried out for permanent partial disability benefits. On January 17, 1991, Ms. Laseur attended for an estimation of her permanent medical impairment. The medical services administrator noted that "[t]his is basically a chronic pain problem, perhaps even a chronic pain syndrome although she seems to be a very pleasant individual with not the usual features of this type of problem. However, there is no organic evidence to justify a PMI as far as I can tell based on the examination done today." A permanent partial disability award was denied.

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11 After being denied accommodation by her employer and permanent benefits by the Board, Ms. Laseur resigned from her position. She took courses in accounting and business computer programming, which she self-financed, notably by borrowing money from her mother-in-law. She did well and, upon graduating from her last course in 1994, found employment with a software firm in Edmonton. As she continued to suffer from chronic back pain, her work schedule was modified and she was allowed occasionally to work from home. She continued to pursue her claim in Nova Scotia for permanent partial disability benefits retroactive to January 1991. On August 12, 1994, after further medical reports, a case manager determined that Ms. Laseur was not entitled to such benefits or to vocational rehabilitation assistance. The case manager stated that "she probably has a full blown chronic pain syndrome, which is a non-compensable condition and is well known to be virtually totally related to psychosocial factors". This decision was affirmed by a review officer on March 21, 1996, and by a hearing officer on November 19, 1996.

12 Ms. Laseur appealed the Board's decision to the Appeals Tribunal on the ground that portions of s. 10B of the Act, which prevents chronic pain sufferers from obtaining workers' compensation benefits, infringed s. 15 of the *Charter*. The Appeals Tribunal allowed the appeal in part, but held that, even disregarding the effect of s. 10B of the Act, Ms. Laseur was not entitled to permanent impairment benefits or vocational rehabilitation assistance. The Board appealed the Appeals Tribunal's *Charter* conclusions, and Ms. Laseur cross-appealed the refusal to award benefits. The Nova Scotia Court of Appeal allowed the Board's appeal and dismissed Ms. Laseur's cross-appeal.

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B. *The Martin Appeal*

13 The appellant Donald Martin worked as a foreman at Suzuki Dartmouth. On February 6, 1996, he lifted a tow dolly and towed it backward about 15 feet. He experienced a sudden and severe pain in his lumbar spine and, although he remained at work that day, he later visited his family

physician, who on February 8 diagnosed a lumbar sprain. In the following months, Mr. Martin returned to work several times, but recurring pain required him to stop. He attended a work conditioning and hardening program. During this period, the Board provided him with temporary disability benefits and rehabilitation services. However, his temporary benefits were discontinued on August 6, 1996. Mr. Martin sought review of this decision, but his claim was denied. The review officer noted that there was no demonstrated pathology to support Mr. Martin's complaint of pain, that he was developing early signs of chronic pain and that under the FRP Regulations, chronic pain is generally excluded from the operation of the Act. A further appeal to a hearing officer was also denied.

14 Mr. Martin appealed the Board's decision to the Appeals Tribunal on the ground that the FRP Regulations and s. 10B(c) of the Act infringed s. 15 of the *Charter*. The Board challenged the Appeal Tribunal's jurisdiction to hear the *Charter* argument. The Appeals Tribunal affirmed its jurisdiction to apply the *Charter* and allowed the appeal on the merits, holding that the FRP Regulations and s. 10B(c) of the Act violated s. 15 of the *Charter* and that these violations are not justified under s. 1. Mr. Martin was awarded temporary benefits from August 6 to October 15, 1996. The Board appealed the Appeals Tribunal's *Charter* conclusions, and Mr. Martin cross-appealed the cut-off of benefits as of October 15, 1996. The Nova Scotia Court of Appeal allowed the Board's appeal and dismissed Mr. Martin's cross-appeal.

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III. Judgments Below

A. *Nova Scotia Workers' Compensation Appeals Tribunal*

15 In its preliminary decision on jurisdiction in the *Martin* appeal, rendered on August 27, 1999, the Appeals Tribunal held that it had jurisdiction to make determinations of all questions of law, including whether the Act or the FRP Regulations violated the *Charter*. It did so on the basis of s. 185(1) of the Act, which granted the Board "exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part", "[s]ubject to the rights of appeal provided in this Act" and of s. 243, which provided a right of appeal from the Board to the Appeals Tribunal. The Appeals Tribunal applied this decision in the *Laseur* appeal.

16 In the *Martin* appeal, decided on January 31, 2000, the Appeals Tribunal concluded that the FRP Regulations violated s. 15(1) of the *Charter*. It found that workers suffering from chronic pain were subjected to differential treatment, in that the benefits to which they were entitled were significantly restricted and their cases were not determined having regard to their individual circumstances. The Appeals Tribunal also found that such differential treatment was founded on

disability caused by chronic pain, and that that disability constitutes either a physical or a mental disability under s. 15(1). Finally, it held that the operation of the FRP Regulations was discriminatory in that it stereotyped workers with chronic pain and determined their cases without reference to their individual circumstances, thus impacting their dignity by implying that their claims were less valid than those of injured workers without chronic pain.

17 The Appeals Tribunal further found that this infringement was not justified under s. 15(2) or s. 1 of the *Charter*. In its view, the blanket exclusion of chronic pain from the operation of the Act illustrated that the objective of the FRP Regulations was not to ameliorate the condition of workers affected [page523] by chronic pain, but rather to provide them with very limited, structured benefits. Turning to s. 1, the Appeals Tribunal found that the objective of the FRP Regulations was pressing and substantial, as they attempted to provide a compensation scheme to individuals whose disability presented a challenge to the normal system. The Appeals Tribunal found, however, that the FRP Regulations did not pass the minimal impairment test, as they effectively precluded chronic pain sufferers from receiving any benefits whatsoever in relation to the frequent permanency of their condition. For the same reasons, the Appeals Tribunal also found that s. 10B(c) of the Act was unconstitutional and that Mr. Martin was entitled to temporary loss of earnings benefits and medical aid up to October 15, 1996.

18 In the *Laseur* appeal, also decided on January 31, 2000, the Appeals Tribunal concluded, based on the reasons given in the *Martin* appeal, that s. 10A and s. 10B(b) and (c) of the Act also violated s. 15(1) of the *Charter* and were not saved by s. 15(2) or s. 1. Even ignoring these provisions, however, the Appeals Tribunal found that while Ms. Laseur suffered from chronic pain attributable to her work injury, her permanent medical impairment rating under the applicable guidelines was 0 percent, thus barring her from obtaining permanent impairment or vocational rehabilitation benefits. While the Appeals Tribunal recognized that this conclusion was inconsistent with its findings on the *Charter* issue, it held that, since the constitutionality of the guidelines had not been raised or argued, it lacked jurisdiction to decide the issue.

- B. *Nova Scotia Court of Appeal* (2000), 192 D.L.R. (4th) 611, 2000 NSCA 126
- 1. Jurisdiction of the Appeals Tribunal to Apply the *Charter*

19 Cromwell J.A. found that the Appeals Tribunal did not have jurisdiction to consider the constitutional validity of the Act. He stated that the relevant inquiry was whether the legislature intended [page524] to confer on the tribunal the power to interpret and apply the *Charter*, an intention that should generally not be inferred from the tribunal's authority simply to interpret and apply its own enabling statute. What was needed, in his view, was a grant of authority to the tribunal to interpret or apply "any law necessary to [reaching] its findings", to address "general questions of law", or to "apply the law of the land to the disputes before them" (para. 93). In the absence of an express grant, one may be implied from the statutory scheme and the role of the tribunal. A key consideration is whether the tribunal performs an adjudicative function.

20 Turning to the applicable legislation, Cromwell J.A. stated, at para. 126, that "[t]he linchpin of the argument in favour of [the Appeals Tribunal]'s *Charter* jurisdiction is that it derives this authority by virtue of its appellate role in relation to the Board." Thus, it was necessary first to consider the authority of the Board to subject its enabling statute to *Charter* scrutiny. Cromwell J.A. held that, while s. 185 of the Act conferred on the Board jurisdiction to determine "all questions of fact and law arising pursuant to this Part", other factors indicated that the legislature did not intend it to decide fundamental constitutional issues. The Board was not an adjudicative body, hearing officers could not refuse to apply the Board's policies on grounds of inconsistency with the Act, and the Chair of the Board of Directors could postpone an appeal raising "an issue of law and general policy" for up to 12 months to allow the Board to exercise its policy-making power (s. 200(1)(a)). Thus, Cromwell J.A. concluded, the Board lacked the authority to refuse to apply a provision of the Act on *Charter* grounds.

21 Cromwell J.A. found that, since the Appeals Tribunal's jurisdiction was to "confirm, vary or reverse" the decision of the Board, the latter's lack [page525] of jurisdiction to apply the *Charter* destroyed the underpinning of the submission that the former was empowered to do so. In addition, even though the Appeals Tribunal, unlike the Board, was an adjudicative body, there were clear indications of its lack of jurisdiction to apply the *Charter*. It had no express grant of authority to decide general questions of law, but merely to interpret and apply the Act itself; it was not an expert tribunal, since it did not exercise policy-making functions; its members (apart from the Chief Appeal Commissioner) were not required to be members of the bar; and it was required to decide appeals within 60 days, in brief written reasons. Moreover, the Chair could refer "an issue of law and general policy" arising on an appeal to the Board of Directors. Finally, allowing the Appeals Tribunal to decide constitutional questions could increase its workload and cause delays which parties to other cases would have to bear. This would contradict the objective of eliminating the previous backlog of cases, the objective propelling the 1999 chronic pain amendments.

2. Section 15(1) of the *Charter*

22 Cromwell J.A. first noted that prior to the enactment of the challenged provisions, claims based on chronic pain were problematic under the Act. This had been due to the difficulties in establishing causality, the absence of ascertainable organic cause or objective findings and the lack of response to traditional treatment. To respond to these problems, the legislature enacted the challenged provisions, which "may be taken as a legislative judgment ... that for workers' compensation purposes, the loss of earnings or permanent impairment flowing from chronic pain are not reasonably attributed to the injury" (para. 181). Turning to the formal s. 15(1) analysis, Cromwell J.A. held that in each case, the appropriate comparison was between workers subject to the Act who have chronic pain and have suffered functional limitation, wage loss or permanent [page526] impairment and workers subject to the Act who do not have chronic pain and have suffered functional limitation, wage loss or permanent impairment.

23 Cromwell J.A. went on to find that there was clear differential treatment in Mr. Martin's case.

Since Ms. Laseur would not have been entitled to benefits under the guidelines even without the challenged provisions, Cromwell J.A. held that the differential treatment in her case consisted of denial of access to the general scheme of benefits under the Act: *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3. He further found that the differential treatment of the respondents was based on the enumerated ground of "physical or mental disability". Even though injured workers without chronic pain also suffered from disabilities, differential treatment could exist even where the appropriate comparator group consists of persons who are also described by the same enumerated ground: *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28.

24 Turning to the substantive discrimination analysis, Cromwell J.A. first held that nothing in the record indicated that chronic pain sufferers have been victims of historical disadvantage or stereotyping distinct from that experienced by other disabled workers seeking compensation. As to the relationship between the benefits, the claimants' circumstances and the ameliorative purpose of the impugned law, he found that in the context of a large-scale no-fault compensation scheme, it would be unrealistic to insist upon perfect correspondence. The scheme as a whole had an ameliorative purpose; the question was whether the limitations on recovery were premised on a misunderstanding of the claimants' actual needs, capacities and circumstances. [page527] He found that chronic pain was a complex of physical, psychological, emotional, social and cultural factors, and the chronic pain provisions in issue attempted to respond to this reality by providing short-term benefits in the form of participation in the Functional Restoration Program and encouraging early return to work by denying further benefits. Although the need to contain costs and to bring consistency to the large number of claims before the Board also motivated the enactment, this did not negate its ameliorative effects. Cromwell J.A. also found the interest affected by the denial of benefits to be merely economic in nature.

25 Based on these findings, he concluded that the chronic pain provisions did not demean the human dignity of the claimants and thus did not violate s. 15(1). Consequently, it was not necessary to address arguments relating to s. 15(2) or s. 1.

IV. Issues

26 Does the Nova Scotia Workers' Compensation Appeals Tribunal have the authority to refuse to apply, on *Charter* grounds, benefits provisions of its enabling statute?

In addition, the following constitutional questions have been stated by this Court:

1. Do s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, infringe the equality rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to question # 1 is yes, does such infringement constitute a

reasonable limit prescribed by law and demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

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V. Analysis

A. *Jurisdiction of the Appeals Tribunal to Apply the Charter*

1. The Policy Adopted by This Court in the Trilogy

27 This Court has examined the jurisdiction of administrative tribunals to consider the constitutional validity of a provision of their enabling statute in *Douglas College, supra*, *Cuddy Chicks, supra*, and *Tétreault-Gadoury, supra* (together, the "trilogy"). On each occasion, the Court emphasized the strong reasons, of principle as well as policy, for allowing administrative tribunals to make such determinations and to refuse to apply a challenged provision found to violate the Constitution.

28 First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act, 1982*, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state. Obviously, it cannot be the case that every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply. If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine [page529] whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.

29 From this principle of constitutional supremacy also flows, as a practical corollary, the idea

that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts: see *Douglas College, supra*, at pp. 603-4. In La Forest J.'s words, "there cannot be a Constitution for arbitrators and another for the courts" (*Douglas College, supra*, at p. 597). This accessibility concern is particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings. As McLachlin J. (as she then was) stated in her dissent in *Cooper, supra*, at para. 70:

The *Charter* is not some holy grail which only judicial initiatives of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.

Similar views had been expressed by the majority in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

30 Second, *Charter* disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies. This need is heightened when, as is often [page 530] the case, it becomes necessary to determine whether a *prima facie* violation of a *Charter* right is justified under s. 1. In this respect, the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court: see *Douglas College, supra*, at pp. 604-5. As La Forest J. correctly observed in *Cuddy Chicks, supra*, at pp. 16-17:

It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical... The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.

31 Third, administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks, supra*, at p. 17. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling

statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.

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32 In *Douglas College, supra*, La Forest J. expressly considered and rejected several general arguments made against recognizing that administrative tribunals that have jurisdiction to decide questions of law possess a concomitant jurisdiction to apply the *Charter*. He noted that some authors had pointed to practical concerns with respect to the desirability of such adjudication, such as the lack of legal expertise of some administrative tribunals, the differences between their rules of procedure and evidence and those followed by courts, and the need to maintain the accessibility and timeliness of their procedures. Nevertheless, La Forest J. concluded, at p. 603, that these considerations, "though not without weight, should [not] dissuade this Court from adopting what has now become the clearly dominant view in the courts of this country". Nor, in my view, should such practical considerations surreptitiously find their way back into the courts' analysis of a particular tribunal's jurisdiction despite a clear expression of legislative intent to endow it with authority to decide questions of law, including constitutional issues. I now turn to the rules governing this analysis.

2. The Applicable Law

33 In view of the policy considerations outlined above, this Court has adopted a general approach for the determination of whether a particular administrative tribunal or agency can decline to apply a provision of its enabling statute on the ground that the provision violates the *Charter*. This approach rests on the principle that, since administrative tribunals are creatures of Parliament and the legislatures, their jurisdiction must in every case "be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought": *Douglas College, supra*, at p. 595; see also *Cuddy Chicks, supra*, at pp. 14-15. When a case brought before an administrative tribunal involves a challenge to the constitutionality of a provision of its enabling statute, the tribunal is asked to interpret the relevant *Charter* right, apply it to the impugned [page532] provision, and if it finds a breach and concludes that the provision is not saved under s. 1, to disregard the provision on constitutional grounds and rule on the applicant's claim as if the impugned provision were not in force.

34 Since the subject matter and the remedy in such a case are premised on the application of the *Charter*, the question becomes whether the tribunal's mandate includes jurisdiction to rule on the constitutionality of the challenged provision: see *Douglas College, supra*, at p. 596; *Cuddy Chicks*,

supra, at p. 15. This question is answered by applying a presumption, based on the principle of constitutional supremacy outlined above, that all legal decisions will take into account the supreme law of the land. Thus, as a rule, "an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid": *Cuddy Chicks, supra*, at p. 13; or, as stated in *Cooper, supra*, at para. 46:

If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.

While the general principles outlined above have been consistently reaffirmed by this Court and remain sound, their application has been fraught with difficulties, as evidenced by the disagreements that arose in *Cooper, supra*. I am of the view that it is now time to reappraise the case law and to provide a single set of rules concerning the jurisdiction of administrative tribunals to consider *Charter* challenges to a legislative provision.

35 In each case, the first question to be addressed is whether the administrative tribunal at issue has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. While, as stated in the trilogy and *Cooper, supra*, this question is one of legislative intent, it is crucial that the relevant intent be clearly defined. [page533] The question is not whether Parliament or the legislature intended the tribunal to apply the *Charter*. As has often been pointed out, such an attribution of intent would be artificial, given that many of the relevant enabling provisions pre-date the *Charter*: see, e.g., A. J. Roman, "Case Comment: *Cooper v. Canada (Human Rights Commission)*" (1997), 43 Admin. L.R. (2d) 243, at p. 244; D. M. McAllister, "Administrative Tribunals and the *Charter*: A Tale of Form Conquering Substance", in *L.S.U.C. Special Lectures 1992 -- Administrative Law: Principles, Practice and Pluralism* (1993), 131, at p. 150. That attribution of intent would also be incompatible with the principle stated above that the question of constitutional validity inheres in every legislative enactment by virtue of s. 52(1) of the *Constitution Act, 1982*. Therefore, in my view, to the extent that passages in the trilogy and *Cooper, supra*, suggest that the relevant legislative intention to be sought is one that the tribunal apply the *Charter* itself, those passages should be disregarded.

36 Rather, one must ask whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, then the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of the *Charter*, unless the legislator has removed that power from the tribunal. Thus, an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision. In other words, the power to decide a question of law is the power to decide by applying only valid laws.

37 Often the statute will expressly confer on the tribunal jurisdiction to decide certain questions

of law. Thus, in *Cuddy Chicks, supra*, the Ontario *Labour Relations Act* granted the Labour Relations Board jurisdiction "to determine all questions of fact or law that arise in any matter before it". This [page534] provision was held to provide a clear jurisdictional basis for the Labour Relations Board to consider the constitutional validity of a provision of the *Labour Relations Act* excluding agricultural employees from its purview. Yet, while obviously adequate, such a broad grant of jurisdiction is not necessary to confer on an administrative tribunal the power to apply the *Charter*. It suffices that the legislator endow the tribunal with power to decide questions of law arising under the challenged provision, and that the constitutional question relate to that provision.

38 This nuance was sometimes overlooked in the trilogy. Thus, in *Douglas College, supra*, La Forest J. held that an arbitration board had jurisdiction to apply the *Charter* to a provision in the collective agreement that the board was empowered to interpret and apply. While that conclusion was certainly correct, courts should use some care in relying on the reasoning used to support it. The British Columbia *Labour Code* provided that the arbitration board had authority to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement". La Forest J. found that the *Charter* was intended to be included within the meaning of the term "Act" in that section. With respect, I believe the better view is that, since the board had undisputed jurisdiction to decide questions of law arising under the collective agreement, and the agreement constituted "law" within the meaning of s. 52(1) of the *Constitution Act, 1982*, the board could consider the constitutional validity of the agreement's provisions. This conclusion would have been true regardless of whether the *Charter* is truly an "Act intended to regulate the employment relationship of the persons bound by a collective agreement".

39 In other words, the relevant question in each case is not whether the terms of the express grant of jurisdiction are sufficiently broad to encompass the *Charter* itself, but rather whether the express grant [page535] of jurisdiction confers upon the tribunal the power to decide questions of law arising under the challenged provision, in which case the tribunal will be presumed to have jurisdiction to decide the constitutional validity of that provision. The *Charter* is not invoked as a separate subject matter; rather, it is a controlling norm in decisions over matters within the tribunal's jurisdiction.

40 In cases where the empowering legislation contains an express grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. An express grant of authority to consider or decide questions of law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision.

41 Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and

practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. As is the case for explicit jurisdiction, if the tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision.

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42 Once this presumption has been raised, either by an explicit or implicit grant of authority to decide questions of law, the second question that arises is whether it has been rebutted. The burden of establishing this lies on the party who alleges that the administrative body at issue lacks jurisdiction to apply the *Charter*. In general terms, the presumption may only be rebutted by an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself rather than from external considerations. The question to be asked is whether an examination of the statutory provisions clearly leads to the conclusion that the legislature intended to exclude the *Charter*, or more broadly, a category of questions of law encompassing the *Charter*, from the scope of the questions of law to be addressed by the tribunal. For instance, an express conferral of jurisdiction to another administrative body to consider *Charter* issues or certain complex questions of law deemed too difficult or time-consuming for the initial decision maker, along with a procedure allowing such issues to be efficiently redirected to such body, could give rise to a clear implication that the initial decision maker was not intended to decide constitutional questions.

43 As La Forest J. stated in *Tétreault-Gadoury*, *supra*, at p. 33, "the power to interpret law is not one which the legislature has conferred lightly upon administrative tribunals". When a legislature chooses to do so, whether explicitly or by implication, the courts must assume that the administrative body at issue was intended to be an appropriate forum for the resolution of complex legal issues, including the interpretation and application of the *Charter*. Thus, while, as noted above, considerations concerning an administrative body's practical capacity to address such issues may be relevant in determining the scope of a tribunal's implicit authority to decide questions of law, they generally will not suffice on their own to rebut the presumption that arises from such authority, whether explicit or implied, once that presumption has been found to [page537] apply. In my view, lower court cases which suggest otherwise, such as *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392 (T.D.), *rev'd on other grounds*, [2001] 3 F.C. 481 (C.A.), and *Canada (Minister of Citizenship and Immigration) v. Reynolds* (1997), 139 F.T.R. 315, as well as the Court of Appeal's decision in the present case, are erroneous in this respect.

44 I refrain, however, from expressing any opinion as to the constitutionality of a provision that would place procedural barriers in the way of claimants seeking to assert their rights in a timely and

effective manner, for instance by removing *Charter* jurisdiction from a tribunal without providing an effective alternative administrative route for *Charter* claims.

45 In applying the approach set out above, there is in my view no need to draw any distinction between "general" and "limited" questions of law, as was admittedly done in *Cooper, supra*. An administrative body will normally either have or not have the power to decide questions of law. As stated above, administrative bodies that do have that power may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard: see, e.g., *McLeod v. Egan*, [1975] 1 S.C.R. 517; *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.); *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157. Absent a clear expression or implication of contrary intent, such administrative bodies will also have jurisdiction to subject the statutory provisions over which they have jurisdiction to *Charter* scrutiny, while those tribunals without power to decide questions of law will not.

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46 In *Cooper, supra*, this Court considered the jurisdiction of the Canadian Human Rights Commission or a tribunal appointed by it to consider the validity of s. 15(c) of the *Canadian Human Rights Act* under s. 15(1) of the *Charter*. The challenged section provided that no discrimination occurred when persons were forced to retire at the normal age for employees working in similar positions in the same industry. La Forest J. first noted the absence of any explicit grant of jurisdiction to consider questions of law, which raised the need to determine whether such jurisdiction was implied. Turning to an examination of the statutory scheme under the *Canadian Human Rights Act*, he concluded that Parliament did not intend the Commission to decide questions of law arising under s. 15(c), but rather to serve as a screening mechanism for a tribunal endowed with broader jurisdiction to decide such questions as well as with greater capacity to do so. In those specific circumstances, he concluded that a series of well-circumscribed provisions allowing the Commission to consider other questions of law necessary to the exercise of its limited statutory functions as a screening body could not endow it with such power.

47 In my view, the result reached in *Cooper* could have been reached under the current restated rules, given La Forest J.'s finding that the Commission had no authority, either explicit or implicit, to decide questions of law arising under s. 15(c) of the *Canadian Human Rights Act*. It is thus unnecessary at this time to revisit the holding in that case. To the extent that it is incompatible with the present reasons, however, I am of the view that the *ratio* of the majority judgment in *Cooper* is no longer good law. This is particularly true insofar as it implies that the distinction between general and limited questions of law is generally relevant to the analysis of an administrative tribunal's jurisdiction to apply the *Charter*, or that the adjudicative nature of the administrative body is a

necessary (or even preponderant) factor in the search for implicit jurisdiction. Likewise, the views expressed by Lamer C.J. in his concurrence [page539] are at odds with the current approach and should not be relied on.

48 The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to *Charter* scrutiny can be summarized as follows: (1) The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision. (2)(a) Explicit jurisdiction must be found in the terms of the statutory grant of authority. (b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*. (4) The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the *Charter*; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.

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3. Application to the Facts

49 In the case at bar, the jurisdiction of the Board is primarily determined by s. 185(1) of the Act. That provision states that "[s]ubject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part." The right of appeal contemplated by this section is to the Appeals Tribunal, which under s. 243 and s. 252(1) "may confirm, vary or reverse the decision of a hearing officer". It follows, then, that s. 185(1) also confers upon the Appeals Tribunal jurisdiction to "determine all questions of fact and law arising pursuant to this Part". This provision is, of course, almost identical to the one considered by this Court in *Cuddy Chicks*. In addition, s. 256(1) allows for an appeal from the Appeals Tribunal to the Nova Scotia Court of Appeal "on any question of law", which suggests that the Appeals Tribunal may deal initially with such questions.

50 Section 10B is found in Part I of the Act, and the FRP Regulations were adopted under that Part. Thus, it is clear that the Act confers upon the Appeals Tribunal explicit jurisdiction to decide questions of law arising under the challenged provisions.

51 Given this conclusion, it is not strictly necessary to consider other aspects of the statutory scheme or the practical considerations raised by the respondents. Nevertheless, since much of the parties' submissions relate to considerations of this nature, and since I believe that an examination of the statutory scheme as a whole supports the conclusion that the legislature intended the Appeals Tribunal to decide questions of law, I will discuss this question briefly. I repeat, however, that the explicit jurisdiction to determine questions of law would alone have been determinative.

52 First, and most importantly, there can be no doubt that the power to decide questions of law arising [page541] under the Act is necessary in order for the Appeals Tribunal effectively to fulfill its mandate. Any conclusion to the contrary would contradict the legislature's clear intent to create a comprehensive scheme for resolving workers' compensation disputes, notably by barring access to the courts in cases covered by the Act: see *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at paras. 23-29. Moreover, the Appeals Tribunal's implied jurisdiction clearly extends even beyond the Act itself, to other questions of statutory interpretation or common law raised in the course of a dispute arising from the operation of the workers' compensation scheme. This conclusion is supported by the common law presumption, alluded to above, that administrative tribunals can interpret laws other than their enabling statute when necessary to resolve a case over which they otherwise have jurisdiction, subject to judicial review. It is also consistent with the practice of the Appeals Tribunal, which regularly decides questions of law involving the interpretation of common law principles and statutes other than the Act. These questions include the law of contracts, evidence, causation, employment, corporate relationships, conflicts of law, administration of foreign workers' compensation schemes, and motor vehicles, to name but a few. Denying the Appeals Tribunal the authority to decide such questions would seriously impede its work and threaten the access by injured workers to a forum capable of deciding all aspects of their case.

53 Second, the Appeals Tribunal is fully adjudicative in nature. It is independent of the Board and is placed under the supervision of the Minister of Justice, whereas the Board is supervised by the Minister of Labour. The Appeals Tribunal establishes its own rules of procedure (s. 240(1)), can consider all relevant evidence (s. 246(1)), and records any oral evidence for future reference [page542] (s. 253(1)). Its members have the powers, privileges and immunities of a commissioner appointed under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372 (s. 178(1)), including the power to summon witnesses, compel testimony, require production of documents, and punish persons guilty of contempt; they also have certain powers of entry (s. 180). Although the Appeals Tribunal is normally required to render its decision within 60 days of the hearing, or if there is no hearing, of the day on which all submissions have been received (s. 246(3)), it may "at any time, extend any time limit prescribed by this Part or the regulations where, in the opinion of the Appeals Tribunal, an injustice would otherwise result" (s. 240(2)). This extension power allows it to give proper

consideration to the more intricate issues raised by a *Charter* appeal, as was done in this case. While only the Chief Appeal Commissioner is required to be a practising lawyer (s. 238(5)), in reality all appeal commissioners have been admitted to the bar. Moreover, this Court has recognized that non-lawyers sitting on specialized tribunals can make important contributions to *Charter* adjudication: *Cuddy Chicks, supra*, at pp. 16-17. In my view, there is no reason to doubt that the Appeals Tribunal is an adjudicative body fully capable of deciding *Charter* issues, as demonstrated by its competent reasons on the s. 15(1) issue in the case at bar.

54 I hasten to add, however, that while the presence of an adjudicative process is an important factor in finding an implied power to decide questions of law, its absence would not by itself be determinative. An examination of the statutory scheme as a whole may lead to the conclusion that the legislature intended a non-adjudicative body to consider and decide questions of law.

55 Third, under the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, and under s. 245(1)(d) of the Act, the Attorney General may be provided with an opportunity to intervene in any proceedings involving a constitutional question, as was done in this [page543] case. Such interventions diminish the relative disadvantage of administrative tribunals as compared to courts by relieving private parties or administrative agencies from the burden of defending the validity of legislation: see *Cuddy Chicks, supra*, at pp. 17-18.

56 Finally, the Court of Appeal was wrong to take into consideration the backlog of cases that had accumulated at the Appeals Tribunal prior to the 1999 amendments. Practical considerations of this nature, while they may in certain circumstances be helpful to confirm the legislature's intent, are of little weight when faced with clear legislative intent, arising from the statutory scheme as a whole, to confer upon an administrative body the power to consider and decide questions of law. Such considerations "can never supplant the intention of the legislature" (*Cooper, supra*, at para. 47). Moreover, as the Appeals Tribunal itself argues in its submissions, the backlog has since been completely eliminated. Counsel for the Appeals Tribunal informed us at the hearing that *Charter* challenges were not the cause of the backlog and would not significantly increase its workload or cause undue delay. Since the Appeals Tribunal itself does not believe that deciding *Charter* cases would aggravate matters, and in the absence of other evidence, I fail to see on what basis the Court of Appeal could have reached such a conclusion. In contrast, allowing the Appeals Tribunal to apply the *Charter* clearly furthers the policy objectives outlined in the trilogy. It allows courts to benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim, and permits workers to have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act, rather than having to take separate proceedings in the courts in addition to their compensation claim before the administrative tribunal.

57 These aspects of the legislative scheme all militate in favour of allowing the Appeals Tribunal to [page544] apply the *Charter*, in conformity with the legislature's intent to create a comprehensive scheme for the treatment of workers' compensation claims and related disputes. Thus, even if there

had been no express provision endowing the Appeals Tribunal to consider and decide questions of law arising under the Act, I would have found that it had implied jurisdiction to do so. I have already noted that, in assessing implied jurisdiction, the adjudicative or non-adjudicative character of a tribunal is not dispositive. Given the rich variety of administrative schemes and enabling statutes, I would not wish to suggest either that the other factors present in this case are individually or collectively essential to finding implied jurisdiction to decide questions of law. The question is, in each case, to be decided by looking at the relevant statutory scheme as a whole.

58 The Appeals Tribunal's jurisdiction to decide questions of law arising under the challenged provisions is presumed to include the authority to consider their constitutional validity. Is this presumption rebutted by other provisions of the Act?

59 The respondents argue that the authority conferred upon the Chair of the Board to direct certain issues from the Appeals Tribunal to the Board of Directors is incompatible with the idea that the Appeals Tribunal was itself intended by the legislature to decide *Charter* questions. Surely, it is said, the legislature cannot have intended that *Charter* issues be postponed to a policy-making executive body with no special expertise or powers of ultimate disposition of the issue. I disagree with this description of the procedure allowed by the Act. Section 248(1) provides that the Chair may postpone or adjourn an appeal before the Appeals Tribunal when he or she is of the opinion that the appeal raises "an issue of law and general policy that should be reviewed by the Board of Directors pursuant to Section 183". It is s. 183 that grants the Board of Directors authority to adopt policies. Pursuant to s. 202(a), an adjournment to the Board of Directors lasts no longer than [page545] three months or, "where the Board determines that exceptional circumstances exist", twelve months. If the Board of Directors issues a policy with respect to the issue raised in the appeal or notifies the hearing officer that it will not issue a policy, the postponement also comes to an end. Section 248(3) provides that "where the Chair postpones or adjourns a hearing pursuant to subsection (1), the Chief Appeal Commissioner shall ensure that the final disposition of the appeal is left solely to the independent judgement of the Appeals Tribunal".

60 In my view, these provisions do no more than allow the Board of Directors to respond to the issues of law and general policy raised by an appeal by adopting a policy on the matter, enabling the Workers' Compensation Board to deal consistently with future similar cases on a principled basis. As s. 248(3) attests, this does not mean that the Board of Directors is entitled to take over an appeal raising a *Charter* issue and decide the issue itself. Rather, at most, the Board of Directors can suspend the appeal for up to twelve months in order to adopt a policy that properly responds to the general issues raised. For instance, the Board of Directors may recognize that one of its policies is inconsistent with the *Charter* or the Act and reformulate that policy, rather than litigating the *Charter* issue further. If the Board of Directors declines to do so, or if the policy as reformulated remains inconsistent with the *Charter* or the Act, the Appeals Tribunal will have the authority to refuse to apply that policy when the appeal is resumed. This is the effect of s. 183(5A), which provides that "a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with this Part or the regulations". In addition, as the Appeals Tribunal correctly

pointed out, even taking into consideration the additional delay that may be imposed by the Chair, the cost and length of an appeal before the [page546] Appeals Tribunal would still compare favourably to those of a *Charter* challenge before the courts.

61 Consequently, nothing in the Act produces the kind of clear implication capable of rebutting the presumption that the Appeals Tribunal may consider the constitutionality of the Act that it is called upon to interpret and apply. The Appeals Tribunal could properly consider and decide the *Charter* issue raised in this case because it could properly consider and decide questions of law.

4. The Relationship Between the *Charter* Jurisdictions of the Board and the Appeals Tribunal

62 The reasons outlined in the previous section establish that, even if s. 185(1) of the Act had not provided the Appeals Tribunal with explicit authority to decide questions of law, an examination of the statutory scheme set out by the Act would lead to the conclusion that it has implied authority to do so. The determinative explicit conferral of jurisdiction in this case raises one last question. Section 185(1) of the Act defines the jurisdiction of both the Board and the Appeals Tribunal. Therefore, our holding that this section confers explicit jurisdiction upon the Appeals Tribunal to decide questions of law, including *Charter* issues, appears to lead to the conclusion that such jurisdiction is also vested in the Board, despite the considerably different characteristics of its claims adjudication process. In particular, I note a distinction between the Appeals Tribunal and the Board. In its submissions, the Appeals Tribunal argued confidently for its ability to apply the *Charter*. In contrast, the Board itself argues that it does not possess the resources or expertise to deal with numerous *Charter* cases, and that doing so would compromise its efficiency and timeliness in handling vast numbers of compensation cases.

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63 Of course, as a matter of statutory interpretation, the Board's own view is not determinative of its jurisdiction. As La Forest J. noted in *Cuddy Chicks*, referring to the Ontario Labour Relations Board (at p. 18):

At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the *Labour Relations Act*. [Emphasis added.]

Likewise, in the present appeals, the Act clearly contemplates that the Board will decide questions of law. Practical considerations cannot override the clear expression of legislative intent in s. 185(1). The legislature also seems to have contemplated, however, that it may be preferable, as a

matter of administrative convenience, to refer *Charter* questions raised before the Board to the Appeals Tribunal or to the courts. Thus, s. 199(1)(b) provides that when a hearing officer "is of the opinion ... that an appeal raises important or novel questions or issues of general significance that should be decided by the Appeals Tribunal pursuant to Part II, ... the hearing officer shall postpone or adjourn the appeal and refer the appeal to the Chair". The Chair may then, under s. 199(2)(b) and (c), refer the appeal to the Appeals Tribunal or return it to the hearing officer. Likewise, under s. 200(1)(b), when an appeal before a hearing officer raises such questions, the Chair "may postpone or adjourn the appeal and direct that the appeal be ... heard and decided by the Appeals Tribunal".

64 Under these provisions, it seems to be entirely within the Board's discretion to refer complex *Charter* cases to the Appeals Tribunal, either on a case-by-case basis or as a matter of policy. As noted above, since an administrative process which avoids parallel proceedings in the courts is preserved, I believe that the Board would not infringe its duty to consider the constitutionality of the Act by referring such cases to the Appeals Tribunal: see generally [page 548] *Tétreault-Gadoury*, *supra*, at pp. 35-36. Therefore, I believe that the practical concerns raised by the respondents concerning the Board's capacity to handle complex *Charter* cases do not require a conclusion that either the Board or the Appeals Tribunal lacks jurisdiction to apply the *Charter*. On the contrary, they explain the choice made by the legislature in providing a procedural mechanism to allow such complex issues to be redirected from the Board to the Appeals Tribunal when the Chair of the Board of Directors deems it appropriate.

5. Conclusion

65 I conclude that the Appeals Tribunal has explicit jurisdiction to decide questions of law arising under the challenged provisions of the Act. It is thus presumed to have jurisdiction to consider the validity of these provisions under s. 15(1) of the *Charter*, and to disregard these provisions if it finds them to be unconstitutional. This presumption is not rebutted by the statute, either explicitly or by necessary implication. Since the remedy requested arises from s. 52(1) of the *Constitution Act, 1982*, it is not necessary to determine whether the Appeals Tribunal is a "court of competent jurisdiction" within the meaning of s. 24(1) of the *Charter*: see *Douglas College*, *supra*, at pp. 594-95 and 605. However, as the Appeals Tribunal's decision on the constitutionality of the challenged provisions is to be reviewed on a correctness standard, I now turn to the substantive *Charter* questions.

B. Section 15(1) of the *Charter*

1. The Chronic Pain Regime Under the Act

66 The FRP Regulations and s. 10A of the Act define "chronic pain" as "pain"

(a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or

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(b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

67 The challenged provisions then go on to create a separate regime to deal with injured workers suffering from chronic pain under the Act. The combined effect of these provisions is (i) to preclude workers injured before March 23, 1990, from receiving any benefits in connection with chronic pain; (ii) to entitle workers injured between March 23, 1990, and February 1, 1996, and who, on November 25, 1998, were in receipt of temporary benefits or had a claim under appeal, to receive uniform limited benefits for chronic pain as provided by s. 10E; and (iii) to preclude workers injured after February 1, 1996, from receiving any benefits for chronic pain except as provided by the FRP Regulations. The chronic pain provisions also maintain the bar against suing employers under s. 28 of the Act, so that no additional compensation may be obtained through tort actions in the courts.

68 Section 3(2) of the FRP Regulations deems chronic pain always to have been excluded from the operation of Part I of the Act, and provides that no compensation other than that provided by the FRP Regulations is payable for chronic pain with respect to injuries subsequent to February 1, 1996. The benefits available under the FRP Regulations are not determined with regard to the individual circumstances of each worker. Rather, the FRP Regulations establish a limited Functional Restoration Program. No worker may participate in the Functional Restoration Program if more than 12 months have elapsed since his or her date of injury, and participation in the Functional Restoration Program is limited to four weeks. No further benefits are available. Thus, injured workers suffering [page550] from chronic pain cannot receive earning replacement benefits (whether temporary or permanent), permanent impairment benefits, retirement annuities, vocational rehabilitation services or medical aid beyond the four-week Functional Restoration Program. They are also excluded from the duties to re-employ and to accommodate imposed upon employers by ss. 90 and 91 of the Act.

69 Section 10E of the Act is a transitional measure that provides limited permanent benefits to chronic pain sufferers who were receiving temporary benefits or had a claim under appeal on November 25, 1998. These benefits are based on a percentage of the permanent impairment benefits

that would be available if the worker were impaired by a condition other than chronic pain. Neither Mr. Martin nor Ms. Laseur is subject to the application of s. 10E and its constitutionality is not at issue in this case.

2. Application of Section 15(1) of the Charter

70 In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 39, Iacobucci J. summarized this Court's three-step approach to s. 15(1) of the *Charter* as follows:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1). [Emphasis in original.]

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Following this approach, I now turn to an analysis of the appellants' claims based on the three inquiries required by s. 15(1).

(a) *Differential Treatment*

71 I agree with the Court of Appeal that the appropriate comparator group for the s. 15(1) analysis in this case is the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their employment-related injuries. The appellants are unlike these workers. Mr. Martin was deprived of temporary earnings loss and medical treatment benefits to which he would be entitled were he suffering from a condition other than chronic pain. Ms. Laseur, for her part, was denied access to an evaluation of her permanent impairment rating. Although, under the current guidelines, Ms. Laseur would be found to have a 0 percent impairment rating and would thus be denied benefits anyway, this Court has previously held that deprivation of access to an institution available to others, even though the individual bringing the claim would not necessarily derive immediate benefits from such access, constitutes differential treatment: see *Egan, supra*; *Vriend, supra*; *M. v. H., supra*. More generally, while the Act prevents all injured workers

from obtaining compensation in court, the Act also disentitles injured workers disabled by chronic pain to compensation and other benefits beyond the four-week period, as well as to an individual assessment of their condition and needs. Indeed, the respondents concede that chronic pain sufferers are subject to differential treatment relative to other injured workers subject to the Act.

72 In addition, the appellants argue that another relevant comparator group is the group of persons suffering from chronic pain who are not subject to the Act and can obtain damages for their condition through the application of normal tort principles. [page552] I do not believe that this comparison is appropriate. What distinguishes this group from the appellants is not mental or physical disability -- both suffer from chronic pain. Rather, the only difference between them is that persons in the comparator group are not subject to the Act and thus have access to the tort system, while the appellants have to rely on the workers' compensation system. In my view, the Court of Appeal correctly held that a s. 15(1) analysis based on this distinction would amount to a challenge to the entire workers' compensation system, a challenge which this Court unanimously rejected in *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922. Moreover, such a comparison would also be inappropriate since compensation under the tort system normally requires the injured party to establish that his or her injury was caused by the negligence of another. Thus, even if the workers' compensation system did not exist, not all injured workers with chronic pain would have access to tort damages. Ms. Laseur and Mr. Martin, for instance, do not allege that anyone's negligence caused their injuries.

73 Finally, the appellants submit that workers suffering from chronic pain and eligible for s. 10E benefits constitute an appropriate comparator group. Assuming without deciding that such workers do constitute an appropriate comparator group, I do not think this approach advances the appellants' argument. As the Court of Appeal indicated, the distinction between this group and the appellants would be the date of their injury and the status of their case before the Board, rather than the nature of their disability. Thus, in any case, the second branch of the test would not be met.

74 Having found a distinction between the claimants and the comparator group, it is necessary next to examine the basis for that distinction.

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(b) *Enumerated or Analogous Ground*

75 The relevant potential ground of discrimination in this case is "physical disability", a ground expressly included in s. 15(1). The question here is whether the differential treatment of chronic pain sufferers is truly based on this enumerated ground. While the Attorney General of Nova Scotia concedes that it is, the Board argues that since both the claimants and the comparator group suffer from physical disabilities, differential treatment of chronic pain within the workers' compensation

scheme is not based on physical disability. Rather, argues the Board, the differential treatment must derive from some other basis.

76 In my view, this argument is without merit. This Court has long recognized that differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated. This issue first arose in the context of employment discrimination claims under provincial human rights statutes. In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, Dickson C.J. held that sexual harassment in the workplace constituted sex discrimination. He responded to the argument that, since harassers choose their targets on the basis of physical attractiveness, a personal characteristic, rather than gender, a group characteristic, sexual harassment did not amount to sex discrimination. He stated, at pp. 1288-89, that:

While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value... . To deny a finding of discrimination in the circumstances [page 554] of this appeal is to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive.

Likewise, in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the employer argued that the exclusion of pregnancy from a group health insurance policy did not amount to sex discrimination, because it did not affect all women but only those who were pregnant. Dickson C.J. rejected this argument too, holding that, since only women could become pregnant, distinctions based on pregnancy could be nothing other than distinctions based on or related to sex. Thus, he concluded, the exclusion of pregnancy from the list of compensable conditions constituted sex discrimination.

77 The potential discriminatory character of distinctions drawn between different disabilities was addressed in *Gibbs, supra*. In that case, an employee became disabled as a result of a mental disorder. The employer subscribed to an insurance policy which provided a replacement income to employees who became unable to work because of a disability. The policy provided, however, that in cases of mental illness, the income replacement benefit would terminate after two years unless the former employee remained in a mental institution. The employee challenged this provision under the *Saskatchewan Human Rights Code*. The employer argued that the insurance plan was not discriminatory, since the proper comparison was not between mentally disabled persons and physically disabled persons, but between disabled persons generally and able-bodied persons. Sopinka J. rejected this argument and held that a comparison could properly be drawn between two groups, each of whose members were affected by a disability. He stated, at paras. 27-28, that:

[page555]

In my view, the Court of Appeal was correct, in the circumstances of the present case, in finding discrimination on the basis of a comparison between the insurance benefits offered to those unable to work because of a physical disability and those unable to work because of a mental disability. In concluding that a "mental disability/physical disability" comparison is appropriate, I note first of all that in order to find discrimination on the basis of disability, it is not necessary that all disabled persons be mistreated equally. The case law has consistently held that it is not fatal to a finding of discrimination based on a prohibited ground that not all persons bearing the relevant characteristic have been discriminated against.

...

Thus, a finding of discrimination on the basis of disability, even though only a subset of disabled employees is mistreated, is permissible according to the case law. [Emphasis added.]

78 Sopinka J. went on to support the comparison between mental and physical disability by noting that s. 15(1) of the *Charter* expressly contains such a distinction, and that mentally disabled persons are subject to a particular historical disadvantage. Admittedly, the alleged discrimination in this appeal is between different physical disabilities, and therefore these additional justifications may not apply directly. Nevertheless, I believe that the Court of Appeal was correct in concluding that this Court's previous approach to discrimination on the basis of distinction within a protected group, as dealt with by this Court in *Janzen*, *Brooks* and *Gibbs*, while not determinative, indicates that the s. 15(1) claim under consideration should turn on the presence or absence of substantive discrimination rather than on the second branch of the *Law* test.

79 While the issue was not argued at length, Binnie J. in *Granovsky*, *supra*, at para. 53, held that a legislative distinction between temporary and permanent disability was based on the enumerated ground of "physical disability" in s. 15(1) of the *Charter*. Likewise, in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at para. [page556] 80, McLachlin J. held that the special treatment of the not criminally responsible was founded "on the presence of a particular type of mental disability at the time of commission of the criminal act" (emphasis added). In my view, such reasoning is consistent with the general principles underlying discrimination law and s. 15(1), which prohibits discrimination "based on" certain enumerated grounds, including "mental or physical disability".

80 For instance, there could be no doubt that a legislative distinction favouring persons of Asian

origin over those of African origin would be "based on" race, ethnic origin or colour, or that a law imposing a disadvantage on Buddhists relative to Muslims would draw a distinction "based on" religion. It would be no answer for the legislator to say there is no discrimination because both persons born in Asia and persons born in Africa have a non-Canadian national origin, or that Muslims, like Buddhists, belong to a minority religion in Canada. Likewise, in the present case, it is no answer to say that all workers subject to the scheme are disabled. The second step of the *Law* test does not ask whether the claimant and members of the comparator group possess a certain characteristic. Rather, the inquiry is whether the basis of the challenged differential treatment is an enumerated or analogous ground. The distinction between the claimants and the comparator group was made on the basis of the claimants' chronic pain disability, i.e., on the basis of disability. The fact that injured workers without chronic pain have their own disability too is irrelevant. Distinguishing injured workers with chronic pain from those without is still a disability-based distinction. Whether that distinction is in fact discriminatory remains in each case to be determined under the third branch of the *Law* test.

[page557]

81 This approach to the analysis of distinctions drawn between various disabilities allows the courts to take into account a fundamental and distinctive characteristic of disabilities when compared to other enumerated grounds of discrimination: their virtually infinite variety and the widely divergent needs, characteristics and circumstances of persons affected by them: see *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 69; *Granovsky, supra*, at para. 27. Due sensitivity to these differences is the key to achieving substantive equality for persons with disabilities. In many cases, drawing a single line between disabled persons and others is all but meaningless, as no single accommodation or adaptation can serve the needs of all. Rather, persons with disabilities encounter additional limits when confronted with systems and social situations which assume or require a different set of abilities than the ones they possess. The equal participation of persons with disabilities will require changing these situations in many different ways, depending on the abilities of the person. The question, in each case, will not be whether the state has excluded all disabled persons or failed to respond to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability. If a government building is not accessible to persons using wheelchairs, it will be no answer to a claim of discrimination to point out a TTY (teletypewriter) telephone for the hearing impaired has been installed in the lobby.

82 Of course, government benefits or services cannot be fully customized. As a practical matter, general solutions will often have to be adopted, solutions which inevitably may not respond perfectly to the needs of every individual. This is particularly true in the context of large-scale compensation systems, such as the workers' compensation scheme under consideration. Such systems often need to classify various injuries and illnesses based [page558] on available medical

evidence and use the resulting classifications to process the claims made by beneficiaries. This approach is necessary, both for reasons of administrative efficiency and to ensure fairness in processing large numbers of claims. In addition, the beneficiaries themselves benefit from the reduced transaction costs and speed achieved through such techniques, and without which large-scale compensation might well be impossible. The state should therefore benefit from a certain margin of appreciation in this exercise, but it cannot be exempted from the requirements of s. 15(1) of the *Charter*. The distinction made will not be allowed to stand when it, intentionally or not, violates the essential human dignity of the individuals affected and thus constitutes discrimination.

83 Thus, I now turn to the third branch of the *Law* test, which asks whether the differential treatment based on an enumerated or analogous ground is discriminatory in a substantive sense. The substantive discrimination test, however, is demanding, and the distinction drawn in this case, like many other disability-based distinctions, will stand to survive or fail the s. 15(1) analysis at this stage.

(c) *Substantive Discrimination*

84 A violation of s. 15(1) of the *Charter* will only be established when, beyond the existence of differential treatment based on an enumerated or analogous ground, the claimant proves that such differential treatment is truly discriminatory. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 174-75, McIntyre J. described discrimination as follows:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual [page559] solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

85 Iacobucci J., writing for a unanimous Court in *Law, supra*, stated at para. 51, that the substantive discrimination analysis must be informed by the purpose of s. 15(1), which is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration". Human dignity, in turn,

is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different

individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

(*Law*, at para. 53)

Iacobucci J. went on to identify four contextual factors which may be referred to in order to determine whether the challenged legislation demeans the essential human dignity of the affected person or group. These factors are: (1) the presence of pre-existing disadvantage, vulnerability, stereotyping or prejudice directed at this person or group; (2) the correspondence, or lack thereof, between the ground upon which the differential treatment is based and the actual needs, characteristics and circumstances [page 560] of the affected person or group; (3) the ameliorative purpose or effect of the legislation upon a more disadvantaged group; and (4) the nature of the interest affected by the legislation. This list, of course, is not exhaustive, the goal of the analysis in each case being to determine whether a reasonable and dispassionate person, fully apprised of all the circumstances and possessed of similar attributes to the claimant, would conclude that his or her essential dignity had been adversely affected by the law. For the same reason, not all factors will be relevant in each case. The enquiry always remains a contextual rather than a mechanical one: *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, at para. 46.

(i) Pre-existing Disadvantage

86 The appellants allege that chronic pain sufferers have been subjected to historical disadvantage as a result of stereotypes concerning the nature and causes of their disability. As they describe it, "[t]he stereotypical assumption is that chronic pain is caused by psychosocial factors, litigation or secondary gain as opposed to employment related trauma" (appellants' factum, at para. 108). In other words, in the appellants' submission, the particular characteristics of chronic pain syndrome and related medical conditions, such as their persistence beyond the normal healing time for the underlying injury and the apparent lack of physical manifestations supporting the sufferer's complaint of continuing pain, have led to a common misconception, rising to the level of an invidious social stereotype, that persons affected by chronic pain do not suffer from a legitimate medical condition but are malingering, frequently with a view to financial benefits, or that their pain stems from weakness of character rather than from the injury itself.

87 The respondents, on the contrary, argue that, although chronic pain is a legitimate medical

[page561] condition, no such widespread invidious stereotypes against chronic pain sufferers exist in society beyond the stereotypes associated with all injured workers, who are sometimes erroneously suspected of malingering. Thus, the respondents conclude, the appellants have failed to establish their case under this first contextual factor, as it requires them to establish not only that they are affected by the general pre-existing disadvantage or stereotypes applicable to all injured workers, but also that they have been subject to greater historical disadvantage or stereotypes.

88 In my view, this last part of the respondents' argument is without merit. They rely on *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, for the proposition that the appellants must demonstrate prejudice or stereotyping that is distinct from that experienced by the comparator group. In *Corbiere*, this Court considered a s. 15(1) challenge to a provision of the *Indian Act*, R.S.C. 1985, c. I-5, which provided that only band members ordinarily resident on the reserve were entitled to vote in band elections. While both McLachlin and Bastarache JJ., writing for the majority, and L'Heureux-Dubé J., writing for a minority of four, recognized that off-reserve Aboriginal band members had been subject to particular historical disadvantage compared to those living on-reserve, nowhere can the suggestion be found that such relative disadvantage is a necessary condition for the first contextual factor to point towards discrimination. This point was eloquently made by Iacobucci J. in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 69, where he stated that "this enquiry does not direct the appellants and respondents to a 'race to the bottom', i.e., the claimants are not required to establish that they are more disadvantaged than the comparator group". See also *Granovsky, supra*, at para. 67. Thus, while a finding of relative disadvantage may in certain cases be helpful to the claimant, the absence of relative disadvantage should in my view be seen as neutral when, as is the case here, the claimants belong to a larger group -- disabled persons -- who have [page562] experienced historical disadvantage or stereotypes.

89 But there is more. Sometimes, as in the case at bar, the lack of correspondence between the differential treatment to which the claimants are subject and their actual needs, capacities and circumstances is at the heart of the s. 15(1) claim to such an extent as to make a relative disadvantage analysis largely inappropriate. This is particularly true when distinctions are drawn between various types of mental or physical disabilities, because, as I noted above, the rationale underlying the prohibition of disability-based discrimination is the imperative to recognize the needs, capacities and circumstances of persons suffering from widely different disabilities in a vast range of social contexts. It can be no answer to a charge of discrimination on that basis to allege that the particular disability at issue is not subject to particular historical disadvantage or stereotypes beyond those visited upon other disabled persons. Indeed, the contrary position could potentially relieve the state from its obligation to accommodate or otherwise recognize many disabilities that, despite their severity, are not subject to widespread stereotypes or particular historical disadvantage. Such a result would run contrary to the very meaning of equality in that context and cannot be condoned.

90 For these reasons, I do not find it necessary to determine, based on the limited evidence before us, whether chronic pain sufferers have historically been subject to disadvantage or stereotypes

beyond those affecting other injured workers. It will be sufficient to note that many elements seem to point in that direction. Most importantly, the medical reports introduced as evidence often mention the inaccurate negative assumptions towards chronic pain sufferers [page563] widely held by employers, compensation officials and the medical profession itself. They identify the correction of negative assumptions and attitudes of this kind as a significant step in improving the treatment of chronic pain. The troubling comments made by some case workers in the Laseur file appear to betray such negative assumptions. Thus, statements that Ms. Laseur had "fallen into the usual chronic pain picture" and that "[t]his is basically a chronic pain problem, perhaps even a chronic pain syndrome although she seems to be a very pleasant individual with not the usual features of this type of problem" were clearly inappropriate and suggest that Ms. Laseur's claim may have been treated on the basis of presumed group characteristics rather than on its own merits. Finally, the medical experts recognize that chronic pain syndrome is partially psychological in nature, resulting as it does from many factors both physical and mental. This Court has consistently recognized that persons with mental disabilities have suffered considerable historical disadvantage and stereotypes: *Granovsky, supra*, at para. 68; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 994; *Winko, supra*, at paras. 35 *et seq.* Although the parties have argued the s. 15(1) case on the basis that chronic pain is a "physical disability", the widespread perception that it is primarily, or even entirely, psychosomatic may have played a significant role in reinforcing negative assumptions concerning this condition.

91 While all these indicia point to relative disadvantage, it is not necessary to decide whether the evidence before us is sufficient to establish that the negative assumptions associated with chronic pain are so harmful, widespread or socially embedded as to rise to the level of "historical disadvantage" or "invidious stereotype". This is because, in my view, the gravamen of the appellants' s. 15 claim is the lack of correspondence between the differential [page564] treatment imposed by the Act and the true needs and circumstances of chronic pain sufferers: see generally *Law, supra*, at paras. 64-65. I therefore turn to this question.

(ii) Correspondence with the Needs, Capacities and Circumstances of the Claimants

92 The second contextual factor to be considered is the relationship between the ground of distinction -- here the presence of disability caused by chronic pain -- and the actual needs, capacities and circumstances of the group to which the claimants belong. In other words, does the separate regime for chronic pain under the Act and the FRP Regulations take into account the actual needs, capacity or circumstances of workers suffering from chronic pain in a manner that respects their value as human beings and as members of Canadian society?

93 In answering this question, it is vital to keep in mind the rationale underlying the prohibition of discrimination based on disability. As I stated above, this rationale is to allow for the recognition of the special needs and actual capacities of persons affected by a broad variety of different disabilities in many different social contexts. In accordance with this rationale, s. 15(1) requires a considerable degree of reasonable accommodation and adaptation of state action to the

circumstances of particular individuals with disabilities. Of course, classification and standardization are in many cases necessary evils, but they should always be implemented in such a way as to preserve the essential human dignity of individuals.

94 Another vital consideration in a case such as this one is the overall purpose of the legislative scheme at issue: see *Gibbs, supra*, at para. 34; *Granovsky, supra*, at para. 62. A classification that results in depriving a class from access to certain benefits is much more likely to be discriminatory when it is [page565] not supported by the larger objectives pursued by the challenged legislation. In the case at bar, the objectives of the workers' compensation scheme are clear. As explained in *Pasiechnyk, supra*, the scheme embodies a historical trade-off between employers and workers. While the former are protected by s. 28 of the Act against the possibility of being sued in tort for work-related injuries, the latter are guaranteed a reasonable amount of compensation for such injuries without being subject to the costs, delays and uncertainties of an action before the courts. In order to obtain compensation, employees must establish that their personal injury was caused by an accident arising "out of and in the course of employment" (s. 10(1)).

95 The challenged provisions, however, while maintaining the bar to tort actions, exclude chronic pain from the purview of the general compensation scheme provided for by the Act. Thus, no earning replacement benefits, permanent impairment benefits, retirement annuities, vocational rehabilitation services or medical aid can be provided with respect to chronic pain. Employers are also exempt from the duties to re-employ them and accommodate their disability, which are normally imposed by the Act. Instead, workers injured on or after February 1, 1996, who suffer from chronic pain are entitled to a four-week Functional Restoration Program, after which no further benefits are available. In addition, if a chronic pain claim is not asserted within a year of the accident taking place, no benefit will be provided at all. Workers injured before March 23, 1990, are excluded from all benefits under the Act with respect to chronic pain. Finally, workers injured in the interim period are subject to transitional provisions whose constitutionality is not at issue before us.

96 The respondents allege that this blanket exclusion of chronic pain claims responds to the actual [page566] needs and circumstances of workers suffering from chronic pain. In their submission, the combination of early medical intervention through the Functional Restoration Program and an immediate cut-off of benefits is the optimal strategy to favour early return to work, which has been identified in medical studies as the most promising approach to the treatment of chronic pain.

97 I am unable to agree that the challenged provisions are sufficiently responsive to the needs and circumstances of chronic pain sufferers to satisfy the second contextual factor. Although the medical evidence before us does point to early intervention and return to work as the most promising treatment for chronic pain, it also recognizes that, in many cases, even this approach will fail. It is an unfortunate reality that, despite the best available treatment, chronic pain frequently evolves into a permanent and debilitating condition. Yet, under the Act and the FRP Regulations, injured workers who develop such permanent impairment as a result of chronic pain may be left

with nothing: no medical aid, no permanent impairment or income replacement benefits, and no capacity to earn a living on their own. This cannot be consistent with the purpose of the Act or with the essential human dignity of these workers.

98 Others, more fortunate, may only be partially incapacitated by chronic pain, and it is natural that they be encouraged to rejoin the workforce. Beyond simply cutting off all benefits, however, the Act does little to assist their return to work. Workers unable to return to their previous physically strenuous employment because of recurrent chronic pain are not eligible for vocational rehabilitation training under the Act. Ms. Laseur, for instance, had to finance her retraining out of her own savings and by borrowing from her family, resources many injured workers likely will not have. Others, who need some accommodation in the workplace in order to remain productive despite their chronic pain, cannot request [page567] such accommodation under the Act, unlike workers affected by virtually any other disability caused by a work-related accident. Their employer will even be exempt from the duty to re-employ them.

99 In my view, it simply cannot be said that the regime as it stands sufficiently corresponds to the needs and circumstances of injured workers suffering from chronic pain for the second contextual factor to point away from discrimination. The separate regime set up for chronic pain under the Act thus stands in sharp contrast to the one upheld by this Court in *Winko, supra*. In that appeal, this Court held that s. 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46, which provided that, following a verdict declaring an accused not criminally responsible on account of mental disorder, a court or Review Board could direct that the accused be discharged (with or without conditions) or detained in a hospital, did not infringe the s. 15(1) rights of mentally impaired criminal defendants. In that case, the key to the finding of non-discrimination was the combination of individualized assessment and adequate treatment provided by the *Criminal Code*. As McLachlin J. stated, at paras. 88-89:

The essence of stereotyping, as mentioned above, lies in making distinctions against an individual on the basis of personal characteristics attributed to that person not on the basis of his or her true situation, but on the basis of association with a group: *Andrews, supra*, at pp. 174-75; *Law, supra*, at para. 61. The question is whether Part XX.1 in effect operates against individual NCR accused in this way. In my view, it does not. At every stage, Part XX.1 treats the individual NCR accused on the basis of his or her actual situation, not on the basis of the group to which he or she is assigned. Before a person comes under Part XX.1, there must be an individual assessment by a trial judge based on evidence with full access to counsel and other constitutional safeguards. A person falls under Part XX.1 only if the judge is satisfied that he or she was [page568] unable to know the nature of the criminal act or that it was wrong. The assessment is based on the individual's situation. It does not admit of inferences based on group association. More importantly, the disposition of the NCR accused is similarly tailored to his or her individual situation and needs, and is

subject to the overriding rule that it must always be the least restrictive avenue appropriate in the circumstances. Finally, the provision for an annual review (at a minimum) of the individual's status ensures that his or her actual situation as it exists from time to time forms the basis of how he or she is to be treated.

This individualized process is the antithesis of the logic of the stereotype, the evil of which lies in prejudging the individual's actual situation and needs on the basis of the group to which he or she is assigned. [Emphasis added.]

See also: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

On the contrary, the treatment of injured workers suffering from chronic pain under the Act is not based on an evaluation of their individual situations, but rather on the indefensible assumption that their needs are identical. In effect, the Act stamps them all with the "chronic pain" label, deprives them of a personalized evaluation of their needs and circumstances, and restricts the benefits they can receive to a uniform and strictly limited program.

100 Finally, the chronic pain provisions of the Act also differ from the welfare scheme that was challenged in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84. The impugned regulations in that case required unemployed youth under 30 years of age to take part in educational or training programmes as a condition for receiving the same level of social assistance payment available to unemployed persons aged 30 or over. The majority held that the requirement that youth participate in programs intended to improve their employment prospects did not communicate stereotypes [page569] or demeaning messages about young people. The majority also held that Ms. Gosselin had not satisfied her burden of proof by establishing on a balance of probabilities that she or other class members were effectively prevented from participating in the programmes (see paras. 46-54). Since Ms. Gosselin and class members did not show that they were effectively excluded from the protection against extreme poverty afforded by the social security scheme and since the conditions for receiving the basic social assistance did not force young persons to do something that demeaned their dignity or human worth, the majority concluded that the welfare scheme was not discriminatory (see para. 52).

101 In contrast to the scheme upheld in *Gosselin, supra*, the chronic pain regime under the Act not only removes the appellants' ability to seek compensation in civil actions, but also excludes chronic pain sufferers from the protection available to other injured workers. It also ignores the real needs of workers who are permanently disabled by chronic pain by denying them any long-term benefits and by excluding them from the duty imposed upon employers to take back and accommodate injured workers. The Act thus sends a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society. In my view, the

second contextual factor clearly points towards discrimination.

(iii) Ameliorative Purpose

102 There can be no serious argument here that the differential treatment is aimed at improving the circumstances of some other, more disadvantaged group. While some individuals in the comparator group -- injured workers without chronic pain -- may be more severely disabled than the appellants, [page570] there is no evidence that the comparator group as a class is in a more disadvantaged position than the group of injured workers suffering from chronic pain. In addition, as discussed above, the challenged provisions are inconsistent with the ameliorative purpose of the Act, as they exclude injured workers suffering from chronic pain from the normal compensation system without regard for their actual needs and circumstances, and deprive them of an opportunity to establish the validity of their individual claim on a fair basis. While the legislature's concern to efficiently allocate resources within the workers' compensation system so as to give priority to the most severe cases is laudable, it cannot serve to shield an outright failure to recognize the actual needs of an entire category of injured workers from *Charter* scrutiny. As such, there is no ameliorative purpose upon which the respondents can rely.

(iv) Nature of the Interest Affected

103 The Court of Appeal accepted the respondents' argument that the disadvantage suffered by injured workers was solely economic in nature and that the deprivation of benefits was relatively minor. First, I believe it is important to clarify the status of economic interests in the substantive discrimination context. While a s. 15(1) claim relating to an economic interest should generally be accompanied by an explanation as to how the dignity of the person is engaged, claimants need not rebut a presumption that economic disadvantage is unrelated to human dignity. In many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely held negative attitudes towards the claimants and thus reinforce the assault on their dignity.

104 In my view, given the circumstances of injured workers, particularly those who may be permanently impaired by chronic pain and have no source of support other than the provincial compensation scheme, it cannot be said that the loss of financial benefits [page571] here is a trivial matter. More importantly, I cannot agree that the interest affected by the chronic pain provisions is purely, or even primarily, economic. Beyond the financial benefits at stake, injured workers suffering from chronic pain are also denied an opportunity to access the compensation scheme available to other injured workers in the province, on the basis of the nature of their disability. They are also deprived of ameliorative benefits, such as vocational rehabilitation services, medical aid and a right to accommodation, which would clearly assist them in preserving and improving their dignity by returning to work when possible. Our Court has consistently emphasized the crucial importance of work and employment as elements of essential human dignity under s. 15(1) of the *Charter*. Indeed, in the words of Bastarache J., "work is a fundamental aspect of a person's life" (

Lavoie, supra, at para. 45).

105 Thus, far from dispelling the negative assumptions about chronic pain sufferers, the scheme actually reinforces them by sending the message that this condition is not "real", in the sense that it does not warrant individual assessment or adequate compensation. Chronic pain sufferers are thus deprived of recognition of the reality of their pain and impairment, as well as of a chance to establish their eligibility for benefits on an equal footing with others. This message clearly indicates that, in the Nova Scotia legislature's eyes, chronic pain sufferers are not equally valued as members of Canadian society.

106 The contextual enquiry mandated by *Law* could hardly lead to a clearer conclusion. I am of the view that a reasonable person in circumstances similar to those of the appellants, fully apprised of all the relevant circumstances and taking into account the above contextual factors, would conclude that the challenged provisions have the effect of demeaning [page572] his or her dignity. Section 10B of the Act, as well as the FRP Regulations in their entirety, violate s. 15(1) of the *Charter*.

C. Section 1 of the Charter

107 The last question raised in these appeals is whether the challenged provisions, although they violate the appellants' right to equality under s. 15(1) of the *Charter*, can be saved as "reasonable limits prescribed by law" that are "demonstrably justified in a free and democratic society" under s. 1. This question requires applying the four-step test elaborated in *R. v. Oakes*, [1986] 1 S.C.R. 103, and summarized by Iacobucci J. in *Egan, supra*, at para. 182, as follows:

A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

(Cited with approval in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 84, and *Vriend, supra*, at para. 108.)

Under s. 1, the government must demonstrate that a limit imposed on a *Charter* right is justified in a free and democratic society. Therefore, the proper focus of enquiry under s. 1 is the limit itself. In

the case at bar, the Nova Scotia government has the burden of demonstrating that the exclusion of chronic pain from the purview of the Act and the substitution of very limited, structured benefits for those normally [page573] available under the workers' compensation system, is so justified.

108 The first difficulty to arise under s. 1 in this case is the ambiguity of the respondents' submissions with respect to the legislative objective pursued by the challenged provisions. Four principal concerns or objectives emerge from these submissions. The first concern is to maintain the viability of the Accident Fund set up by the Act to compensate injured workers, which has accumulated a considerable unfunded liability. Second is the need to develop a consistent legislative response to the administrative challenges raised by the processing of chronic pain claims. These challenges mostly arise from the difficulties in establishing a causal link between a workplace accident and the later development of chronic pain, as well as in assessing the degree of impairment resulting from chronic pain in particular claimants. The third concern, closely related to the first, is to avoid potential fraudulent claims based on chronic pain, which would be difficult to detect under the normal compensation system, given that no objective findings are available to support chronic pain claims. This objective is referred to in the submissions of the Attorney General of Nova Scotia, who rejects the choice made by other provinces to process chronic pain claims under the normal system on the ground that "these schemes are based on subjective findings and self-reporting which are unreliable and difficult to verify" (AGNS factum, at para. 159). The fourth and last objective is to implement early medical intervention and return to work as the optimal treatment for chronic pain according to current scientific knowledge, or, as the Attorney General of Nova Scotia puts it somewhat bluntly, "to eradicate the dependency on benefits to motivate return to the workforce" (AGNS factum, at para. 148).

[page574]

109 The first concern, maintaining the financial viability of the Accident Fund, may be dealt with swiftly. Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*P.E.I. Reference*"), at para. 281; see also *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709. It has been suggested, however, that in certain circumstances, controlling expenditures may constitute a pressing and substantial objective: see *Eldridge, supra*, at para. 84. I find it unnecessary to decide this point for the purposes of the case at bar. Nothing in the evidence establishes that the chronic pain claims in and of themselves placed sufficient strain upon the Accident Fund to threaten its viability, or that such claims significantly contributed to its present unfunded liability. Admittedly, when a court finds the challenged legislation to be supported by another, non-financial purpose, budgetary considerations may become relevant to the minimal impairment test: see *P.E.I. Reference*, at para. 283. But at the present stage of the analysis, such a non-financial purpose remains to be identified.

110 Likewise, the second objective, developing a consistent legislative response to chronic pain claims, could not stand on its own. Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a *Charter* right. In my view, this objective only becomes meaningful when examined with the third objective, i.e., avoiding fraudulent claims based on chronic pain. That objective is consistent with the general objective of the Act, as avoiding such claims ensures that the resources of the workers' compensation scheme are properly directed to workers who are genuinely unable to work by reason of a work-related accident. In my view, it is clearly pressing and substantial. As I believe this is the strongest s. 1 argument raised by the respondents, I will first apply the *Oakes* test to this objective. I will then briefly [page575] consider the fourth and last objective alleged by the respondents.

111 The challenged provisions of the Act and the FRP Regulations are rationally connected to this objective. There can be no doubt that, by excluding all claims connected to chronic pain from the purview of the Act and, in the case of workers injured after February 1, 1996, providing strictly limited benefits in the form of a four-week Functional Restoration Program, s. 10B of the Act and the FRP Regulations virtually eliminate the possibility of fraudulent claims based on chronic pain for all other types of benefits.

112 The same reasoning, however, makes it patently obvious that the challenged provisions do not minimally impair the equality rights of chronic pain sufferers. On the contrary, one is tempted to say that they solve the potential problem of fraudulent claims by preemptively deeming all chronic pain claims to be fraudulent. Despite the fact that chronic pain may become sufficiently severe to produce genuine and long-lasting incapacity to work, the provisions make no effort whatsoever to determine who is genuinely unable to work and who is abusing the system. As the respondents correctly point out, the government is entitled to a degree of deference in its weighing of conflicting claims, complex scientific evidence and budgetary constraints, especially given the large unfunded liability of the Accident Fund. In other words, it is not sufficient that a judge, freed from all such constraints, could imagine a less restrictive alternative. Rather, s. 1 requires that the legislation limit the relevant *Charter* right "as little as is reasonably possible" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772, *per* Dickson C.J.). However, even a brief examination of the possible alternatives, including the chronic pain regimes adopted in other provinces, clearly reveals that the wholesale exclusion of chronic pain cannot [page576] conceivably be considered a minimum impairment of the rights of injured workers suffering from this disability.

113 The general compensation scheme under the Act already provides that benefits may be limited, suspended or discontinued if the worker fails to mitigate losses, does not comply with medical advice, or fails to provide the Board with full and accurate information regarding his or her claim (ss. 84 and 113 of the Act). The adaptability of the system is illustrated by the approaches adopted by other provinces such as Alberta, British Columbia, Quebec and Ontario. These provinces all provide compensation for chronic pain within their respective workers' compensation regimes, in some cases by adapting the assessment method to the reality of chronic pain so as to evaluate accurately each claimant's level of impairment. This general approach is supported by

considerable scientific evidence commissioned by the relevant workers' compensation boards and introduced in evidence before this Court. See *Chronic Pain Initiative: Report of the Chair of the Chronic Pain Panels* (2000), which concludes that "[i]t would be difficult to support, on the basis of the existing scientific evidence, any limitation of benefits for chronic pain disability" (p. 5).

Difficulties in establishing a causal link between a work-related injury and later development of chronic pain are also adequately handled within the scope of the general compensation system in these provinces: see *Report of the Chair of the Chronic Pain Panels, supra*; Dr. T. J. Murray, *Chronic Pain* (1995), prepared for the Workers' Compensation Board of Nova Scotia, App. B; Association of Workers' Compensation Boards of Canada, *Compensating for Chronic Pain -- 2000* (2000). In addition, courts faced with tort claims for chronic pain have also developed approaches that do not rely on blanket exclusion: see, e.g., *White v. Slawter* (1996), 149 N.S.R. (2d) 321 (C.A.); *Marinelli v. Keigan* (1999), 173 N.S.R. (2d) 56 (C.A.). Even recognizing the Nova Scotia [page577] legislature's constitutional entitlement to select from a range of acceptable policy options, it is impossible to conclude that the blanket exclusion it enacted was necessary to achieve a principled response to chronic pain and avoid fraudulent claims.

114 Since I conclude that the challenged provisions cannot survive the third stage of the *Oakes* test on the basis of this objective, it is unnecessary to consider the general proportionality stage.

115 What of the last objective, which is to implement early medical intervention and return to work as the optimal treatment for chronic pain? First, a cautionary note. In my view, when a legislative provision that draws a distinction based on disability is found not to correspond to the needs and circumstances of the claimants to such a degree that it demeans their essential human dignity, the government will face a steep evidentiary burden if it chooses to allege that the provision is rationally connected to the objective of providing the best available treatment to such claimants.

116 This being said, assuming, without deciding the point, that the objective of early return to work is pressing and substantial and that the challenged provisions are rationally connected to it, I am of the view that they fail the minimum impairment and general proportionality tests. While the report commissioned from Dr. T. J. Murray by the Board concludes that early intervention and return to work together constitute the best available treatment for work-related chronic pain, nowhere does that report recommend an automatic cut-off of benefits such as the one adopted by the Nova Scotia legislature. No other evidence indicates that an automatic cut-off of [page578] benefits regardless of individual needs and circumstances is necessary to achieve the stated goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights to re-employment and accommodation. It cannot be seriously countenanced that the challenged measures are minimally impairing of the s. 15(1) right. Moreover, as discussed above, the legislation deprives workers whose chronic pain does not improve as a result of early medical intervention and return to work from receiving any benefits beyond the four-week Functional Restoration Program. Others, like Ms. Laseur, are not even admissible to this program because of the date of their injuries. The deleterious effects of the challenged provisions on these workers clearly outweigh their potential beneficial

effects.

117 I conclude that the challenged provisions are not reasonably justified under s. 1 of the *Charter*.

VI. Conclusion

118 I would allow the appeals. Section 10B of the Act and the FRP Regulations in their entirety infringe s. 15(1) of the *Charter*, and the infringement is not justified under s. 1. It follows that the challenged provisions are inconsistent with the Constitution and are of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*. Since these appeals have been funded by the Workers Advisers Program established under Part III of the *Workers' Compensation Act*, no order for costs has been requested by the appellants.

119 As the appellants point out, the policies that used to provide for individualized assessment of impairment in chronic pain cases have been repealed following the enactment of the challenged provisions of the Act and the FRP Regulations. Therefore, giving immediate effect to the declaration [page579] of invalidity of these provisions could result in prejudice to injured workers affected by chronic pain, as the Board would then have no specific policies or provisions to rely on in such cases. While some default or residuary provisions of the Act and of the FRP Regulations as well as policies of the Board might apply, the results would likely be inconsistent, given the considerable discretion which would be left to the Board in chronic pain cases. The default rules might even prevent certain chronic pain sufferers from receiving any benefits, as was the case for Ms. Laseur. Allowing the challenged provisions to remain in force for a limited period of time would preserve the limited benefits of the current program until an appropriate legislative response to chronic pain can be implemented. Therefore, as the appellants requested, it is reasonable to postpone the general declaration of invalidity for six months from the date of this judgment: see *Schachter, supra*.

120 This postponement, of course, does not affect the appellants' cases. Mr. Martin is clearly entitled to the benefits he has been claiming, as the challenged provisions stood as the only obstacle to his claims. I would thus reinstate the judgment rendered by the Appeals Tribunal in the Martin case on January 31, 2000.

121 The Appeals Tribunal, however, refused to grant permanent impairment benefits to Ms. Laseur because she did not challenge the constitutionality of the applicable guidelines, which attributed a permanent impairment rating of 0 percent to her injuries. In my view, it is appropriate to return Ms. Laseur's case to the Board for reconsideration on the basis of the subsisting provisions of the Act and the applicable regulations and policies. I note that, if Ms. Laseur elects to raise the constitutionality of the permanent impairment guidelines, the Board will be obliged to consider [page580] and decide the issue in accordance with the present reasons.

122 I would answer the constitutional questions as follows:

1. Do s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, infringe the equality rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

2. If the answer to question # 1 is yes, does such infringement constitute a reasonable limit prescribed by law and demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

* * * * *

APPENDIX

Workers' Compensation Act, S.N.S. 1994-95, c. 10

10A In this Act, "chronic pain" means pain

(a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain;
or

(b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

10B Notwithstanding this Act, Chapter 508 of the Revised Statutes, 1989, or any of its predecessors, the *Interpretation Act* or any other enactment,

(a) except for the purpose of Section 28, a personal injury by accident that occurred on or after [page581] March 23, 1990, and before February 1, 1996, is deemed never to have included chronic pain;

(b) a personal injury by accident that occurred before February 1, 1996, is deemed never to have created a vested right to receive compensation for chronic pain;

(c) no compensation is payable to a worker in connection with chronic pain, except as provided in this Section or in Section 10E or 10G or, in the case of a worker injured on or after February 1, 1996, as provided in the Functional Restoration (Multi-Faceted Pain Services) Program Regulations contained in Order in Council 96-207 made on March 26, 1996, as amended from time to time and, for greater certainty, those regulations are deemed to have been validly made pursuant to this Act and to have been in full force and effect on and after February 1, 1996.

10E Where a worker

(a) was injured on or after March 23, 1990, and before February 1, 1996;

(b) has chronic pain that commenced following the injury referred to in clause (a); and

(c) as of November 25, 1998, was in receipt of temporary earnings-replacement benefits; or

(d) as of November 25, 1998, had a claim under appeal

- (i) for reconsideration,
- (ii) to a hearing officer,
- (iii) to the Appeals Tribunal, or
- (iv) to the Nova Scotia Court of Appeal,

or whose appeal period with respect to an appeal referred to in subclauses (i) to (iv) had not expired,

the Board shall pay to the worker a permanent-impairment benefit based on a permanent medical impairment award of twenty-five per cent multiplied by fifty per cent, and an extended earnings replacement benefit, if payable pursuant to Sections 37 to 49, multiplied by fifty per cent and any appeal referred to in clause (d) is null and void regardless of the issue or issues on appeal.

185 (1) Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the Board on the question is final and [page582] conclusive and is not subject to appeal, review or challenge in any court.

252 (1) The Appeals Tribunal may confirm, vary or reverse the decision of a hearing officer.

Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96

2 In these regulations,

...

(b) "chronic pain" means pain

- (i) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered, or otherwise predated the pain, or
- (ii) disproportionate to the type of personal injury that precipitated, triggered, or otherwise predated the pain;

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed;

...

- 3 (1) Chronic pain is included in the operation of Part I of the Act, subject to the terms and conditions set out in these regulations.
- (2) For greater certainty, except as provided in these regulations, chronic pain is and is deemed always to have been excluded from the operation of Part I of the Act, and no compensation is payable in connection with chronic pain except in accordance with these regulations.
- 4 There is hereby established a program of the Board known as the Functional Restoration (Multi-Faceted Pain Services) Program.
- 5 A worker may be designated by the Board as a participant in the Functional Restoration (Multi-Faceted Pain Services) Program if
- (a) the worker is suffering from chronic pain; and
- [page583]
- (b) the worker has, at the time of designation, a loss of earnings subsequent to a compensable injury and identifies pain and pain-related symptoms as the reason for the loss of earnings.
- 6 No worker may be designated as a participant in the Functional Restoration (Multi-Faceted Pain Services) Program if more than twelve months have elapsed since the worker's date of injury.
- 7 (1) Participation in the Functional Restoration (Multi-Faceted Pain Services) Program is limited to four weeks.
- (2) During a worker's participation in the Functional Restoration (Multi-Faceted Pain Services) Program, the worker is eligible to re-

ceive a benefit equal to the amount of temporary earnings-replacement benefits the worker would have received if the worker were eligible for temporary earnings-replacement benefits.

- 8 (1) These regulations apply to all decisions, orders or rulings made pursuant to the Act on or after February 1, 1996.
- (2) For greater certainty, these regulations apply to any decision, order or ruling made on or after February 1, 1996, concerning eligibility for compensation or the calculation or re-calculation of an amount of compensation.
- (3) Despite subsections (1) and (2), where a decision, order or ruling was made by the Board or the Appeal Board before February 1, 1996, finding that a worker has a permanent impairment in connection with chronic pain but not fixing the worker's permanent-impairment rating, a rating shall be awarded pursuant to Section 34 and compensation may be paid accordingly pursuant to Sections 226, 227 or 228 of the Act, as the case may be.
- (4) Despite subsections (1) and (2), where a decision, order or ruling was made by the Board or the Appeal Board before February 1, 1996, fixing a worker's permanent-impairment rating, the rating is deemed to be the rating to which the worker is entitled and compensation shall be paid accordingly pursuant to Sections 226, 227 or 228 of the Act, as the case may be.

Solicitors:

Solicitors for the appellants: Workers' Advisers Program, Halifax.

[page584]

Solicitors for the respondent the Workers' Compensation Board of Nova Scotia: Stewart McKelvey Stirling Scales, Halifax.

Solicitor for the respondent the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitors for the intervener the Nova Scotia Workers' Compensation Appeals Tribunal: Merrick Holm, Halifax.

Solicitor for the intervener the Ontario Network of Injured Workers Groups: Advocacy Resource Centre for the Handicapped, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Workers' Compensation Board of Alberta: Workers' Compensation Board of Alberta, Edmonton.

cp/e/qw/qllls

TAB 10

Indexed as:

Nova Scotia (Board of Censors) v. McNeil

**The Nova Scotia Board of Censors (Also known as the Amusements
Regulation Board of Nova Scotia) and
The Attorney General in and for the Province of Nova Scotia,
Appellants; and
Gerard McNeil, Respondent.**

[1976] 2 S.C.R. 265

Supreme Court of Canada

1975: April 29, 30 / 1975: May 20.

**Present: Laskin C.J. and Martland, Judson, Ritchie, Spence,
Pigeon, Dickson, Beetz and de Grandpré JJ.**

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Actions -- Status -- Standing of taxpayer -- Challenge of provincial legislation -- Theatres and Amusements Act, R.S.N.S. 1967, c. 304.

The respondent, a resident and taxpayer in the Province of Nova Scotia, had become concerned about the wide powers of the Nova Scotia Board of Censors. He had enquired about a particular film and when the Board made public its decision to prohibit exhibition of that film without giving reasons the respondent invoked the statutory provision for appeal to the Lieutenant Governor in Council as provided by s. 3(4) of the Theatres and Amusements Act, R.S.N.S. 1967, c. 304, but was not recognized as having any right to appeal. He then sought through the Attorney-General of Nova Scotia to have the constitutionality of the Provincial Act tested before the Appeal Division. After some correspondence with counsel for the Attorney-General respondent brought his application for a declaration that certain sections of the Theatres and Amusements Act and certain regulations thereunder were ultra vires. The question of the respondent's locus standi, to impeach the constitutional validity of the statute, was raised as a preliminary objection. This objection was rejected by the Nova Scotia Courts and an appeal was brought to this Court.

Held: The appeal should be dismissed.

The respondent had taken all the steps that he could reasonably be required to take in order to make the question of his standing ripe for consideration. A serious and substantial constitutional issue had been raised by the respondent's declaratory proceeding. While film exchanges, theatre owners, cinematograph operators and apprentices are directly affected by the impugned legislation and would be entitled to take proceedings with respect to it, the members of the public arguably also had a direct interest. It arose from the power given to the Board to determine what members of the public may view in theatres or other places of public entertainment. In view of the fact that there was no other way in practical terms to subject the challenged Act to judicial review the Court was justified in the circumstances in exercising its discretion to grant standing to the respondent.

Cases Cited

Smith v. A.-G. Ont., [1924] S.C.R. 331; Thorson v. A.-G. Can. et al. (No. 2), [1975] 1 S.C.R. 138 referred to.

APPEAL from a judgment of the Supreme Court of Nova Scotia, Appeal Division [(1974), 9 N.S.R. (2d) 483.], affirming the judgment of Hart J. [(1974), 9 N.S.R. (2d) 506.] on preliminary objections on an application for a declaration that the Theatres and Amusements Act, R.S.N.S. 1967, c. 304, and some of the Regulations thereunder, were ultra vires the provincial legislature. Appeal dismissed.

Bruce J. Preeper, and William M. Wilson, for the appellants.

Robert Murrant, and Dereck M. Jones, for the respondent.

M. Manning, for the intervenant, Attorney-General of Ontario.

W. Henkel, Q.C., for the intervenant, Attorney-General of Alberta.

K. Lysyk, Q.C., for the intervenant, Attorney-General of Saskatchewan.

T.B. Smith, Q.C., for the intervenant, Attorney-General of Canada.

S. Borins, and G.D. Watson, for the intervenant, Canadian Civil Liberties Association.

Solicitor for the appellants: Bruce J. Preeper, Halifax. Solicitor for the respondent: Robert Murrant, Dartmouth.

The judgment of the Court was delivered by

LASKIN C.J.:-- This appeal from the unanimous judgment of the Appeal Division of the Supreme Court of Nova Scotia, affirming the judgment of Hart J., was brought here by leave of the

Appeal Division, purporting to act under s. 38 of the Supreme Court Act, R.S.C. 1970, c. 2-19. On the opening of the appeal, this Court raised, *ex proprio motu*, the question whether, in view of s. 44 of the Supreme Court Act, it was open to the Appeal Division to grant leave if, as appeared to be the case, a discretionary order was involved. Upon an application thereupon made by the appellant for the leave of this Court, pursuant to s. 41 of the Act, as amended by 1974-75 (Can.), c. 18, s. 5, leave was given with costs to the respondent in any event.

The litigation out of which this appeal arose originated in an application by the respondent, then a resident and taxpayer in the Province of Nova Scotia, for a declaration that the Theatres and Amusements Act, R.S.N.S. 1967, c. 304 and some of the regulations thereunder were *ultra vires* the provincial Legislature. The merits were not reached because of certain preliminary objections which were raised for prior determination. Of these the most important one, and the only one meriting consideration by this Court, was the question of the respondent's *locus standi*, his standing or status to impeach the constitutional validity of the provincial statute.

In granting leave, this Court indicated that where, as here, there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing. I note that in *Smith v. Attorney General of Ontario* [[1924] S.C.R. 331.], Duff J. thought that the issue of standing was an arguable one and since the merits had been canvassed "we are loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure, and accordingly we think it right to say that in our opinion the appellant's action also fails in substance" (at p. 338).

Although the merits have not been canvassed in this case, it has not been disputed by any of the counsel who supported the position of the appellant, being appellant's counsel and counsel for the Attorney General of Ontario, of Alberta and of Saskatchewan, that a serious, a substantial constitutional issue, had been raised by the respondent's declaratory proceeding. The question of standing here begins with this feature of the proceeding, just as it did in *Thorson v. Attorney General of Canada* [[1975] 1 S.C.R. 138.].

It is part of the record before this Court that the respondent, then editor of a weekly newspaper published in the City of Dartmouth in Nova Scotia, had become concerned about the wide powers exercisable by the Nova Scotia Board of Censors, whose name was changed by 1972 (N.S.), c. 54 to the Amusements Regulation Board of Nova Scotia. In particular he made inquiries whether the film "Last Tango in Paris" would be permitted by the Board to be shown in Nova Scotia. Early in 1974, the Board made public its decision to prohibit the exhibition of the film, no reasons being given. The respondent invoked the statutory provision for appeal to the Lieutenant-Governor in Council, as provided by s. 3(4) of the Theatres and Amusements Act, but was not recognized as having any right to appeal. He also requested the Attorney General to refer the constitutionality of the provincial Act to the Appeal Division, but was unable to elicit any

affirmative or negative response to his request. Indeed, in correspondence with the respondent's counsel, counsel for the Attorney General took the position that the Act was *intra vires* and there appeared to be no right in the respondent to attack its validity. Thereafter, the respondent brought his application for a declaration.

In my opinion, the respondent took all the steps that he could reasonably be required to take in order to make the question of his standing ripe for consideration. It was suggested, albeit faintly, that he ought to have also sought the intervention of the Attorney General of Canada by way of having him direct a reference to this Court. This is not a suggestion which can stand in the way of a determination of the issue which is before this Court.

The submissions on the issue of standing made by counsel for the parties and for the intervenors, who included the Attorney General of Canada and the Canadian Civil Liberties Association (both supporting the respondent) as well as the provincial Attorneys General previously referred to, were very largely concerned with the scope of the Thorson decision and, on the part of the appellant and its supporting intervenors, with an emphasis on the distinction, allegedly the basis of the Thorson case, between a so-called regulatory statute and a declaratory one. The distinction, broadly taken, was sufficient to enable this Court to explain why in the Thorson case it was a proper exercise of discretion to accord standing to the appellant as a mere taxpayer seeking to challenge the validity of a federal statute. It was not a distinction that could be controlling, especially in the light of the reserve of discretion in the Court, and more especially because the word or the term "regulatory" is not a term of art, not one susceptible of an invariable meaning which would in all cases serve to distinguish those in which standing to a taxpayer or citizen would be granted and those in which it would not.

I think it important to distinguish what I would term the administrative law features of so-called regulatory legislation and the constitutionality of such legislation. Its pith and substance, in the latter aspect, may very well disclose a purpose which would be served by its administrative features but would not be limited by them. Thus, the fact that certain persons or classes of persons, or certain activities in which persons engage may be subjected to compulsory regulation on pain of a penalty or other sanction does not always mean that the pith and substance of the legislation is to be determined only in that context, so as to make those regulated the only persons with a real stake in the validity of the legislation.

The Theatres and Amusements Act, whose constitutional validity is challenged by the respondent, is a good illustration of this point. The Act provides for the appointment of a Board empowered by s. 3(2)(a)(b) to permit or prohibit the use or exhibition in Nova Scotia or in any part or parts thereof for public entertainment of any film or any performance (defined to include, *inter alia*, theatrical, musical or moving picture performance for public entertainment) in any theatre. Provision is made for the promulgation of licensing regulations in respect of theatres and film exchanges and in respect of theatre performances as well as in respect of cinematograph operators and apprentices. Regulations are envisaged in respect of the exhibition, sale, lease and exchange of

films. No film exchange may sell, lease, rent, exchange or exhibit any film without first obtaining a licence from the Board. Moreover, the Board may require any film exchange to submit statements showing the names or other description of films proposed to be distributed. It is given unfettered discretion to suspend or revoke any licence. The statutory provisions are reinforced by regulations, especially in respect of licence requirements, and they make clear the complete power of the Board over the showing of films, even to the point of being empowered to confiscate films exhibited without a previous certificate. The statute prescribes a monetary penalty for breach of the Act or regulations, but, of course, the real sanction lies in the effective control of the Board over the exhibition of films and over theatres in the province.

There is no doubt that film exchanges, theatre owners and cinematograph operators and apprentices are directly regulated by the Act and regulations. This matter was examined by Hart J. who agreed that the film exchanges and theatre owners would be entitled to take proceedings in respect of the legislation that so directly affects them but he was also of opinion that (in his words) "the film exchanges and the theatre owners would not have an interest similar to that of the members of the public and there could be a large number of persons with a valid desire to challenge the prohibitory aspects of the legislation who have no vehicle through which to effect their purpose unless granted standing before the Court."

In the Appeal Division, Macdonald J.A. speaking for the Court aptly stated that "the factual situation has some relevancy to the determination of this question [of standing]". I would add to his extensive reference to the facts which led to the challenge to the legislation the situation which the statute itself appears to present, namely, one where joined to a regulatory scheme applicable to a manageable group of entrepreneurs in the theatre and film distribution businesses there is as well, and as a central piece, an apparently unlimited power in the Board to determine what members of the public may view in theatres or other places of public entertainment.

Since the issue of validity does not fall for determination here and, indeed, has not even been argued in relation to the question of standing, I would not, in this case, go beyond the tentative conclusion that there is an arguable case under the terms of the challenged legislation that members of the Nova Scotia public are directly affected in what they may view in a Nova Scotia theatre, albeit there is a more direct effect on the business enterprises which are regulated by the legislation. The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the members of the public in one of its central aspects.

In my view, this is enough, in the light of the fact that there appears to be no other way, practically speaking, to subject the challenged Act to judicial review, to support the claim of the respondent to have the discretion of the Court exercised in his favour to give him standing. I would dismiss the appeal with costs against the appellant. There will be no costs to or against any of the intervenors.

Appeal dismissed with costs.

TAB 11

Re
Ontario Energy Board and Consumers' Gas Co. et al.

59 O.R. (2d) 766

[1987] O.J. No. 281

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

**CALLAGHAN A.C.J.H.C., STEELE
AND J. HOLLAND JJ.**

18TH MARCH 1987.

Constitutional law -- Distribution of legislative authority -- Local works -- Natural gas bypass facilities located in Ontario and owned and operated by large Ontario consumers -- Bypass facilities connected to interprovincial pipeline -- Bypass facilities local work within provincial jurisdiction -- Provincial energy board having exclusive jurisdiction over approval and regulation of bypass facilities -- Ontario Energy Board Act, R.S.O. 1980, c. 332 -- Constitution Act, 1867, s. 92(10).

Pursuant to s. 31 of the Ontario Energy Board Act, R.S.O. 1980, c. 332, the Ontario Energy Board stated a case for the opinion of the Divisional Court as to whether the board was correct in determining that it had exclusive jurisdiction over the approval and regulation of natural gas bypass facilities within the Province of Ontario. While the natural gas is produced in Alberta and transported by a national carrier the bypass pipeline, although connected to the interprovincial pipeline, would be located entirely within Ontario, and would be owned and operated by the bypassers, large Ontario consumers of natural gas. The national carriers would continue to operate in their usual manner without regard to the existence of the bypassers.

Held, the board has exclusive jurisdiction over the approval and regulation of the bypass facilities. Section 92(10) of the Constitution Act, 1867, gives authority over local works and undertakings to the provinces, subject to certain exceptions. The typical proposed bypass facility located entirely within Ontario remains a local work subject to provincial authority under s. 92(10) because: (1) It is owned, controlled and maintained by a separate entity from the interprovincial work; (2) it is

operated separately from the interprovincial work; (3) it has no direct effect on the operating ability of the interprovincial work; (4) its purpose is entirely to serve an Ontario user, and (5) it is not vital, essential or integral to the interprovincial work.

Capital Cities Communication et al. v. Canadian Radio-Television Com'n et al. (1977), 81 D.L.R. (3d) 609, 36 C.P.R. (2d) 1, [1978] 2 S.C.R. 141, 18 N.R. 181; Re Public Service Board et al., Dionne et al. and A.-G. Can. et al. (1977), 83 D.L.R. (3d) 178, 38 C.P.R. (2d) 1 sub nom. Regie des services publics et al. v. Dionne et al., 18 N.R. 271, distd

Other cases referred to

C.P.R. v. A.-G. B.C. et al., [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 sub nom. Reference re Application of Hours of Work Act (B.C.), etc., 64 C.R.T.C. 266; Re Ontario Energy Board and The Queen in right of Ontario et al. (1986), 57 O.R. (2d) 281, 32 D.L.R. (4th) 706; Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al. (1983), 147 D.L.R. (3d) 1, [1983] 1 S.C.R. 733, 48 N.R. 161; Northern Telecom Canada Ltd. v. Communications Workers of Canada et al. (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107; North Fraser Harbour Com'rs et al. v. B.C. Electric Ry. Co. & C.P.R., [1932] 2 D.L.R. 728, [1932] S.C.R. 161 sub nom. British Columbia Electric R. Co. Ltd. et al. v. Canadian National R. Co. et al., 39 C.R.C. 215; City of Montreal v. Montreal Street R. Co. (1912), 1 D.L.R. 681, [1912] A.C. 333, 13 C.R.C. 541, 10 E.L.R. 281; Canadian National R. Co. v. Nor-Min Supplies Ltd. et al. (1976), 66 D.L.R. (3d) 366, [1977] 1 S.C.R. 322, 7 N.R. 603; Re Cannet Freight Cartage (1975), 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, 11 N.R. 606; Di Iorio and Fontaine v. Warden of Common Jail of Montreal and Brunet et al. (1976), 73 D.L.R. (3d) 491, 33 C.C.C. (2d) 289, [1978] 1 S.C.R. 152, 35 C.R.N.S. 57

Statutes referred to

Constitution Act, 1867, ss. 91(29), 92(10)

Municipal Franchises Act, R.S.O. 1980, c. 309, ss. 8, 9

National Energy Board Act, R.S.C. 1970, c. N-6, s. 2, definition "pipeline" (rep. & sub. 1980-81-82, c. 116, s. 1)

Ontario Energy Board Act, R.S.O. 1980, c. 332, ss. 19, 31, 46

CASE STATED for the opinion of the Divisional Court by the Ontario Energy Board pursuant to s. 31 of the Ontario Energy Board Act.

S.T. Goudge, Q.C., and P. Lukasiewicz, for applicant.

J.A. Campion, for applicant.

P.Y. Atkinson and P.W. Hogg, for respondent, Consumers' Gas Company.

J.M. Roland, Q.C., and D.S. Morritt, for respondent, ICG Utilities (Ontario) Ltd.

B.W. Cameron, for respondent, Alberta Petroleum Marketing Commission.

B.H. Kellock, Q.C., for respondent, Union Gas Limited.

E.C. Goldberg, for Attorney-General of Ontario.

H. Soudek, for National Energy Board, amicus curiae.

The judgment of the court was delivered orally by

STEELE J.:- The federal government changed its policy relating to the sale of natural gas in Canada. As a result, consumers in Ontario may purchase gas directly from Alberta producers. While the gas must still be transported by a national carrier, such as TransCanada Pipelines Ltd. (TCPL), it no longer need be purchased from a local distributing company (LDC), such as Consumers' Gas Company. This permits a large Ontario consumer to compare the cost of gas that it might purchase from the local distributing company with the cost if it purchased it in Alberta, and had an LDC pipe the gas to it, and with the cost, if it purchased it in Alberta and built its own facilities or made other arrangements to transport it from the national carrier (TCPL) to its usage point. The Ontario Energy Board (OEB) is responsible for the regulation of the following aspects of natural gas in Ontario:

1. To approve natural gas franchises to serve geographical areas under s. 9 of the Municipal Franchises Act, R.S.O. 1980, c. 309.
2. To grant leave to construct natural gas transmission lines under s. 46 of the Ontario Energy Board Act, R.S.O. 1980, c. 332.
3. To grant certificates of public convenience and necessity approving the supply of natural gas for the construction of works to supply natural gas in a franchise area under s. 8 of the Municipal Franchises Act.
4. To approve or fix rates for the sale of natural gas by transmission, distribution and storage companies and for the transmission, distribution and storage of gas under s. 19 of the Ontario Energy Board Act.

As a result of the above change in federal policy and upon the request of the Minister of Energy, the OEB undertook a study of the effect of consumers purchasing directly from Alberta suppliers upon the rate structures allowed to the LDCs. In the course of this study it became apparent that if a consumer constructed its own pipeline from the TCPL line directly to its usage point, it would bypass the LDC and have an effect upon the rates. The OEB found it a necessary preliminary concern to determine whether it could regulate these bypass lines in order that it could determine their effect upon the rate structures to be set for the LDCs. After due notice and a public inquiry into this phase of the rate hearings, the OEB concluded that it had such jurisdiction. The OEB was aware of an application by Cyanamid Canada Pipeline Incorporated ("CCPI") to the National Energy Board ("NEB") for the construction of a bypass line, and it gained assistance from it in understanding the characteristics of what it considered to be a typical bypass.

In order to confirm its opinion, the OEB, under the provisions of s. 31 of the Ontario Energy Board Act, stated a case for the opinion of this court. This case was stated prior to any decision having been made by the NEB upon the CCPI application. However, the OEB heard evidence relating to the nature of that application before it stated the case. It did not make any determination of the merits of the CCPI application because such was not before it. It did conclude, however, that the CCPI was obviously typical of one type of bypass that could be constructed. The stated case is as follows:

1. By Notice of Public Hearings dated July 24, 1986, the Ontario Energy Board (the "Board") on its own motion, pursuant to subsection 13(5) and section 19 of the Ontario Energy Board Act (the "Act"), called hearings to inquire into, hear and determine certain matters relating to contract carriage arrangements on the three major gas distribution systems in Ontario. The hearings commenced on Monday, September 22, 1986, (the "Main Hearing"). The changes that have occurred and the new issues that have arisen since the Interim Decision dated April 4, 1986 made in the above-captioned matter as well as the design and feasibility of permanent contract carriage arrangements in Ontario are the subject of the Main Hearing.
2. The Board decided that common elements of contract carriage and direct purchase arrangements should be dealt with first and a decision rendered before specific rates and tolls were considered. The bypass issue was differentiated from the other generic issues because of its potential impact on the economy of Ontario and its jurisdictional concerns. The bypass issue was heard first and because of its significance, separate Reasons for Decision have been issued (Appendix "A").
3. In the course of the hearing, and in the Board's Reasons for Decision, certain constitutional issues arose for determination:

A. Does the Legislative Assembly for the Province of Ontario have the right under the Constitution Act, 1867, to pass laws with respect to the approval and regulation of the construction and operation of bypass facilities situated in the Province of Ontario?

B. Is the right to pass laws concerning the approval and regulation of bypass facilities in the Province of Ontario within the exclusive legislative competence of the Legislative Assembly of the Province of Ontario?

C. If the answer to B is no, does the Federal Parliament have the paramount right to pass laws concerning the approval and regulation of bypass within the Province of Ontario?

4. Section 31 of the Act provides:

"31. (1) The Board may at the request of the Lieutenant Governor in Council or of its own motion or upon the application of any party to proceedings before the Board and upon such security given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the Board, is a question of law.

"(2) The Divisional Court shall hear and determine the stated case and remit it to the Board with the opinion of the court thereon."

5. Accordingly, the Board requests the opinion of the Divisional Court on the following question:

"In light of the constitutional issues referred to above, and based on the description of bypass facilities adopted by the Ontario Energy Board in its Reasons for Decision, is the Ontario Energy Board correct in determining that it has exclusive jurisdiction over the approval and regulation of bypass facilities within the Province of Ontario?"

DATED at Toronto this 23rd day of December, 1986.

R.W. Macaulay, Q.C.
Chairman & Presiding Member

It is clear from the OEB reasons that it found as facts that the key points relating to a typical bypass were as follows -- physically speaking, the following three items:

1. That the bypass pipeline was located entirely within Ontario.
2. That it was owned and operated solely by the bypasser.
3. Mechanical factors such as valves, metres and a small stub line would have to take place at the connection with the TCPL facilities.

With respect to operational aspects, it found:

1. That the bypass was for the transportation of gas from the TCPL line to the end user.
2. That the bypasser nominated the gas that was to be supplied to the end user, much the same as the existing direct purchase customers do from the LDCs.
3. That the bypasser will have physical control of gas into and through the line and that TCPL is precluded from interfering except by complete shut-off in case of emergency.
4. The bypasser will use the pressure of the TCPL line or its own compression to move the gas.
5. TCPL would continue to operate in the same manner regardless of the bypasser's existence.

The Ontario Energy Board at para. 8.12 of its reasons found as follows:

8.12 In the case of bypass, the bypass pipeline will be entirely owned, controlled and maintained by the corporation seeking approval for bypass construction (the bypass corporation). The bypass pipeline will be within the exclusive control of the bypass corporation, and will be operated using only the property, equipment and employees of the bypass corporation, and not those of any interprovincial undertaking.

In addition, the Ontario Energy Board at para. 8.19 of its reasons states:

8.19 The relationship between the bypass corporation and TCPL, insofar as the operation of a proposed bypass pipeline is concerned, will be governed by the terms of

contracts negotiated at arm's length.

In our opinion, the Ontario Energy Board was acting within its jurisdiction to state the question as presented to this court.

I deal first with the issue of s. 92(10)(a) of the Constitution Act, 1867. Section 91(29) of the Constitution Act, 1867, confers upon Parliament those classes of subjects which are expressly excepted from the provincial enumeration in s. 92. Section 92(10)(a) of that Act reads as follows:

92(10) Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

Section 92(10)(a) has been confined to transportation or communication activities. Such activities, which are interprovincial, are within federal jurisdiction. Those which are intraprovincial are within provincial jurisdiction: see Hogg, *Constitution of Canada*, 2nd ed. (1985), p. 484, and *C.P.R. v. A.-G. B.C. et al.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 sub nom. *Reference re Application of Hours of Work Act (B.C.)*, etc.

For the purposes of s. 92(10)(a) there is a distinction between works and undertakings. The former is a physical thing, the latter is an arrangement under which the physical things are used. Clearly, the bypass in question is a work. It is very similar to the storage facility considered in *Re Ontario Energy Board and The Queen in right of Ontario et al.* (1986), 57 O.R. (2d) 281, 32 D.L.R. (4th) 706.

Because in s. 92(10)(a) federal competence is the exception to the rule of provincial competence, the onus is on those who would demonstrate federal jurisdiction over bypass facilities. Failing this, exclusive provincial competence must prevail: see *Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al.* (1983), 147 D.L.R. (3d) 1 at p. 11, [1983] 1 S.C.R. 733 at p. 779, 48 N.R. 161. Parliament may usurp that exclusive provincial jurisdiction only if the local work or undertaking is an integral part of matters of federal competence. Hence, the degree of operational integration of the bypass facility with the interprovincial work, in this case, the TCPL facility, must be such that the former is vital, essential or integral to the latter. It is not a question of whether the federal work is vital, essential or integral to the bypass: see *Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107, and the *Ontario Energy Board* case, *supra*.

The mere physical connection of the bypass facility with the interprovincial work does not attract federal jurisdiction. This is especially so where, as with natural gas, physical connection is required

for the local work to operate: see *North Fraser Harbour Com'rs et al. v. B.C. Electric Ry. Co. & C.P.R.*, [1932] 2 D.L.R. 728 at p. 736, [1932] S.C.R. 161 at p. 170 sub nom. *British Columbia Electric R. Co. Ltd. et al. v. Canadian National R. Co. et al.*, 39 C.R.C. 215, and *City of Montreal v. Montreal Street R. Co.* (1912), 1 D.L.R. 681 at pp. 687-8, [1912] A.C. 333 at pp. 344-6, 13 C.R.C. 541. Nor does federal jurisdiction arise merely because the interprovincial work may gain economic advantages or because it exclusively provides the natural gas to the bypass facility: see the *Ontario Energy Board* case, *supra*, and *Canadian National R. Co. v. Nor-Min Supplies Ltd. et al.* (1976), 66 D.L.R. (3d) 366, [1977] 1 S.C.R. 322, 7 N.R. 603. Nor can federal jurisdiction be created because the end user or bypasser contracts to procure gas in Alberta and effect its transmission to Ontario via the TCPL facility. This does not create an interprovincial undertaking out of the bypass facility or the bypass corporation. Section 92(10)(a) has never been held applicable to an activity not of transportation communication character: see *Hogg*, at p. 486, and *Re Cannet Freight Cartage Ltd. and Teamsters Local 419* (1975), 60 D.L.R. (3d) 473, [1976] 1 F.C. 174, 11 N.R. 606.

The regulatory scheme from which the OEB's jurisdiction derives has regulated the storage and transmission of natural gas within Ontario for distribution by way of LDCs to the ultimate consumer for most of this century. Parliament has asserted jurisdiction over interprovincial pipeline companies only with the advent of the *National Energy Board Act* in 1959 [c. 46]. The history of legislative assertion of jurisdiction is helpful in the resolution of constitutional issues: see the *Ontario Energy Board* case, *supra*, and *Di Iorio and Fontaine v. Warden of Common Jail of Montreal and Brunet et al.* (1976), 73 D.L.R. (3d) 491, 33 C.C.C. (2d) 289, [1978] 1 S.C.R. 152. I see no legislative difference between LDCs and the typical bypass facility.

During argument, reference was made to the broadcasting decisions of *Capital Cities Communication et al. v. Canadian Radio-Television Com'n et al.* (1977), 81 D.L.R. (3d) 609, 36 C.P.R. (2d) 1, [1978] 2 S.C.R. 141, and *Re Public Service Board et al., Dionne et al. and A.-G. Can. et al.* (1977), 83 D.L.R. (3d) 178, 38 C.P.R. (2d) 1 sub nom. *Regie des service publics et al. v. Dionne et al.*, [1978] 2 S.C.R. 191. These decisions stress the undesirability of having divided jurisdiction over broadcasting that had historically been within federal jurisdiction merely because of changed technology. The analogy to the broadcast cases is inappropriate because pipelines and LDCs historically have been within provincial jurisdiction long before interprovincial carriers came into existence. As I have already indicated, I see no difference between the typical bypass and the LDCs. The broadcasting decisions deal with a different product. In those cases the product was radio or television signals transmitted over the air that were clearly within federal jurisdiction. These signals could be received with or without the aid of the intervening cables. It was held that the change in technology or alternate means of reception did not change the legislative jurisdiction over the basic subject-matter. In the present case, gas can only be transmitted and received through pipelines.

The typical bypass facility located entirely within Ontario remains a local work under s. 92(10)(a) because:

1. It is owned, controlled and maintained by a separate entity from the interprovincial work.
2. It is operated separately from the interprovincial work.
3. It has no direct effect on the operating ability of the interprovincial work.
4. Its purpose is entirely to serve an Ontario user.
5. It is not vital, essential or integral to the interprovincial work.

I turn now to a second issue of trade and commerce. The statutory scheme of the Ontario Energy Board Act and the Municipal Franchises Act, from which the OEB's jurisdiction over bypass facility springs, has been found to be valid provincial legislation, which in pith and substance is directed to the regulation of matters having to do with energy and local undertakings in relation to energy within the province: see the Ontario Energy Board case, *supra*.

A bypass facility is a gas carrier and, being a local work, cannot constitute an integral part of a federal regulatory scheme pursuant to the trade and commerce power of s. 91(2) of the Constitution Act, 1867. Nor can it be necessarily incidental thereto, even if the owner thereof buys the gas in Alberta: see the Ontario Energy Board case, *supra*, and *City of Montreal v. Montreal Street Railway*, *supra*.

The National Energy Board Act, R.S.C. 1970, c. N-6, does not extend to bypass facilities. In particular, s. 2 of that Act does not include them, since it reads in part as follows:

"pipeline" means a line for the transmission of gas or oil connecting a province with any other or others of the provinces or extending beyond the limits of a province ...

The definition includes references to branches and storage facilities, but as found in the Ontario Energy Board case, *supra*, at p. 294 O.R., p. 718 D.L.R., this must apply only to works which are an integral part of the interprovincial line. There are no such integral works in the present case.

All of the above reasons relate to the typical bypass hereinbefore referred to. The OEB also suggested two other examples of bypass. However, there are not sufficient facts found by the OEB or set out in the stated case to properly assess them under the legislative tests above referred to. We therefore make no determination with respect to them. For these reasons we answer the question in the affirmative relating only to the typical bypass specifically referred to in these reasons and based on the existing legislation.

Answer accordingly.

TAB 12

City of Ottawa v. Attorney General for Ontario et al.*
[Indexed as: Ottawa (City) v. Ontario (Attorney General)]

64 O.R. (3d) 703

[2002] O.J. No. 2501

Docket No. C36418

Court of Appeal for Ontario

McMurtry C.J.O., Charron and Goudge JJ.A.

June 26, 2002**

*Application for leave to appeal to the Supreme Court of Canada dismissed without costs February 27, 2003 (Iacobucci, Binnie and LeBel JJ.).

**This case was recently brought to the attention of the editors.

Administrative law -- Boards and tribunals -- Ontario Energy Board -- Jurisdiction to state case for opinion of Divisional Court -- Board not limited to stating case in context of particular application -- Energy Board may state case where opinion of Divisional Court would be useful in connection with Board's statutory mandate -- Sufficiency of factual [page704] record for stated case -- Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 32.

Pursuant to s. 92(1) of the Ontario Energy Board Act, 1998, on July 5, 2000, Hydro One Networks Inc. ("Hydro One") applied to the Ontario Energy Board for leave to construct an electricity transmission line in the City of Ottawa. Section 96 of the Act requires the Board to make the order granting leave if it concludes that the proposed construction is in the public interest. Section 1 of the Act sets out certain broad objectives by which the Board must be guided in carrying out its responsibilities in relation to electricity, including, among other things, environmental concerns. Just prior to the application, on June 23, 2000, O. Reg. 365/00 came into effect. It defined "public interest" for applications in respect of electricity as meaning "the interests of consumers, as defined in Part V of the Act, with respect to the pricing, availability, reliability and quality of electricity service."

The City of Ottawa intervened in the application in order to oppose the proposed use of lattice towers and it asked that steel poles be used. Pollution Probe also intervened to raise environmental issues. Hydro One took the position that the City's and Pollution Probe's concerns were both beyond the Board's jurisdiction because of O. Reg. 365/00. The Board responded by deciding to hear Hydro One's application on the merits while at the same time stating a case on a question of law to the Divisional Court pursuant to s. 32 of the Act. The question was: "When s. 1 of Regulation 365/00 is interpreted in conjunction with the Ontario Energy Board Act, 1998, is that section consistent with the statute and therefore to be applied to applications made under s. 92 of the Act?"

On January 12, 2001, the Board set out its question for the stated case and it also released its order on the merits of the application under s. 92 with reasons to follow. Its order granted leave to construct the line subject to certain conditions, including the use of steel poles. On January 26, 2001, the Attorney General for Ontario moved to quash the stated case. On February 15, 2001, the Divisional Court quashed the stated case. It did so on the grounds that (1) the Board had been able to render its decision, and it was functus officio for the purposes of stating a case; (2) the stated case was academic and ought not to be decided because the Board had not made any findings of fact related to it; and (3) the Board had no jurisdiction to state a case to ask if a regulation is valid. The City of Ottawa appealed.

Held, the appeal should be allowed.

The Board was not functus officio for the purposes of stating a case under the Act and was not limited to stating a case only in the context of a particular application. Subsection 32(1) contemplates that the Board may state a case (1) when invited to do so by the Lieutenant Governor in Council; (2) on its own motion; and (3) on request of any party to a proceeding before it. Here, although the stated case originated out of Hydro One's application, the question stated was one of general application. While the Board might be functus officio in relation to Hydro One's application, s. 32(1) remained available where the opinion of the Divisional Court would be useful in connection with the Board's statutory mandate.

Before the Divisional Court will entertain the question, it is not necessary for the Board to make findings of fact on the question posed. Section 32(1) contained no such limitation. While it was undoubtedly preferable that all necessary facts be included in the stated case, there was no reason why the record before the Divisional Court could not be supplemented by uncontested facts presented by affidavit. Unlike this case, however, where facts are contested, the Board must hear and decide those facts first. It was open to the Divisional Court to conclude that on the record it was not possible to opine without additional facts; however, [page705] the court should strive to answer the question if it can to assist the Board in the discharge of its statutory mandate.

The Divisional Court erred in characterizing the question posed as a request for the court to determine the validity of the regulation. The Board asked the more limited question of whether the regulation is effective to determine the boundary of the Board's jurisdiction. The question did not

seek to determine the validity of O. Reg. 365/00, but was a question which the Board could state and the Divisional Court had jurisdiction to answer.

Cases referred to

Canadian Pacific Ltd. v. Matsqui Indian Band (1995), [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, 177 N.R. 325, 85 F.T.R. 79n; Manitoba (Public Utilities Board) v. Manitoba (Attorney-General), [1989] M.J. No. 491 (QL), 61 Man. R. (2d) 164 (C.A.); Ontario (Energy Board) v. Consumers' Gas Co. (1987), 59 O.R. (2d) 766, 22 O.A.C. 142, 39 D.L.R. (4th) 161 (Div. Ct.); Ontario Energy Board (Re) (1985), 51 O.R. (2d) 333, 11 O.A.C. 26, 19 D.L.R. (4th) 753, 2 C.P.C. (2d) 226 (Div. Ct.); Public Service Staff Relations Act (Canada) (Re), [1973] F.C. 604, 38 D.L.R. (3d) 437 (C.A.); Rosen (Re), [1987] 3 F.C. 238, 80 N.R. 47, 31 Admin. L.R. 276, [1987] F.C.J. No. 320 (QL) (C.A.)

Statutes referred to

Federal Court Act, R.S.C. 1985, c. F-7, s. 28(4)

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, ss. 1, 2, 19(1), 32, 90, 92, 96

Rules and regulations referred to

O. Reg. 365/00 ("Ontario Energy Board Act"), s. 1

APPEAL from an order of the Divisional Court (Farley, Dunnet and Sedgwick JJ.) (2001), 146 O.A.C. 46, [2001] O.J. No. 552 quashing a case stated by the Ontario Energy Board pursuant to s. 32 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B.

Peter K. Doody and Michelle A. Flaherty, for appellant City of Ottawa.

Patrick Moran, for intervenor Ontario Energy Board.

Sara Blake, for respondent Attorney General for Ontario.

Allyn Abbott, for Hydro One Networks Inc.

The judgment of the court was delivered by

[1] **GOUDGE J.A.**: -- Pursuant to s. 32 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15,

Schedule B (the "Act"), the Ontario Energy Board stated a case for the opinion of the Divisional Court on the following question of law:

When s. 1 of Regulation 365/00 is interpreted in conjunction with the Ontario Energy Board Act, 1998, is that section consistent with the statute and therefore to be applied to applications made under s. 92 of the Act? [page706]

[2] On the motion of the Attorney General for Ontario, the Divisional Court quashed the stated case without considering it on the merits.

[3] It gave three reasons for doing so. First, without the benefit of the Divisional Court's opinion, the Board had been able to render its decision in the proceeding from which the stated case originated and, as a result, the Board was functus officio and unable to state the case. Second, the stated case was academic and hypothetical and ought not to be addressed because the Board had not made any findings of fact related to it. Third, the Board stated a case which, in effect, asked if a regulation is valid and has no jurisdiction to do so.

[4] With respect, I disagree with each of these reasons. I would therefore allow the appeal and remit the stated case to the Divisional Court for disposition on the merits.

The Background to the Stated Case

[5] The Board is an administrative tribunal with a wide range of responsibilities. While s. 19(1) of the Act gives the Board authority to hear and determine all questions of law and fact in all matters within its jurisdiction, s. 32 permits it to seek the assistance of the Divisional Court on any question of law. That section reads as follows:

32(1) The Board may, at the request of the Lieutenant Governor in Council or of its own motion or upon the motion of any party to proceedings before the Board and upon such security being given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the Board, is a question of law.

(2) The Divisional Court shall hear and determine the stated case and remit it to the Board with its opinion.

[6] Section 92(1) of the Act requires that anyone seeking to construct an electricity transmission line obtain an order from the Board granting leave to construct. Section 90 is the counterpart for those seeking to construct a gas transmission line. Section 96 requires that in both cases, the Board make the order if it concludes that the proposed construction is in the public interest. Section 96 reads as follows:

96. 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.

[7] Section 1 of the Act sets out certain broad objectives by which the Board must be guided in carrying out its responsibilities in relation to electricity. Section 2 does the same in relation to gas. Section 1 is in the following terms: [page707]

1. The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition.
2. To provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario.
3. To protect the interests of consumers with respect to prices and the reliability and quality of electricity service.
4. To promote economic efficiency in the generation, transmission and distribution of electricity.
5. To facilitate the maintenance of a financially viable electricity industry.
6. To facilitate energy efficiency and the use of cleaner, more environmentally benign energy sources in a manner consistent with the policies of the Government of Ontario.

[8] On June 23, 2000, O. Reg. 365/00 came into effect. It specifically defined "public interest" in s. 96 of the Act, but only for applications in respect of electricity, namely applications made pursuant to s. 92. Section 1 of the regulation says this:

.....

(2) In section 96 of the Act,

"the public interest" means the interests of consumers, as defined in Part V of the Act, with respect to the pricing, availability, reliability and quality of electricity service.

(3) Subsection (2) applies only in respect of applications under section 92 of the Act.

[9] On July 5, 2000, Hydro One Networks Inc. applied to the Board for an order for leave to construct an electricity transmission line which would run through the City of Ottawa. The

subsequent hearing was one of the first held pursuant to s. 92 of the Act after the making of O. Reg. 365/00.

[10] The City intervened in the application in order to oppose the use of lattice towers as proposed by Hydro One. The City asked the Board to condition any order granting leave to construct on a requirement that steel poles be used rather than lattice towers to lessen the visual impact of the proposal in the urban areas of the city to be traversed by the line. The City advised that it would challenge the validity of O. Reg. 365/00 in so far as it purported to exclude this argument and limit the Board's jurisdiction to decide what was in the public interest in electricity applications in a way that did not apply to gas applications. [page708]

[11] Pollution Probe also intervened and advised that it wished to raise environmental considerations relating to the proposal, which O. Reg. 365/00 appeared to preclude, but which s. 1 of the Act appeared to expressly require the Board to consider.

[12] Hydro One took the position that the City's argument that steel poles should be required and Pollution Probe's environmental concerns were both beyond the Board's jurisdiction because of O. Reg. 365/00.

[13] After receiving submissions on how it should deal with this issue, the Board announced that it would be stating a case to the Divisional Court and would not itself hear arguments on the validity of the regulation. In addition, it accepted the agreement of the affected parties that to avoid delay, it should proceed to hear the Hydro One application on its merits while at the same time proceeding with the stated case.

[14] The Board heard evidence from November 22 to 24, 2000. On January 12, 2001, it released its order with reasons to follow. It granted leave to construct the line subject to certain conditions including the use of steel poles instead of lattice towers on part of the route through the City of Ottawa. While the Board has not yet issued its reasons, since it left the challenge to the applicability of O. Reg. 365/00 to the stated case, it may be presumed that the Board proceeded to make its order on the basis that the regulation did apply and concluded that it permitted the imposition of this condition.

[15] Also on January 12, 2001, the Board gave notice of the case stated for the opinion of the Divisional Court. After setting out the question posed, the notice described the background facts leading up to the stated case, most of which I have just recited.

[16] On January 26, 2001, the Attorney General for Ontario moved to quash the stated case.

[17] On February 7, 2001, Hydro One filed a notice of appeal of the order of the Board. Its first ground of appeal is that the Board exceeded its jurisdiction by ordering the construction of steel poles instead of lattice towers through the City of Ottawa in contravention of O. Reg. 365/00.

[18] On February 15, 2001, the Divisional Court issued its decision quashing the stated case. Its three reasons, which I recited above, are sufficiently succinct that they can be quoted in full.

On January 12, 2001 the board released its order without reasons, granting the application subject to certain conditions. The board is functus officio with respect to this application. This in itself is sufficient ground to quash the stated case, since it was made within the proceedings of that subject case as outlined in the style of proceedings and the board was able to make its decision without the benefit of the court's opinion.
[page709]

Secondly however, in addition, the board has not made any findings of fact on these issues nor has it determined that these issues fall within or outside the scope of the "public interest" as defined by the subject regulation. In this case the City of Ottawa and others challenged the validity of the regulation. However, the board takes no position with respect to the application of the regulation. Statutory interpretation is best accompanied in the context of a concrete set of facts. While the majority of the Manitoba Court of Appeal in *Manitoba (Public Utilities Board) v. Manitoba (Attorney General)*, [1989] M.J. No. 491 answered the question, we are of the opinion that the view of Twaddle J.A. is the preferable approach. The stated case clause in that case was for all material purposes identical with section 32 of the Ontario Energy Board Act, here in the case before us. We find that the stated case is an academic and hypothetical one. We decline to give an opinion in such circumstances.

Thirdly, further, the board has no jurisdiction to state a case asking if a regulation is valid. It has attempted to justify its approach by analogising with respect to two Charter cases: *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1992] 2 S.C.R. 5 and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 that it is not questioning the validity of the regulation, but rather only whether it has to apply it. The case before us is not a Charter case. In any event this seems to be a distinction without a functional difference. The board's jurisdiction under section 96 of the Ontario Energy Board Act is restricted to determining whether the proposed transmission line is in the public interest. When the board asks this court to determine the "applicability", but in substance the validity of the regulation, it is exceeding its jurisdiction as a creature of statute. Therefore, the court has no jurisdiction to decide the validity of the regulation within the context of this stated case.

[19] Pursuant to leave, the City of Ottawa has appealed to this Court. It is supported by the Board as intervenor and opposed by the Attorney General for Ontario as respondent.

Analysis

[20] The arguments raised by the parties all address one way or another the three issues dealt with by the Divisional Court. I propose to deal with each of these issues in turn.

[21] The first issue is whether s. 32(1) of the Act can be utilized by the Board only in the context of a particular application in which the Board requires the Divisional Court's opinion? In the context of this case, once having decided the Hydro One application, is the Board functus officio and no longer empowered to state a question for the opinion of the Divisional Court?

[22] In my view, s. 32(1) contains no such limiting condition. It contemplates that the Board may state a case in three circumstances: (1) when invited to do so by the Lieutenant Governor in Council; or (2) on its own motion; or (3) on request of any party to proceedings before it. The section ties neither of the first two circumstances to a proceeding before the Board. Both are in that sense free standing, and not required to be founded on a particular proceeding. This flexibility is consistent with the purpose of the [page 710] statutory provision, namely to provide the assistance of the Divisional Court on a question of law when the Board is of the view that this would be useful in connection with its statutory mandate.

[23] In this case there is no doubt that the stated case originated out of the Hydro One application and that the Board was able to go on to decide the application without the Divisional Court's assistance. However, there is also no doubt that the question stated for the Divisional Court's opinion is one of general application. The enacting of O. Reg. 365/00 has clearly resulted in some uncertainty about the extent of the Board's jurisdiction in hearing applications to construct electricity transmission lines in Ontario. Counsel for the Board made it plain in argument that the Divisional Court's opinion would be a great assistance to applicants, intervenors and the Board itself in such applications. I think s. 32(1) encompasses just such a circumstance. While the Board may be functus officio in relation to the Hydro One application, s. 32(1) nonetheless remains available to it where it determines that the opinion of the Divisional Court would be useful in connection with its statutory mandate. That is this case.

[24] This interpretation is consistent with the past application of the section. In *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333, 19 D.L.R. (4th) 753 (Div. Ct.), the Divisional Court gave its opinion on the Board's jurisdiction to award costs in response to a case stated by the Board that was unrelated to any particular application before it. The court considered that the matter was of such obvious importance to all those who had occasion to appear before the Board that it should not only answer the question stated, but should accord liberal rights of intervention to a number of parties to assist the court in reaching its opinion.

[25] In *Ontario (Energy Board) v. Consumers' Gas Co.* (1987), 59 O.R. (2d) 766, 39 D.L.R. (4th) 161 (Div. Ct.), the Divisional Court gave its opinion in response to a stated case where the Board had already issued reasons for decision on the question referred to the court. In doing so, the Divisional Court stated that the Board had jurisdiction to state the case, where it was seeking the Divisional Court's opinion not to facilitate its own decision, but to determine if it had decided the

issue correctly.

[26] In *Manitoba (Public Utilities Board) v. Manitoba (Attorney-General)*, [1989] M.J. No. 491 (QL), 61 Man. R. (2d) 164 (C.A.), a majority of the Manitoba Court of Appeal acted under a provision very similar to s. 32 to offer its opinion on a case stated by the Manitoba Public Utilities Board although the latter had disposed of the rate approval application from which the stated case originated without requiring the court's opinion on the question. [page711]

[27] In dissent, Twaddle J.A. said [at p. 166 Man. R.] that "the statutory power to state a case is limited to stating a case on an issue which actually arises before the Board and which must be decided in order that a decision can be made." He reached this conclusion because he thought it essential to ensure that the question posed not be abstract, but be sufficiently grounded in fact. While no doubt this is a valid concern, it cannot justify reading into s. 32(1) the condition that a case may be stated only where the issue must be decided in a particular application before the Board. As I have said, the language of the section and its purpose are inconsistent with such a limitation.

[28] The respondent seeks support from two cases arising in the context of s. 28(4) of the Federal Court Act, R.S.C. 1985, c. F-7: *Re Public Service Staff Relations Act (Canada)*, [1973] F.C. 604, 38 D.L.R. (3d) 437 (C.A.) and *Re Rosen*, [1987] 3 F.C. 238, 80 N.R. 47 (C.A.). However, s. 28(4) is worded quite differently from s. 32(1). It provides that a federal board may at any stage of its proceedings refer any question of law to the Court of Appeal for determination. The presence of the underlined phrase in the relevant legislation explains the decisions in these two cases which confine such references to questions of law that must be determined for the purpose of dealing with the proceeding that is then before the referring tribunal. Without a proceeding before it, a federal board cannot state a case. There is no such constraint in the Ontario Energy Board Act.

[29] To summarize the first issue, I disagree with the Divisional Court and conclude that s. 32(1) does not require that the opinion sought be needed to assist the Board in deciding a particular application then before it.

[30] The second issue is whether the Board must make findings of fact on the question posed to the Divisional Court before the Court will entertain it.

[31] Again in my view, the simple answer is that s. 32(1) contains no such limitation.

[32] Having said that, I am sympathetic to the concern of Twaddle J.A. in *Manitoba (Public Utilities Board)*, *supra*, that the court must be provided with a sufficient factual context to answer the questions posed. But every stated case does not require the same level of factual detail for proper resolution. Here, the appellant argues that the question posed is a pure question of law requiring no facts beyond the background facts included by the Board in the stated case. The respondent does not challenge these facts, but says additional facts are necessary such as a description of the mischief that the Lieutenant Governor in Council was attempting to address with

O. Reg. 365/00. [page712]

[33] While it is undoubtedly preferable that all necessary facts be included in the stated case, there is no reason why the record before the Divisional Court in this case cannot be supplemented by uncontested facts presented by affidavit. This is not like an appeal by way of stated case, where the record must remain as it was before the original trier.

[34] However, while it does not appear to be this case, if facts are contested, I think the Board must hear and decide those facts first. Its decision would then form the basis for the stated case. That is what happened in *Ontario Energy Board v. Consumers' Gas Co.*, *supra*.

[35] Undoubtedly, it will be open to the Divisional Court, when the stated case is remitted, to conclude that on the record before it, it is not possible to offer an opinion without additional facts. However, given the purpose of s. 32(1), I think that the Divisional Court will strive to answer the question if it can, to assist the Board in the discharge of its statutory mandate.

[36] In this case, however, the Divisional Court did not examine the factual context provided by the stated case to determine if it was sufficient to permit the question to be answered. Rather, it simply focussed on the absence of findings of fact by the Board as a reason to refuse to address the question stated for its opinion. In this I think it erred.

[37] The third issue is whether the Divisional Court was correct to quash the stated case on the basis that the Board was really asking if O. Reg. 365/00 was valid and had no jurisdiction to state such a case.

[38] With respect, I think that the Divisional Court erred in characterizing the question posed in the stated case as a request that the Court determine the validity of the regulation. The stated case poses the more limited question of whether the regulation is to be applied by the Board in hearing applications under s. 92 of the Act or whether, as asserted by the appellant, it is inconsistent with the Act and therefore not to be applied.

[39] The stated case does not seek a determination of whether the regulation is valid for all purposes. It simply asks whether the regulation is effective to determine the boundary of the Board's jurisdiction. In stating the case the Board seeks the assistance of the Divisional Court in defining the Board's jurisdiction in s. 92 applications, following the making of O. Reg. 365/00. The question posed is one which the Board could put to itself and equally one it could put to the Divisional Court by way of stated case. As Lamer C.J. said in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, at pp. 25-26 S.C.R.: [page713]

It is now settled that while the decisions of administrative tribunals lack the force of *res judicata*, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference.

[40] In short, I think the question posed did not seek to determine the validity of O. Reg. 365/00, but was a question which the Board could state and the Divisional Court had the jurisdiction to answer.

[41] In conclusion, this appeal is not about the appropriate answer to the stated case, but only about whether the Divisional Court should address the question to see if it can offer an opinion. For the reasons given, I think the Divisional Court was wrong to stop short of this and quash the stated case. The appeal must therefore be allowed and the stated case remitted so that the Divisional Court can try, if possible, to help the Board and the parties that appear before it to get on with their task.

[42] Counsel for the appellant shall deliver brief written submissions on costs here and below and any proposed bill of costs within ten days from the date of this judgment. Counsel for the respondent may deliver a response, if any, within ten days thereafter.

Appeal allowed.

TAB 13

**** Preliminary Version ****

Case Name:
R. v. Conway

Paul Conway, Appellant;

v.

**Her Majesty The Queen and Person in charge of the Centre for
Addiction and Mental Health, Respondents, and
Attorney General of Canada, Ontario Review Board, Mental
Health Legal Committee and Mental Health Legal, Advocacy
Coalition, British Columbia Review Board, Criminal Lawyers'
Association and David Asper Centre for, Constitutional Rights,
and Community Legal Assistance Society, Intervenors.**

[2010] S.C.J. No. 22

[2010] A.C.S. no 22

2010 SCC 22

File No.: 32662.

Supreme Court of Canada

Heard: October 22, 2009;

Judgment: June 11, 2010.

**Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish,
Abella, Charron, Rothstein and Cromwell JJ.**

(104 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Remedies -- Accused not criminally responsible by reason of mental disorder detained in mental health facility -- Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms -- Accused also seeking as remedy order directing mental health facility to provide him with particular treatment -- Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter -- If so, whether accused entitled to remedies sought -- Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.55.

Constitutional law -- Charter of Rights -- Remedies -- Court of competent jurisdiction -- Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms -- New approach.

Criminal law -- Mental disorder -- Review Board -- Remedial jurisdiction under Canadian Charter of Rights and Freedoms -- Accused not criminally responsible by reason of mental disorder detained in mental health facility -- Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms at his disposition hearing before Review Board -- Board concluding accused was a threat to public safety and not entitled to absolute discharge under Criminal Code -- Whether Review Board has jurisdiction to grant absolute discharge as remedy under s. 24(1) of Charter -- If so, whether accused entitled to remedy sought -- Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

Administrative law -- Boards and tribunals -- Jurisdiction -- Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms -- New approach.

Court Summary:

In 1984, C was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he has been detained in mental health facilities and diagnosed with several mental disorders. Prior to his annual review hearing before the Ontario Review Board in 2006, C alleged that the mental health centre where he was being detained had breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought an absolute discharge as a remedy under s. 24(1) of the *Charter*. The Board unanimously concluded that C was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under s. 672.54(a) of the *Criminal Code*, which provides that an

absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public". The Board therefore ordered that C remain in the mental health centre. The Board further concluded that it had no jurisdiction to consider C's *Charter* claims. A majority in the Court of Appeal upheld the Board's conclusion that it was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. However, the Court of Appeal unanimously concluded that it was unreasonable for the Board not to address the treatment impasse plaguing C's detention. This issue was remitted back to the Board.

Before this Court, the issue is whether the Ontario Review Board has jurisdiction to grant remedies under s. 24(1) of the *Charter*. C has requested, in addition to an absolute discharge, remedies dealing with his conditions of detention: an order directing the mental health centre to provide him with access to psychotherapy and an order prohibiting the centre from housing him near a construction site.

Held: The appeal should be dismissed.

When the *Charter* was proclaimed, its relationship with administrative tribunals was a blank slate. However, various dimensions of the relationship quickly found their way to this Court. The first wave of relevant cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The *Mills* cases established that a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought. The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The *Slaight* cases established that any exercise of statutory discretion is subject to the *Charter* and its values. The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The cases flowing from this trilogy, which deal with s. 52(1) of the *Constitution Act, 1982*, established that specialized tribunals with both the expertise and the authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions.

This evolution of the case law over the last 25 years has cemented the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. It confirms that we do not have one *Charter* for the courts and another for administrative tribunals and that, with rare exceptions, administrative tribunals with the authority to apply the law, have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions. The evolution also confirms that expert tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that in exercising their statutory functions, administrative tribunals must act consistently with the *Charter* and its values.

Moreover, the jurisprudential evolution affirms the practical advantages and the constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without

the need for bifurcated proceedings between superior courts and administrative tribunals. Any scheme favouring bifurcation is, in fact, inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction.

A merger of the three distinct constitutional streams flowing from this Court's administrative law jurisprudence calls for a new approach that consolidates this Court's gradual expansion of the scope of the *Charter* and its relationship with administrative tribunals. When a *Charter* remedy is sought from an administrative tribunal, the initial inquiry should be whether the tribunal can grant *Charter* remedies generally. The answer to this question flows from whether the administrative tribunal has the jurisdiction, explicit or implied, to decide questions of law. If it does, and unless the legislature has clearly demonstrated its intent to withdraw the *Charter* from the tribunal's authority, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal is, in other words, a court of competent jurisdiction under s. 24(1) of the *Charter*. This approach has the benefit of attributing *Charter* jurisdiction to a tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether the tribunal is a court of competent jurisdiction.

Once the initial inquiry has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought given its statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent, namely, whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations include the tribunal's statutory mandate and function.

In this case, C seeks certain *Charter* remedies from the Board. The first inquiry, therefore, is whether the Board is a court of competent jurisdiction under s. 24(1). The answer to this question depends on whether the Board is authorized to decide questions of law. The Board is a quasi-judicial body with significant authority over a vulnerable population. It operates under Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of NCR patients: accused who have been found not criminally responsible by reason of mental disorder. Part XX.1 of the *Criminal Code* provides that any party to a review board hearing may appeal the board's disposition on a question of law, fact or mixed fact and law. The *Code* also authorizes appellate courts to overturn a review board's disposition if it was based on a wrong decision on a question of law. This statutory language is indicative of the Board's authority to decide questions of law. Given this conclusion, and since Parliament has not excluded the *Charter* from the Board's mandate, it follows that the Board is a court of competent jurisdiction for the purpose of granting remedies under s. 24(1) of the *Charter*.

The next question is whether the remedies sought are the kinds of remedies which would fit within the Board's statutory scheme. This requires consideration of the scope and nature of the Board's statutory mandate and functions. The review board regime is intended to reconcile the "twin goals"

of protecting the public from dangerous offenders and treating NCR patients fairly and appropriately. Based on the Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, it is clear that Parliament intended that dangerous NCR patients have no access to absolute discharges. C cannot, therefore, obtain an absolute discharge from the Board. The same is true of C's request for a treatment order. Allowing the Board to prescribe or impose treatment is expressly prohibited by s. 672.55 of the *Criminal Code*. Finally, neither the validity of C's complaint about the location of his room nor, obviously, the propriety of his request for an order prohibiting the mental health centre from housing him near a construction site, have been considered by the Board. It may well be that the substance of C's complaint can be fully addressed within the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If so, resort to s. 24(1) of the *Charter* may not add to the Board's capacity to either address the substance of C's complaint or provide appropriate redress.

Cases Cited

Considered: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Carter v. The Queen*, [1986] 1 S.C.R. 981; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; **referred to:** *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family and Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6) 455, aff'd 2010 BCSC 105 (CanLII); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*,

2008 SCC 15, [2008] 1 S.C.R. 383; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Swain*, [1991] 1 S.C.R. 933; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(b), (d), 7, 8, 9, 12, 15(1), 24.

Constitution Act, 1982, s. 52(1).

Criminal Code, R.S.C. 1985, c. C-46, Part XX.1, ss. 672.4(1), 672.38(1), 672.39, 672.54, 672.55, 672.72(1), 672.78(1), 672.81(1), 672.83(1).

Authors Cited

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, No. 7, 3 Sess., 34 Parl., October 9, 1991.

Latimer, Jeff, and Austin Lawrence. *Research Report: The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study*. Ottawa: Department of Justice Canada, Research and Statistics, January 2006.

Lokan, Andrew K., and Christopher M. Dassios. *Constitutional Litigation in Canada*. Toronto: Thomson/Carswell, 2006.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Armstrong and Lang JJ.A.), 2008 ONCA 326, 90 O.R. (3d) 335, 293 D.L.R. (4) 729, 235 O.A.C. 341, 231 C.C.C. (3d) 429, 169 C.R.R. (2d) 314, [2008] O.J. No. 1588 (QL), 2008 CarswellOnt 2352, allowing in part an appeal from a decision of the Ontario Review Board. Appeal dismissed.

Counsel:

Marlys A. Edwardh, Delmar Doucette, Jessica Orkin and Michael Davies, for the appellant.

Hart M. Schwartz and Amanda Rubaszek, for the respondent Her Majesty the Queen.

Janice E. Blackburn and *Ioana Bala*, for the respondent the Person in charge of the Centre for Addiction and Mental Health.

Simon Fothergill, for the intervener the Attorney General of Canada.

Stephen J. Moreau and *Elichai Shaffir*, for the intervener the Ontario Review Board.

Paul Burstein and *Anita Szigeti*, for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition.

Joseph J. Arvay, Q.C., *Mark G. Underhill* and *Alison Latimer*, for the intervener the British Columbia Review Board.

Cheryl Milne, for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights.

David W. Mossop, Q.C., and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

The judgment of the Court was delivered by

1 ABELLA J.:-- The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.

2 There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2). Section 24(1) states that anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a "court of competent jurisdiction" to obtain a remedy that is "appropriate and just in the circumstances". Section 24(2) states that in those proceedings, a court can exclude evidence obtained in violation of the *Charter* if its admission would bring the administration of justice into disrepute. A constitutional remedy is also available under s. 52(1) of the *Constitution Act, 1982*, which states that the Constitution is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

3 When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was a *tabula rasa*. It was not long, however, before various dimensions of the relationship found their way to this Court.

4 The first relevant wave of cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The philosophical legacy of *Mills* was in its conclusion that for the purposes of s. 24(1) of the

Charter, a "court of competent jurisdiction" was a "court" with jurisdiction over the person, the subject matter, and the remedy sought. For the next 25 years, this three-part test served as the grid for determining whether a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* (*Carter v. The Queen*, [1986] 1 S.C.R. 981; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 ("*Dunedin*"); *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family and Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6th) 455, aff'd 2010 BCSC 105 (CanLII)).

5 The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. Although *Slaight* did not -- and does not -- offer any direct guidance on what constitutes a "court of competent jurisdiction", its legacy was in its conclusion that any exercise of statutory discretion is subject to the *Charter* and its values (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 875; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53-56; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 38-40; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 22; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383, at paras. 20-24).

6 The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The legacy of these cases -- the *Cuddy Chicks* trilogy -- is in their conclusion that specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257).

7 The impact of these three jurisprudential waves has been to confine constitutional issues for administrative tribunals to three discrete universes. It seems to me that after 25 years of parallel evolution, it is time to consider whether the universes can appropriately be merged.

Background

8 Paul Conway is 56 years old. As a child, he was physically and sexually abused by close

relatives. During his twenties, Mr. Conway was twice convicted of assault.

9 In September 1983, at the age of 29, Mr. Conway threatened his aunt at knife point and forced her to have sexual intercourse with him repeatedly over the course of a few hours. On February 27, 1984, Mr. Conway was found not guilty by reason of insanity on a charge of sexual assault with a weapon.

10 Since the verdict, Mr. Conway has been detained in mental health facilities across Ontario, primarily the Penetanguishene Mental Health Centre's maximum security unit. He has been diagnosed with an unspecified psychotic disorder, a mixed personality disorder with paranoid, borderline and narcissistic features, potential post traumatic stress disorder and potential paraphilia.

11 In 2005, following Mr. Conway's mandatory annual review hearing before the Ontario Review Board, the Board transferred Mr. Conway from Penetanguishene to Toronto's Centre for Addiction and Mental Health ("CAMH"), a medium security facility. The Board observed that although Mr. Conway was "unconvinced that he suffers from a mental illness" and was "uncured", his treatment required that he have hope of eventually being integrated into the community.

12 Prior to his annual review hearing in 2006, Mr. Conway sent a Notice of Constitutional Question to the Board, CAMH, and the Attorneys General of Ontario and Canada, alleging breaches of ss. 2(b), 2(d), 7, 8, 9, 12 and 15(1) of the *Charter*. He listed the following grounds as the basis of the claim that his constitutional rights had been violated and that he was therefore entitled to an absolute discharge under s. 24(1):

Mr. Conway states that there is little regard for the living conditions under which he is detained and that these factors have a negative impact on his mental and physical health. These conditions include:

- a. Construction noise, fumes and dust associated with the renovation of the unit directly below him which affect his peace, tranquillity and convalescence;
- b. Failure to respect his rights, individuality, and expressions of same;
- c. Interruptions by staff of his telephone calls and unnecessary and improper implementation of call restrictions including when he is speaking with legal counsel;
- d. Unfair treatment by staff which manifests in differential treatment towards him compared with other NCR accused individuals detained on the unit; and
- e. Failure to provide for his needs and advocacy for his expressed needs;

...

Mr. Conway is currently incarcerated and is subject to infringements on his liberty, safety, dignity and security of his person without due process of the law, including:

- a) environmental pollution;
- b) noise pollution;
- c) arbitrary actions by staff;
- d) threats of attack and attacks by inpatients;
- e) hostility by staff against him;
- f) threats of the use of chemical and mechanical restraints;
- g) failure to provide emotional counselling for the abuse suffered by Mr. Conway as a child (including emotional, physical, sexual and domestic abuse) which is the real source of Mr. Conway's mental health problems and emotional distress;
- h) failure to provide an environment which allows him to feel safe on a daily basis;
- i) failure to provide an environment where the Rule of Law prevails;
- j) failure to provide an environment where Mr. Conway is afforded procedural fairness in respect of any restriction of his liberties;
- k) failure to provide an environment which is free of racism;
- l) failure to provide [an] environment which is cross-culturally sensitive; and
- m) such other and further infringements and violations as counsel may advise and the Board may permit;

These violations on Mr. Conway's rights have affected Mr. Conway such that he no longer can benefit therapeutically from the environment.

13 After an eight-day hearing, the five-member panel of the Ontario Review Board unanimously concluded that Mr. Conway was "an egocentric, impulsive bully with a poor to absent ability to control his own behaviour", had continued paranoid and delusional ideation, and had a persistent habit of threatening and intimidating others, high actuarial scores for violent recidivism and an untreated clinical condition.

14 He was consequently found to be a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under the statute, which states that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 672.54). Accordingly, Mr. Conway was ordered to remain at CAMH. The Board suggested, but did not formally order, that CAMH establish a "renewed treating team" for Mr. Conway, enrol him in anger management and sexual assault prevention programs, and investigate whether he had sustained

brain damage in a car accident more than 30 years ago.

15 As for Mr. Conway's application for a remedy under s. 24(1) of the *Charter*, the Board concluded that it had no *Charter* jurisdiction in light of its statutory structure and function, its own past rulings, and those of other Canadian review boards denying s. 24(1) jurisdiction. It therefore had no jurisdiction to consider Mr. Conway's *Charter* claims.

16 Mr. Conway appealed to the Ontario Court of Appeal, which unanimously found that an absolute discharge was not an available remedy for Mr. Conway under s. 24(1) (2008 ONCA 326, 90 O.R. (3d) 335). Armstrong J.A. for the majority concluded that the Board lacked jurisdiction to grant an absolute discharge as a *Charter* remedy because granting such a remedy to a patient who, like Mr. Conway, was a significant threat to the public, would frustrate Parliamentary intent. The Board was therefore not a court of competent jurisdiction pursuant to the test set out in *Mills* since it lacked jurisdiction over the particular remedy sought. Lang J.A. agreed that an absolute discharge was unavailable to Mr. Conway, but she was of the view that the Board was competent to make other orders that would be appropriate remedies for a breach of a patient's *Charter* rights.

17 Notably, the Court of Appeal also unanimously concluded that it was unreasonable for the Board not to make a formal order setting out conditions addressing the treatment impasse plaguing Mr. Conway's detention. This issue was remitted back to the Board.

18 This Court, in order to decide whether Mr. Conway is entitled to the *Charter* remedies he is seeking, must first determine whether the Ontario Review Board is a court of competent jurisdiction which can grant *Charter* remedies under s. 24(1). In accordance with the new approach developed in these reasons, I am of the view that it is. On the other hand, I am not persuaded that Mr. Conway is entitled to the particular *Charter* remedies he seeks and would therefore dismiss the appeal.

Analysis

19 Section 24(1) states:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

20 We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, *per* McLachlin J. (in dissent), at para. 70; *Dunedin*; *Douglas College*; *Martin*). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts *and* administrative tribunals. It is also reflected in the jurisprudence flowing from *Mills* and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.

21 The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*.

22 All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

23 This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. It is also an approach which emerges from a review of the three distinct constitutional streams flowing from this Court's jurisprudence. As the following review shows, this Court has gradually expanded the approach to the scope of the *Charter* and its relationship with administrative tribunals. These reasons are an attempt to consolidate the results of that expansion.

The Mills Cases

24 In *Mills*, it was decided that relief is available under s. 24(1) of the *Charter* if the "court" from which relief is sought has jurisdiction over the parties, the subject matter and the remedy sought. Since 1986, the *Mills* test has been consistently applied to determine whether courts and tribunals acting under specific statutory schemes are courts of competent jurisdiction to grant particular remedies under s. 24(1).

25 The early cases considered the remedial jurisdiction of statutory and superior courts. In *Mills* and *Carter*, this Court held that a provincial court judge sitting as a preliminary inquiry court was not a court of competent jurisdiction for the purpose of ordering a stay of proceedings for an alleged s. 11(b) violation. The following year, this Court concluded that extradition judges had the same institutional features as preliminary inquiry judges, and could therefore not order a stay in the event of a *Charter* breach (*Mellino*; *Allard*). Further, in *Mellino*, the Court observed that since extradition proceedings were reviewable by superior courts by way of *habeas corpus*, those superior courts were the courts of competent jurisdiction to grant a stay under s. 24(1), not the extradition judge.

26 In 1988, in *Gamble*, the Court held that a superior court in the province where an individual is in custody is a court of competent jurisdiction to hear an application for *habeas corpus*, stating:

Where the courts of Ontario have jurisdiction over the subject matter and the person, it seems to me that they may, under the broad provisions of s. 24(1) of the *Charter*, grant such relief as it is within their jurisdiction to grant and as they consider appropriate and just in the circumstances. [p. 631]

27 In 1995, in *Weber*, the Court expanded the scope of the *Mills* inquiry to cover administrative tribunals. The issue was whether a labour arbitrator appointed under the *Labour Relations Act*, R.S.O. 1990, c. L.2, was a court of competent jurisdiction for the purpose of granting damages and a declaration under s. 24(1) in relation to disputes which in their essential character arose out of the collective agreement between the parties. Weber had sought relief for what he alleged were breaches of ss. 7 and 8 of the *Charter* committed by his employer, Ontario Hydro, who had gathered surveillance evidence about him during his extended sick leave. The Court had to determine whether Weber was required to raise his *Charter* claims before a labour arbitrator or before the superior court.

28 For the majority, McLachlin J. rejected an approach that would bifurcate the proceedings between the arbitrator and the courts. In her view, the "essential character" of Weber's claim was unfair treatment by the employer. The collective agreement expressly stated that the grievance procedure applied to "[a]ny allegation that an employee has been subjected to unfair treatment". Weber's *Charter* claims were therefore found to be within the arbitrator's exclusive jurisdiction:

[W]hile the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their *Charter* rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing court. And the specialized competence of the tribunal may provide assistance to the reviewing court.

...

... it is not the name of the tribunal that determines the matter, but its powers... . The practical import of fitting *Charter* remedies into the existing system of tribunals, as McIntyre J. notes, [*in Mills*] is that litigants have "direct" access to *Charter* remedies in the tribunal charged with deciding their case. [paras. 60 and 65]

29 Foreshadowing the debate that is before us in this case, Iacobucci J. in dissent, expressed the view that the arbitrator was neither a "court" nor of "competent jurisdiction" for the purpose of

granting *Charter* remedies under s. 24(1). In his view, Weber was entitled to seek labour remedies from the arbitrator, but not those under the *Charter*.

30 The *Weber* "exclusive jurisdiction model" enunciated by McLachlin J., which directed that an administrative tribunal should decide *all* matters whose essential character falls within the tribunal's specialized statutory jurisdiction, is now a well-established principle of administrative law (*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Québec (Human Rights Tribunal); Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; *Okwuobi*; Andrew K. Lokan and Christopher M. Dassios, *Constitutional Litigation in Canada* (2006), at p. 4-15).

31 The next year, this Court decided *Mooring*. The issue was whether the National Parole Board was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Sopinka J., writing for the majority, considered only the third step of the *Mills* test since he found it to be determinative. In his view, it followed from the Parole Board's structure and function, as well as the language of its enabling statute, that the Board could not exclude evidence under s. 24(2) of the *Charter*. Pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the Board was not bound by the traditional rules of evidence and was obliged to consider all available, relevant information when rendering its decisions. The ability to exclude evidence would have been, in Sopinka J.'s view, inconsistent with the intent and specific provisions of the Parole Board's statutory scheme. Since the *Mills* test was ultimately a means of discerning Parliamentary intent, this inconsistency precluded the Board from being a court of competent jurisdiction for the purpose of granting the particular remedy sought. Sopinka J. concluded instead that the Parole Board's "duty of fairness" obligations offered sufficient protection to those appearing before the Board.

32 Major J. (McLachlin J. concurring), in a vigorous dissent, criticized the majority's implicit resurrection of the idea, rejected in *Weber*, that only courts could be "courts of competent jurisdiction" for the purpose of s. 24(1). Major J. was of the view that the policy considerations animating the Court's reasoning under s. 52 in the *Cuddy Chicks* trilogy applied equally in cases arising under s. 24(1). He felt that "[o]f primary importance is the ability of the citizen to rely upon and assert *Charter* rights in a direct manner in the normal procedural context in which the issue arises" (para. 61). As he explained:

There is no reason in principle why any of the practical advantages enunciated by La Forest J. in the trilogy should apply with any less force to a tribunal granting a remedy under s. 24 than to a tribunal declining to enforce a constitutionally invalid statutory provision. If anything, tailoring a specific *Charter* remedy for a specific applicant before a tribunal is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise. It has less serious ramifications than determining that a statutory provision will not be applied on *Charter* grounds. [para. 64]

33 Turning to the *Mills* test, Major J. concluded that the only real question before the Court was whether the Parole Board was a court of competent jurisdiction for the purpose of awarding the specific remedy sought by the applicant, namely the exclusion of evidence. While the Parole Board was not bound by formal rules of evidence, it was nonetheless obliged to exclude information that was irrelevant, unreliable or inaccurate. Accordingly, the Board had the jurisdiction to exclude evidence and it therefore met the third *Mills* criterion. Major J. expressly disagreed with Sopinka J.'s conclusion that the doctrine of procedural fairness provided sufficient protection of constitutional rights in the context of the Board's proceedings.

34 More recently, the Court has had two further opportunities to consider the *Mills* test. In *Dunedin*, the issue was whether a provincial court judge with jurisdiction under Ontario's *Provincial Offences Act*, R.S.O. 1990, c. P.33, was a court of competent jurisdiction for the purpose of ordering costs against the Crown for failure to comply with the *Charter*. McLachlin C.J., writing for a unanimous Court, again confirmed that applying the *Mills* test is, first and foremost, a matter of discerning legislative intent. The question in each case is whether the legislature intended to give the court or tribunal the power to apply the *Charter*:

[W]here a legislature confers on a court or tribunal a function that involves the determination of matters where *Charter* rights may be affected, and furnishes it with processes and powers capable of fairly and justly resolving those incidental *Charter* issues, then it must be inferred, in the absence of a contrary intention, that the legislature intended to empower the tribunal to apply the *Charter*. [para. 75]

35 This approach "promotes direct and early access to *Charter* remedies in forums competent to issue such relief" (para. 75). Applying it to the issue before her, McLachlin C.J. concluded that both the structure and function of the provincial offences court supported the view that it could and should apply the *Charter*. Looking first to function, McLachlin C.J. concluded that the provincial offences court's role as a quasi-criminal court of first instance weighed strongly in favour of expansive remedial jurisdiction under s. 24 of the *Charter*. Such jurisdiction would promote the resolution of *Charter* issues in the forum best situated to resolve them:

Provincial offences courts, like other criminal trial courts, are the preferred forum for issuing *Charter* remedies in the cases originating before them, where they will have the 'fullest account of the facts available'... This role commends a full complement of criminal law remedies at the disposal of provincial offences courts. This broad remedial jurisdiction is necessary to prevent frequent resort to superior courts to fill gaps in statutory jurisdiction, and to ensure that the remedy that ultimately flows is in fact both appropriate and just. [para. 79]

36 McLachlin C.J. also sought, as she had in *Weber*, to avoid the unnecessary bifurcation of avenues of relief:

[F]racturing the availability of *Charter* remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. It may be unrealistic to expect criminal accused, who often rely on legal aid to mount a defence against the state, to bring a separate action in the provincial superior court to recover the costs arising from the breach of their *Charter* rights. This option, while available in theory, may far too often prove illusory in practice. [para. 82]

37 McLachlin C.J. then considered the structure of the provincial offences court. She concluded that since criminal and quasi-criminal proceedings are structurally indistinguishable, the criminal courts' jurisdiction to grant costs in the event of a *Charter* breach extends to the quasi-criminal courts. The *Provincial Offences Act* disclosed no contrary intention. McLachlin C.J. ultimately concluded that since the legislature gave the provincial offences court functions destined to attract *Charter* issues and *Charter* remedies, the legislature must have intended that it be able to deal with related *Charter* issues.

38 In the companion case of *Hynes*, the issue was whether a preliminary inquiry court was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Again, only the third step of the *Mills* test was considered, and again the tension on display in *Weber* and *Mooring* was exhibited. McLachlin C.J., for the majority, reiterated the principles set out in *Dunedin* and explained that in all cases the question is

whether Parliament or the legislature intended to empower the court or tribunal to make rulings on *Charter* violations that arise incidentally to their proceedings, and to grant the remedy sought as a remedy for such violations. [para. 26]

She went on to conclude that a preliminary inquiry court was not a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). A preliminary inquiry's primary function was, in her view, to determine whether the Crown has sufficient evidence to warrant committing the accused to trial. Empowering a preliminary inquiry judge to exclude evidence under the *Charter* would jeopardize the inquiry's expeditious nature. The criminal trial courts were better suited to the task of determining whether to exclude evidence.

39 Major J., writing in dissent for four judges, agreed that only the third step of the *Mills* test was at issue but disagreed with the majority as to the result. He noted that preliminary inquiry judges were authorized to exclude evidence under the common law confessions rule. It was not, therefore, supportable by "logic or efficiency to permit a preliminary inquiry justice to determine the admissibility of statements for common law purposes, but not for *Charter* purposes, when it is recognized that preliminary inquiry justices are armed with all the facts. Parliament could not have intended such waste" (para. 96). Accordingly, in his view, a preliminary inquiry judge was competent to exclude evidence under s. 24(2).

40 This review of *Mills*' progeny gives rise to three observations. First, this Court has accepted that the *Mills* test applies to courts as well as to administrative tribunals. Second, although *Mills* set out a three-pronged definition of "court of competent jurisdiction", the first two steps have almost never been relied on. Twenty-five years later, "jurisdiction over the parties" and "jurisdiction over the subject matter" remain undefined for the purposes of the test. The inquiry has almost always turned on whether the court or tribunal had jurisdiction to award the *particular* remedy sought under s. 24(1). In other words, the inquiry is less into whether the adjudicative body is institutionally a court of competent jurisdiction, and more into whether it is a court of competent jurisdiction *for the purposes of granting a particular remedy*. Third, while there appears to be agreement that s. 24(1) jurisdiction is a function of legislative intent, the authoritative comments of the majorities in *Weber* and *Dunedin* eschewing bifurcated proceedings and heralding early and accessible adjudication of *Charter* applications, may have been slightly unmoored by the majority in *Mooring*.

The Slaight cases

41 The cases flowing from *Slaight*, while of no direct assistance on what constitutes a court of competent jurisdiction, are of interest as they too show how the Court increasingly came to expand the application of the *Charter* in the administrative sphere. In 1989, *Slaight* established that any exercise of statutory discretion must comply with the *Charter* and its values. The issue was whether an adjudicator appointed under the *Canada Labour Code*, R.S.C. 1970, c. L-1, had the authority to order an employer to write a content-restricted reference letter for an employee and to limit the employer's response to any inquiries about the employee to the comments in the letter. The employer argued that such an order violated s. 2(b) of the *Charter*. This Court agreed that the employer's s. 2(b) rights were violated, but a majority concluded that the arbitrator's order was justified under s. 1 of the *Charter*.

42 Lamer J. explained that it was "not ... open to question" that the adjudicator's orders were subject to the *Charter*:

The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied... . Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. [Emphasis in original; pp. 1077-78.]

43 *Slaight* was applied in 1994 in *Dagenais*, where Lamer C.J. (for the majority on this issue)

said that a judge's discretion to order a publication ban was subject to the *Slaight* principle. He concluded that the judge's discretion could not be open-ended or exercised arbitrarily, and had to be "exercised within the boundaries set by the principles of the *Charter*" (p. 875). Exceeding those boundaries would result in a reversible error of law (see also *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188).

44 In the 1997 case of *Eaton*, the Ontario Special Education Tribunal, acting pursuant to the *Education Act*, R.S.O. 1990, c. E.2, had ordered that Emily Eaton, a child with cerebral palsy, be placed in a special classroom for students with disabilities. The Eatons alleged discrimination, arguing that their daughter's education should take place in the mainstream schools. Lamer C.J. wrote brief reasons to clarify what he had said in *Slaight*:

[S]tatutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can potentially violate *Charter* rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like Emily Eaton ... *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the *Charter*. [para. 3]

45 In the 1997 case of *Eldridge*, the Court was asked to assess the constitutionality of certain aspects of British Columbia's health care delivery scheme. The issue was whether the *Charter* applied to the Medical Services Commission's decision not to provide sign language interpreters for the deaf as part of a publicly funded scheme for the provision of medical care. La Forest J., writing for a unanimous Court, said that the basic principle derived from *Slaight* was that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so (para. 35). The provincial government had delegated to the Medical Services Commission the power to decide whether a service was a "benefit" under the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76, and to define what constitutes a "medically required" service for the purpose of the provincial health insurance program. When exercising this discretion, the Commission was acting in a governmental capacity and was therefore subject to the *Charter*.

46 In 1999, the Court decided *Baker*, a judicial review of the exercise of statutory discretion by an immigration officer pursuant to the *Immigration Act*, R.S.C. 1985, c. I-2. L'Heureux-Dubé J., relying on *Slaight* and *Roncarelli v. Duplessis*, [1959] S.C.R. 121 among others, concluded that statutory discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter* (paras. 53 and 56).

47 The following year, in *Blencoe*, the Court was asked to determine whether the provincial

Human Rights Commission was subject to the *Charter*. Bastarache J., writing for the majority, explained that *Slaight* guaranteed that statutory bodies like the Commission are bound by the *Charter* even if they are independent of the government and/or exercising adjudicatory functions:

The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy... . The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission. [paras. 39-40]

The majority ultimately concluded that Blencoe's *Charter* rights had not been infringed.

48 Finally, in 2006, in *Multani*, the Court considered whether a decision of a school board's council of commissioners prohibiting one of its students from wearing a kirpan at school infringed the student's freedom of religion. Charron J., writing for the majority and relying on *Slaight*, explained:

The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker. [para. 22]

The Cuddy Chicks Trilogy

49 While the courts and tribunals were preoccupied with the proper application of the principles in *Mills* and *Slaight*, another line of authority regarding the constitutional jurisdiction of statutory tribunals was emerging. These cases dealt with whether administrative tribunals could decide the constitutionality of the provisions of their own statutory schemes and decline to apply them because they are "of no force or effect" under s. 52(1) of the *Constitution Act, 1982*. The first case was *Douglas College*, in which two Douglas College employees challenged the mandatory retirement provision in their collective agreement, claiming that it was contrary to s. 15(1) of the *Charter*. The primary issue was whether a labour arbitrator, governed by the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, and appointed under the parties' collective agreement, had the jurisdiction to determine the collective agreement's constitutionality.

50 La Forest J., writing for the Court on this issue, concluded that the jurisdiction lay with the arbitrator. Under the *Industrial Relations Act*, the arbitrator had express authority to "provide a final and conclusive settlement of a dispute". To fulfill this mandate, arbitrators acting under the Act could interpret and apply any statute that regulated employment. This included the *Charter*. La Forest J. noted that arbitrators were bound by the same Constitution as the courts. Accordingly, if a collective agreement was illegal or unconstitutional, an arbitrator must decline to apply it just as a court would.

51 La Forest J. rejected the College's argument that the informal arbitration process was unsuited to litigating a *Charter* issue, concluding that any disadvantages of allowing administrative tribunals to decide constitutional questions were outweighed by the "clear advantages" of granting them this jurisdiction. In his view, such jurisdiction promotes respect for the Constitution because "[t]he citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution" (p. 604). Constitutional issues should be raised at an early stage in the context in which they arise, without the claimant having to first resort to an application in superior court, which is more expensive and time-consuming than the administrative process. In addition, a "specialized competence can be of invaluable assistance in constitutional interpretation" (p. 605). Specialized arbitrators and agencies can sift through the facts and quickly compile a record for the benefit of a reviewing court. In this way, the parties (and the reviewing courts) benefit from the arbitrators' expertise. This practice also allows for all related aspects of a matter to be dealt with by the most appropriate decision maker. As La Forest J. pointed out, "it would be anomalous if tribunals responsible for interpreting the law on the issue were unable to deal with the issue in its entirety, subject to judicial review" (p. 599).

52 In 1991, *Cuddy Chicks* established that the Ontario Labour Relations Board could determine the constitutionality of a provision which excluded agricultural workers from the protections of Ontario's *Labour Relations Act*, R.S.O. 1980, c. 228. The issue arose out of an application by the union for the certification of Cuddy Chicks' hatchery employees. The union challenged the constitutional validity of this exclusion, arguing that it violated ss. 2(d) and 15 of the *Charter*, and

sought to have it declared to be of no force and effect pursuant to s. 52(1).

53 In rejecting the employer's argument that the superior court, not the Labour Board, should deal with the constitutional question, and drawing on his reasons in *Douglas College*, La Forest J.'s "overarching consideration" was that where administrative bodies like the Labour Board have specialized expertise, that expertise makes them the appropriate forum for assessing *Charter* compliance:

It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the *Charter* challenge to its enabling statute, particularly at the s. 1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the Labour Relations Act. [Emphasis added; p. 18.]

54 After citing a number of cases in which labour boards were found to have the jurisdiction to consider constitutional questions relating to their own jurisdiction, such as *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, La Forest J. observed:

What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the Charter is simply a natural progression of a well established principle. [Emphasis added; p.19.]

55 La Forest J. ultimately concluded that it was within the Board's jurisdiction to consider the constitutionality of its enabling statute since it had the express authority to consider questions of law under the statute.

56 In *Tétreault-Gadoury*, Ms. Tétreault-Gadoury lost her job shortly after her 65th birthday and applied for unemployment insurance benefits. The Employment and Immigration Commission denied her application because, under s. 31 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, a person over 65 was only entitled to a lump sum retirement benefit. Ms. Tétreault-Gadoury appealed the Commission's decision to a Board of Referees, arguing that s. 31 of

the Act offended s. 15(1) of the *Charter*. The Board declined to rule on the constitutional question. Rather than appeal to an umpire as directed by the Act, Ms. Tétreault-Gadoury appealed to the Federal Court of Appeal, which concluded that s. 31 of the *Unemployment Insurance Act, 1971* was contrary to s. 15 of the *Charter*.

57 On appeal, La Forest J., again writing for the Court on the jurisdictional issue, reiterated the principle that an administrative tribunal with the authority to interpret or apply the law is entitled to determine whether a particular statutory provision is unconstitutional. The *Unemployment Insurance Act, 1971* expressly conferred the jurisdiction to consider questions of law on the umpires, not the Board of Referees. This meant that under the legislative scheme, umpires, not the Referees, were authorized to resolve constitutional issues .

58 In 1996, the constitutional jurisdiction of another statutory body -- the Canadian Human Rights Commission -- came under scrutiny in *Cooper*. Two airline pilots filed a human rights complaint with the Commission alleging that the mandatory retirement provision in their collective agreement was discriminatory. Section 15(c) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, permitted the imposition of mandatory retirement if the age set was the "normal age of retirement for employees ... in [similar] positions". The complainants challenged the constitutionality of s. 15(c). The issue before the Court was whether the Commission and, in turn, a tribunal appointed by the Commission to hear a complaint, had the power to assess the constitutionality of a provision of the *Canadian Human Rights Act*.

59 *Cooper*, decided in the same year as *Mooring*, highlighted the conceptual debate in this Court as to the constitutional jurisdiction of administrative tribunals. La Forest J., writing for the majority, again confirmed that if a tribunal has the power to consider questions of law, then it "must be able to address constitutional issues" (para. 46). The Commission, however, lacked statutory authority to decide questions of law. While it was entitled to interpret and apply its enabling statute, this limited legal jurisdiction was insufficient to establish that the Commission could consider general questions of law.

60 La Forest J. reached the same conclusion with respect to a human rights tribunal. While a tribunal could consider general legal and constitutional questions, "logic" demanded that it lacked the ability to assess the constitutionality of the *Canadian Human Rights Act* (para. 66). The tribunals lacked expertise; any gain in efficiency would be lost through the inevitable judicial review of a tribunal's constitutional determinations; the tribunals' loose evidentiary rules were unsuited to constitutional litigation; and constitutional matters would bog down the human rights system, which was intended to provide for efficient and timely adjudication of complaints.

61 Lamer C.J. concurred with La Forest J., but wrote separate reasons urging the Court to abandon the principles set out in the *Cuddy Chicks* trilogy. In his view, the principles enunciated in those cases were contrary to the separation of powers and Parliamentary democracy, two fundamental principles of the Canadian Constitution.

62 In dissent, McLachlin J. (L'Heureux-Dubé J. concurring) concluded that both the Human Rights Commission and a human rights tribunal were empowered to assess the constitutionality of the *Canadian Human Rights Act*. This result, according to McLachlin J., "best achieves the economical and effective resolution of human rights disputes and best serves the values entrenched in the *Canadian Human Rights Act* and the *Charter*" (para. 73). Like La Forest J., McLachlin J. reinforced the view expressed in the trilogy that "administrative tribunals empowered to decide questions of law may consider *Charter* questions" (para. 81), and once again confirmed that in light of the doctrine of constitutional supremacy,

[c]itizens have the same right to expect that [the *Charter*] will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the *Charter*.
[para. 78]

In her view, both the Commission and the tribunals could consider whether the *Charter* renders invalid the "'normal age of retirement' defence", since both bodies were empowered to decide questions of law.

63 In *Martin*, in 2003, the Court sought to resolve the debate over the *Charter* jurisdiction of tribunals. The issue was whether s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, which precluded individuals suffering from chronic pain from receiving workers' compensation benefits, were contrary to s. 15(1) of the *Charter*. As a threshold issue, it was necessary to decide whether the Nova Scotia Workers' Compensation Appeals Tribunal had the jurisdiction to consider whether the benefits provisions of its enabling statute were constitutional.

64 Gonthier J., writing for a unanimous Court, expressly rejected the 1996 *ratio* in *Cooper*, particularly insofar as it distinguished between limited and general questions of law and insofar as it suggested that an adjudicative function was a prerequisite for a tribunal's constitutional jurisdiction. He also expressly rejected Lamer C.J.'s contention that the *Cuddy Chicks* trilogy was inconsistent with the separation of powers and Parliamentary democracy.

65 Instead, Gonthier J. affirmed and synthesized the main principles emerging from the trilogy. The first was the principle of constitutional supremacy, which provides that any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect. No government actor can apply an unconstitutional law, he observed, and, subject to an express contrary intention, a government agency given statutory authority to consider questions of law is presumed to have the jurisdiction to assess related constitutional questions.

66 As a further corollary, Gonthier J. echoed the views expressed over the years by McLachlin J., Major J., La Forest J., and McIntyre J. confirming that "Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available,

without the need for parallel proceedings before the courts". Explaining that this "accessibility concern" was "particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation", Gonthier J. concluded that "forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings" (para. 29).

67 In his view, a tribunal's factual findings and the record it compiles when considering a constitutional question are of invaluable assistance in constitutional determinations. The tribunal provides the reviewing court with the most well-informed, expert view of the issues at stake:

It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical... The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. [para. 30, citing *Cuddy Chicks*, at pp. 16-17]

68 Based on these principles, Gonthier J. concluded that the following determines whether it is within an administrative tribunal's jurisdiction to subject a legislative provision to *Charter* scrutiny:

* Under the tribunal's enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.

* Does the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

69 Applying this approach, Gonthier J. noted that the Workers' Compensation Appeals Tribunal was explicitly authorized to "determine all questions of fact and law". Further, the Tribunal's decisions could be appealed "on any question of law". This confirmed that the Tribunal was entitled to decide legal questions which triggered the presumption that the Tribunal was authorized to decide *Charter* questions.

70 The adjudicative nature of the Tribunal was also relevant. It was independent of the Workers' Compensation Board, could establish its own procedural rules, consider all relevant evidence, record any oral evidence for future reference, exercise powers under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, and extend time limits for decisions when necessary. In addition, its members had been called to the bar and the Attorney General could intervene in proceedings involving constitutional questions. In his view, therefore, even if the Tribunal had lacked express

authority to decide questions of law, an implied grant of authority would have been found. The legislature clearly intended to create a comprehensive scheme for resolving workers' compensation disputes. Nothing in the *Workers' Compensation Act* rebutted the presumption.

71 Moreover, allowing the Tribunal to apply the *Charter* furthered the policy objectives of allowing courts to "benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim". It also permitted workers to "have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act" rather than having to pursue separate proceedings in the courts in addition to a compensation claim before the administrative tribunal (para. 56).

72 Gonthier J. concluded that the Workers' Compensation Board too, like the Appeals Tribunal, had the jurisdiction to review the constitutional validity of its enabling statute, since both statutory bodies had the same authority to decide questions of law.

73 *Martin* was released with *Paul v. British Columbia (Forest Appeals Commission)*. Paul was charged with a breach of s. 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, which was a general prohibition against cutting Crown timber. Paul conceded that he cut the prohibited timber, but asserted that as an aboriginal person, he had a right to do so under s. 35 of the *Constitution Act, 1982*. The issue on appeal was whether the provincial Forest Appeals Commission had the authority to entertain Paul's constitutional argument.

74 Bastarache J., writing for the Court, applied the methodology in *Martin* to determine whether the Commission was authorized to consider and apply s. 35 of the *Constitution Act, 1982*. The issue therefore was whether the enabling statute either expressly or by implication granted the Commission the jurisdiction to interpret or decide questions of law.

75 The *Forest Practices Code* stated that any party to a proceeding before the Commission could make submissions as to fact, law and jurisdiction and could appeal a Commission's decision on a question of law or jurisdiction. These provisions made it impossible to conclude that the Commission's mandate was limited to purely factual matters, and the Court accordingly concluded that the Forest Appeals Commission was empowered to decide questions of law, including whether s. 35 of the *Constitution Act, 1982* applied.

76 In the case of *Okwuobi*, the issue was the jurisdiction of the Administrative Tribunal of Québec to hear rights claims for minority language education under the *Charter of the French Language*, R.S.Q., c. C-41, and the *Canadian Charter*. Based on *Martin* and *Paul*, the Court concluded:

As will become clear, the fact that the ATQ is vested with the ability to decide questions of law is crucial, and is determinative of its jurisdiction to apply the *Canadian Charter* in this appeal. The quasi-judicial structure of the ATQ, discussed briefly above, may be indicative of a legislative intention that

constitutional questions be considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced by the recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. [para. 28]

In *Okwuobi*, the Administrative Tribunal of Québec was found to have the jurisdiction to decide questions of law. The presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted.

77 These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority -- and duty -- to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:

[E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiatives of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70]

The Merger

78 The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

79 Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-604; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized

statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Québec (Commission des droits de la personne et des droits de la jeunesse)*; *Québec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49).

80 If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, "[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies" (para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

81 Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* -- and *Charter* remedies -- when resolving the matters properly before it.

82 Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

Application to this Case

83 The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. Before the Board, Mr. Conway sought an absolute discharge. At the hearing before this Court, and for the first time, he requested additional remedies dealing with his conditions of detention: an order directing CAMH to provide him with access to psychotherapy, and an order prohibiting CAMH from housing him near a construction site.

84 The first inquiry is whether the Board is a court of competent jurisdiction. In my view, it is. The Board is a quasi-judicial body with significant authority over a vulnerable population. It is unquestionably authorized to decide questions of law. It was established by, and operates under, Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory

jurisdiction over the treatment, assessment, detention and discharge of those accused who have been found not criminally responsible by reason of mental disorder ("NCR patient"). Section 672.72(1) provides that any party may appeal a board's disposition on any ground of appeal that raises a question of law, fact or mixed fact and law. Further, s. 672.78(1) authorizes an appellate court to allow an appeal against a review board's disposition where the court is of the opinion that the board's disposition was based on a wrong decision on a question of law. I agree with the conclusion of Lang J.A. and the submission of the British Columbia Review Board that, as in *Martin and Paul*, this language is indicative of the Board's power to decide legal questions. And there is nothing in Part XX.1 of the *Criminal Code* -- the Board's statutory scheme -- which permits us to conclude that Parliament intended to withdraw *Charter* jurisdiction from the scope of the Board's mandate. It follows that the Board is entitled to decide constitutional questions, including *Charter* questions, that arise in the course of its proceedings.

85 The question for the Court to decide therefore is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appeared to have anticipated would fit within the statutory scheme governing the Ontario Review Board. This requires us to consider the scope and nature of the Board's statutory mandate and functions.

86 Part XX.1 of the *Criminal Code* was enacted after this Court struck down the traditional regime for dealing with mentally ill offenders as contrary to s. 7 of the *Charter* in *R. v. Swain*, [1991] 1 S.C.R. 933. The traditional system subjected offenders with mental illness to automatic and indefinite detention at the pleasure of the Lieutenant Governor in Council (*Criminal Code*, s. 614(2) (formerly s. 542.2(2)) (repealed S.C. 1991, c. 43, s. 3); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625). Part XX.1 was designed to address the concerns raised in *Swain* and was intended to highlight that offenders with a mental illness must be "treated with the utmost dignity and afforded the utmost liberty compatible with [their] situation" (*Winko*, at para. 42; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, at para. 22).

87 Part XX.1 introduced a new verdict -- "not criminally responsible on account of mental disorder" -- into the traditional guilt/innocence dichotomy. This verdict is neither an acquittal nor a conviction; rather, it diverts offenders to a special stream that provides individualized assessment and treatment for those found to be a significant danger to the public (*Winko*, at para. 21; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 90; *Penetanguishene*, at para. 21). Those NCR patients who are not a significant danger to the public must be unconditionally released.

88 The Ontario Board manages and supervises the assessment and treatment of each NCR patient in Ontario by holding annual hearings and making dispositions for each patient (ss. 672.38(1), 672.54, 672.81(1) and 672.83(1); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para. 29). It is well established that the review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders, and treating NCR patients fairly and appropriately (*Winko*, at para. 20; House

of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, No. 7, 3rd Sess., 34th Parl., October 9, 1991, at p. 6). While public safety is the paramount concern, an NCR patient's liberty interest has been held to be the Board's "major preoccupation" within the fence posts staked by public safety (*Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at para. 19). The Board fulfills its "primary purpose" therefore by protecting the public while minimizing incursions on patients' liberty and treating patients fairly (*Mazzei*, at para. 32; *Winko*, at paras. 64-71; *Penetanguishene*, at para. 51).

89 Section 672.54 of the *Criminal Code* sets out the remedial jurisdiction of review boards, stating:

Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Accordingly, at a disposition hearing regarding an NCR patient, the Ontario Review Board is authorized to make one of three dispositions: an absolute discharge, a conditional discharge or a detention order. When making its disposition, the Board must consider the four statutory criteria: the need to protect the public from dangerous persons, the patient's mental condition, the reintegration of the patient into society and the patient's other needs.

90 The Board has a "necessarily broad" discretion to consider a large range of evidence in order to fulfill this mandate (*Winko*, at para. 61). The Board's assessment of the evidence must "take place in an environment respectful of the NCR accused's constitutional rights, free from the negative stereotypes that have too often in the past prejudiced the mentally ill who come into contact with the justice system" (*Winko*, at para. 61). Upon considering the evidence, if the Board is not of the

opinion that the patient is a significant threat to public safety, it must direct that the patient be discharged absolutely (s. 672.54(a); *Winko*, at para. 62). On the other hand, if the Board finds that the patient is, as in Mr. Conway's case, a significant threat to public safety, an absolute discharge is not statutorily available as a disposition (s. 672.54; *Winko*, at para. 62).

91 A patient is not a significant threat to public safety unless he or she is a "real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying" (*Winko*, at para. 62). The conduct giving rise to the harm must be criminal in nature (*Winko*, at paras. 57 and 62).

92 Once a patient is absolutely discharged, he or she is no longer subject to the criminal justice system or to the Board's jurisdiction (*Mazzei*, at para. 34). However, pending an absolute discharge, NCR patients are subject to a detention or conditional discharge order. The Board is entitled to include appropriate conditions in its orders (s. 672.54(b) and (c)). The appropriateness of conditions is tied, at least in part, to the framework for making the least onerous and least restrictive disposition consistent with public safety, the patient's mental condition and other needs, and the patient's reintegration into the community (s. 672.54(b), (c); *Penetanguishene*, at paras. 51 and 56).

93 The Board is not entitled to include any conditions that prescribe or impose treatment on an NCR patient (s. 672.55; *Mazzei*) and any conditions must withstand *Charter* scrutiny (*Slaight*). In addition, disposition orders, including any conditions, are subject to appeal. The Court of Appeal is entitled to allow an appeal against a disposition if it is unreasonable, cannot be supported by the evidence, is based on a wrong decision on a question of law, or gives rise to a miscarriage of justice (s. 672.78(1); *Owen*).

94 Subject to these limits, the content of the conditions included in a disposition is at the Board's discretion. In this way, the Board has the statutory tools to supervise the treatment and detention of dangerous NCR patients in a responsive, *Charter*-compliant fashion and has a broad power to attach flexible, individualized, creative conditions to the discharge and detention orders it devises for dangerous NCR patients.

95 The Board's task calls for "significant expertise" (*Owen*, at paras. 29-30) and the Board's membership, which sits in five-member panels comprised of the chairperson (a judge or a person qualified for or retired from appointment to the bench), a second legal member, a psychiatrist, a second psychiatrist or psychologist and one public member (ss. 672.39 and 672.4(1)), guarantees that the requisite experts perform the Board's challenging task (*Owen*, at para. 29; s. 672.39). Further, as almost one-quarter of NCR patients and accused found unfit to stand trial spend at least 10 years in the review board system, with some, like Mr. Conway, spending significantly longer (Jeff Latimer and Austin Lawrence, *Research Report -- The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, January 2006, at p. v), review boards become intimately familiar with the patients under their supervision. In light of this expertise, the appellate courts are "not to be too quick to

overturn" a review board's "expert opinion" on how best to manage a patient's risk to the public (*Owen*, at para. 69; *Winko*, at para. 61).

96 Mr. Conway submits that, pursuant to s. 24(1) of the *Charter*, and notwithstanding the Board's finding that he is a significant threat to public safety, he is entitled to an absolute discharge or, in the absence of a discharge, an order directing CAMH to provide him with alternative treatment and/or an order directing CAMH to ensure that he can access psychotherapy. Mr. Conway admits that these remedies are outside the Board's statutory jurisdiction, but asserts that s. 24(1) of the *Charter* frees the Board from statutory limits on its jurisdiction.

97 I disagree. Part XX.1 of the *Code* provides the Board with "wide latitude" in the exercise of its powers (*Winko*, at para. 27; *Mazzei*, at para. 43). However, Parliament did not imbue the Board with free remedial rein, and in fact withdrew certain remedies from the Board's statutory arsenal. As noted above, Part XX.1 of the *Code* precludes the Board from granting either an absolute discharge to an NCR patient found to be dangerous or an order directing that a hospital authority provide an NCR patient with particular treatment (ss. 672.54(a) and 672.55; *Winko*; *Mazzei*). Parliament was entitled to withdraw these powers from the Board and, barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent.

98 Granting the Board the jurisdiction to unconditionally release a dangerous patient without the requisite treatment to resolve the dangerousness would frustrate the Board's mandate to supervise the special needs of those who are found to require the treatment/assessment regime (*Winko*, at paras. 39-42). It would also undermine the balance required by s. 672.54: it not only threatens public safety, it jeopardizes the interests of the NCR patient by failing to adequately prepare him or her for reintegration and, as a result, creating a substantial risk of re-offending and re-entry into the Part XX.1 regime (*Winko*, at paras. 39-41). As McLachlin J. wrote in *Winko*, at paras. 39-41:

Treatment ... is necessary to stabilize the mental condition of a dangerous NCR accused and reduce the threat to public safety created by that condition... .

Part XX.1 protects society. If society is to be protected on a long-term basis, it must address the cause of the offending behaviour -- the mental illness...

Part XX.1 also protects the NCR offender. The assessment-treatment model introduced by Part XX.1 of the *Criminal Code* is fairer to the NCR offender than the traditional common law model. The NCR offender is not criminally responsible, but ill. Providing opportunities to receive treatment, not imposing punishment, is the just and appropriate response.

99 The Board's duty to protect public safety, its statutory authority to grant absolute discharges

only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, all point to Parliament's intent not to permit NCR patients who are dangerous to have access to absolute discharges as a remedy. These factors are determinative in this case and lead to the conclusion that it would not be appropriate and just in Mr. Conway's current circumstances for the Board to grant him an absolute discharge.

100 The same is true of Mr. Conway's request for a treatment order. Allowing the Board to prescribe or impose treatment is not only expressly prohibited by the *Criminal Code* (s. 672.55); it is also inconsistent with the constitutional division of powers (*Mazzei*). The authority to make treatment decisions lies exclusively within the mandate of provincial health authorities in charge of the hospital where an NCR patient is detained, pursuant to various provincial laws governing the provision of medical services. "It would be an inappropriate interference with provincial legislative authority (and with hospitals' treatment plans and practices) for Review Boards to require hospital authorities to administer particular courses of medical treatment for the benefit of an NCR accused" (*Mazzei*, at para. 31).

101 A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway.

102 Finally, Mr. Conway complains about where his room is located and seeks an order under s. 24(1) prohibiting CAMH from housing him near a construction site. Neither the validity of this complaint, nor, obviously, the propriety of any redress, has yet been determined by the Board.

103 Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 30). Yet, it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct *Charter* applications (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 2). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes (*Nasogaluak*; *Dagenais*; *Okwuobi*). In this case, it may well be that the substance of Mr. Conway's complaint about where his room is located can be fully addressed within the framework of the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If that is what the Board ultimately concludes to be the case, resort to s. 24(1) of the *Charter* may not add either to the Board's capacity to address the substance of the complaint or to provide appropriate redress.

104 I would dismiss the appeal. In accordance with the request of the parties, there will be no order for costs.

Appeal dismissed.

Solicitors:

Solicitors for the appellant: Marlys Edwardh Barristers Professional Corporation, Toronto.

Solicitor for the respondent Her Majesty the Queen: Attorney General of Ontario, Toronto.

Solicitors for the respondent the Person in charge of the Centre for Addiction and Mental Health: Bersenas Jacobsen Chouest Thomson Blackburn, Toronto.

Solicitors for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the Ontario Review Board: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitors for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition: Hiltz Szigeti, Toronto.

Solicitors for the intervener the British Columbia Review Board: Arvay Finlay, Vancouver.

Solicitors for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitors for the intervener the Community Legal Assistance Society: Community Legal Assistance Society, Vancouver.

cp/e/ql ecl

TAB 14

Indexed as:

Reference re Proposed Federal Tax on exported Natural Gas

**IN THE MATTER OF The Constitutional Questions Act, being
c. 63, R.S.A. 1970**

**AND IN THE MATTER OF a Reference pursuant thereto by the
Lieutenant Governor in Council to the Court of Appeal of
Alberta for hearing and consideration of the questions set out
in Order in Council No. 107980, concerning a tax proposed by
the Parliament of Canada on exported natural gas**

[1982] 1 S.C.R. 1004

File No.: 16521.

Supreme Court of Canada

1981: June 17, 18 / 1982: June 22, 23.

**Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz,
Estey, McIntyre, Chouinard and Lamer JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law -- Taxation -- National Energy Policy -- Provincially owned resource -- Whether or not proposed federal tax on natural gas exported by Alberta within the legislative competence of Parliament -- British North America Act, 1867, R.S.C. 1970, Appendix II, ss. 91(2), (3), 108, 109, 117, 125 -- British North America Act, 1930, R.S.C. 1970, Appendix II, s. 1 -- Alberta Act, 1905 (Can.), c. 3 (R.S.C. 1970, Appendix II), s. 20(1) -- Excise Tax Act, R.S.C. 1970, c. E-13 -- Petroleum Administration Act, 1974-75-76 (Can.), c. 47 -- National Energy Board Act, R.S.C. 1970, c. N-6 -- National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056.

This appeal relates to a levy which the Crown in right of Canada sought to impose upon certain natural gas owned, produced, and to be exported, by the Crown in right of Alberta. The question was whether such natural gas was shielded from the levy by s. 125 of the B.N.A. Act. The matter originated in a Reference to the Alberta Court of Appeal by the Lieutenant Governor of that Province. This appeal is from that Court's judgment that the tax did not apply to the gas in question

and that, to the extent that it purported to apply to that gas, the tax was ultra vires the Parliament of Canada.

Held (Laskin C.J. and McIntyre and Lamer JJ. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Dickson, Beetz, Estey and Chouinard JJ.: In this case extrinsic materials, specifically the National Energy Program 1980, and 1980 federal budget documents, are admissible to show the factual context and purpose of the Bill imposing the proposed tax. A tax on the transit of goods may be imposed for the purpose of raising revenue or for the purpose of regulating trade or both. Viewed in the context of the National Energy Program 1980, the 1980 federal budget and existing federal regulatory schemes that control the price and quantity of gas entering interprovincial and export markets, the proposed tax is clearly not a regulatory tool. Nor can it be characterized as an export tax; it applies to all gas, whether consumed outside or inside Alberta, and only incidentally reaches exports. Bill C-57 is not an exercise of Parliament's trade and commerce jurisdiction under s. 91(2); it is in pith and substance taxation under s. 91(3). Parliament's power to impose taxation under s. 91(3) is subordinate to s. 125, which provides that no lands or property of the federal or provincial Crown shall be subject to taxation. The purpose of this immunity is to prevent one level of government from appropriating to its own use the property of the other, or the fruits of that property. Section 25.13(1) of Bill C-57 is therefore ultra vires with respect to the interests of the Province of Alberta as the owner of the gas in question. While s. 125 restricts the federal taxing power, it does not limit the exercise of other heads of power found in s. 91. Thus, federal legislation in the form of taxation may yet be binding on a province if it is primarily enacted under a head of power other than s. 91(3).

Per Laskin C.J. and McIntyre and Lamer JJ., dissenting: The critical question in this case was how far it was constitutionally proper to limit the exercise of federal power in light of the protection given provincial Crown property by s. 125. The unqualified paramountcy plainly established in s. 91 is not subject to s. 125. Nevertheless, s. 125 can be rationalized with exercises of federal legislative power under s. 91; it permits the Crown provincial to act as proprietor beyond the province -- absent federal legislation -- whereas as legislator its exclusive jurisdiction is restricted to the province. Here, the province even acting only as proprietor was required to obtain an export licence pursuant to applicable federal legislation. The tax, part of that regulatory scheme, was a transaction tax arising on the movement of property across an international border and was not simply a superadded measure unconnected to the control of exports so far as to be a tax on the resource itself. Collecting the tax from the person, here the Crown provincial, did not affect that character that removed the tax from the cocoon of s. 125. It was not necessary to invoke the power to legislate for the "peace, order and good government" of Canada to support the validity of the legislation.

Cases Cited

Attorney-General for Quebec v. Nipissing Central Railway Company et al., [1926] A.C. 715;

Reference re Waters and Waterpowers, [1929] S.C.R. 200; Attorney General for British Columbia v. Attorney General for Canada (the Johnny Walker case) (1922), 64 S.C.R. 377, affirmed [1924] A.C. 222, considered; Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714; St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 App. Cas. 46; Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, c. A-7 et al., [1978] 2 S.C.R. 1198; Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355; Hodge v. The Queen (1883), 9 App. Cas. 117; O'Grady v. Sparling, [1960] S.C.R. 804; Mann v. The Queen, [1966] S.C.R. 238; Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5, [1951] A.C. 786; Attorney-General for Saskatchewan v. Canadian Pacific Railway Company et al., [1953] A.C. 594; New York v. United States (1945), 326 U.S. 572, referred to.

APPEAL from a judgment of the Alberta Court of Appeal, [1981] 2 W.W.R. 408, 122 D.L.R. (3d) 48, 28 A.R. 11, finding the federal "Natural Gas and Gas Liquids Tax" to be ultra vires the Parliament of Canada in so far as it purported to apply to the gas in question. Appeal dismissed, Laskin C.J. and McIntyre and Lamer JJ. dissenting.

J.J. Robinette, Q.C., W.E. Code, Q.C., and T.B. Smith, Q.C., for the appellant.

William Henkel, Q.C., J.C. Major, Q.C., and R.W. Paisley, Q.C., for the respondent.

Jean-K. Samson and Odette Laverdière, for the intervener the Attorney General of Quebec.

K.M. Lysyk, Q.C., and E.R.A. Edwards, for the intervener the Attorney General of British Columbia.

D.D. Blevins and T.G. Hague, for the intervener the Attorney General of Manitoba.

D.D.M. Goldie, Q.C., George Taylor, Q.C., and John D. Whyte, for the intervener the Attorney General of Saskatchewan.

James A. Nesbitt, Q.C., for the intervener the Attorney General of Newfoundland.

J.M. Robertson, Q.C., and D.G. Samuelson, for the intervener Independent Petroleum Association of Canada.

Solicitor for the appellant: Roger Tassé, Ottawa.

Solicitor for the Attorney General of Alberta: W. Henkel, Edmonton.

Solicitor for the Independent Petroleum Association of Canada: J.M. Robertson (Fenerty, Robertson, Fraser & Hatch), Calgary.

Per LASKIN C.J. and McINTYRE and LAMER JJ. (dissenting):-- We have had the advantage of reading reasons for judgment in this appeal which would affirm the opinion of the Alberta Court of Appeal, given on a reference, that the proposed federal legislation, the subject of the reference, is ultra vires in so far as it would levy a tax upon the export of natural gas owned and

produced by the Crown in right of Alberta. This is a rare case in which, in our opinion, form would triumph over substance in a constitutional matter if the confirmation of the decision of the Alberta Court of Appeal is allowed to stand. The decision below is, in a sense, an application of colourability in reverse; the substance has been found to be colourable while the form has been given independent force in a declaration of invalidity.

The issues in this case turn on the relative scope of federal power in relation to the regulation of trade and commerce under s. 91(2) of the British North America Act, and federal power in relation to the raising of money by any mode or system of taxation under s. 91(3), juxtaposed against the protection given to the Crown in right of a province, under s. 125, against taxation of lands or property belonging to a province. Two points must initially be made. First, and this must not be forgotten, the federal powers above-mentioned operate and may be invoked notwithstanding anything in the British North America Act and, hence, notwithstanding s. 125 or any other provincial protection or provincial legislative authority. Second, this is not a case where provincial authority or provincial action under its competent legislation is posed against unexercised federal power. Parliament has (for the purposes of this case) legislated affirmatively, and we are consequently concerned with the substance of what it has (figuratively) enacted.

Moreover, there is no principle of provincial Crown immunity from federal legislative authority, whether regulatory authority or tax authority, once a provincial Crown purports to enter the export field and engage in international transactions. That is this case. Indeed, the national government would become hostage to Crowns in right of the province if the latter could transcend general federal control of international trade simply by asserting that it was bringing Crown properties into the international market.

There is an intimation in the reasons that we have read that the proposed tax which is challenged is one in respect of provincially-owned natural gas which is thereafter exported. That, however, is not what the Ways and Means Motion or the implementing Bill C-57 says. We confine ourselves to that aspect of the Motion and of the Bill that relates to taxation upon the exportation of provincially-owned natural gas. It is only in respect of the export of such gas from Canada that the levy is challenged. Of course, in assessing the merit of the challenge it is only sensible to examine the entire program which is envisaged in the proposed legislation, and we shall come to that examination shortly.

There are some preliminary observations that must be made. It is, in our opinion, unreal to contend that the federal taxing power envisages only what might be called pure taxation. The definition of the power as directed to the raising of money by any mode or system of taxation (the underlining is our] is enough to dispel such a notion. Of course, taxing measures may be designed to raise revenue without any other considerations, but many taxing measures have economic objectives, sometimes plainly stated, sometimes implicit. Moreover, when such measures are enacted in conjunction with measures under the trade and commerce power, as, for example, in customs legislation, they can hardly be considered as merely revenue-raising. This is certainly the

case when export and import controls are put in place either alone under a licensing system or in conjunction with taxation so as to promote economic objectives which are open to Parliament.

We need hardly add that we know of no constitutional principle which precludes either Parliament or a provincial legislature from basing legislation on an invocation of two or more assigned legislative powers. To strip challenged legislation of a basic support and then, on that footing, to find vulnerability in what is left is not an acceptable judicial approach to a policy as carefully structured as the comprehensive one which is before us.

Contrary to the view taken by the Alberta Court of Appeal, we find it impossible to characterize the proposed legislation in this case as imposing taxation unconnected with any regulatory scheme or regime. The conclusion reached by that Court was that the federal measure cannot constitutionally apply to a provincial Crown-owned resource, even upon its exportation, or, if it purports so to apply, it is an unconstitutional exaction. Moreover, we are unable to agree, and this for the reasons which follow, that the tax is imposed on Crown-owned property in the sense of s. 125. Once the property, here (to use the terms of the challenged legislation) marketable pipeline gas, is exported from Canada so as to attract the tax, we are no longer concerned with property in situ, or even with property of the province enjoyed therein, whether by the Crown owner or by transferees, but rather with an international commercial transaction which is based upon an acknowledged requirement of federal approval for the intended exportation of the particular substance.

The Proposed Federal Legislation: Purpose and Character

Bill C-57, in its relevant provisions, would add Part IV.1 to the Excise Tax Act, headed "Natural Gas and Gas Liquids Tax". The added part begins with an interpretation or definition s. 25.1, and the following definitions and substantive provisions are germane:

25.1 (1) In this Part,

"broker" means a person, other than a gas producer or a distributor, who carries on the business of selling marketable pipeline gas;

"consumer" means a person who uses marketable pipeline gas

- (a) as a fuel or an energy source,
- (b) in the manufacture of products of trade and commerce, or
- (c) for any other purpose, other than resale;

"distributor" means a person who, in any year, carries on the business of selling marketable pipeline gas to consumers in Canada and whose volume of such sales in any period of three consecutive months in the immediately preceding year is at least fifty per cent of his total sales of marketable pipeline gas, other than sales to provincial oil or gas marketing agencies, in that period and includes any person or class of persons designated by regulations made pursuant to paragraph 25.19(a);

...

"gas producer" means a person who has the right to take or remove gas from a natural reservoir in Canada and includes an operator;

...

"licensee" means a gas producer, broker or distributor to whom a licence has been issued under section 25.16 and includes any gas producer, broker or distributor who is required by that section to apply for a licence;

"marketable pipeline gas" means gas, other than

- (a) natural gas liquids, and
- (b) gas injected into a natural reservoir for any purpose, other than storage;

...

(2) Where any marketable pipeline gas in respect of which no tax has been paid under this Part is exported from Canada for use outside Canada pursuant to a licence issued under Part VI of the National Energy Board Act or pursuant to any other authority under that Act, the exporter of that gas is, for the purposes of this Part, deemed to be the distributor of that gas and to have received that gas at the time he exports it.

(3) Where any marketable pipeline gas in respect of which no tax has been paid under this Part is received for export by a person on behalf of a distributor, broker or gas producer and is in exchange for natural gas of foreign origin delivered in Canada, that distributor, broker or gas producer is, for the purposes of this Part, deemed to be the distributor of that marketable pipeline gas and to have received it at the time it is received for export by that person.

(4) Where any marketable pipeline gas in respect of which no tax has been paid under this Part is received by a person, other than a distributor, at the direction of or on behalf of a distributor, that distributor is, for the purposes of this Part, deemed to be the distributor of that gas and to have received that gas at the time it is received by that person and that person is deemed not to have received that gas.

...

(6) Where any marketable pipeline gas in respect of which no tax has been paid under this Part is consumed by a gas producer or broker, he is, for the purposes of this Part, deemed to be the distributor of that gas and to have received that gas at the time he appropriated it for his own consumption.

...

25.11 The purpose of this Part is to provide legislative authority for the imposition of a natural gas and gas liquids tax as an essential and integral element of the national oil and gas policy as expounded in the National Energy Program.

25.12 This Part binds Her Majesty in right of Canada or a province and every person acting for or on behalf of Her Majesty in right of Canada or a province.

25.13 (1) There shall be imposed, levied and collected on the receipt of marketable pipeline gas by a distributor in Canada a tax at the rate specified in subsection (5).

(2) There shall be imposed, levied and collected on the receipt of marketable pipeline gas by a consumer in Canada from a gas producer or a broker, or from any person acting for or on behalf of a gas producer or a broker, a tax at the rate specified in subsection (5).

...

(5) Tax shall be imposed under this section at the rate of

- (a) twenty-eight cents per gigajoule, in the case of marketable pipeline gas received after October 31, 1980 and before July 1, 1981;
- (b) forty-two cents per gigajoule, in the case of marketable pipeline gas received after June 30, 1981 and before January 1, 1982;
- (c) fifty-six cents per gigajoule, in the case of marketable pipeline gas received after December 31, 1981 and before January 1, 1983; and
- (d) seventy cents per gigajoule, in the case of marketable pipeline gas received after December 31, 1982.

(6) The tax imposed under this section is payable by the distributor or the consumer, as the case may be, at the time he receives the marketable pipeline gas.

...

25.15 Whenever marketable pipeline gas or natural gas liquids are received under such circumstances or conditions as render it difficult to determine the time of receipt or quantity of such gas or liquids because of inadequate procedures or measuring devices, the Minister may determine the time of receipt or quantity for the purpose of determining the tax payable under this Part.

25.16 (1) Subject to this section, every gas producer, broker and distributor shall, in such form as may be prescribed by the Minister, apply to the Minister for a licence for the purposes of this Part.

(2) The Minister may issue a licence to any person applying therefor under subsection (1), but may direct that any class of gas producer, broker or distributor be exempt from the requirement to obtain a licence under this section, and any person so exempted is not required to apply for a licence.

(3) An exemption granted by the Minister under subsection (2) may be withdrawn by the Minister at any time.

(4) The Minister may cancel a licence issued under this section if, in his opinion, it is no longer required for the purposes of this Part.

A key provision of the new part added to the Excise Tax Act and appearing immediately after the definition provisions is s. 25.11, already quoted. We repeat the stated purpose in s. 25.11 which

is to provide legislative authority for a natural gas and gas liquids tax "as an essential and integral element of the national oil and gas policy as expounded in the National Energy Program". This is a referential provision, comprehensive despite its terseness, which must be brought into account in assessing the thrust of Bill C-57 in adding Part IV.1 to the Excise Tax Act.

Account must also be taken of the National Energy Board Act under which the Crown in right of Alberta was licensed (according to the assumed facts in the order of reference) to export natural gas from Canada for use outside of Canada.

We turn, first, to some of the considerations applicable to this case as reflected in the National Energy Program. It is necessary to dispel at the outset an erroneous appreciation by the Alberta Court of Appeal of a paragraph on p. 34 of The National Energy Program 1980, a lengthy document issued by the Department of Energy, Mines and Resources. The Court said, in the course of its reasons:

In passing, we observe in the National Energy Program ... the express declaration that the tax was not imposed as an export tax.

This, obviously, has reference to the following statement on the aforementioned p. 34:

The Government of Canada is, therefore, not proceeding with a natural gas export tax.

The Alberta Court of Appeal ignored completely the telling word "therefore" in the quoted sentence, a word which takes one back to the discussion which resulted in the sentence. What the discussion, on pp. 32 to 34 of The National Energy Program 1980, reveals is that the Government was considering the imposition of a federal tax on natural gas exports which would be paid by the recipient of the exported gas, becoming part of the price and collectible, presumably, by the exporter as agent for the Government of Canada. This is evident from the following passages on p. 34 of The National Energy Program 1980:

The governments of Alberta and British Columbia have strongly opposed a natural gas export tax. They have argued that such a tax is an intrusion on their resource ownership rights. They also argue that taxes on gas exports are discriminatory.

The Government of Canada rejects these arguments. There is no doubt of the federal government's constitutional right to impose export taxes on any commodity. To deny this is to attempt to extend provincial powers well beyond their present constitutional limits. The federal government imposed an export tax on electricity for 38 years, from 1925 to 1963. Similarly, the federal government established a tax on oil exports in 1973. It continues to impose this tax.

A tax on natural gas exports is not discriminatory. These exports have earned enormous economic rents as their price has soared due to OPEC's price increases. Taxation based on the ability to pay is in accord with long-established principles.

However, in deference to the opposing provinces this federal proposal was dropped. In its place, however, a different taxing scheme was introduced which was reflected in the Ways and Means Motion and in Bill C-57. It was described as follows on p. 35 of The National Energy Program 1980:

All natural gas sales will be subject to the tax, including those to the export market. There is no reason to exclude exports from a tax payable on all gas produced and consumed in Canada. That portion of gas which enters the export market will be exempt from the tax until February 1, 1981, because of the agreement with the United States government requiring Canada to give 90 days' notice of price changes.

It is impossible, in our opinion, to contend in the light of this assertion and in the light of the proposed legislation, that a tax on exports, payable by the producer-distributor, was not imposed. It is equally impossible to contend that qua this feature, export was not the triggering mechanism. The Alberta Court of Appeal has plainly misconstrued the federal position under the proposed legislation.

Certainly, The National Energy Program 1980 is a self-serving document and, for constitutional purposes, must be approached cautiously to see in what respects, if any, its assertions are reflected in the proposed legislation or in allied or associated legislation. Its mention in the proposed legislation is without the detail which it itself reveals about national energy policy. Nonetheless, it may be looked at to see what are its elements and how the anticipated revenues from the taxes under the proposed legislation (including the export tax) relate to the policies already in place and to others envisaged by the Program.

Some details of the National Energy Program must be given for proper perspective on the policies it embodies. In introducing the National Energy Program, the responsible Minister listed what he called the three precepts of federal action, as follows:

It must establish the basis for Canadians to seize control of their own energy future through security of supply and ultimate independence from the world oil market.

It must offer to Canadians, all Canadians, the real opportunity to participate in

the energy industry in general and the petroleum industry in particular, and to share in the benefits of industry expansion.

It must establish a petroleum pricing and revenue-sharing regime that recognizes the requirement of fairness to all Canadians no matter where they live.

The following considerations are recited in the Program document (the numbering and the underlining is ours):

- [1.] Canada produces more than enough energy to displace all of our oil imports, and still have substantial quantities of energy available for export if desired. We have significant excess capacity in the natural gas and electricity production system, and considerable potential in coal and renewable energy. With determined efforts to restrain energy demands, giving us time to develop new energy sources, our self-sufficiency capacity could last for the foreseeable future. Recent large additions to the domestic supply of natural gas now provide a further basis for a concerted effort to substitute domestic fuels for foreign energy. The dramatic rise in oil prices since the mid-1970s, and the potential costs of reliance on insecure supplies of imported oil, establish a powerful economic and political rationale to reduce oil's share of our energy market. The way is now clear to reduce oil imports through use of more plentiful domestic energy, which is reasonably priced, readily transportable, and environmentally acceptable.

...

- [2.] Energy has always been a special case. No Canadian can escape the impact of changes in its availability or price. Its influence on other activity--other products, other services--is pervasive. Reliance upon it is enormous. None of us can eliminate this reliance. Governments in Canada and elsewhere have long recognized and responded to this uniqueness. In Canada, for example, trade in the major forms of energy has been closely regulated by federal agencies for many years. Special procedures governing energy exports have been in place for some time, reflecting a national consensus that Canadian needs are to be served first, and that only surplus energy may be exported. At the international level, creation of institutions such as the International Energy Agency reflects a view that energy's role in today's world is extraordinarily important.

And now a new reason for special treatment has emerged. Due to external events, which bear no relationship to the Canadian energy situation, Canadian consumers are asked to pay ever-rising prices for both imported and domestic energy. A large proportion--approaching one-half--of the revenue from these higher domestic prices accrues to the governments of the petroleum-producing provinces; most of it to Alberta.

The resulting inter-regional transfers of wealth are now so large, and growing so rapidly, that they have become a national issue.

...

- [3.] The producing provinces are entitled to substantial revenues by virtue of their ownership of resources. The revenues accruing from the sale of oil and gas, and the economic benefits of the resource boom now under way, have created an unprecedented, and welcome, prosperity in the three westernmost provinces. This prosperity has no discernible end; indeed, the energy surge is bringing about a major, enduring westward shift of wealth, activity and population.

At the same time, there must be recognition of a national claim--a claim by all Canadians--to a share in these revenues and benefits. The petroleum industry's growth over the years, and its buoyant outlook, owes much to national policies, including those that provided assured markets for western Canadian oil and gas, and those which gave, and still give, extraordinarily generous incentives under the federal Income Tax Act. The citizens of Canada, and their national government, have played a major role in fostering the development of the oil and gas industry, and deserve to share in its benefits.

...

- [4.] Nor is the issue primarily one of the sharing of revenues between government and industry. While there is some scope to obtain increased revenues from the oil and gas companies, the solution cannot be found exclusively in this direction. To rely entirely on new taxes upon the industry would be unfair. It would also be ill-advised, for it would put in jeopardy our energy supply objectives. Finally, it would miss the basic point: what is the appropriate distribution of oil and gas revenues among governments?

What share of revenues reflects the needs and responsibilities of the two levels of government? At present, provincial governments receive more than three-quarters of the oil and gas production revenues accruing to governments. Alberta, with 10 per cent of Canada's population, receives over 80 per cent of the petroleum revenues gained by provinces.

Under existing arrangements, the Government of Alberta is enjoying

rapid increases in its oil and gas revenues. Its revenues have grown faster than its expenditures, even though those expenditures have risen faster than those in any other province. Alberta has been able, moreover, to reduce substantially its tax rates for non-resource corporations, and its citizens enjoy the lowest tax burden, and the highest disposable incomes, in Canada. With rising oil and gas prices, the revenues accruing to the province are sufficient to allow the Government of Alberta to have growing budgetary surpluses for the foreseeable future.

Under any plausible price and revenue-sharing system, the financial position of the Alberta government will improve substantially, in both absolute and per capita terms. Canadians must decide, however, whether the current arrangements, which concentrate the financial benefits of higher oil prices in one provincial government, and give little benefit to the national government, are appropriate.

The Government of Canada believes that the present system is inappropriate and unfair. It believes that more appropriate arrangements must be made, so that the national government, which is accountable to all Canadians, gains access to the funds it needs to support its response to national needs.

...

- [5.] One of the objectives of the Energy Strategy for Canada, published by the Government of Canada in 1976, was to increase substantially Canadian ownership of the petroleum sector. While there has been some reduction in the level of foreign ownership of the industry, the objectives have not been met. Perhaps due to a pre-occupation with oil security objectives since the mid-1970s, the set of energy policy instruments has not been sufficiently conducive to increased Canadian ownership of the sector.

In general, price and tax policies have provided the industry with the cash flow necessary to finance its expenditures. This means that the oil consumer and the Canadian taxpayer have financed virtually all of the substantial expansion of this industry.

...

- [6.] The significant fact today remains that the foreign companies control most of Canada's oil and gas industry, and of its revenues. Foreign-controlled firms control the future through their control of the land in which exploration takes place. The frontier land permits are largely held by foreign-controlled companies. Of the 290 million acres held under permit on frontier lands, 110 million acres are held by Canadian-controlled companies. Of the Canadian-held permits, Petro-Canada clearly accounts for the largest portion, about 60 per cent. It is one of the few Canadian companies capable of handling the costs and risks of frontier exploration. Dome Petroleum Limited, another Canadian-controlled company, holds a further 15 per cent. Other Canadian companies hold only very small interests in these important new resource areas. Similarly, the existing oil sands plants are dominated by foreign-controlled firms. Canadian-controlled firms represent only 34 per cent of the equity in Syncrude.

If this pattern were left undisturbed, foreign-controlled companies would account for a large part of the future energy supplies in Canada. The reinvestment of the cash flow earned by the foreign companies on their current production will help increase the size and influence of these companies.

...

- [7.] Canada is not so rich in energy that it can afford to squander its energy endowment, or put off hard decisions. To do so would be a disservice to ourselves, to future generations of Canadians, and to a world that expects us to play a role that reflects our strength. Nor, however, is Canada so imperiled by the energy situation that must rush blindly into energy decisions to the exclusion of other pressing national concerns.

The Government of Canada believes that energy should not be a problem. On the contrary, it can be a major factor in the solution to our broader challenges, if Canada has a program to provide Canadians with energy security, the opportunity to participate in energy development, and fairness in the manner in which the benefits of the nation's rich resources are shared. The National Energy Program is designed to achieve these goals.

...

- [8.] Despite our strengths, the nature of our energy use and trade leaves Canada unwisely and unnecessarily vulnerable to the vagaries of the world oil market. An immediate start must

be made on measures to achieve sustained energy security.

The current fiscal system concentrates petroleum wealth within Canada to a highly undesirable extent, and leaves the federal government seriously short of the revenue it requires to manage the Canadian economy, reduce regional disparities, and develop an effective national energy policy. Also, while there is an important and entrepreneurial Canadian presence in the oil and gas sector, the involvement of Canadians through private and public sector corporations is still unacceptably low. The challenge is to effect the changes required to alleviate these problems.

- [9.] The National Energy Program is the federal government's response to these energy challenges. It is an energy package that includes pricing regimes, fiscal measures, expenditure programs, and direct federal action to achieve the goals of energy security, opportunity, and fairness. The specific elements of the National Energy Program, which are detailed in the following pages, will re-structure Canada's energy system to balance domestic oil supplies with domestic demand by 1990, achieve an equitable sharing of energy benefits and burdens among Canadians, lead to a high level of Canadian ownership and control of the energy sector, expand the role of the public sector in oil and gas, and ensure greater industrial benefits from energy development.

What we have reproduced from the National Energy Program is, we think, enough to show that, in relation to the proposed legislation under challenge here, there is a blend of tax and regulatory policies aimed at realizing the three precepts stated by the responsible Minister, with emphasis on promoting the Canadianization of energy resources, the encouragement of energy conservation and the support of an allocation scheme under which tax money collected for natural gas and as well for oil as they go out will be used to help pay for oil as it comes in through importation.

The wisdom or likely success of the policies envisaged by the National Energy Program are not matters for assessment by this Court. The Court's role is the determination of validity when, as here, a constitutional challenge is raised to legislation. A court must be careful not to confuse validity with wisdom or efficacy and it is also expected to defer to the legislative, indeed to the political judgment which the legislation expresses, save as it clearly sees constitutional infirmity in what is proposed or enacted.

The National Energy Board Act, R.S.C. 1970, c. N-6, as amended, as a related statute, may even more confidently be regarded as giving character to the proposed legislation herein by reason of the acknowledgement of required subservience to the licensing provisions of that Act. Section 81 of the Act, found in Part VI, provides that "Except as provided in the regulations, no person shall export any gas ... or import any gas except under the authority of and in accordance with a licence

issued under this Part". Conditions to be met for a licence to export or import gas are set out in succeeding provisions which it is unnecessary to examine in any detail.

We need only say here that the export licence cannot be seen as a mere yielding to a regulatory authority and, thereafter, as standing apart from the tax, leaving it as an independent and unconnected levy on gas produced in and by Alberta. This is to ignore the setting in which the levy is imposed, a matter which we have already canvassed.

The Reference to the Alberta Court of Appeal

What is before this Court, by way of an appeal as of right, is the opinion of the Alberta Court of Appeal on a reference to it under an Alberta Order in Council of November 12, 1980 setting out two questions for hearing and consideration. The questions were to be answered on the basis of certain facts set out in the Order in Council. When the reference was directed, only the Ways and Means Motion was current but it is not disputed that Bill C-57 does not alter the relevant terms of the Ways and Means Motion.

The two questions asked on the reference (and we should add that there was no substantial change in them under the order in this Court directing notice to be given to the Attorneys-General of the province] were as follows:

3. The questions to be heard and considered by the Court of Appeal are as follows:
 - (a) If the tax on exported natural gas imposed under the said legislation is intra vires the Parliament of Canada, is the said natural gas that is exported from Canada for use outside Canada liable to taxation under the tax on exported natural gas having regard to the British North America Acts, 1867 to 1975, and in particular sections 117, 125 or 126 of those Acts or any combination of those sections?
 - (b) Is the tax on exported natural gas imposed under the said legislation, with respect to the said natural gas that is exported from Canada for use outside Canada, ultra vires the Parliament of Canada either in whole or in part, and, if so, in what particular or particulars and to what extent?

The facts recited in the Order in Council as underpinning the reference declare the ownership of the Crown in right of Alberta of Crown lands, mines and minerals (including natural gas). Mention is then made of a well being drilled on certain Crown land, with a resulting production of natural gas in commercial quantities and belonging solely to the Province of Alberta. The Order in Council then continues as follows:

1 ...

- (f) the Province of Alberta has entered into agreements with commercial corporations to have the said natural gas gathered, compressed and processed (such processing does not cause a change in the nature and quality of the said natural gas, but involves only the removal of certain impurities) and then to have it transported by a natural gas pipeline for export sale by the Province of Alberta to a purchaser in the United States of America that is a corporation carrying on business only in the United States of America and not in Canada;
- (g) the said natural gas pipeline
 - (i) is wholly situated within the Province of Alberta and extends from a commencement point in the South-Eastern part of the Province of Alberta for approximately 20 miles to the international border between Canada and the United States of America where the border of the Province of Alberta meets the border of the State of Montana, and
 - (ii) does not connect with any other pipeline within the Province of Alberta;
- (h) the Province of Alberta maintains sole ownership of the said natural gas until it is delivered to the purchaser on the State of Montana side of the border between the State of Montana and the Province of Alberta;
- (i) the revenue from the sale of the said natural gas will be paid into the General Revenue Fund of the Province of Alberta to be appropriated to the public service of the Province;

Further facts to be assumed for the purposes of the reference were added in paragraph 2 of the Order in Council in the following terms:

2 ...

- (a) the Parliament of Canada has enacted legislation in the terms of the Ways and Means Motion (in this Appendix referred to as the "said legislation");
- (b) the Province of Alberta has complied with all the laws in force in the Province of Alberta relating to the sale, export and delivery of the said natural gas;
- (c) the said natural gas is marketable pipeline gas as defined in the Ways and Means Motion, in respect of which no tax has been paid under the said legislation, and is exported from Canada for use outside Canada pursuant to a licence issued by the National Energy Board under Part VI of the National Energy Board Act, or pursuant to any other authority under that Act.

Although the Order in Council does not expressly refer to portions of the Ways and Means Motion that have in view the implementation of the federal National Energy Program, its reference to the Ways and Means Motion, attached as a Schedule, makes it appropriate to consider all its terms. They include its embrace of the National Energy Program which, accordingly, becomes material in dealing with the constitutional issues posed for determination. The same consideration would apply also to Bill C-57 which had emerged before the hearing in the Alberta Court of Appeal and was before the Court.

The Opinion of the Alberta Court of Appeal

The five-person Court gave a per curiam or collective opinion in which it said that although two questions were asked, there was, in substance, only one issue raised, as follows:

Is it within the competence of Parliament to impose this levy in respect of this particular natural gas or is it prevented from doing so by Section 125 of the British North America Act? Put another way: What is the reach of the protection afforded by Section 125, which provides:

"125. No lands or property belonging to Canada or any Province shall be liable to taxation."

It approached this issue by considering, first, whether the levy was a tax (it held that it was, its object being unequivocally to raise revenue) and then addressed the question whether, as urged by the Attorney General of Canada, the levy was associated with a scheme which had support in the federal trade and commerce power. This federal contention was rejected on what, in our view, was too formal a ground, namely, that where money is raised to further an object under a given federal power, that does not, by that fact alone, characterize the tax as a levy under that power. An example was given of taxation of provincial property in Saskatchewan to enable the building of a lighthouse on Sable Island, matters within federal competence.

The Court of Appeal dropped the qualification in its assessment reflected in the phrase "by that fact alone" and moved, in our opinion, to a completely dissociated illustration. If there is a scheme involving a tax on a provincial resource upon its exportation in a commercial transaction, the connection of that tax with the pursuit and attempted realization of a national energy policy surely takes the matter in issue here beyond the characterization "by that fact alone". In this assessment of the issue, the imposition of the levy is no longer dissociated revenue-raising, but is embraced, as a levy in respect of an energy resource, in a comprehensive energy allocation and conservation scheme, a matter to which we will return later in these reasons.

The Alberta Court of Appeal recognized in its reasons that it is difficult to envisage a taxation measure without some effect on trade and commerce, or that a government would tax without regard to that effect; and, further, a government needing to raise revenue would almost invariably mould its legislation to serve other ends. Having, however, said this, the Court declared that it must look at the dominant feature of the proposed legislation in this case, and it concluded that there was no regulatory aspect in it and that the levy was based solely on the power to tax under s. 91(3). It also rejected the submission that the tax was an export tax, distinguishing in this respect the Johnny Walker case, [1924] A.C. 222, as founded on the trade and commerce power. It purported to solidify this view by the following observation:

Moreover, the tax itself avoids export as a direct triggering mechanism. Rather it is the receipt of gas by a distributor which is taxed. An exporter is deemed to be a distributor and is deemed to have received the gas at the time the gas is exported.

We confess to considerable difficulty in following this reasoning on the stated facts in this case and under the proposed legislation. Of course, the tax extends to others in addition to the provincial Crown but in relation to the latter, we are only concerned with the levy when exportation occurs and the tax has not been paid. The assimilation of the Crown provincial to a distributor is simply an attributed character to fix liability for the tax which, itself, arises only upon exportation of the natural gas. If, as we think is the case, the Alberta Court of Appeal is wrong in rejecting the submission that the reference to it clearly envisages an export tax, then the foundation of its opinion is undermined.

The last third of the reasons of the Alberta Court of Appeal considers the scope of s. 125, examines the property provisions of the British North America Act and the effect of the transfer to Alberta (as, indeed, to the other western province] of the Crown lands and natural resources therein. It cannot be gainsaid that the purpose of this transfer was to place Alberta in the same position vis-à-vis property and resource ownership as the original confederating provinces and those which entered later in the 1870's. The Court found it unnecessary to deal with an argument of counsel for the Attorney General of Alberta that the effect of the transfer legislation of 1930, especially s. 1 of the confirming statutes, put Alberta in a superior position. This point was, however, heavily pressed in the argument in this Court, and we propose to deal with it later in these reasons.

The Alberta Court of Appeal went on in its reasons to take issue with what it called "an artificial and non-existent situation" in attributing distributor character to the Crown provincial when in fact the Crown was a producer. It put the matter in these terms:

The Province produces natural gas which it owns, from land which it owns, through a pipeline which it owns and sells it to a purchaser in the State of Montana. That process of disposing of a Crown asset would not ordinarily be termed distribution. A distributor is one who receives the product from a producer and passes it on to a consumer. The Ways and Means Motion before Parliament and the amendments to the Excise Tax Act proposed in Bill C-57, however, make it distribution by deeming it to be so. The exporter of the gas is the Crown; the exporter is also the producer of it and not the distributor. But Section 2 of Part IV.1 provides that the exporter of gas is "deemed to be the distributor of that gas and to have received that gas at the time he exports it".

This disposition disregards the fact, the plain fact (conceded by the Court's reference to the Crown as exporter) that (and we have said this earlier in these reasons) attributing distributor character to the Crown provincial is not for the purpose of putting a false face on the Crown's operations leading to the export of the natural gas but merely to charge it with tax by reason of the export.

It is plain to us that the Alberta Court of Appeal has substituted an attack on the mechanics of the tax, on the collection provisions, in place of addressing the substantive issues. The Privy Council's reasons in *Atlantic Smoke Shops, Limited v. Conlon*, [1943] A.C. 550 and those of this Court in its recent judgment in *Minister of Finance of New Brunswick v. Simpsons-Sears Ltd.*, [1982] 1 S.C.R. 144, show how wrong it is to be beguiled by form which goes to the gathering in of a tax and to make it a ground of invalidation. The present case, in our opinion, risks a similar approach which should equally be rejected.

There are two other conclusions by the Alberta Court that appear to us to be in the face of the words of the order of reference and of the proposed legislation and, indeed, in the face of admitted facts. These conclusions are in the following terms:

The tax, insofar as it affects the natural gas concerned in this reference, is not a tax on a transaction or on the movement of gas or on the consumption of gas or on a person. It is a tax on a Province respecting its property and is prohibited by Section 125.

And, again:

In our view the activity in this case is nothing more than primary production.

If only "primary production" was involved, it would be easy to concede that s. 125 protects against

taxation in that respect. The Alberta Court of Appeal has, however, an extravagant conception of primary production when it includes in it (as its reasons go on to say) capture and removal of the natural gas by the drilling of a well, installation of the necessary piping, installation of compression facilities, removal of impurities and transport to the purchaser in the usual way. It only neglected to mention that an export transaction was involved.

Primary production surely ends where actual marketing of the product begins. We would not quarrel with a definition of primary production of natural gas which goes beyond the mere bringing it up from its situation in the ground, or even if it extended to making it fit for sale. Indeed, the proposed federal legislation appears to concede this much by making "marketable pipeline gas" the pivot upon which tax liability arises but (in respect of the Alberta Crown) only upon its export from Canada pursuant to a licence; that is upon it being marketed, not upon it being merely marketable.

In view of the above, can it be seriously doubted that the Alberta Crown has gone far beyond primary production in the facts stated and assumed in the order of reference?

The Natural Resources Transfer Agreement: The British North America Act, 1930, c. 26

We wish to dwell briefly on an argument strongly advanced by one of the counsel for the Attorney General of Alberta, namely, that by virtue of the Natural Resources Transfer Agreement and confirmatory legislation, especially the British North America Act, 1930, the Province of Alberta is qua control of its property and natural resources in a superior position to that enjoyed by the older provinces under the various property provisions of the British North America Act, 1867. In our opinion, this is an untenable proposition.

Section 1 of the British North America Act, 1930 is the main reliance for counsel's submission. It reads as follows:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Counsel fastens on the words "notwithstanding anything in the British North America Act, 1867" etc. There are two frailties in the contention. First, and foremost, it ignores the context in which this non obstante clause is used; it is clearly addressed to the Natural Resources Transfer Agreements worked out between Canada and the Western Provinces and thus is related directly to the property provisions of the 1867 Act. The agreement with Alberta opens with the words that "it is desirable that the Province should be placed in a position of equality with the other Provinces of Confederation with respect to the administration and control of its natural resources", and s. 1 of the agreement places the province in the same position as the original provinces of Confederation with respect to Crown lands, mines, minerals and royalties derived therefrom. There is simply no basis

upon which Alberta can claim a superior position to that of the 1867 confederating provinces.

The second frailty in its submission is that it would erode s. 125 of the 1867 Act if not also all other restraints imposed by the 1867 Act and would, in effect, prove too much, namely, that Alberta in respect of its natural resources is not governed by any limiting terms of the Act of 1867.

There is no need to say anything more on what is a far-fetched submission.

The Scope of Section 125: Relation to Heads of Federal Power

It is not necessary to say anything about s. 125 in the face of unexercised federal power. The section is not a grant of legislative authority nor is it a grant of proprietary right. The latter is covered by s. 109 of the British North America Act and associated provisions, which, in the light of the Natural Resources Transfer Agreement, apply to Alberta as they apply to other provinces of Canada.

Only if federal power is exercised under s. 91 (as is the contemplation of the present reference) does it become necessary to consider the degree to which s. 125 immunizes provincial lands or property from the federal exercise. We readily agree with the submission of the Attorney General of Alberta that the non obstante clause of s. 91 does not itself qualify whatever scope s. 125 has, but that is because s. 125, not being itself a grant of legislative power, is not brought into possible conflict with the grants of federal legislative power in s. 91, so as to make it necessary to find a mutual accommodation as is the case with the grants of provincial legislative power under s. 92.

The non obstante clause of s. 91 has, however, another office, another aspect, and that is to declare the paramountcy of valid federal legislation as against any incompatible provincial legislation and as against any other provisions of the Act of 1867 such as ss. 109 and 117, or s. 125. The question that arises on this score--and it is in truth the critical question in this case--is how far is it constitutionally proper to limit the exercise of federal power in the light of the protection given to provincial Crown property by s. 125.

We reject completely any contention or suggestion that the paramountcy exemplified in the plain and unambiguous language of s. 91 ("notwithstanding anything in this Act, the exclusive legislative authority of the Parliament of Canada extends" etc.) is subject to qualification and is subordinated either to s. 125 or to any other provincial protective provision or legislative authority. That does not mean, however, that an accommodation is excluded which would give rational scope to s. 125 or to other provincial matters without completely suppressing federal authority given in non obstante terms.

The Alberta Court of Appeal did not address itself to this issue, and its opinion appears to stand for an inversion of the terms of the Act of 1867, and especially of the effect of the non obstante clause of s. 91. Moreover, although that opinion indicates a qualification of the overriding

protection allegedly given by s. 125 (the qualification residing in the paramount regulatory authority of Parliament in respect of international trade), it diminishes if it does not entirely abrogate the qualification by its definition of primary production as including the marketing (and, in this case, the export marketing) of natural gas.

In our opinion, a rational reconciliation of s. 125 with exercises of federal legislative power under s. 91 lies in recognizing the immunity of property and natural resources of the provincial Crown from federal taxation of such property and resources within the province, or in respect of intraprovincial transactions. This would be to recognize the exclusive legislative authority of the province in matters that do not extend beyond provincial territorial limits. We have, as well, no reason to doubt that the province may engage in extra-provincial transactions as a proprietor (in respect of its natural resource] so long as there is no inhibiting or regulating federal legislation. In short, it may do as a proprietor (absent federal legislation) what it might not be able to do as a legislator: see *Brooks-Bidlake and Whittall, Limited v. Attorney-General for British Columbia*, [1923] A.C. 450; cf. *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700.

These considerations do not apply to the present case either in terms of the facts, stated and assumed in the order of reference, or in terms of the proposed legislation to which those facts are addressed.

In the first place, even if the province is acting only as proprietor, it confronts applicable federal legislation governing the export of natural gas, legislation under which an export licence is admittedly required. We construe the Province of Alberta's principal position to be that the Parliament of Canada may exercise its regulatory authority over provincial Crown property or resources in relation to export but not in relation to taxation; and we make the same assessment of the views expressed by the Alberta Court of Appeal. There is, hence, no challenge to the imposition of an obligation to obtain a licence for an international transaction in natural gas. What is challenged is any association of a tax with the regulated export of natural gas or, to put it another way, a rejection of any connection between the tax and the licence. The ground of the challenge is simply that the tax is not part of any regulatory scheme connected with the export licence. What this appears to mean is that unless the tax is interwoven in the licence requirement, as, for example, by being made a condition of securing permission to export, it stands apart as simply a superadded revenue measure unconnected with any regulation or control of export. On this basis, so the argument goes, it does not differ from a tax on the natural resource itself, something forbidden by s. 125.

We are guilty of repetition in asserting here, as we did earlier, that we have here not only no segregated elements but rather a situation in which both the export licence and the tax are pieces of the overall energy program embraced in the proposed federal legislation, a program which we have already examined.

It is, of course, important, and certainly necessary, in considering the foregoing submission, adverse to the validity of the tax, to dwell on the terms of the proposed enactment which is the focus of this case. Although every distributor of natural gas to a consumer in Canada is made liable for the proposed tax, and private persons who export natural gas are also subject to the proposed tax as distributors, the taxability of the Crown in right of Alberta arises only upon the export of any such gas from Canada. It does not arise in this reference upon any dealing by the provincial Crown with its natural gas in Canada.

The charging section of the proposed legislation imposes the tax "on the receipt of marketable pipeline gas by a distributor" and the exporting Crown is made liable for the tax as a distributor and, therefore, by a statutorily deemed receipt of the gas in that character. It is the receipt of gas (the deemed receipt here) which is taxable, and the tax becomes payable by a distributor upon such receipt. Although this (in the ordinary case of a distributor selling to consumers in Canada) distinguishes between a tax on property and a tax on receipt of property (natural gas), imposing the tax upon such receipt, we find nothing untoward in this and would characterize it in no different way than if the tax were imposed (as it in effect is) upon the export of the natural gas. It is a transaction tax, arising upon the movement of property across an international border. The prescription for its collection from the person, here the Crown provincial, does not affect its character. It is by that character taken out of the cocoon of s. 125.

The underlying principle is exemplified by judgments in this Court in the *Johnny Walker* case (1922), 64 S.C.R. 377, and also by the opinion of the Privy Council in that case, reported, [1924] A.C. 222, and previously cited. It involved litigation between the Government of Canada and the Government of British Columbia respecting the former's claim to recover customs duty in respect of whisky purchased overseas by the Government of British Columbia and shipped to Canada where customs clearance was refused unless duty was paid. The whisky was intended for government liquor stores under provincial legislation by which the government would be sole vendors of the liquor for sale in the province. Section 125 was pressed in argument both in the Exchequer Court, in the Supreme Court of Canada and in the Privy Council, but in all courts the attempted reliance on s. 125 to defeat the claim for customs duties was rejected.

We readily agree that the situation in the *Johnny Walker* case may be distinguished from the present case by reason of a more express involvement of the federal trade and commerce power. There are, however, affinities which are reflected in reasons delivered in the Supreme Court of Canada. These affinities do not depend on differentiating exports and imports because, as to the latter, we take it that the result in the *Johnny Walker* case did not depend on where title to the whisky passed; even if it passed in Scotland where the whisky was purchased, the result would be the same. One of the points made by Anglin J., as he then was, at p. 388, was that "property" within s. 125 must mean property within Canada and does not include property about to be brought into the country. By parallel reasoning, it may be said that "property" in s. 125 does not include natural gas about to be exported from the country. Mignault J., at p. 394, makes much the same point when he says that the customs duties are not a tax imposed upon property as such, but are levied on the

importation of certain goods into Canada or as a condition of their importation. So, in the present case, the tax arises upon the export of the natural gas from Canada.

There are other passages in the reasons of members of the Court which emphasize the association of customs duties with the federal trade and commerce power. Thus, Duff J., as he then was, says, at p. 382, that "Since the imposition of customs duties (as being indirect taxation) is excluded from the provincial jurisdiction, the words ... [of s. 91(3)] suggest that such duties except where imposed primarily at all events for purposes of revenue are treated as falling within the 'ambit' of ... [s. 91(2)]". The Privy Council, too, in the short reasons of Lord Buckmaster, fastened primarily on the trade and commerce power as a support for federal legislation with paramountcy over s. 125.

The central question here is thus reduced to the degree of refinement addressed to the proposed legislation; in short, whether it makes practical sense so to divorce the export tax from the overall energy policy as reflected in the National Energy Program and in the National Energy Board Act as to conclude that two unrelated matters are involved, one being a pure revenue measure and, even more, being a taxation of provincial Crown property, albeit that property has entered into the stream of commerce under an export licence. The plain fact is that the matters are very much related, as both the order of reference and the proposed legislation indicate. They are parts in a mosaic, a combination of elements in an integrated program.

There are observations relevant to the issues herein in some decisions in Australia whose Constitution includes a clause similar to s. 125; and there is one decision, *Attorney-General of New South Wales v. Collector of Customs for New South Wales* (1908), 5 C.L.R. 818, which deals with an issue similar to that in the *Johnny Walker* case, *supra*. Section 114 reads as follows:

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

The issue in the *New South Wales* case was whether the state was liable to pay federal customs duties on steel rails imported by it for use in the construction of government railways of the state. It was, of course, argued on behalf of the state that goods imported by the state were property of the state within the above-quoted s. 114 and hence immune from taxation. This contention was unanimously rejected. The principal ground of rejection was that the duties were imposed in respect of the importation of the steel rails, and not on state property as such, and thus were an exercise of the federal power of taxation under s. 51(11) and its power in respect of foreign trade and commerce under s. 51(1) of the Australian Constitution. Although Isaacs J., as he then was, took the view that the tax was imposed on the steel rails themselves, he nonetheless held that, having regard to the context in which s. 114 appeared in the Constitution, customs duties were not taxes within s. 114. By parity of reasoning it may be said that an export tax is outside of s. 125 in the present case.

We come back, however, to the principal point taken in this Australian case, and it is fully considered in the reasons of Griffith C.J., as follows (at pp. 831-32):

Again; the words "property belonging to the Commonwealth," "property belonging to a State," seem, *prima facie*, to import property lying and being within the Commonwealth. Neither the Commonwealth nor a State can impose a tax upon property which is not within the geographical limits of its jurisdiction. Even if they can impose a tax upon a resident in respect of property situated elsewhere, such a tax is a personal tax, and cannot be properly regarded as a tax upon his property. It was contended, however, that duties of Customs are a tax upon property within the Commonwealth, since the goods must have been imported before the liability to duty can arise. But this, although true in one sense, is not true in any relevant sense. The payment of the Customs duty is an obligation or condition which must be fulfilled before the goods can lawfully form part of the stock or mass of goods in the country, although for convenience they are allowed to be retained in bond in a King's warehouse until payment. Adapting the words of Chief Justice Taney, cited in *Perkin's Case*, [163 U.S., 625, at p. 629] I say that a Customs law from this point of view is nothing more than an exercise of the power the Commonwealth possesses of regulating the manner and terms on which goods may be brought into the Commonwealth.

For these reasons I am of opinion that the levying of duties of Customs on importation is not the imposition of a tax upon property within the primary and literal meaning of sec. 114, standing alone. I am further of opinion that, even if it is an imposition of a tax on property within the primary and literal meaning of that section, yet that meaning is not the only or the necessary meaning, and that, for the reasons already given, it must be rejected as being inconsistent with other plain provisions of the Constitution. I think, therefore, that sec. 114 does not apply to duties of Customs.

The foregoing comments are relevant here. Although the Australian Constitution refers to "property of any kind" and not to "Lands or Property" as does the Canadian s. 125, it may appropriately be considered here even on the basis of its wide terms, having regard to the fact that the proposed taxing legislation in the present case does not apply to "lands" and thus can be looked at from the standpoint of its "property" provision alone. The New South Wales case would support the conclusion that s. 125 does not apply to a transaction tax nor to an export tax.

A number of other Australian decisions may be mentioned, all having to do with the attempted imposition of stamp duties on a Trust, constituted as a corporation under Commonwealth legislation and empowered to manage the Superannuation Fund created by the legislation for the benefit of public employees. These cases are *Superannuation Fund Investment Trust v.*

Commissioner of Stamps (1978), 19 S.A.S.R. 481 and, on appeal, (1979), 26 ALR 99, and *Superannuation Fund Investment Trust v. Commissioner of Stamps (SA)*, (1980), 31 ALR 327. The main issue in these cases was whether the Trust was, so to speak, the Crown in right of the Commonwealth and thus immune from taxation unless it had consented thereto pursuant to s. 114. The decisions turned on the Crown issue which was decided adversely to the Trust in respect of the transactions in issue. There were, however, some comments on s. 114 which may usefully be referred to.

In the first cited case, a judgment of the Supreme Court of South Australia (in banco), Jacobs J. had this to say (at p. 497) on the question whether the assessment of certain instruments for stamp duty offended s. 114:

An affirmative answer to this question involves the proposition that by assessing the instruments to duty, the State has, without the consent of the Parliament of the Commonwealth, imposed a tax on property belonging to the Commonwealth. It was but faintly argued that the assessment imposes a tax upon the subject properties, or more particularly, upon the Trust's equitable interest in those properties as purchaser. What is taxed is the instrument or instruments which evidence a transaction in those properties, not the properties themselves. In *D'Emden v. Pedder* [(1904) 1 C.L.R. 91] it was decided that a receipt evidencing a payment to the Commonwealth, which was required to be stamped under State law, "although undoubtedly the property of the Commonwealth for some purposes", is not "property" of the kind intended in s. 114, which "appears rather to refer to taxation imposed upon property qua property". Despite the subsequent fate of that case on other issues, the decision on that point does not seem to have been doubted, and it would seem to dispose of the alternative submission, that the instruments themselves are relevant property of the Commonwealth. But even if they are so regarded, they are not taxable when they come into the hands of the Trust.

In the appeal to the High Court in this case, only Barwick C.J. (who dissented on the main issue, holding that the Trust was entitled to Crown immunity and, further, that Parliament had not subjected the Commonwealth Crown and its property to the challenged taxation) gave any consideration to s. 114. Speaking of the South Australian stamp duty, he said this (at p. 103):

Further, in form it is a tax upon the document by which the Commonwealth acquires the land to which the instrument relates. It falls upon the document when the document has itself become the property of the Commonwealth. Unless the document is stamped, ie the tax upon it paid, its function as a document is largely, if not indeed entirely, stultified (see s. 27 of the Stamp Duties Act 1923 as amended (SA)). Thus, even in the most technical sense, the duty, in my opinion, is a tax upon the property of the Commonwealth. It falls squarely, in my

opinion, within the operation of s 114, which is expressed in universal terms, "any tax on property of any kind".

There is nothing in this passage that in any way qualifies what was said by Griffith C.J. in the more relevant New South Wales case.

The quoted statement by Barwick C.J. was adopted by King C.J. of the Supreme Court of South Australia in the third of the decisions above-mentioned. He earlier rejected the contention that the stamp tax was a tax on a transaction and not on the instrument (a memorandum of transfer of land), holding that it was a tax on Commonwealth property. The Commonwealth had at that time withdrawn its consent to be taxed so that the naked question was whether the Trust was entitled to Crown immunity or was otherwise free of the stamp duty in respect of the matters in issue. Mitchell J. also referred to the comment by Barwick C.J. but in the context of determining whether the stamp duty was a tax upon property of the Trust. The third Judge in the case, Matheson J., accepted what Jacobs J. said and which we quoted from the first-mentioned of these cases, and he also quoted extensively from the New South Wales (steel rail) case, including what we reproduced from the reasons of Griffith C.J. He also brought into account portions of the reasons of O'Connor J. and of Higgins J. in the New South Wales case. O'Connor J. said, at p. 844, that, taking the preferable narrower view of property and a tax on property in the light of the Constitution as a whole, it is "an exaction made in respect of the holding or ownership of property". Higgins J. expressed himself as follows, at p. 854:

A Customs tax is a tax, not on property as such, but on persons in respect of the act of importation. There is a fundamental difference between taxing men for having property, and taxing men for moving property--and, in particular, for moving property into the country from overseas. [The emphasis in this quotation is that of Matheson J.]

The Australian decisions provide support for sustaining the validity of the proposed federal legislation under our characterization of its thrust. It has always been necessary, in dealing with a question of constitutionality, to examine the challenged legislation as a whole, especially where, as here, it is part of a package, and to interpret it before considering its validity. This is still the proper course.

We have one other observation. The proposed federal legislation, as noted early in these reasons, is intended to be an addition to the federal Excise Tax Act. There is no doubt that the Act serves an important revenue purpose but it is equally true that it reflects economic objectives. This was noticed by the Quebec Court of Appeal in *Reader's Digest Association (Canada) Ltd. et al. v. Attorney-General of Canada* (1965), 59 D.L.R. (2d) 54, affirming (1962), 37 D.L.R. (2d) 239, which sustained a federal excise tax on the value of advertising material in special editions (as defined) of non-Canadian periodicals published in Canada. The tax was designed to aid Canadian periodicals or had that effect. Both Hyde J.A. and Rinfret J.A. expressed the view that (in the words

of Hyde J.A., at p. 58), the Excise Tax Act "contains several Parts where the Act is used to raise revenue and protect Canadian trade and commerce". In our opinion, the legislation being questioned here is of that character. It has a constitutional base in both those heads of federal power.

What seem to dominate the views of the Alberta Court of Appeal and the views of the majority in the present appeal are a preference for protecting the property interests of the provincial Crown and a subordination of federal legislation because of the form in which that legislation is cast. We mentioned this at the outset of these reasons, and we return to it to say emphatically that it is not for the Court to attempt to soften the stated effect of federal legislation. There is nothing in the reasons of the majority that deny the power of Parliament to legislate and tax in relation to export, whether in respect of the provincial Crown or any other person. We witness here the odd result that those other than the Crown provincial are subjected to federal controls from which the Crown provincial is relieved, although the legislation purports to apply in both instances.

Reliance on the Federal General Power

There is another consideration which permeates the National Energy Program although, strictly speaking, it is unnecessary to invoke it in order to support the validity of Bill C-57, and especially the impugned portions of Part IV.1 to be added to the Excise Tax Act. We refer to a rather obvious interpenetration of the Program with social and economic conditions in all of Canada and thus as engaging the power of Parliament to legislate for the peace, order and good government of Canada. It may be that it would be sufficient in this context to embrace the trade and commerce power in that somewhat neglected dimension described in the Parsons case (1881), 7 App. Cas. 96, at p. 113, as "general regulation of trade affecting the whole dominion". The power to legislate for the peace, order and good government of Canada is to us a more apt repository of authority for proposed legislation of the scope and extent envisaged by the National Energy Program.

It is necessary to allay some fears about unwarranted federal intrusion into fields of exclusive provincial competence. In the first place, the federal legislation proposed for enactment is not of the character described in the Snider case, [Toronto Electric Commissioners v. Snider], [1925] A.C. 396, as being legislation which could have been enacted by any one province, save that its field of operation was made the whole of Canada. Certainly, attempted equalization of economic benefits throughout the country is a value that goes to the heart of a working federalism although we hasten to say that it is not for this or any Court to pronounce on the wisdom or likely success of the plan of equalization. Energy resources and energy supplies are matters which in their international, transnational and interprovincial impact concern all Canadians, both in their business and domestic activities, and place upon government responsibilities which only the national government can discharge with, it is to be hoped, fairness to all.

To the extent to which revenue-raising, by whatever means and by whatever invocation of associated legislative powers, can assist in distributing and equalizing economic burdens and benefits, it transcends intrusion into any particular trades in a province or into any control of a

provincial resource when there is a careful limitation to taxation at the export level if a province should choose to enter that market.

The power to legislate for the peace, order and good government of Canada must be given no less a contemporary exposition than any other powers delineated in ss. 91 and 92 of the British North America Act. Sterilizing grants of constitutional power does a disservice to a living constitution. Had this Court accepted sterility after the Privy Council pointed to an evolutionary path in *Edwards v. Attorney-General of Canada*, [1930] A.C. 124, it might have come to a different conclusion than that which it reached in the *Johannesson* case, [*Johannesson et al. v. Rural Municipality of West St. Paul et al.*], [1952] 1 S.C.R. 292. If a high point was reached in the *Hauser* case, [*The Queen v. Hauser*], [1979] 1 S.C.R. 984, it at least showed that the majority of this Court was bold enough to find support for a piece of federal legislation, the Narcotic Control Act, in the power to legislate for the peace, order and good government of Canada when other members of the Court would have been content to confine their assessment to the criminal law power and to the trade and commerce power.

Relaxation of some of the strictures thought to limit resort to the peace, order and good government power was seen in the *Anti-Inflation Act Reference*, [1976] 2 S.C.R. 373. That case laid to rest once and for all the idea that the general power could be invoked (apart from its purely residual scope) only in time of a war emergency. Economic stringency might also support reliance on the general power but it must be conceded that in the *Anti-Inflation Act Reference* the Court was concerned with temporary legislation directed to combatting a conjunction of high inflation and high unemployment. Nonetheless, the considerations actually present in that case and offered in support of the federal legislation cannot be taken to be in themselves limiting factors respecting resort to the general power of Parliament.

There has always been a two-stream line of authorities on the general powers stemming from the Privy Council's decisions in the *Russell* case [*Russell v. The Queen*] (1882), 7 App. Cas. 829, and in the *Local Prohibition* case, [*Attorney-General for Ontario v. Attorney-General for the Dominion et al.*], [1896] A.C. 348. The attempt by Lord Haldane in the *Snider* case, *supra*, to explain the *Russell* case on an emergency footing of the need to save the nation from the disaster of convulsing alcoholism did no credit to the judicial process and, in our view, demeaned the Privy Council. We need only call in aid that body's corrective judgment in the *Canada Temperance Federation* case, [*Attorney-General for Ontario v. Canada Temperance Federation*], [1946] A.C. 193.

Conclusion

We would allow the appeal, set aside the decision of the Alberta Court of Appeal and issue a declaration that the proposed tax would be validly exacted in respect of the export of natural gas produced by the Crown in right of Alberta.

Per MARTLAND, RITCHIE, DICKSON, BEETZ, ESTEY and CHOUINARD JJ.:-- This appeal relates to a levy which the Crown in right of Canada seeks to impose upon certain natural gas owned, produced, and to be exported, by the Crown in right of Alberta. The question is whether such natural gas is shielded from the levy by s. 125 of the British North America Act, 1867, which reads:

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

The matter originated in a reference to the Court of Appeal for Alberta by the Lieutenant Governor in Council of that province pursuant to s. 3 of The Constitutional Questions Act, R.S.A. 1970, c. 63. The appendix accompanying the reference stated that the answers to the two questions raised should be based on the following:

1 ...

- (a) the Province of Alberta was established pursuant to the Alberta Act (Canada);
- (b) all Crown lands, mines and minerals (precious and base) and royalties derived therefrom within the Province of Alberta belong to the Province of Alberta by virtue of
 - (i) the Memorandum of Agreement made the 14th day of December 1929, between the Government of the Dominion of Canada and the Government of the Province of Alberta, as amended;
 - (ii) the Alberta Natural Resources Act (Alberta);
 - (iii) the Alberta Natural Resources Act (Canada);
 - (iv) the British North America Act, 1930;
 - (v) legislation enacted by the Legislature of the Province of Alberta and the Parliament of Canada approving and confirming amendments to the Agreement referred to in subclause (i);
- (c) natural gas is a mineral;
- (d) part of the minerals that belong to the Province of Alberta under the agreements and legislation referred to in clause (b) consists of minerals below the surface of the land legally described as follows:

Section 18 in Township 3, Range 10, West of the 4th Meridian in the Province of Alberta;

- (e) during the month of September, 1980, the Province of Alberta caused a well to be drilled on the land referred to in clause (d) that resulted in the production of natural gas in commercial quantities (in this Appendix referred to as the "said natural gas"), and the said natural gas belongs solely to the Province of Alberta;
- (f) The Province of Alberta has entered into agreements with commercial corporations to have the said natural gas gathered, compressed and processed (such processing does not cause a change in the nature and quality of the said natural gas, but involves only the removal of certain impurities) and then to have it transported by a natural gas pipeline for export sale by the Province of Alberta to a purchaser in the United States of America that is a corporation carrying on business only in the United States of America and not in Canada;
- (g) the said natural gas pipeline
 - (i) is wholly situated within the Province of Alberta and extends from a commencement point in the South-Eastern part of the Province of Alberta for approximately 20 miles to the international border between Canada and the United States of America where the border of the Province of Alberta meets the border of the State of Montana, and,
 - (ii) does not connect with any other pipeline within the Province of Alberta;
- (h) the Province of Alberta maintains sole ownership of the said natural gas until it is delivered to the purchaser on the State of Montana side of the border between the State of Montana and the Province of Alberta;
- (i) the revenue from the sale of the said natural gas will be paid into the General Revenue Fund of the Province of Alberta to be appropriated to the public service of the Province;
- (j) the Minister of Finance for Canada has tabled in the House of Commons a Notice of Ways and Means Motion to amend the Excise

Tax Act (2) (Sessional Paper No. 321-1/310E) attached as Schedule A (in this Appendix referred to as the "Ways and Means Motion") respecting a measure to establish a natural gas and gas liquids tax to be imposed, levied and collected, inter alia, on natural gas exported from Canada for use outside Canada (in this Appendix referred to as the "tax on exported natural gas").

It was also provided in the reference that the answers to the questions raised should be based on the following facts to be assumed for the purpose of the reference:

- (a) the Parliament of Canada has enacted legislation in the terms of the Ways and Means Motion (in this Appendix referred to as the "said legislation");
- (b) the Province of Alberta has complied with all the laws in force in the Province of Alberta relating to the sale, export and delivery of the said natural gas;
- (c) the said natural gas is marketable pipeline gas as defined in the Ways and Means Motion, in respect of which no tax has been paid under the said legislation, and is exported from Canada for use outside Canada pursuant to a licence issued by the National Energy Board under Part VI of the National Energy Board Act, or pursuant to any other authority under that Act.

The Court of Appeal of Alberta (McGillivray C.J.A., Lieberman, Laycraft, Kerans and Stevenson J.J.A.) issued a joint opinion of the Court. That judgment is now reported at [1981] 3 W.W.R. 408. The Court held that the proposed levy was indeed a tax, imposed solely for revenue purposes. The tax, said the Court, was not intended to act as a regulatory mechanism of an industry operating throughout Canada, but was to attain, in the eyes of the federal government, a more equitable sharing of gas revenues. After reference to portions of The National Energy Program 1980, the stated goals of the tax and its apparent impact, the Court held the tax to be supported only by s. 91(3) of the British North America Act, 1867, 30-31 Vict., c. 3, "The raising of Money by any Mode or System of Taxation". As such, the tax was liable to offend s. 125 of the B.N.A. Act, supra, if indeed it was taxation of "Lands or Property belonging to" the Province of Alberta. The Court then determined that the "real bite" of the tax was upon provincial property, or the province in respect of its property, and hence offended s. 125. The Court rejected the contention that the tax was upon a transaction, the movement of property, and not the property itself. The "deemed distribution" system of the proposed tax was artificial, and could not disguise the "real bite" of the levy.

It was argued before the Court of Appeal that the application of "industry" by a province to its resources, its assimilation to a commercial entrepreneur, deprived the province of the protection of s. 125. Without ruling on the issue, the Court contented itself with holding that in any case the activity here was no more than primary production, the simple capture and sale of a resource.

The Court concluded that the tax did not apply to the gas in question; and to the extent it purported to, was ultra vires the Parliament of Canada.

The Attorney General of Canada has now appealed to this Court pursuant to s. 37 of the Supreme Court Act, R.S.C. 1970, c. S-19 as amended. The Attorneys General of Quebec, Manitoba, British Columbia, Saskatchewan and Newfoundland, and the Independent Petroleum Association were permitted to intervene and file factums in support of the Attorney General of Alberta.

Two constitutional questions were stated by the Chief Justice, corresponding to the two questions put by the Lieutenant Governor in Council of Alberta. They are:

1. If the tax on exported natural gas contemplated by a Notice of Ways and Means Motion and to be imposed under the proposed enactment entitled "Natural Gas and Gas Liquids Tax" is intra vires the Parliament of Canada, is the said natural gas that is exported from Canada for use outside Canada liable to taxation under the tax on exported natural gas having regard to the British North America Acts, 1867 to 1975, and in particular section 117, 125 or 126 of those Acts or any combination of those sections?
2. Is the tax on exported natural gas imposed under the proposed legislation, with respect to the said natural gas that is exported from Canada for use outside Canada, ultra vires the Parliament of Canada either in whole or in part, and, if so, in what particular or particulars and to what extent?

Although two questions are asked, only the one issue is raised: Does s. 125 protect the particular natural gas from the intended levy of the Parliament of Canada. Expressed in another way, is it within the legislative authority of the Parliament of Canada to impose a tax in respect of natural gas which, at all material times prior to its export, belongs to the Crown in right of Alberta?

Various government documents were filed both in this Court and in the Court of Appeal to aid in the constitutional characterization. This Court has recently commented on the admissibility and use of such extrinsic materials in constitutional cases: see *Re Residential Tenancies Act, 1979* (now reported at [1981] 1 S.C.R. 714). In the present case, the budget documents announcing the proposed tax, and The National Energy Program 1980 of which the tax is purportedly an element, are the sort of material admissible "to show the factual context and purpose of the legislation" (*ibid*, per Dickson J. at p. 721.)

The material filed includes: Budget in Brief, October 28, 1980; Budget Papers, October 28, 1980; The Budget, October 28, 1980; The Medium-Term Prospects for the Canadian Economy 1980-1985, October 1980; The National Energy Program 1980; Bill C-57--"An Act to amend the Excise Tax Act and the Excise Act and to provide for a revenue tax in respect of petroleum and gas"; National Energy Board Annual Report 1979; and Energy Issues for the People of Alberta.

To the extent possible, we propose to deal chronologically with the matters which bear upon

this dispute, under the following headings:

I Part VIII of the British North America Act, 1867

II The Alberta Act, 1905, 1905 (Can.), c. 3

III The British North America Act, 1930, 20-21 Geo. V, c. 26 (U.K.) and the Natural Resources Transfer Agreement

IV The National Energy Program 1980

V Budget Papers, Notices of Ways and Means Motions and supplementary information on the Budget, October 28, 1980

VI Bill C-57--"An Act to amend the Excise Tax Act and the Excise Act and to provide for a revenue tax in respect of petroleum and gas"

VII Section 125 of the British North America Act, 1867

VIII Characterizing the proposed legislation

I

Part VIII of the British North America Act, 1867

A

In 1867, the original four provinces at the union (Ontario, Quebec, Nova Scotia and New Brunswick) retained ownership of the resources within their respective provincial boundaries. In simplest terms, s. 109 of the B.N.A. Act provided that "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces ... at the Union ... shall belong to the several Provinces ... in which the same are situate. ..." Section 117 went on to provide that the several provinces should retain all their respective public property not otherwise disposed of in the Act "subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country".

Section 125, *supra*, protected the lands and property of one level of government from incursion by way of taxation by the other level of government. This might seem, without more, to settle the present controversy in favour of the Province of Alberta but, as we shall see, the matter is

not that plain. Section 125 must be read within the context of the entire B.N.A. Act and, in particular s. 91 of the Act.

At Confederation each of the original confederating colonies received the entire beneficial interest of the Crown in Crown lands situate within its boundaries, with the limited exception of certain public works acquired by the Dominion under s. 108 or assumed for fortifications or defence under s. 117. See *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.), per Lord Watson at p. 57.

The right of exploitation by the provinces of provincially owned natural resources flows logically from that ownership and is discussed in Hogg, *Constitutional Law of Canada*, (1977), at p. 393:

Because each provincial government may own much of the natural resources of its province, and because it has the constitutional power to purchase or expropriate resources in private hands, each province can control the exploitation of its natural resources by means of permits, licences and leases, and can profit from that exploitation through licence fees, rents, royalties or sales.

B

It was suggested from the bench during argument that the federal power of expropriation of provincial lands limited the beneficial ownership of the provinces. The case of *Attorney-General for Quebec v. Nipissing Central Railway Company et al.*, [1926] A.C. 715 (P.C.), was mentioned. Counsel for the intervening Province of British Columbia, however, sought to turn the analogy to the intergovernmental expropriation powers to advantage in his analysis of the relationship between the levels of government vis-à-vis s. 125. He emphasized the limited expropriation powers of the federal authority in respect of provincial lands. In the *Attorney-General for Quebec v. Nipissing Central Railway Company* the Privy Council found the authority in the Parliament of Canada to authorize the expropriation by the Parliament of Canada of provincial lands. Section 189 of *The Railway Act, 1919*, 1919 (Can.), c. 68, which empowered any railway company, with the consent of the Governor General to take Crown lands for the use of the railway was found to apply to provincial Crown lands. Although s. 189(4) contemplated that compensation for Crown lands taken would be paid to the Governor in Council, there was no reason why he should not direct that any compensation received in respect of Crown lands of a province be handed over to the government of that province.

Viscount Cave, Lord Chancellor, stated at p. 723:

... while the proprietary right of each Province in its own Crown lands is beyond dispute, that right is subject to be affected by legislation passed by the Parliament of Canada within the limits of the authority conferred on that Parliament.

No difficulty has ever arisen in the constitutional cases with respect to the absolute right in appropriate circumstances of the federal government to take over the lands of a province where such is a necessity in order properly to discharge the constitutional responsibilities of Parliament. A more difficult question arises where it is not a direct consequence of the discharge of the federal regulatory power that the proprietary interests of the province must suffer. In that regard Viscount Cave added, at pp. 723-24:

Reference was made to certain passages in judgments pronounced on behalf of the Board in earlier cases, in which emphasis was laid on the view that the regulative powers conferred upon the Dominion Parliament by s. 91 of the British North America Act did not authorize that Parliament to transfer to itself or others the proprietary rights of a Province. But those expressions must, of course, be taken subject to the observation of Lord Herschell in the first Fisheries case, *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia*, [[1898] A.C. 700, at p. 712], that the power to legislate in respect of any matter must necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights; and it may be added that where (as in this case) the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a Province and of the Provincial Government, the power so to affect those rights is necessarily involved in the legislative power.

Three years later other aspects of the same problem arose in a constitutional reference by the Governor in Council to this Court: *Reference re Waters and Water-Powers*, [1929] S.C.R. 200 ("the Water-Powers case"). Duff J., as he then was, approached the relationship between valid federal action on the one hand and provincial proprietary interests on the other from several directions. He pointed out at p. 212:

In the first Fisheries case, [[1898] A.C. 700], their Lordships had to pass upon the validity of an enactment of the Parliament of Canada (R.S.C., c. 95, s. 4) empowering the Governor in Council to grant fishery leases. Their Lordships decided that "in so far as" it empowered

the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it.

The legislative authority in respect to "Fisheries", conferred upon the Dominion Parliament by section 91, does not, it was held, involve the power to deal with the property of a province as if the administration of that property had been

entrusted by the B.N.A. Act, to the control of the Dominion Parliament; for, as Lord Herschell, who delivered the judgment of the Board, said, such a ruling would enable the Dominion to

transfer to itself property which had by the B.N.A. Act been left to the provinces and not vested in it. (p. 713).

The full definition of expropriation or appropriation powers is beyond the scope of these reasons. One has to bear in mind, however, in dealing with the arrogation of property rights by federal authority in the exercise of some other right, that, whatever the terminology may be, it is only such part of the property right and such extent of the taking of that right, as may be tied inherently and of necessity to the exercise of the authority in question by the federal level of government that the Constitution will permit. Thus the Government of Canada may not take or authorize the taking of property of the province beyond the property absolutely essential to the Dominion undertaking. Mineral rights, for example, would not be involved in the appropriation of the site of the federal work. This is so both because that part of the beneficial ownership of the province is not required by the fulfilment of the federal undertaking; and, because the federal government may not take over a source of revenue for its benefit in the course of establishing, under an express legislative heading, a federal project or undertaking. A serious overlap occurs, for example, in the authorization of the harnessing of interprovincial waters, where the title to provincial lands must necessarily be directly affected. The Dominion, in the exercise of its powers, may arguably, in some circumstances, as pointed at p. 218, of the Water Powers case, do so "without payment of compensation". Nevertheless, the Dominion may not constitutionally "assume the administration or control of water-powers so acquired for purposes not connected with the canal".

C

Here we are not concerned with expropriation. Either the federal government has the power to impose taxation under s. 91(3), "The raising of Money by any Mode or System of Taxation", without reference to other provisions of the B.N.A. Act, or it has not, and this must be answered in the context of the contest between s. 91(3) and s. 125 bearing in mind always the presence of the "notwithstanding" phrase ("notwithstanding anything in this Act") which introduced the former section. Furthermore, the federal government has the undoubted power in the exercise of its regulatory authority under s. 91(2), "The Regulation of Trade and Commerce", to affect directly and seriously the provincial proprietary interest notwithstanding that that effect might come through regulatory taxation and notwithstanding the presence of s. 125. That is the contest to be settled here and we do not find the analysis of the right to expropriate or the alleged right to appropriate of much assistance, even analogically. The fact that the power to expropriate is, as Sir Lyman Duff has said at p. 224 of the Water-Powers case (*supra*) "not expressly given" (except for defence, s. 117) under the B.N.A. Act is of little or no determinative value. The power to expropriate or the power to

appropriate must be determined in conjunction with the discharge of other functions under the Constitution by one level of government or the other. Expropriation by either level of government without legislative root in the Constitution is not a legal right and cannot take place legally. What we are talking about here is not expropriation of gas but taxation of gas, or, as the federal government submits, taxation of the movement of gas. Title to the gas at no time vests in the Government of Canada or its designate. Title transfers from the province to its customer. The transaction is purported to be subjected to tax federally. That is the question and one which brings into context the federal powers under s. 91 and the limits imposed by s. 125.

D

The relationship between ss. 91 and 125 of the Act is revealed by the use in the latter provision of the expression "taxation". This is a specific reference to an action which might be taken by one legislature or the other in the course of its governmental functions. It is this action from which the lands and property of the other level of government are exempted. The section does not purport to exempt the lands or property of either the province or the Dominion from proper regulatory action taken by the other level of government within its allocated spheres in ss. 91 and 92; but such lands or property are not subject to the taxation activities of the other level of government either under s. 91(3) or 92(2). If a contrary meaning were intended by the legislation of the United Kingdom in s. 125 of the B.N.A. Act, the term "taxation" might have been qualified as British Columbia would have had it in *Attorney-General for British Columbia v. Attorney-General for Canada* (1922), 64 S.C.R. 377 (the Johnny Walker case) by the addition of words which would include taxation where undertaken for regulatory purposes. On this appeal it therefore falls to the Attorney General of Canada to demonstrate that the action undertaken by Parliament in Bill C-57 relates to legislative functions under s. 91 other than those confined purely and simply to taxation.

II

The Alberta Act, 1905

At the time of its formation, in 1905, by the Alberta Act, 1905 (Can.), c. 3, the Province of Alberta was not given the natural resources contained within the province. All Crown lands, mines and minerals, and royalties incident thereto, located within the province, continued to be vested in the federal Crown, and to be administered by the Government of Canada for the purpose of Canada. Section 20(1) of the Alberta Act stated that inasmuch as the province would not have the public land as a source of revenue, provision would be made for half yearly payments by Canada to Alberta.

III

The British North America Act, 1930 and the Natural Resources Transfer Agreement

It is contended on behalf of the Province of Alberta that in 1930, Alberta and the three other western provinces were placed in the same, or in a better, position, vis-à-vis natural resources, than the original confederating provinces. On December 14, 1929 the Government of Canada and the Government of Alberta signed an agreement known as the Natural Resources Transfer Agreement, approved by the Parliament of Canada and the Legislature of Alberta, and confirmed by the British North America Act, 1930, the effect of which was to place ownership of all the natural resources formerly owned by the Crown in right of Canada in the Crown in right of Alberta. The right of ownership carried with it, as a necessary incident, the right in the public interest to possess, enjoy, sell or otherwise dispose of such resources, and revenues therefrom, subject only to such laws as the Parliament of Canada might validly enact in pursuance of its legislative authority. The position of the provinces was considered by Duff J. in the *Johnny Walker* case, at p. 385:

The provinces are to keep the property assigned to them and enjoy the fruits of that property free from any right of the Dominion to assume it except for the purposes of defence (s. 117) and they have the further protection of section 125; a provision suggested, it may well be, by Marshall's famous dictum adapted from Webster's argument "a power to tax is a power to destroy"; but there is nothing in any of these clauses suggesting that the legislator is aiming at a limitation of Dominion authority in such matters as e.g. shipping and external trade. [Emphasis added.]

The agreement of 1929 between the Dominion Government and the Government of Alberta includes a recital:

And whereas it is desirable that the Province should be placed in a position of equality with the other Provinces of Confederation with respect to the administration and control of its natural resources as from its entrance into Confederation in 1905:

By section 1 of that agreement it was provided:

Transfer of Public Lands Generally

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall ... belong to the Province ... and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof...

Section 1 of the British North America Act, 1930, *supra*, provides:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid. [Emphasis added.]

It is the submission of counsel for Alberta that, by reason of the presence of the words "notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada," the ownership by Alberta of its lands and resources is on a plane higher than that enjoyed by the founding provinces under s. 109. Put another way, if the argument can be made that s. 125 is subject to s. 91 by reason of the presence of the word "notwithstanding" in s. 91, then, because of the 1930 amendment to the B.N.A. Act, the presence of "notwithstanding" in s. 1 of that Act makes the grant or transfer of resources confirmed by the 1930 amendment immune from any term in the 1867 Act, as amended, including the expression of "notwithstanding" in s. 91.

We find no requirement to determine the validity of such submission, because of the disposition which we propose of this appeal. It is sufficient to conclude that whether the Province of Alberta's title to its resources be on the level of s. 109 of the B.N.A. Act or on a higher plane, the interests of the province are not subject to federal taxation, implemented under s. 91(3), where no regulatory or other valid federal power is the constitutional basis of the taxation in question.

IV

The National Energy Program 1980

One of the documents placed before the Court is an undated publication entitled "The National Energy Program 1980" issued by the Minister of Energy, Mines and Resources Canada. It is a statement of the federal position in respect of energy.

The document first addresses the matter of oil availability. Three points are noted. Over the last two decades (i) the world tripled its consumption of oil; (ii) the relative use of oil doubled from one-fifth to two fifths of primary demand; (iii) the capacity of the United States to supply its own oil needs declined. The emergence of the Organization of Petroleum Exporting Countries (OPEC) cartel and its effectiveness in increasing oil prices from \$3 a barrel in 1960--and about the same in 1970--to \$38 or more in 1980, is discussed. "The International Context" part of the document concludes with a forecast of traumatic adjustment and transformation for the world economy, supply uncertainties and unpredictable oil prices.

The discussion of "Energy Benefits and Burdens" is of particular interest in the present inquiry, notably the following quotes from pages 11 to 16, which we will number for ease of reference:

[1.] In Canada, for example, trade in the major forms of energy has been closely regulated by federal agencies for many years. Special procedures governing energy exports have been in place for some time, reflecting a national consensus that Canadian needs are to be served first, and that only surplus energy may be exported [at p. 11].

[2.] A large proportion--approaching one-half--of the revenue from these higher domestic prices accrues to the governments of the petroleum-producing provinces; most of it to Alberta. The resulting inter-regional transfers of wealth are now so large, and growing so rapidly, that they have become a national issue [at pp. 11-12].

[3.] The national and provincial governments in Canada have specific rights, powers, and obligations under the provisions of the British North America Act. However, there is no legislatively-defined arrangement under this Act for the sharing of revenues arising from the exploitation of natural resources, including petroleum [at pp. 12-13].

[4.] The revenue share accruing to each level of government is a function of a mixture of fiscal instruments that has evolved over time. The result is a distribution of benefits that is extra-ordinarily unfavourable to the national government, even in comparison to a country such as Australia, where the state governments, like Canadian provinces, own the resources. Revenue-sharing arrangements in Canada are an international anomaly, bearing no relationship to the rights and responsibilities of the two levels of government [at p. 13].

[5.] While Canadian economic performance since the initial OPEC price shock compares favourably with that of other industrial countries, the effort to support the economy has left the national government's fiscal position badly weakened. Each OPEC price shock makes the federal position worse [at p. 14].

[6.] This is a crucial difference between Canada and most other energy-rich countries, among them federal states like Australia, or unitary states such as Norway and the United Kingdom. In these countries, the national government obtains most of the revenues accruing from the increase in price of domestic petroleum; it captures the "upside" appreciation; it gets the financial wherewithal to offset the negative economic consequences of world oil price shocks. In

Canada, one provincial government--not all, and not the national government--enjoys most of the windfall, under current policies. These policies are no longer compatible with the national interest. The Government of Canada must have a reasonable share of revenues from oil and gas production, if it is to shield Canadians from the full impact of the negative economic shock, and help bring about the adjustments that must be made in Canada's economic, energy, and industrial structure [at p. 14].

[7.] To rely entirely on new taxes upon the industry would be unfair. It would also be ill-advised, for it would put in jeopardy our energy supply objectives. Finally, it would miss the basic point: what is the appropriate distribution of oil and gas revenues among governments?

What share of revenues reflects the needs and responsibilities of the two levels of government? At present, provincial governments receive more than three-quarters of the oil and gas production revenues accruing to governments. Alberta, with 10 per cent of Canada's population, receives over 80 per cent of the petroleum revenues gained by provinces [at p. 15].

[8.] Canadians must decide, however, whether the current arrangements, which concentrate the financial benefits of higher oil prices in one provincial government, and give little benefit to the national government, are appropriate [at p. 16].

The Government of Canada believes that the present system is inappropriate and unfair. It believes that more appropriate arrangements must be made, so that the national government, which is accountable to all Canadians, gains access to the funds it needs to support its response to national needs [at p. 16].

Under the heading "Energy Taxes", the document refers to earlier discussion of the "major shortcomings of the prevailing tax and revenue-sharing system" and continues,

[9.] The Program [i.e. the National Energy Program] will create a framework for more balanced revenue sharing between the producing provinces, who are entitled to large and growing revenues from their resources, and the Government of Canada, which has a national claim, on behalf of all Canadians, to a share of the industry's revenues [at p. 33].

We are told at p. 33 that "For all these reasons the proposals presented to the producing provinces incorporated a federal tax on natural gas exports" but that

[10.] The governments of Alberta and British Columbia have strongly opposed a natural gas export tax. They have argued that such a tax is an intrusion on their resource ownership rights. They also argue that taxes on gas exports are discriminatory [at p. 34].

The Government of Canada, it appears, rejected these arguments but "[r]ecognizing, however, the strong opposition of Alberta and British Columbia to the gas export tax" (at p. 34) offered to discuss other arrangements which the Alberta government, however, considered neither feasible nor appropriate.

The discussion of "Energy Taxes" concludes with a pregnant passage:

[11.] The Government of Canada is, therefore, not proceeding with a natural gas export tax. This tax would have provided the federal government with a major source of the revenues needed to meet its national energy obligations [at p. 34]. [Emphasis added.]

Under the next heading, "New taxes on Oil and Gas", the federal government says:

[12.] To compensate for these foregone revenues [i.e. the revenues which would have been available through a natural gas export tax] the federal government will need new sources of funds. One potential new source is the Petroleum Compensation Charge [at p. 35].

After some comment on the Petroleum Compensation Charge one reads:

[13.] Another source of revenue is needed. The Government of Canada will, therefore, impose a new natural gas and gas liquids tax.

All natural gas sales will be subject to the tax, including those to the export market. There is no reason to exclude exports from a tax payable on all gas produced and consumed in Canada [at p. 35]. [Emphasis added.]

This "new natural gas and gas liquids tax" is the tax central to the present reference.

V

Notices of Ways and Means Motions and supplementary information on the Budget, October 28, 1980

The Budget Papers of October 28, 1980 announced that a new tax would "be imposed under the Excise Tax Act on all natural gas and gas liquids produced in Canada". It stated (at p. 84-85) that

[14.] While the tax will generally apply to distributors of natural gas on their acquisitions of gas for resale to consumers, the purchase and sale arrangements in the industry take a variety of forms and various provisions will thus be necessary in the legislation to deal with them. Specifically:

- i) In the case of marketable pipeline gas acquired by distributors for resale to consumers in Canada, the tax will be imposed upon distributors when they acquire gas and will be collected from them.
- ii) In the case of sales of marketable pipeline gas by producers, pipeline companies or other gas brokers directly to consumers, the tax will be imposed on the consumer and collected by the seller on behalf of the government. This type of direct sale is often made to an industrial user.
- iii) Sales of marketable pipeline gas outside Canada will be taxable in the hands of the person who exports the gas.
- iv) Natural gas liquids, which are ethane, propane, and butanes, will be taxed when they are first removed, following production, from a gas processing or reprocessing plant. The operator of the plant will be required to collect the tax on behalf of the government. The tax will not apply to such liquids produced from oil.

The tax was first detailed in a Notice of Ways and Means Motion to amend the Excise Tax Act (2), tabled by the Minister of Finance in the House of Commons on November 12, 1980. This is the motion referred to in paragraph 1(j) of the reference, *supra*. It reads in part:

That it is expedient to introduce a measure to amend the Excise Tax Act to establish a natural gas and gas liquids tax, and to provide among other things:

1. That a tax be imposed, levied and collected,
 - (a) on each gigajoule of marketable pipeline gas received by a distributor, payable to the Minister of National Revenue, by the distributor, at the time when the gas is received;
 - (b) On each gigajoule of marketable pipeline gas, received by a consumer in Canada from a gas producer, broker or anyone for or on behalf of the gas producer or broker, payable to the Minister of

National Revenue by the consumer at the time when the gas is received...

...

3. That the tax imposed by the said measure be binding on Her Majesty in right of Canada and in right of any province.

...

5. That where any marketable pipeline gas, in respect of which no tax has been paid under the said measure, is exported from Canada for use outside Canada, pursuant to a licence issued by the National Energy Board under Part VI of the National Energy Board Act, or pursuant to any other authority under that Act, the exporter be deemed to be the distributor of the gas so exported and to have received that gas at the time it was exported by him. [Emphasis added.]

It will be noted that it was initially proposed that the tax be imposed directly on the marketable pipeline gas.

On November 12, 1980 the Lieutenant Governor in Council of Alberta launched the present reference.

The Motion to which we have referred was apparently superseded by a later Notice of Ways and Means Motion, referred to as "Excise Tax Motion (No. 2)" in Bill C-57, tabled in the House of Commons on January 22, 1981.

VI

Bill C-57--An Act to amend the Excise Tax Act and the Excise Act and to provide for a revenue tax in respect of petroleum and gas

On January 26, 1981, Bill C-57 received first reading. Part II of the Bill is entitled "Excise Tax Act". The explanatory material states that:

The amendments to the Excise Tax Act proposed in this Part would implement the Ways and Means Motion (No. 2) relating to that Act tabled by the Minister of Finance on January 22, 1981 (hereinafter referred to as the "Excise Tax Motion (No. 2)").

Section 43 of Part II would add after Part IV of the Excise Tax Act a new Part IV.1 entitled "Natural Gas and Gas Liquids Tax". Section 25.11 of the new Part states:

25.11 The purpose of this Part is to provide legislative authority for the imposition of a natural gas and gas liquids tax as an essential and integral element of the national oil and gas policy as expounded in the National Energy Program.

The provisions of the new Part are designed to ensure that all gas produced in Canada will be subject to tax. Section 25.13 is the charging section:

25.13 (1) There shall be imposed, levied and collected on the receipt of marketable pipeline gas by a distributor in Canada a tax at the rate specified in subsection (5).

(2) There shall be imposed, levied and collected on the receipt of marketable pipeline gas by a consumer in Canada from a gas producer or a broker, or from any person acting for or on behalf of a gas producer or a broker, a tax at the rate specified in subsection (5).

A "distributor" is defined generally in s. 25.1(1) as meaning a person who, in any year, carried on the business of selling marketable pipeline gas to consumers in Canada. No tax is imposed on the exportation of gas as such. The word "distributor", however, is given an extended meaning by a deeming provision s. 25.1(2) which reads:

25.1 ...

(2) Where any marketable pipeline gas in respect of which no tax has been paid under this Part is exported from Canada for use outside Canada pursuant to a licence issued under Part VI of the National Energy Board Act or pursuant to any other authority under that Act, the exporter of that gas is, for the purposes of this Part, deemed to be the distributor of that gas and to have received that gas at the time he exports it.

The new Part has many other provisions but the only other one directly of interest in the present appeal is s. 25.12 which provides:

25.12 This Part binds Her Majesty in right of Canada or a province and every person acting for or on behalf of Her Majesty in right of Canada or a province.

It is the contention of the Attorney General of Canada that despite the fact that, (i) all Crown

lands, mines and minerals in Alberta are owned by the province; (ii) the province produced its natural gas and transported the gas by pipeline for export sale to a purchaser in the United States of America; and (iii) the province maintains sole ownership of the said natural gas until it is delivered to the American purchaser on the American side of the border, the province falls within the "deeming" provision of s. 25.1(2) and is therefore liable to tax.

VII

Section 125 of The British North America Act

A

Clement, *The Law of the Canadian Constitution* (3rd ed., 1916), at p. 643 considered s. 125 of the B.N.A. Act unnecessary. "It was not intended," he said, "to affect the general rule as to the exemption of Crown property from taxation as that rule is to be applied, for example, in England or in a colony under one legislature only. It was inserted by way of abundant caution to prevent the Dominion from levying taxes for federal purposes upon property held by the Crown for provincial purposes, and vice versa."

Be that as it may, s. 125 is plainly intended to prevent inroads, by way of taxation, upon the property of one level of government, by another level of government.

It is apparent that the public domain was to be a principal source of revenue for the new provinces. The federal government had assumed the most costly obligations of government at the time, and had been granted a general power to raise "Money by any Mode or System of Taxation" (s. 91(3)). This taxing power, of course, included authority to levy duties of customs and excise which, in 1867, provided more than eighty per cent of the revenue of the British North American Colonies. By contrast, the provinces were limited to imposing "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes" (s. 92(2)) and licensing fees (s. 92(9)). These revenue sources were not expected to yield significant sums of money; indeed, the extreme unpopularity of direct taxes in this era of "laissez-faire" political theory created the assumption that the provinces would levy taxes only as a last resort (LaForest, *The Allocation of Taxing Power under the Canadian Constitution*, Canadian Tax Paper No. 65, (2nd ed., 1981), at pp. 2-3). Provincial revenues were to be derived, not from s. 92 powers, but from the assets allocated to the provinces in Part VIII of the B.N.A. Act.

Section 118 (now repealed and superseded by the B.N.A. Act, 1907) provided for annual subsidies to be paid by the Dominion to the provinces, while the balance of provincial revenue requirements would largely be met through the exploitation and development of the public domain. These sentiments are expressed by Galt in the *Confederation Debates* (1865) at p. 68:

We may, however, place just confidence in the development of our resources, and repose in the belief that we shall find in our territorial domain, our valuable

mines and our fertile lands, additional sources of revenue far beyond the requirements of the public service.

Neither the federal government nor the provincial governments alone have the authority unilaterally to alter the terms of the division of assets effected in Part VIII. As Duff J. observed in the *Water-Powers* case, *supra*, at p. 212, with reference to Part VIII of the B.N.A. Act including s. 125:

The effect of the decisions seems to be, that neither the Dominion nor a province can take possession of a source of revenue which has been assigned to the other, and as a source of revenue, appropriate it to itself, nor, as owner, transfer it to another.

Faced with the general constitutional taxing competence of the federal parliament under s. 91(3) of the Act it was important for the survival of the provinces and of Canadian federalism that this vital source of provincial revenue be protected from erosion through taxation. Section 125 thus gives legislative recognition to that constitutional value. LaForest states, referring to s. 125, at p. 182:

This section appears to have been enacted to ensure that the legislative powers of taxation were not used to interfere with the control the British North America Act has given the federal and provincial governments over their property.

The immunity conferred by s. 125 must override the express powers of taxation contained in ss. 91(3) and 92(2). The legislative powers conferred by Part VI (ss. 91 to 95) must be regarded as qualified by provisions elsewhere in the Act. Otherwise those other provisions are meaningless. The courts have consistently proceeded on the basis that s. 91 and s. 92 powers are so qualified even where the legislative power is fortified by a non obstante clause. The *Johnny Walker* case, to which much attention was paid during argument, is a good example. All courts proceeded on the basis that s. 125 would, in appropriate circumstances, limit Parliament's legislative powers under s. 91. The overriding nature of s. 125 and, indeed, of the whole of Part VIII, was endorsed by Duff J. in the *Water-Powers* case, *supra*. "There is nothing more clearly settled," Duff wrote at p. 216, "than the proposition that in construing section 91, its provisions must be read in light of the enactments of section 92, and of the other sections of the Act, and that where necessary, the *prima facie* scope of the language may be modified to give effect to the Act as a whole." After referring to the division of assets in Part VIII and the express limitation on the power of taxation expressed in s. 125, Duff J. concluded at p. 217: "... it cannot be maintained that it is competent to the Dominion in exercise of ... [section 91] powers to legislate in disregard of the provisions of sections 102-126."

Section 125 raised to the rank of constitutional guarantee the immunity of provincial property from taxation. Section 125 is an exception to the general constitutional competence of the federal Parliament in the matter of taxation based on s. 91(3) and in this manner the section renders inapplicable to the property of the provinces federal fiscal legislation enacted pursuant to s. 91(3).

B

While s. 125 restricts the federal taxing power, it does not limit the exercise of the other heads of power found in s. 91. Provincial Crown lands are not immune from the operation of Dominion laws made in exercise of competent authority affecting the use of such property. This proposition flows from the doctrine that laws "in relation to" a federal head of power may "affect" provincial jurisdiction or property.

Federal legislation which is in form taxation may yet be binding on a province if it is in substance and primarily enacted under another head of power. This was recognized in the *Johnny Walker* case. A majority of the judges in this Court (and the Privy Council [1924] A.C. 222) held that customs duties and other duties imposed by the Dominion of Canada could be levied upon alcoholic liquors imported by the Government of British Columbia for the purpose of sale, notwithstanding s. 125 of the B.N.A. Act. The rather brief judgment of Lord Buckmaster in the Judicial Committee refers to the legislative authority of Parliament with respect to both regulation of trade and commerce and the raising of money by any mode or system of taxation. The judgment is not entirely free of ambiguity. Lord Buckmaster said, at p. 225

The imposition of customs duties upon goods imported into any country may have many objects; it may be designed to raise revenue or to regulate trade and commerce by protecting native industries, or it may have the two-fold purpose of attempting to secure both ends; in either case it is a power reserved to the Dominion. It has not indeed been denied that such a general power does exist, but it is said that a breach is created in the tariff wall, which the Dominion has the power to erect, by s. 125, which enables goods of the Province or the Dominion to pass through, unaffected by the duties. But s. 125 cannot, in their Lordships' opinion, be so regarded. It is to be found in a series of sections which, beginning with s. 102, distribute as between the Dominion and the Province certain distinct classes of property, and confer control upon the Province with regard to the part allocated to them. But this does not exclude the operation of Dominion laws made in exercise of the authority conferred by s. 91. The Dominion have [sic] the power to regulate trade and commerce throughout the Dominion, and, to the extent to which this power applies, there is no partiality in its operation. Sect. 125 must, therefore, be so considered as to prevent the paramount purpose thus declared from being defeated. [Emphasis added.]

Although the matter is equivocal we think the better view is that customs duties on imported goods were viewed by their Lordships as primarily supportable under Parliament's constitutional authority to regulate trade and commerce. The fiscal immunity of the provincial Crown could not prevail with respect to federal legislation founded upon a head of constitutional competence other than s. 91(3). In this Court, Duff J. had said, at p. 382:

The importance of the customs duties as an instrument for the regulation of external trade is too obvious to require comment ...

I have no difficulty in point of legal construction in holding that this authority is given by sec. 91(2), that is to say that the authority to levy customs duties for trade purposes is embraced in the authority thereby conferred, "the regulation of trade and commerce". ... The language used for defining the authority of the Dominion on the subject of taxation--the "raising of money by any mode or system of taxation"--seems to distinguish between taxation for trade purposes and taxation for the purpose of raising money. Since the imposition of customs duties (as being indirect taxation) is excluded from the provincial jurisdiction, the words of the last mentioned heading suggest that such duties except where imposed primarily at all events for purposes of revenue are treated as falling within the "ambit" of the power given to the Dominion in relation to "Trade and Commerce".

Many references can be made to the judgments on this point, but suffice it to refer to the argument of counsel on behalf of the Federal Government at p. 223 of the Privy Council decision wherein it was stated:

The imposition of duties upon goods imported into Canada is not "taxation" within the meaning of s. 125, but falls within "the regulation of trade and commerce" (head 2 of s. 91);

Vide also the judgment of this Court (1922), 64 S.C.R. 377, at p. 385.

We agree with Professor Hogg who, referring to s. 125, states at p. 413:

This provides an intergovernmental immunity from taxation, but only from taxation upon "lands or property belonging to Canada or any province". The section was held inapplicable in the Johnny Walker case, apparently because the Privy Council held that the customs duties were designed to regulate trade and commerce as well as to raise revenue. Since most taxes are levied with a view to their effects on the economy as well as their revenue yield, this reasoning seems unsatisfactory. However, if their lordships were regarding the customs legislation as primarily regulatory, then it is easier to understand not only why s. 125 did not apply, but also why the federal Parliament was held competent to tax the province.

LaForest, *ibid.* at p. 183, speaking of the Johnny Walker case, states: "section 125 was not meant to interfere with legislative authority other than the taxing power".

The essential question here is no different than in any other constitutional case: What is the "pith and substance" of the relevant legislation. If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the "adjustment levies" considered in Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, s. A-7 et al., [1978] 2 S.C.R. 1198 or the unemployment insurance premiums in Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355, then the levy is not in pith and substance "taxation" and s. 125 does not apply.

VIII

Characterizing the proposed legislation

The first submission of the Attorney General of Canada is that the proposed tax is an export tax, analogous to the customs duties considered in the Johnny Walker case, and thus binding on the province. He argues that the tax is a tax on the export of natural gas from Canada, that a tax on export is a duty in the nature of a customs duty, and that a customs duty is not a tax on lands or property as those words are used in s. 125 of the B.N.A. Act. Accompanying this submission is the argument that the measure is supportable as being in relation to international trade. These arguments are allied since they can both be reduced to the assertion that the measure is not "taxation" and thus is not limited by s. 125.

In our view there is little, if anything, in the language of Bill C-57 to support the contention that the proposed tax is valid as being an export tax. The tax is not levied exclusively on exported gas. It is levied without differentiation, as to the rate of tax or otherwise, between exported gas and gas that is not exported. Section 25.1(2) does not, in terms, purport to impose a tax on gas that is exported from Canada. The proposed tax applies to the "receipt" of all marketable pipeline gas produced in Canada. It is the deemed receipt, and not export, that triggers liability.

It will be noted that in the Notice of Ways and Means Motion of October 28, 1980, the tax was described as one to be imposed directly on marketable pipeline "gas", whereas in Bill C-57, the tax is described as falling on the "receipt" of gas. The change in drafting might well be seen as a colourable attempt to legislate in a prohibited area under the guise of legislating in a permitted area.

In order to bring an exporter even within the ambit of the charging provisions the draftsman has had to give a contorted meaning to the word "distributor". By reason of the definition of "distributor" in s. 25.1(1) and the "deeming" provision in s. 25.1(2) the Province of Alberta is deemed to be a "person who ... carries on the business of selling marketable pipeline gas to consumers in Canada", a patent legislative fiction.

It will be observed that the deeming provision only comes into play when no tax has previously been paid on the marketable pipeline gas that is exported. Thus, if marketable pipeline

gas is first received by a distributor, so that the tax then becomes payable under s. 25.13(1), and if that gas is subsequently exported by that distributor, no further tax becomes payable as a consequence of export. In short, the act of export per se is irrelevant in terms of tax liability.

As the Attorney General of Saskatchewan submits, the deeming provision s. 25.1(2) is at the most an anti-avoidance device. It is a mechanism to ensure that tax will be paid by some person within Canada in the limited circumstances of gas exported from Canada under the authority of the National Energy Board Act upon which no tax has theretofore been paid.

A tax on the transit of goods from inside to outside the country may be imposed for the purpose of raising money or for the purpose of regulating trade or both. Even if the tax is aimed at export, provincial property is protected under s. 125 unless the federal legislation is regulatory. Thus, if the levy here in question were regarded as aimed at exports it would be necessary also, for the appeal to succeed, to conclude that it not be "taxation" in the sense of the foregoing discussion. There is to the proposed tax no aspect of the regulation of trade and commerce that would support its imposition under head 2 of s. 91 of the B.N.A. Act. For the reasons which follow, Bill C-57 should be regarded, in our view, as purely and simply a taxing measure, imposed for revenue purposes.

A

The text of Bill C-57 contains no language to indicate that the tax is imposed as a regulatory device or to reduce or eliminate the export of natural gas. The tax is imposed in a uniform manner. It imposes a tax on all gas produced whether consumed outside or inside Alberta. It applies equally to distributors, local or national, to exporters, to consumers. It is recoverable from anyone who uses or sells natural gas.

It is urged upon this Court by counsel for the Attorney General of Canada that the statute finds its constitutional base in s. 91(2) (Trade and Commerce) of the B.N.A. Act, as well as s. 91(3) (Taxation by any Mode). The importance of the distinction between the one constitutional base and the other lies in the ultimate problem of discerning the relationship between the federal legislative powers under s. 91 and their exercise, and the presence in the Act of s. 125. As will be seen, there is nothing in Part IV.1 added to the Excise Tax Act, supra, by Bill C-57 which in any way regulates the flow of natural gas produced in Canada through interprovincial or international channels. It is not a conservation statute nor is it indeed a price regulating statute. It has nothing to do with the channels of industry into which the gas should be routed, as, for example, in replacement of electricity, coal or other sources of energy. In short, it is purely, as announced in the budget and The National Energy Program 1980 a revenue raising measure. Even in this aspect, the tax is in no way aimed, as the expression was used by all parties before this Court, at the export sector of the natural gas industry. The Act incidentally taxes exports, but only by the indirect device of a deeming process.

In cases considering tax measures, it may be difficult to find a single "pith and substance" of

legislation. A fiscal instrument may be chosen precisely because it can kill two birds with one stone, regulating the industry while raising revenue. The legislation may have, in the argot of the cases, a "double aspect". A subject which in one aspect and for one purpose may fall within one constitutional head of power may in another aspect and for other purposes fall within another head: see *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.) at p. 130. This is perhaps just another way of saying that a measure is supportable under two different heads of power. In most cases, it is enough to place a matter within either s. 91 or s. 92. The concept of a "double aspect" therefore finds currency in cases dealing with a federal power on one hand, and a provincial power on the other; see for example cases on highway traffic offences: *O'Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. The Queen*, [1966] S.C.R. 238. It is seldom necessary to assign a particular head of power if a matter clearly falls within several heads of s. 91 or s. 92. In the present case, however, a specific assignment is necessary. This is because s. 125 is by its terms addressed only to s. 91(3), the power of taxation. It does not attenuate federal power to legislate under other heads in s. 91, such as "trade and commerce".

Such an analysis will not save a tax which is in pith and substance only a revenue-raising mechanism, but which may exhibit ancillary regulatory characteristics. This leads one to consider the intended or anticipated effect of the proposed tax, its place in The National Energy Program 1980 and how it relates to other federal legislation affecting the natural gas industry.

The Shorter Oxford English Dictionary, 3rd ed., (1944 revised with corrections 1973) defines "to regulate" as "To control, govern, or direct by rule or regulations; to subject to guidance or restrictions ... To adjust, in respect of time, quantity, etc., with reference to some standard or purpose". In relation to "regulation of trade and commerce", this definition and common sense would suggest a restraint upon or channelling of economic behaviour in pursuit of policy goals. The proposed tax in this case, when viewed in light of other legislation touching the natural gas industry, has no such regulatory effect on behaviour. By its very comprehensiveness, the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur.

It might be said that in a free market, a general tax touching all natural gas would either lead to an increase in the price charged for gas, or if that is impossible a shifting of money and effort out of a less profitable natural gas production industry into other industries. In a word, either the consumption or production of natural gas could be discouraged. There could be valid policy reasons for such discouragement, and excise taxes have often been justified on bases apart from revenue generation: see *Broadway and Kitchen*, Canadian Tax Policy, Canadian Tax Paper No. 63, (1980) at pp. 201 ff. The application of differential rates of taxation, for example, might reveal a regulatory or directive purpose. Yet in the present case, no such purpose or justification is advanced. Nor has the federal government expressed any desire to create disincentives to gas production or distribution. The proposed tax was not argued to be a conservation measure.

The quantity, movement and price of natural gas are carefully regulated under the present legislation and remain unaffected by the tax. The Petroleum Administration Act, S.C. 1974-75-76, c. 47, and the National Energy Board Act, R.S.C. 1970, c. N-6, together provide a complete scheme for the regulation of the export of natural gas. The volume of gas authorized for export as well as its price are established by orders pursuant to those Acts. The National Energy Program 1980 notes that trade in the major forms of energy has been closely regulated by federal agencies for many years (No.1). The effect of the tax is to reduce the revenue or "net backs" received by producers or marketers of natural gas.

B

In our view, it assists to examine in more detail other legislation bearing on the taxation and regulation of the natural gas industry by the Government of Canada. That Government determines the volume of natural gas to be exported from the country as well as the price at which such exported gas shall be sold: National Energy Board Act, *supra*, and National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056. Under that legislation, and those regulations, the National Energy Board, acting in the national interest, regulates the disposition of natural gas when it enters the channels of interprovincial and international trade. None of the sections of Bill C-57 appears to have any relationship with the operation of the National Energy Board Act, and the regulations thereunder, as they purport to regulate the gas production and marketing industry in Canada.

Parts III, IV, and VI of the National Energy Board Act, and related regulations should be noted. Part III is entitled "Certificates of Public Convenience and Necessity" and gives the Board near total control of the capital assets used in the transport of natural gas. An equivalent control over financial operations within the gas industry is provided in Part IV, entitled "Traffic, Tolls and Tariffs". Regulation of the movement of gas is achieved by Part VI, "Exports and Imports". Section 81 places a blanket prohibition on all gas export or import, subject to the Board's relieving power. By s. 82, the Board is empowered to issue export and import licences. The terms and conditions of these licences are fleshed out by regulation: C.R.C. 1978, c. 1056, as amended. Under these regulations, the quantity of export and import is dictated by the Board (s. 12).

Parallel regulation is provided in the Petroleum Administration Act, *supra*. Part III of that Act, entitled "Domestic Gas Price Restraint", provides for the setting of a uniform price for all gas entering interprovincial or international trade. This is achieved by the various regulations found at C.R.C. 1978, chapters 1259 and 1261, and SOR/80-823.

When viewed in the context of this all-embracing scheme to control the natural gas industry, the present tax is clearly not a "regulatory tool" in itself. Every major aspect of the industry is already subject to licencing, prohibitions, orders and so on. On a plain reading of Bill C-57 it is manifest that the proposed tax adds nothing to the existing structure of regulation, save revenue. An argument may be made that the tax is ancillary to the omnibus scheme for use of natural gas in the economy but, in pith and substance, it remains "taxation" and not "regulation of trade and

commerce". The title to Bill C-57--"An Act to amend the Excise Tax Act and the Excise Act to provide for a revenue tax in respect of petroleum and gas"--confirms this characterization.

Although characterization must rest essentially upon the language of the proposed enactment and what can be drawn therefrom, we have, in this instance, the complementary and explanatory materials which have been alluded to earlier. Even the most cursory reading of The National Energy Program 1980 and in particular the passages quoted, leaves no doubt as to the thrust of the proposed new taxes. The language is clear, unambiguous, emphatic. Revenue sharing arrangements in Canada are "extraordinarily unfavourable to the national government" (No. 4); the "effort to support the economy has left the national government's fiscal position badly weakened" (No. 5); one provincial government enjoys most of windfall, "upside" appreciation accruing from the increase in price of domestic petroleum (No. 6); the "Government of Canada must have a reasonable share of revenues from oil and gas production" (No. 6); the national government must gain access to the funds it needs (No. 8); the Program "will create a framework for more balanced revenue sharing between the producing provinces... and the Government of Canada, which has a national claim... to a share of the industry's revenues" (No. 9); "Another source of revenue is needed. The Government of Canada will, therefore, impose a new natural gas and gas liquids tax" (No. 13).

The National Energy Program 1980 deplores the absence of any "legislatively-defined arrangements under this Act [the British North America Act] for the sharing of revenue arising from the exploitation of natural resources, including petroleum" (No. 3). It is this very absence that in our view renders the proposed tax invalid in respect of provincially-owned natural gas.

C

Section 125 provides, in broad terms, that no lands or property of the federal or provincial Crown shall be "liable to taxation". The purpose of this immunity, as we have seen, is to prevent one level of government from appropriating to its own use the property of the other, or the fruits of that property. This immunity would be illusory if it applied only to taxes "on property" but not to a tax on the Crown in respect of a transaction affecting its property or on the transaction itself. The immunity would be illusory since, by the simple device of framing a tax as "in personam" rather than "in rem" one level of government could with impunity tax away the fruits of property owned by the other. The fundamental constitutional protection framed by s. 125 cannot depend on subtle nuances of form.

In the present case the subject matter of the tax is the property of the provincial Crown, whether one speaks in terms of taxing property or taxing the Crown in respect of property or taxing a transaction relative to Crown property. If the exemption protects the "gas", the "receipt" of the gas does not fall outside the exemption. Of course, as Lord Reid observed in *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5*, [1951] A.C. 786, at p. 817 "no tax literally falls on 'property' only as opposed to 'persons'". All taxes are physically paid by persons. The substance of the matter is an attempt to exact a tax from the provincial Crown in respect of its property. That

property is being made "liable to taxation" within the meaning of s. 125. See Attorney-General for Saskatchewan v. Canadian Pacific Railway Company, et al., [1953] A.C. 594, in which Viscount Simon quoted at p. 616, with approval, what had been said in this Court by Kellock J.:

Their Lordships agree with the view of the majority of the Supreme Court that in the present instance the tax in question is imposed upon the owner of things which he is using in his business. As Kellock J. observed: "It would be an extraordinary result if the proper interpretation of this exemption were to be said to be that while taxes imposed upon the owner in respect of his ownership of these things fall within the exemption, nevertheless taxes imposed upon the owner in respect of his use of the same items do not."

In Abel, Laskin's Canadian Constitutional Law, 4th ed. revised, (1975), at p. 742, it is said:

Section 125 in terms deals only with taxes charged on lands or property and not with "personal" taxes. But, it probably also covers taxation on the Crown in right of the Dominion or of a province in respect of lands or property in which the Crown has an interest. In other words, it ought reasonably to be construed as giving immunity from a tax charged on Crown property or on the Crown itself in respect of its interest in such property.

The Attorney General of Canada argues that the Province of Alberta voluntarily entered into the business of searching for and producing natural gas; tax is payable by the Province as a result of having embarked on a commercial activity as an ordinary trader. In the Court below the Attorney General of Canada conceded that while in situ natural gas belonging to the province is protected from taxation. His argument therefore amounts to this. So long as the gas remains in the ground it is free of tax but as soon as the Crown seeks to realize on the asset in the public interest, the federal Parliament may tax at will the proceeds of the disposition of the resource. We do not think s. 125 is to be so interpreted, nor the protection of the section so readily lost.

Counsel for the Attorney General of Canada cited United States authorities concerning the taxation by the United States federal government of certain "undertakings" by state governments (New York v. United States (1945), 326 U.S. 572). The exemption of the state from federal taxation in that country comes not as a result of an express constitutional provision analogous to s. 125 but rather was brought about by judicial decision interpreting constitutional relations at large. These decisions are, of course, wholly inapplicable here and simply serve to show how much stronger is the provincial position in the constitutional issue before us founded, as the provincial exemption is, upon an express constitutional provision, s. 125.

The allocation in 1930, by agreement and constitutional amendment, of property to the Crown in the right of the Province of Alberta necessarily carries with it the right of the province to the proceeds of disposition--in the words of Duff J. to "enjoy the fruits of that property". The resources were intended to be an important source of revenue, indeed the basis of the provincial financial

integrity, and therefore must be capable of realization. Some activity must accompany any disposal. The immunity is not lost merely because the Province of Alberta was engaged in the simple removal and transportation of natural gas in its natural unprocessed state. Water and certain impurities were removed somewhere between the wellhead and the international boundary. It is clear that the natural gas was not processed or combined in any way with any other material. At the border the gas was delivered to the United States buyer. It can hardly be said that the Province was in the 'business' of processing natural gas. It was simply selling its property in its natural and deliverable state and to which property the Province undoubtedly has the sole and absolute title.

Conclusion

It is important to recognize and indeed to emphasize that we are here dealing with the taxation of natural gas, or were we to accept the Attorney General for Canada's characterization, the taxation of either the movement of natural gas or a transaction involving a specific resource, i.e. natural gas. Irrespective of the characterization given, the title to the natural gas is clearly in the Province. We are not concerned with the taxation or regulation of the provision of a service by a province or with the conduct by a province of business which incidentally concerns the consumption of a resource property. Considerations which might concern a court in any or all of these other matters are of no application in the application of s.125 to legislation in the form of the proposed Part IV.1 of the Excise Tax Act, *supra*.

The two questions posed in the Reference do not lend themselves to individual affirmative or negative answers but rather must be answered in substance:

1. Bill C-57 is not an exercise of the trade and commerce function under s. 91(2) by the Parliament of Canada; it is in pith and substance taxation.
2. Section 91(3) must be subordinated to the express provisions of s. 125;
3. The British North America Act, 1930, places the ownership position of the Province of Alberta not lower than that enjoyed by the original provinces under s. 109 and therefore, where s. 125 is applicable, the province is fully entitled to the benefits of its protection;
4. Therefore, s. 25.13(1) is ultra vires with respect to the interests of the Province of Alberta as the owner, and deemed distributor under s. 25.1(2), of the gas in question.

Appeal dismissed, LASKIN C.J. and McINTYRE and LAMER JJ. dissenting.

TAB 15

Indexed as:
Eurig Estate (Re)

**Marie Sarah Eurig, as Executor of the Estate of Donald
Valentine Eurig, appellant;**

v.

**The Registrar of the Ontario Court (General Division) and the
Attorney General for Ontario, respondents, and
The Attorney General of Quebec, the Attorney General of
British Columbia and the Attorney General for Alberta,
interveners.**

[1998] 2 S.C.R. 565

[1998] S.C.J. No. 72

File No.: 25866.

Supreme Court of Canada

1998: April 27 / 1998: October 22.

**Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory,
McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Estates -- Executors and administrators -- Probate fees -- Provincial regulation providing for probate fee based on value of estate administered -- Whether probate levy a fee or a tax -- Whether ad valorem levy ultra vires on ground that it is an indirect tax -- Whether ad valorem levy invalid on ground that it was imposed by body other than provincial legislature -- O. Reg. 293/92, s. 2(1) -- Administration of Justice Act, R.S.O. 1990, c. A.6, s. 5 -- Constitution Act, 1867, ss. 53, 54, 90, 92(2).

The appellant is the executor of her late husband's estate. Pursuant to s. 2(1) of O. Reg. 293/92, made under the Administration of Justice Act, the total value of the estate required payment of \$5,710 in probate fees in order to obtain letters probate. Section 5(c) of the Administration of

Justice Act provides that the Lieutenant Governor in Council may make regulations requiring the payment of "fees in respect of proceedings in any court" and prescribing the amounts thereof. Section 2(1) of O. Reg. 293/92 sets out a schedule of ad valorem fees which must be paid in order to obtain a grant of probate. The appellant applied to the Ontario Court (General Division) for an order that she be issued letters probate without payment of the probate fee and for a declaration that the regulation which required that payment was unlawful. The application and subsequent appeal to the Ontario Court of Appeal were both dismissed.

Held (Gonthier and Bastarache JJ. dissenting): The appeal should be allowed.

Per Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Major JJ.: The probate levy as enforced at present is a tax, not a fee, according to the criteria set out in this Court's decision in *Lawson*. With respect to the first criterion, the levy is compulsory and therefore enforceable by law. While probate is not the foundation of the executor's title but only the authentic evidence of it, that authentication is nonetheless a practical and legal necessity in most cases. The criterion that the fee must be levied by a public body is also satisfied here. The probate levy also meets the criterion that the levy be intended for a public purpose, as the revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate. Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid. In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service, indicating that the levy is a tax and not a fee. Although the probate levy is properly characterized as a tax, it is a direct tax and therefore *intra vires* the province pursuant to s. 92(2) of the Constitution Act, 1867.

While the Ontario legislature has the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution. Section 53 of the Constitution Act, 1867 mandates that bills for imposing any tax shall originate in the House of Commons. By virtue of s. 90, s. 53 is rendered applicable to the provinces. Thus, all provincial bills for the imposition of any tax must originate in the legislature. The probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 293/92 unconstitutional.

Regardless of whether s. 53 was complied with, or even if s. 53 is considered redundant at the provincial level, the probate levy is not enforceable as it was not authorized by s. 5 of the Administration of Justice Act. While s. 5 authorizes the Lieutenant Governor in Council to impose fees, it does not constitute an express delegation of taxing authority. The Act clearly does not authorize the imposition of a tax, albeit a direct one.

Since s. 54 of the Constitution Act, 1867 concerns the appropriation of taxes, and not the imposition of taxes, it is not relevant to this appeal.

Per McLachlin and Binnie JJ.: As found by Major J., the probate "fee" imposed under O. Reg. 293/92 is in reality a tax which is ultra vires s. 5 of the Administration of Justice Act. The interpretation of s. 5 is not assisted by the legislative history of the probate fee under different and more specialized enactments. Section 5 does not contemplate a fee based on the size of the bank account of the person or estate requesting a service or initiating an action as opposed to the cost, however broadly calculated, of providing or administering same. However, Major J. was disagreed with in his conclusion that the tax is unconstitutional by virtue of non-compliance with s. 53 of the Constitution Act, 1867, which applies to the province by virtue of s. 90. Section 53 requires that money bills originate in the House of Commons. The analysis of Major J. reads the word "bills" out of the section, and takes the section out of the context of the series of sections in the Constitution Act, 1867 of which it forms a part. Section 53 addresses a state of affairs prior to any "legislation" coming into existence. Regulation 293/92 is not, and never was, a "bill". General principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.

Per Gonthier and Bastarache JJ. (dissenting): While the probate fee is a tax, and a direct tax within the legislative authority of the province, it is not invalid on the ground that it was imposed by a body other than the legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867. The purpose of s. 53 is to provide that bills concerning taxation originate in the House of Commons rather than the Senate. With the abolition of bicameral legislatures in the provinces, s. 53 no longer has significance at the provincial level. Even if s. 53 of the Constitution Act, 1867 continues to apply to the provinces, the fact that the legislature has authorized the executive to prescribe fees in the form of a tax does not violate s. 53. The tax in the form of probate fees is imposed by s. 5 of the Administration of Justice Act. This Act was introduced in the Legislative Assembly of Ontario and therefore cannot violate s. 53. All that the legislature has done is delegate to the Lieutenant Governor in Council the authority to provide for the details of the tax through regulation. The provincial legislature is entitled to delegate taxing powers to its subordinate bodies, including the Lieutenant Governor in Council. Section 54 of the Constitution Act, 1867 is not relevant to this appeal. Moreover, the probate fees are authorized under s. 5 of the Administration of Justice Act. According to the ordinary rules of interpretation, including the legislative history of the impugned provision, s. 5(c) of the Administration of Justice Act, which authorizes the Lieutenant Governor in Council to prescribe fees in respect of proceedings in any court, is broad enough to authorize the Lieutenant Governor in Council to impose a direct tax on persons applying for probate.

Cases Cited

By Major J.

Distinguished: *Cotton v. The King*, [1914] A.C. 176; referred to: *Lawson v. Interior Tree Fruit and*

Vegetable Committee of Direction, [1931] S.C.R. 357; Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371; Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929; The King v. National Fish Co., [1931] Ex. C.R. 75; Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198; Air Canada v. British Columbia, [1989] 1 S.C.R. 1161.

By Binnie J.

Referred to: Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

By Bastarache J. (dissenting)

Hodge v. The Queen (1883), 9 App. Cas. 117; Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708; Irving Oil Ltd. v. Provincial Secretary of New Brunswick, [1980] 1 S.C.R. 787; Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371; Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929; Procureur général du Canada v. Compagnie de Publication La Presse, Ltée, [1967] S.C.R. 60.

Statutes and Regulations Cited

Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof, S.U.C. 1793, 33 Geo. 3, c. 8.

Administration of Justice Act, R.S.O. 1990, c. A.6, s. 5.

Constitution Act, 1867, ss. 53, 54, 90, 92(2), (14).

Constitution Act, 1982, ss. 45, 52(1).

Estates Act, R.S.O. 1990, c. E.21.

O. Reg. 293/92, s. 2(1) [rep. & sub. O. Reg. 802/94, s. 1].

Ontario. Standing Orders of the Legislative Assembly [as amended in 1992]. Standing Order 56.

Authors Cited

Anson, William R. The Law and Custom of the Constitution, Part 1, 3rd ed. Oxford: Clarendon Press, 1897.

Driedger, Elmer A. "Money Bills and the Senate" (1968), 3 Ottawa L. Rev. 25.

Dussault, René, and Louis Borgeat, Administrative Law: A Treatise, vol. 1, 2nd ed. Translated by Murray Rankin. Toronto: Carswell, 1985.

La Forest, G. V. The Allocation of Taxing Power Under the Canadian Constitution, 2nd ed. Toronto: Canadian Tax Foundation, 1981.

Macdonell, Sheard and Hull on Probate Practice, 4th ed. By Rodney Hull and Ian M. Hull. Scarborough, Ont.: Carswell, 1996.

McConnell, William H. Commentary on the British North America Act. Toronto: Macmillan of Canada, 1977.

Mill, John Stuart. Principles of Political Economy. New York: D. Appleton, 1884.

New Shorter Oxford English Dictionary on Historical Principles, vol. 1. Oxford: Clarendon Press, 1993, "fee".

Ontario. Law Reform Commission. Report on Administration of Estates of Deceased Persons. Toronto: The Commission, 1991.

Rintoul, Margaret E. The Solicitor's Guide to Estate Practice in Ontario, 2nd ed. Toronto: Butterworths, 1990.

Small, Joan. "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995), 27 Ottawa L. Rev. 33.

APPEAL from a judgment of the Ontario Court of Appeal (1997), 31 O.R. (3d) 777, 96 O.A.C. 354, [1997] O.J. No. 101 (QL), affirming a decision of the Ontario Court (General Division) (1994), 20 O.R. (3d) 385, 5 E.T.R. (2d) 304, [1994] O.J. No. 2570 (QL), dismissing the appellant's application for a declaration that the imposition of an ad valorem levy for grants of letters probate was unlawful. Appeal allowed, Gonthier and Bastarache JJ. dissenting.

Peter W. Hogg, Q.C., Peter T. Fallis, and J. Gregory Richards, for the appellant.

Tanya Lee, for the respondents.

Monique Rousseau, for the intervener the Attorney General of Quebec.

George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.

Robert J. Normey, for the intervener the Attorney General for Alberta.

Solicitors for the appellant: Fallis, Fallis & McMillan, Durham, Ont.

Solicitor for the respondents: The Ministry of the Attorney General, Toronto.

Solicitors for the intervener the Attorney General of Quebec: Monique Rousseau and André Gaudreau, Sainte-Foy.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of Attorney General, Victoria.

Solicitor for the intervener the Attorney General for Alberta: The Alberta Department of Justice, Edmonton.

The judgment of Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Major JJ. was delivered by

1 MAJOR J.:-- At issue in this appeal is whether the province of Ontario acted within its legislative authority in imposing an ad valorem levy for grants of letters probate.

I. Facts

2 The appellant is the executor of her late husband's estate. The total value of the estate was \$414,000 which, pursuant to s. 2(1) of O. Reg. 293/92, subsequently amended by O. Reg. 802/94, required payment of \$5,710 in probate fees in order to obtain letters probate. The regulation was purported to be under the authority of the Administration of Justice Act, R.S.O. 1990, c. A.6.

3 The appellant applied to the Ontario Court (General Division) for an order that she be issued letters probate without payment of the probate fee and for a declaration that the regulation which required that payment was unlawful. The application and subsequent appeal to the Ontario Court of Appeal were both dismissed.

II. Judicial History

A. Ontario Court (General Division) (1994), 20 O.R. (3d) 385

4 Morrison J., in assessing the probate charge, held that the difference between a fee and a tax is that a tax is compulsory, while a fee is only required to be paid where one seeks the services for which it is imposed. In concluding that the charge for probate is a fee and not a tax, he held that probate fees lack the universal application characteristic of a tax. In certain circumstances, executors can administer and distribute the bequest of a deceased without applying for a grant of probate. Also, living persons can arrange their affairs so that there is no necessity for probate. Morrison J. also held that "sliding scale" fees can be supported as ancillary or adhesive to a valid provincial regulatory scheme.

5 In rejecting the appellant's submission that the Administration of Justice Act does not authorize escalating fees as prescribed by the Regulations, Morrison J. held that the language used in s. 5(c) of the Act, together with the long history of similarly worded statutes providing for escalating probate fees, demonstrated the intention of the legislature to authorize volumetric fees. He therefore dismissed the application.

B. Ontario Court of Appeal (1997), 31 O.R. (3d) 777

6 Morden A.C.J.O. held that, in light of the legislative evolution of the probate fee system in Ontario, the ad valorem fee structure imposed by the Regulations is properly authorized by s. 5(c) of the Administration of Justice Act and is not a revenue-generating device enacted for a purpose not authorized by the Act.

7 He also held that the charge for probate is a fee and not a tax. A tax is a levy which is enforceable by law, imposed under the authority of the legislature by a public body, and made for a public purpose: *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, at p. 363. Although the fee is compulsory and therefore enforceable by law, Morden A.C.J.O. found that it is legislation in relation to s. 92(14) of the Constitution Act, 1867 and is not aimed at raising a revenue under s. 92(2). Thus, the charge for probate did not meet all the requirements of a

tax.

8 Morden A.C.J.O. held that the question of whether the taxing power could be delegated to the Lieutenant Governor in Council pursuant to ss. 53 and 54 of the Constitution Act, 1867 did not arise because the fees in question are not taxes. He concluded that even if the fees were considered to be taxes, they were ingredients of a regulatory scheme not covered by ss. 53 and 54. The appeal was dismissed.

III. Issues

9 On November 27, 1997, the Chief Justice stated the following constitutional questions:

1. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it is an indirect tax that is outside the legislative authority of the province of Ontario under s. 92(2) of the Constitution Act, 1867?
2. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867?

IV. Relevant Constitutional, Statutory and Regulatory Provisions

A. Constitutional Provisions

10 Constitution Act, 1867

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

90. The following Provisions of this Act respecting the Parliament of

Canada, namely, -- the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, -- shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next here-inafter enumerated; that is to say, --

...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

...

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Constitution Act, 1982

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

B. Statutory Provisions

11 Administration of Justice Act, R.S.O. 1990, c. A.6

5. The Lieutenant Governor in Council may make regulations,
 - (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
 - (b) providing for the payment of fees and allowances by Ontario in

- connection with services under any Act for the administration of justice and prescribing the amounts thereof;
- (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

C. Regulations

12 Ontario Regulation 293/92 (pursuant to the Administration of Justice Act, R.S.O. 1990, c. A.6, s. 5)

- 2. -- (1) The following fees are payable in estate matters:
 - 1. For a grant of probate, administration or guardianship, not being a double probate, cessate grant or administration de bonis non administratis.
 - i. on the first \$50,000 of the value of the estate being administered, per thousand dollars or part thereof \$ 5.00
 - ii. on the portion of the value of the estate being administered that exceeds \$50,000, per thousand dollars or part thereof 15.00

The above section was re-enacted by O. Reg. 802/94, s. 1, which reads as follows:

- 2. -- (1) The following fees are payable in estate matters:
 - 1. For a certificate of appointment of estate trustee, other than a certificate of succeeding estate trustee or a certificate of estate trustee during litigation,
 - i. on the first \$50,000 of the value of the estate being administered, per thousand dollars or part thereof . . \$ 5.00
 - ii. on the portion of the value of the estate being administered that exceeds \$50,000, per thousand dollars or part thereof . . 15.00

V. Analysis

13 In Ontario, letters probate (now referred to as "certificate of appointment of estate trustee with a will") are issued by the Ontario Court (General Division). The purpose of probate is to certify that a will and codicils have been duly proved and registered in the court and that administration of the property of the deceased has been committed by the court to the persons named in the will as executors. Ontario Regulation 293/92 (subsequently re-enacted as O. Reg. 802/94) sets out a schedule of ad valorem charges which must be paid in order to obtain a grant of probate. The appellant challenges the legality of those charges.

A. Is the Probate Levy a Fee or a Tax?

14 The appellant contends that the probate levy prescribed by s. 2(1) of O. Reg 293/92 is a tax rather than a fee. This distinction is important because a tax may be either direct or indirect, and pursuant to s. 92(2) of the Constitution Act, 1867, a province only has jurisdiction to impose a direct tax. Conversely, a province may charge a fee, regardless of whether it is an indirect tax, provided that it is validly enacted under a provincial head of power other than the taxing power: see *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at p. 412, and *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at p. 988.

15 Whether a levy is a tax or a fee was considered in *Lawson*, supra. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

16 The first, third and fourth criteria pertain to the nature of the levy, while the second criterion involves a consideration of the manner in which the levy was imposed. In this appeal the first concern is identifying the nature of the probate levy. The manner in which the levy was imposed will be considered later.

17 The Court of Appeal held that with respect to the first *Lawson* criterion the probate fee is compulsory and therefore enforceable by law. I agree. A practical compulsion usually exists for the executor to obtain probate in order to comply with his or her legal obligations. Although probate is not the foundation of the executor's title but only the authentic evidence of it, that authentication is nonetheless a practical and legal necessity in most cases, as illustrated by R. Hull and I. M. Hull in *Macdonell, Sheard and Hull on Probate Practice* (4th ed. 1996), at p. 188:

Any debtor of the testator is justified in refusing to pay his debt to the executor until probate is produced. All proceedings in an action by the executor to enforce such payment will be stayed until the plaintiff obtains probate. Similarly an action to recover possession of the testator's goods, or for damages for their wrongful conversion, brought by the executor, must fail unless the executor has proved the will. In the absence of special statutory provisions to the contrary, the executor will fail whenever it is necessary to establish title as the personal representative of the deceased.

See also *The Solicitor's Guide to Estate Practice in Ontario*, by M. E. Rintoul (2nd ed. 1990), at pp. 35-36, wherein protection for the executor and administrative efficiency are identified as practical and legal reasons that frequently compel an executor to obtain probate. The fact that in some instances probate may be avoided does not lessen the fact that in Ontario letters probate are the rule in virtually all estate affairs.

18 The criterion that the fee must be levied by a public body is also satisfied here as probate fees in Ontario are levied by the Ontario Court (General Division).

19 The probate levy also meets the fourth Lawson criterion for a tax as the proceeds were intended for a public purpose. The Ontario Law Reform Commission concluded in 1991 that it is difficult to discern a principled justification for ad valorem probate fees, and that "[t]he only rationale for the graduated fee schedule appears to be that it has been regarded as a suitable vehicle for raising revenue" (Report on Administration of Estates of Deceased Persons, at p. 286).

20 Those conclusions are supported by the evidence before this Court which showed that probate fees do not "incidentally" provide a surplus for general revenue, but rather are intended for that very purpose. The revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate.

21 Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid: see *G. V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 72. This nexus was also considered relevant to determining the nature of a municipal charge in *Allard Contractors*, supra. In that case the Court engaged the question of whether an indirect tax levied by a province was validly enacted as incidental to a matter of provincial jurisdiction. Addressing the relationship between a charge and the cost of the underlying service, Iacobucci J. wrote (at p. 411):

A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme. . . .

22 In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Facts clearly shows that the procedures involved in granting letters probate do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.

23 Having determined that the probate levy is enforceable by law, is levied by a public body, is intended for public purposes, and that no nexus exists between the amount of the levy and the cost of the service for granting letters probate, the compelling conclusion is that the probate levy as presently enforced is a tax.

B. Is the Probate Levy a Direct or Indirect Tax?

24 Section 92(2) of the Constitution Act, 1867 confers upon the provinces the power to raise revenue for provincial purposes only by means of direct taxation: see *Allard Contractors*, supra, at p. 394, per Iacobucci J. It therefore has to be determined whether the probate levy is a direct or indirect tax.

25 In *Principles of Political Economy* (1884), Book V, ch. II, at p. 550, John Stuart Mill defined the distinction between direct and indirect taxes. That oft repeated definition has not been much improved upon and is frequently referred to by courts in determining whether a levy is direct or indirect:

A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. . . .

26 Applying Mill's definition, the tax would be indirect if the executor was personally liable for payment of probate fees, as the intention would clearly be that the executor would recover payment from the beneficiaries of the estate. However, the legislation does not make the executor personally liable for the fees. Payment is made by the executor only in his or her representative capacity. As a result, this case is readily distinguishable from *Cotton v. The King*, [1914] A.C. 176 (P.C.), where the succession duty was intended to be paid by one person and recouped from another. Here, as the amount is paid out of the estate by the executor in his or her representative capacity with the intention that the estate should bear the burden of the tax, the probate fees fall within Mill's definition of direct tax. The probate levy does not fall within the more expansive definition of an "indirect tax" in *Allard Contractors*, per Iacobucci J., at p. 396.

27 Thus, although the probate levy is properly characterized as a tax and not a fee, it is a direct tax and therefore intra vires the province pursuant to s. 92(2) of the Constitution Act, 1867. As a result there is no need to consider whether it would survive as an indirect tax on the basis that it was ancillary to a valid regulatory scheme. Such a result in any event is doubtful on the facts.

C. Did the Implementation of the Probate Tax Violate Sections 53 or 54 of the Constitution Act, 1867?

28 While the Ontario legislature has the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution. Section 53 of the Constitution Act,

1867 mandates that bills for imposing any tax shall originate in the House of Commons. By virtue of s. 90 of the Constitution Act, 1867, s. 53 is rendered applicable to the provinces. Thus, all provincial bills for the imposition of any tax must originate in the legislature.

29 To date, s. 53 has been the subject of only limited academic and jurisprudential discussion. It has been suggested that the purpose of s. 53 is to prevent the introduction of taxation legislation in the Senate, and that with the abolition of bicameral legislatures in the provinces it has become redundant: see, e.g., W. H. McConnell in *Commentary on the British North America Act* (1977), at p. 132.

30 In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

31 In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, "[t]he Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."

32 The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 *Ottawa L. Rev.* 25, at p. 41:

Through the centuries, the principle was maintained that taxation required representation and consent. The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.

33 The conclusion that s. 53 continues to be binding upon the provinces is supported by the fact that the applicability of s. 53 to the provinces was not removed when the Constitution was amended in 1982, even though bicameral legislatures had ceased to exist at the provincial level by that time.

34 Section 53 is a constitutional imperative that is enforceable by the courts. A contrary opinion was expressed in *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, where Pigeon J. for the majority commented in obiter that ss. 53 and 54 are not entrenched in the Constitution and can be indirectly amended through inconsistent legislation. Those comments,

however, were made before the passage of the 1982 amendments to the Constitution.

35 By virtue of s. 45 of the Constitution Act, 1982, the legislature of each province retains the discretion to exclusively make laws amending the constitution of the province. That power must be read in association with s. 52(1) of the Constitution Act, 1982, which stipulates that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Subsection 52(1) effectively requires any provincial legislation that seeks to amend the constitution of the province to do so expressly: see J. Small in "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995), 27 Ottawa L. Rev. 33, at p. 50. Otherwise, the legislation is liable to being struck down on the basis that it is inconsistent with the Constitution.

36 Nothing in the Administration of Justice Act purports to amend the constitutional requirement for imposing tax legislation set out in s. 53. The Ontario legislature did not delegate to the Lieutenant Governor in Council the authority to impose a tax. Therefore whether it could constitutionally do so does not need to be addressed. The only power conferred by s. 5 of the Act was to make regulations regarding the payment of fees, not the imposition of taxes. Yet the probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. While the legislature of Ontario may well be competent to establish probate taxes under the terms of the Administration of Justice Act, s. 53 requires that they do so explicitly. Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 802/94 (previously O. Reg. 293/92) unconstitutional. The unconstitutionality of the impugned legislation is an important reminder of the fact that the imposition of a tax has both political and legal dimensions which require the legislature to act carefully if the tax is to be successfully implemented.

37 The appellant also challenges the validity of the probate tax on the ground that it violates s. 54 of the Constitution Act, 1867. However, since s. 54 concerns the appropriation of taxes, and not the imposition of taxes (see Small, *supra*, at p. 40), it is not relevant to this appeal.

D. Is the Probate Levy Authorized by Section 5 of the Administration of Justice Act?

38 Regardless of whether s. 53 was complied with, or even if s. 53 is considered redundant at the provincial level, the probate levy is not enforceable as it was not authorized by s. 5 of the Administration of Justice Act. Section 5 reads:

5. The Lieutenant Governor in Council may make regulations,
 - (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;

- (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
- (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

39 While these provisions authorize the Lieutenant Governor in Council to impose fees, they do not constitute an express delegation of taxing authority. Whether the province may delegate its taxing authority was not fully argued before this Court, is obiter in the result, and should be considered only when the issue has been raised in the courts below. Of relevance to this appeal is that the Act clearly does not authorize the imposition of a tax, albeit direct.

40 The constitutional requirement for a clear and unambiguous authorization of taxation within the enabling statute also provides the reply to Bastarache J.'s concerns. Once it has been determined that the probate fees levied by the impugned regulation are a direct tax, the question is whether the Administration of Justice Act, and the action of the Lieutenant Governor in Council in enacting O. Reg. 293/92, fulfil the legal and constitutional requirements for the imposition of a tax. Section 53 constitutionally mandates the court to strictly construct enabling legislation, such as s. 5 of the Administration of Justice Act, when determining whether it properly creates a taxation power. This simply strengthens the general principle of interpretation that "[i]f Parliament wants to give the Executive or some administrative agency the power to raise a tax by regulation, it must do so in a specific and unequivocal provision" (R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), vol. 1, at p. 445).

41 Bastarache J. states that the authorization extended to the Lieutenant Governor in Council in the Administration of Justice Act to prescribe fees "includes the power to implement a direct tax" (para. 60). With respect, this conclusion cannot be sustained. The distinction between these two forms of charges cannot be erased by simply interpreting the word "fees" to include taxes. This distinction is both legally and constitutionally significant to determining the validity of the enactment. As s. 53 of the Constitution Act, 1867, Standing Order 56 of the Ontario legislature, and the general law on construction of taxing statutes all demonstrate, the imposition of taxes is an act of unique political significance, subject to special rules and requirements, none of which the impugned scheme meets. Ontario Regulation 293/92 is both unconstitutional and ultra vires as it seeks to impose a tax without clear and unambiguous authorization from the legislature to do so.

42 The appellant also argued that s. 5 does not authorize the imposition of ad valorem probate fees. Given my conclusion that the probate levy is a tax and not a fee, it is not necessary to address this issue. I would add, though, that the wording of the Act does not appear to restrict the type of fee that may be imposed provided that it possesses the characteristics of a fee, including inter alia the existence of a nexus between the amount charged and the cost of the service provided.

E. Disposition and Remedy

43 Section 52(1) of the Constitution Act, 1982 provides that the Constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The probate fee levied by O. Reg. 293/92 is in substance a direct tax which has not been imposed in accordance with the requirements of s. 53 of the Constitution Act, 1867. Thus the regulation is invalid and of no force or effect.

44 An immediate declaration of invalidity would deprive the province of the revenue derived from probate fees, with no opportunity to remedy the legislation or find alternative sources of funding. Probate fees have a lengthy history in Ontario, and the revenue derived therefrom is substantial. For example, the evidence presented to this Court indicated that in 1993 and 1994, probate fees collected in Ontario totalled \$51.8 million and \$52.6 million, respectively. This revenue is used to defray the costs of court administration in the province. An immediate deprivation of this source of revenue would likely have harmful consequences for the administration of justice in the province. The declaration of invalidity is therefore suspended for a period of six months to enable the province to address the issue.

45 The final issue is whether the appellant is entitled to a refund of the probate fees of \$5,710 paid by her as executor for her late husband's estate.

46 In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, La Forest J. for three of the six members of the Court held that there is a general rule against recovery of taxes paid under unconstitutional statutes, with exceptions where the relationship between the state and a particular taxpayer resulting in the collection of the tax is unjust or oppressive in the circumstances.

47 Even if this Court were to adopt the rule articulated by La Forest J., it would not prevent recovery by the appellant in this case. An exception has been recognized where taxes are paid under compulsion or protest: *Air Canada*, supra, at pp. 1209-10. Here, the appellant has challenged the validity of the regulation imposing the probate fee from the outset. She paid the fee in order to fulfil her legal obligations as executor of the estate only after the Ontario Court (General Division) held that the regulation was legally valid. Had the proper decision been rendered at first instance, the appellant would not have paid the fee. It would therefore be inequitable to deny recovery at this stage.

48 The appeal is accordingly allowed with costs and the appellant refunded the \$5,710 paid by her.

49 For the reasons given, I would answer the constitutional questions as follows:

1. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it is an indirect tax that is outside the legislative authority of the province of Ontario under s. 92(2) of the Constitution Act, 1867?

Answer: No.

2. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6, invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the Constitution Act, 1867?

Answer: Yes.

The reasons of Gonthier and Bastarache JJ. were delivered
by

50 BASTARACHE J. (dissenting):-- This appeal concerns the validity of the fees set for probate by the legislature of Ontario through Regulation 293/92, which was enacted pursuant to s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6. The facts and the issues have been set out in the reasons of Major J. and I will not repeat them.

51 I have read the reasons of my colleagues Major and Binnie JJ. and in a number of aspects, I cannot, with respect, agree with their approaches. I accept Major J.'s characterization of the probate fee as a tax and I accept that it is a direct tax within the legislative authority of the province. I do not, however, agree that the probate fee is invalid on the ground that it was imposed by a body other than the legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54 of the Constitution Act, 1867). Moreover, I do not accept Major and Binnie JJ.'s conclusion that the probate fees are not authorized under s. 5 of the Administration of Justice Act.

Sections 53 and 54 of the Constitution Act, 1867

52 Sections 53 and 54 of the Constitution Act, 1867, which are made applicable to the provincial legislature by virtue of s. 90 of the Act, provide as follows:

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first

recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

53 The appellant argued that s. 53 of the Constitution Act, 1867 requires that any bill that appropriates public revenue or imposes any tax must originate in the Legislative Assembly. With respect to s. 54, the appellant argued that it prohibits the Legislative Assembly from adopting or passing such a bill unless it has been recommended to the Legislative Assembly by message of the Lieutenant Governor.

54 Major J., in his reasons, states that the rationale underlying s. 53 of the Constitution Act, 1867 is to prohibit any body other than the legislature from imposing a tax on its own accord. The purpose of s. 53 of the Constitution Act, 1867, in my view, is to provide that bills concerning taxation originate in the House of Commons rather than the Senate. The section was enacted because of a concern in English history about taxation bills being introduced in the House of Lords rather than in the Commons. With the abolition of bicameral legislatures in the provinces, s. 53 no longer has significance at the provincial level (W. H. McConnell, *Commentary on the British North America Act* (1977), at pp. 105-6 and 131-32; W. R. Anson, *The Law and Custom of the Constitution* (3rd ed. 1897), Part 1, at pp. 265-68).

55 Even if s. 53 of the Constitution Act, 1867 continues to apply to the provinces, the fact that the legislature has authorized the executive to prescribe fees in the form of a tax does not violate s. 53 of the Constitution Act, 1867. The tax in the form of probate fees is imposed by s. 5 of the Administration of Justice Act. This Act was introduced in the Legislative Assembly of Ontario and therefore cannot violate s. 53 of the Constitution Act, 1867. All that the legislature has done is delegate to the Lieutenant Governor in Council the authority to provide for the details of the tax through regulation. The provincial legislature is entitled to delegate taxing powers to its subordinate bodies, including the Lieutenant Governor in Council (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at pp. 131-33; *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 (P.C.), at p. 722; *Irving Oil Ltd. v. Provincial Secretary of New Brunswick*, [1980] 1 S.C.R. 787).

56 I agree with Major J. that s. 54 of the Constitution Act, 1867 is not relevant to this appeal. Section 54 requires that bills relating to the appropriation of taxes (supply bills) be accompanied by a royal recommendation. The only bills that are guaranteed to the executive under s. 54 of the Constitution Act, 1867 are true appropriation bills.

Section 5 of the Administration of Justice Act

57 Section 5 of the Administration of Justice Act provides as follows:

5. The Lieutenant Governor in Council may make regulations,

(a) requiring the payment of fees for any thing required or

- authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
- (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
- (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

58 Having found that the probate fee enacted pursuant to s. 5 of the Administration of Justice Act is in reality a direct tax imposed by the province through its delegate, the Lieutenant Governor in Council, the issue to be decided at this stage is whether s. 5 of the Administration of Justice Act authorizes the imposition of the fee structure found in Regulation 293/92. In finding that the probate fee is a direct tax, it has been determined that the probate fee is (1) enforceable by law; (2) levied by a public body; and (3) intended for a public purpose (reasons of Major J., at paras. 17-20).

59 In determining whether or not the probate fee, as a direct tax, is authorized under the Administration of Justice Act, it is not necessary to conduct an analysis of whether a nexus exists between the quantum charged and the cost of the service. It is only because variable fees are indirect in their general tendency that the nexus argument is normally raised (see *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at pp. 398 and 402; see also *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at para. 53). In *Allard and Home Builders'*, the nexus between the fee and the value of the service provided arose in the context of indirect taxes, which would only be valid if ancillary to a valid regulatory scheme. It is noted in *Home Builders'*, at para. 53, that "[a]ny power of indirect taxation extending beyond regulatory costs would indeed render s. 92(2) [Direct Taxation] meaningless". It has long been accepted that there is no constitutional prohibition against a direct tax that is variable and designed to defray the costs of a regulation (see *Shannon v. Lower Mainland Dairy Products Board*, *supra*, at p. 721). As Professor La Forest (as he then was) stated in *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), quoted in *Home Builders'*, *supra*, at para. 52: "there is no doubt that direct taxation may be raised under section 92(2) even though it is framed in the form of a licence". The sole issue here is whether s. 5 of the Administration of Justice Act is broad enough to authorize this direct tax, not whether there is a nexus between the tax and the probate service, as would be required if the tax was indirect.

60 In my view, according to the ordinary rules of interpretation, including the legislative history of the impugned provision as thoroughly described by Morden A.C.J.O. in the Court of Appeal, s. 5(c) of the Administration of Justice Act is broad enough to authorize the Lieutenant Governor in Council to impose a direct tax on persons applying for probate. It authorizes the Lieutenant Governor in Council to prescribe fees in respect of proceedings in any court. This includes the power to implement a direct tax on applications for probate. The language of the section does not require that the fees be in proportion to services rendered. There is no exclusion of an "ad valorem" fee structure (*Procureur général du Canada v. Compagnie de Publication La Presse, Ltée*, [1967]

S.C.R. 60).

61 The powers of a provincial legislature cannot be limited except by the Constitution. The province of Ontario authorized the Lieutenant Governor in Council, through s. 5 of the Administration of Justice Act, to implement a direct tax in respect of court proceedings. The Lieutenant Governor in Council validly prescribed the amount for this tax and the method of payment through the taxing of applications for letters probate pursuant to Regulation 293/92. Accordingly, I would dismiss the appeal with costs.

The reasons of McLachlin and Binnie JJ. were delivered by

62 BINNIE J.:-- I agree with Justice Major's conclusion that Ontario's probate "fee" is in reality a tax, albeit a direct tax within the legislative authority of the province. I also agree with his proposed disposition of the appeal. I differ, however, from his conclusion that the probate tax imposed under O. Reg. 293/92 (now 802/94) is unconstitutional by virtue of non-compliance with s. 53 of the Constitution Act, 1867. I prefer to rest my conclusion on his alternative ground that O. Reg. 293/92 is ultra vires s. 5 of the Administration of Justice Act, R.S.O. 1990, c. A.6.

63 The legislative power of the province is sovereign except as limited by the Constitution itself, including limitations flowing from the federal-provincial division of powers, and the Canadian Charter of Rights and Freedoms. In the absence of a constitutional prohibition, the legislature has power to authorize a tax structure of its own choosing, and for which it will be politically accountable, including a tax to be prescribed by the Lieutenant Governor in Council. I do not construe s. 53 of the Constitution Act, 1867 as constituting such a prohibition.

64 Major J. rightly observes at para. 31 that:

In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax ab initio without the authorization of the legislature.

It seems to me this leads to a straightforward question of whether the regulation is ultra vires s. 5 of the Administration of Justice Act. There is no need to look to the constitutional subtleties of s. 53, which provides:

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Section 53 appears under the heading "Money Votes; Royal Assent" in a series of five sections dealing with various aspects of the relationships among the House of Commons, the Senate and the Crown. These provisions are made applicable to the provinces by s. 90. Section 53 requires that money bills originate in the House of Commons. Regulation 293/92 is not, and never was, a "bill". It is a regulation that was prescribed by the Lieutenant Governor in Council. Bills arise only as part

of the legislative process in the House of Commons or the Senate.

65 My colleague advances the proposition in para. 32 that:

The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. [Emphasis added.]

66 Again, in para. 40, he argues that s. 53 "constitutionally mandates the court to strictly construct enabling legislation". In my view, respectfully, this analysis reads the word "bills" out of the section, and takes the section out of the context of the series of sections of which it forms a part. Section 53 addresses a state of affairs prior to any "legislation" coming into existence. It is explicitly related to legislative procedure and there is nothing that I can see in its text to justify concluding that its "basic purpose" is the constitutional entrenchment of a principle of "strict construction" of legislation, delegated or otherwise. Regardless of the attraction of my colleague's broad rationale of promoting "parliamentary control over, and accountability for, taxation" (para. 32), I do not think the Court can facilitate achievement of the objective by rewriting s. 53. As the Court recently affirmed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.

67 I do, however, agree with Major J. that O. Reg. 293/92 is ultra vires s. 5 of the Administration of Justice Act, and would like to add a comment about the respondents' use of legislative history to support the government position. The respondents emphasized the historical evolution of probate fees in Ontario from 1793 until the present, and related the present fee structure to provisions in the Estates Act, R.S.O. 1990, c. E.21, having a bearing on probate fees. It is argued that it would be reasonable to infer from this historical context that the legislature of Ontario intended by s. 5 to continue the authority of the Lieutenant Governor in Council to impose escalating ad valorem probate fees. Leaving aside the taxation issue, the difficulty with relying on legislative history in this case is that the context has changed. The statutory authority no longer exists in an Act dealing with a court exercising a specialized estates jurisdiction. Section 5 of the Administration of Justice Act, unlike sections of the Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof, S.U.C. 1793, 33 Geo 3, c. 8, and subsequent versions of the Surrogate Courts Acts, does not have a narrow focus. Section 5(a) authorizes fees "for any thing required or authorized under any Act to be done by any person in the administration of justice" (emphasis added), s. 5(b) allows fees to be prescribed "in connection with services under any Act for the administration of justice" (emphasis added), and s. 5(c) allows fees to be prescribed "in respect of proceedings in any court" (emphasis added). The words "for", "in connection with" and "in respect of" are words of very broad signification, and the obligation to pay the prescribed fee can be in relation to an enormous variety of "things", "services", and "proceedings". If s. 5(c), for example, validly authorizes escalating ad valorem fees for probate, it must equally authorize escalating ad valorem type fees "in respect of" other court proceedings. The 200-year legislative history of probate fees does not, therefore, justify an interpretation of the new and more generalized

power to prescribe fees in s. 5 of the Administration of Justice Act beyond the sort of "fees" that the text of s. 5 would otherwise support.

68 It is implicit in the notion of "fee for service" that there is, somewhere, a cost base that is somehow connected to the provision of the relevant service and is to be allocated amongst users. The New Shorter Oxford English Dictionary, vol. 1, at p. 928, includes in its definition of "fee" a "sum payable to a public officer in return for the execution of relevant duties". The Court of Appeal accepted as appropriate in this regard the costs of operating the entire Ontario Court (General Division). The respondents seem to suggest that all users of the Ontario Court (General Division) are being subsidized by the government treasury and that some users cannot complain if they are subsidized less than other users. The record is singularly bare of any accounting data in this regard. In any event, as a matter of ordinary statutory interpretation, s. 5 cannot reasonably be construed as authorizing a fee for "things", "services" or "proceedings" based on the size of the bank account of the person seeking them rather than the cost of their delivery -- however broadly the cost of such things, services or proceedings may be defined.

69 In short, the Ontario legislature may delegate the power to prescribe an escalating ad valorem probate tax to the Lieutenant Governor in Council but it must do so in clear and unambiguous language. The present section authorizes the Lieutenant Governor in Council to prescribe fees, and unless and until the section is amended the charge to users for the relevant service must have some reasonable relationship to the cost of the provision of that service.

Appeal allowed with costs, Gonthier and Bastarache JJ. dissenting.

cp/d/hbb

TAB 16

Indexed as:

RJR-MacDonald Inc. v. Canada (Attorney General)

RJR-MacDonald Inc., Applicant;

v.

**The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada**

And between

Imperial Tobacco Ltd., Applicant;

v.

**The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada**

[1994] 1 S.C.R. 311

[1994] S.C.J. No. 17

File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

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

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice -- Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed -- Leave to appeal granted shortly after applications to stay heard -- Whether the applications for relief from compliance with regulations

should be granted -- Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. -- Tobacco Products Control Regulations, amendment, SOR/93-389 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) -- Rules of the Supreme Court of Canada, SOR/83-74, s. 27 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can

neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided

by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; considered: *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; referred to: *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135; *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127; *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269; *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619; *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574; *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294; *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392; *R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228; *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577; *Hubbard v. Pitt*, [1976] Q.B. 142; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280; *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59; *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791; *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304; *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158; *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix; *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

Authors Cited

Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following Tobacco Products Control Regulations, amendment, SOR/93-389.) In *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284.
Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc.
Simon V. Potter, for the applicant Imperial Tobacco Inc.
Claude Joyal and Yves Leboeuf, for the respondent.
W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.
Solicitors for the respondent: Côté & Ouellet, Montreal.
Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.:--

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed \$100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However, under the Act, the complete prohibition on all point of sale advertising was

not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about \$30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

- (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
- (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
- (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

...

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

20 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit

consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations

that were not even in existence at the time the appeal judgment was rendered.

27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the

subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

31 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as

follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties

pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

- (i) There is a serious constitutional issue to be determined.
- (ii) Compliance with the new regulations will cause irreparable harm.
- (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been

enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd.* (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574

(H.C.), at p. 576:

While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all.
[Emphasis added.]

53 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is

granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the

test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in

Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

- (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co. Re*, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision

on the merits.

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event

that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of \$50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondly, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

- (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
- (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
- (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

90 The Regulatory Impact Analysis Statement, in the Canada Gazette, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have

any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

TAB 17

Indexed as:

Thorson v. Canada (Attorney General)

**Joseph Thorarinn Thorson, Appellant; and
The Attorney General of Canada, The Secretary of State of
Canada, The Receiver General of Canada, Keith Spicer, The
Bilingual Districts Advisory Board, Roger Duhamel, Paul Fox
and Roger St. Denis, Respondents.**

[1975] 1 S.C.R. 138

Supreme Court of Canada

1973: June 6, 7 / 1974: January 22.

**Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie,
Spence, Pigeon, Laskin and Dickson JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Actions -- Status -- Standing of taxpayer in class action -- Interest no greater than that of any other taxpayer -- Challenge of federal legislation -- Official Languages Act, R.S.C. 1970, c. 0-2.

The appellant, suing as a taxpayer in a class action, claimed that the Official Languages Act, 1968-69 (Can.), c. 54 and Appropriation Acts providing money to implement it were unconstitutional. The question of standing was raised as a preliminary question of law and was decided against the appellant, both at first instance and on appeal.

Held (Fauteux C.J. and Abbott and Judson JJ. dissenting): The appeal should be allowed.

Per Martland, Ritchie, Spence, Pigeon, Laskin and Dickson JJ.: A question of alleged excess of legislative power is a justiciable one, and it is open to the Court, in the exercise of a discretionary power, to allow a taxpayer to have such a question adjudicated in a class action, being in effect a class action by a member of the public, when otherwise it could be immune from judicial review because there is no person or class of persons particularly aggrieved and because of the unwillingness of the Attorney-General to institute proceedings or of the Government to direct a reference. Any attempt to place standing in a federal taxpayer suit on the likely tax burden is as

unreal as it is in the case of municipal taxpayer suits. It is not the alleged waste of public funds alone but the right of citizenry to constitutional behaviour that will support standing. As a matter of discretion the appellant should be allowed to proceed to have the suit determined on the merits.

Per Fauteux C.J., Abbott and Judson JJ. dissenting: The ratio of the judgments in the Ontario courts is that an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. Municipal taxpayer class actions are in a class of their own since municipal corporations and municipal councils are creatures of a statute and can only do those things which they are authorized to do.

Cases Cited

[MacIlreith v. Hart, (1907), 39 S.C.R. 657; Smith v. Attorney General of Ontario, [1924] S.C.R. 331; Dyson v. The Attorney General, [1911] 1 K.B. 410, (2nd Dyson case) [1912] 1 Ch. 158; Attorney General v. Independent Broadcasting Authority, ex parte McWhirter, [1973] 1 All E.R. 689; London County Council v. Attorney General, [1902] A.C. 165; Wallasey Local Board v. Gracey, (1887), 36 Ch. 593; Tottenham U.D.C. v. Williamson & Sons Ltd., [1896] 2 Q.B. 353; Boyce v. Paddington Borough Council, [1903] 1 Ch. 109; Electrical Development Co. of Ontario v. Attorney General of Ontario, [1919] A.C. 687; B.C. Power Corp'n. Ltd. v. B.C. Electric Co. Ltd., [1962] S.C.R. 642; Attorney General for Victoria v. The Commonwealth (1946), 71 C.L.R. 237; Massachusetts v. Mellon, (1923), 262 U.S. 447; Ref. Re ss. (1), (3), (4), s. 11, Official Languages Acts, s. 14 Official Languages Act (N.B.), (1972), 5 N.B.R. (2d) 653; Paterson v. Bowes, (1853), 4 Gr. 170; Toronto v. Bowes, (1853), 4 Gr. 489 affd. (1856), 6 Gr. 1, affd. (1858), 11 Moo. P.C. 463, 14 E.R. 770; Crampton v. Zabriskie, (1879), 101 U.S. 601; Bromley v. Smith, (1826), 1 Sim. 8, 57 E.R. 482; Prescott v. Birmingham, [1955] Ch. 210; Bradbury v. Enfield, [1967] 1 W.L.R. 1311; Holden v. Bolton, (1887), 3 T.L.R. 676; Collins v. Lower Hutt City Corporation, [1961] N.Z.L.R. 250; Bradford v. Municipality of Brisbane, [1901] Queensland L.J. 44; Frothingham v. Mellon, (1923), 262 U.S. 447; Flast v. Cohen, (1968), 392 U.S. 83; Everson v. Board of Education, (1947), 330 U.S. 1; Doremus v. Board of Education, (1952), 342 U.S. 429; Sierra Club v. Morton, (1972), 405 U.S. 727; Anderson v. Commonwealth (1932), 47 C.L.R. 50; R. v. Barker, (1762), 3 Burr. 1265, 97 E.R. 823 referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario [[1972] 2 O.R. 340] dismissing an appeal from a judgment of Houlden J. whereby the appellants action was dismissed for want of status.

J.T. Thorson, Q.C., in person.

J.J. Robinette, Q.C., T.B. Smith, Q.C., for the respondent.

Solicitor for the appellant: J.T. Thorson, Ottawa. Solicitor for the respondents: D.S. Maxwell, Ottawa.

The judgment of Fauteux C.J. and Abbott and Judson JJ. was delivered by

JUDSON J.:-- The appellant, Joseph Thorarinn Thorson, sued in the Supreme Court of Ontario for a declaration that the Official Languages Act is ultra vires of the Parliament of Canada, and for a similar declaration in respect of appropriation Acts of the Parliament of Canada insofar as they grant money out of the Consolidated Revenue Fund for the purposes of this Act. The appellant also asked for an order compelling repayment into the Consolidated Revenue Fund of moneys already expended.

One of the defences raised by the defendants in the action was that the appellant had no status to maintain the action. Following the close of pleadings, the defendants applied for an order under Rule 124 of the Rules of Practice of the Supreme Court of Ontario for leave to set down for hearing two questions of law before the trial of the action. These are:

1. That the plaintiff (appellant) has no status or standing to maintain this action;
2. That since the plaintiff (appellant) has not alleged that he as a taxpayer of Canada has suffered any special damage or damage that would set him apart from other taxpayers of Canada as a result of the enactment of the Official Languages Act, the plaintiff (appellant) has no status or standing to obtain the relief claimed in the amended statement of claim.

Leave was granted and these two questions came on for hearing before Mr. Justice Houlden. He found that the appellant had no status to maintain the action and accordingly dismissed it. His judgment [[1972] 1 O.R. 86] was affirmed by a unanimous Court of Appeal [[1972] 2 O.R. 340].

The ratio of the judgments in the Ontario courts is that an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. The plaintiff in this action had only the same interest as any other taxpayer in Canada, and any increased taxes resulting from the implementation of the Act would be borne by all the taxpayers of Canada.

In my opinion, this decision is sound and the case is governed directly by the judgment of this Court in *Smith v. Attorney General of Ontario* [[1924] S.C.R. 331]. In this action, Smith was asking for a declaratory judgment that Part IV of the Canada Temperance Act was not validly in force in the Province of Ontario. The ratio of the judgment of the Court is contained in the reasons of Duff J., at pp. 337 and 338, in the following terms:

Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.

We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining ultra vires expenditures by the governing bodies of municipalities; *MacIlreith v. Hart* (1907), 39 S.C.R. 657. We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended.

These reasons were accepted by Mignault J. and Maclean J. Idington J. thought that the action was an attempt to get an opinion which, on the facts presented, the Court had no right to give. He declined to express any opinion on the questions submitted and concurred in the dismissal of the action for the reasons given by him. The Chief Justice, who presided at the hearing, died before judgment was pronounced.

In the *Smith* case, as in the present appeal, much emphasis was laid on the decision in *Dyson v. Attorney-General* [[1911] 1 K.B. 410, and [1912] 1 Ch. 158]. In my opinion *Dyson's* case has no bearing upon the problem before us. The appellant in this case is seeking a declaration that Parliament had no power to enact a certain piece of legislation. *Dyson's* case was concerned with no such issue. The attack in *Dyson's* case was upon the action of the Commissioners of Inland Revenue. They had devised a form which required all land owners to state the annual value of their land on a certain basis. *Dyson's* objection was that this demand was not authorized by the Act, and the Court of Appeal agreed with him [[1911] 1 K.B. 410]. The decision was, therefore, a declaratory judgment against a certain form of administrative action. It was sought in the *Smith* case to extend this principle to legislation and this request was rejected, and rightly so in my opinion. It is being repeated in this appeal and should be rejected again.

It is also my opinion that Duff J. was right in refusing to extend the ratepayer's action in municipal cases to the kind of action before him in the Smith case and before us in the present case. These actions to restrain illegal or ultra vires expenditures, to recover funds illegally paid out or retained by a member of council (MacIlreith v. Hart [(1908), 39 S.C.R. 657]; Paterson v. Bowes [(1853), 4 Gr. 170]) bear no analogy to the present case. I do not regard them as a relaxation of the rule enunciated in the Smith case. They are in a class of their own. Municipal corporations and municipal councils are creatures of a statute and can only do those things which they are authorized, expressly or implicitly, to do. The ratepayer's action is one means of keeping municipal action within municipal powers.

I would dismiss the appeal with costs.

The judgment of Martland, Ritchie, Spence, Pigeon, Laskin and Dickson JJ. was delivered by

LASKIN J.:-- An important question of standing is raised by this appeal, brought here by leave of this Court. The appellant, suing as a taxpayer in a class action, claims a declaration against the Attorney General of Canada that the Official Languages Act, 1968-69 (Can.), c. 54, now R.S.C. 1970, c. 0-2, and Appropriation Acts providing money to implement it, are unconstitutional. There are other defendants in the action as framed, against whom specific relief is claimed, but it seems to have been assumed that their liability depends initially on whether the appellant can succeed in his claim against the Attorney General of Canada; and that unless the appellant has standing to seek a declaration of unconstitutionality, the various claims of relief must fail in limine.

The question of standing was, on the motion of the defendants under R.124 (Ont.), set down for hearing as a preliminary question of law, and was decided by Houlden J. in their favour. An appeal by the plaintiff to the Ontario Court of Appeal was dismissed without calling on counsel for the defendants. The Court of Appeal, in short reasons, approved the interpretation placed by Houlden J. on the two judgments of this Court upon which, in his view, the issue turned, namely MacIlreith v. Hart [(1907), 39 S.C.R. 657] and Smith v. Attorney General of Ontario [[1924] S.C.R. 331]. Houlden J. regarded the Smith case as laying down the applicable principle as expounded in the reasons of Duff J., speaking in this respect for the majority of the Court. Houlden J. said this in the course of his reasons:

In my judgment, the principle stated in the Smith case is one of general application. This principle is that an individual has no status or standing to challenge the constitutional validity of an Act of Parliament in an action of this type unless he is specially affected or exceptionally prejudiced by it ... The fact that the taxes of the plaintiff and the taxes of every taxpayer in Canada will be raised as a result of the implementation of the Official Languages Act is not, in my opinion, sufficient to constitute special damage or prejudice to the plaintiff so as to enable the plaintiff to bring this action.

I think there is sound reason for this result. If every taxpayer could bring an action to test the validity of a statute that involved the expenditure of public money it would in my view lead to grave inconvenience and public disorder. It is for this reason, I believe, that the plaintiff has been unable to find any Canadian or English decision as authority for the position he is asserting.

I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder. An effective answer to similar arguments advanced in *Dyson v. The Attorney General* [[1911] 1 K.B. 410], was given by Farwell L.J. in his reasons at p. 423, reasons endorsed by Fletcher Moulton L.J. in the second *Dyson* case [[1912] 1 Ch. 158], at p. 168. The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; and as a matter of experience, *MacIlreith v. Hart*, to which I will return, does not seem to have spawned any inordinate number of ratepayers' actions to challenge the legality of municipal expenditures. A more telling consideration for me, but on the other side of the issue, is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute. That, in my view, is the consequence of the judgments below in the present case. The substantive issue raised by the plaintiff's action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

Because of the way in which the matter now before this Court arose, the facts alleged in the amended statement of claim are taken as admitted for present purposes. They do not, of course, answer the legal question which has been posited on those facts. There is one admission of fact to which I wish to refer, however, which was not considered in the reasons of the Courts below. Before bringing his action, the plaintiff wrote to the Attorney General of Canada inviting him, in his capacity as representative of the Crown in right of Canada in matters legal, to take appropriate proceedings to test the validity of the Official Languages Act. The letter noted that prior to the enactment of this statute the plaintiff had asked for a reference to this Court to have its validity considered but his request was refused. Although the record contains no reply to the plaintiff's letter there is an admission by the defendants in their amended statement of defence that the Attorney General declined to act in his public capacity to challenge the constitutionality of the statute.

If a previous request to the Attorney General to institute proceedings or to agree to a relator action is a condition of a private person's right to initiate proceedings such as this on his own (see *Attorney General v. Independent Broadcasting Authority, ex parte McWhirter* [[1973] 1 All E.R. 689], at p. 698) that condition has been met in this case. I doubt, however, whether such a condition can have any application in a federal system where the Attorney General is the legal officer of a Government obliged to enforce legislation enacted by Parliament and a challenge is made to the validity of the legislation. The situation is markedly different from that of unitary Great Britain where there is no unconstitutional legislation and the Attorney General, where he proceeds as guardian of the public interest, does so against subordinate delegated authorities. Indeed, in such

situations the decision of the Attorney General to proceed on his own or to permit a relator action is within his discretion and not subject to judicial control: see *London County Council v. Attorney General* [[1902] A.C. 165]. Nevertheless, what was said by Lord Denning in the *McWhirter* case, *supra*, on the position of a member of the public where the Attorney General refuses without good reason to take proceedings *ex officio* or to give leave for relator proceedings, is relevant to a distinction that I take and on which, in my opinion, the result in this case turns. I shall come to this later in these reasons.

I agree with the submission of counsel for the respondents that the appellant's taxpayer class action here is realistically a class action by a member of the public. He is bringing what has been called a "public action" (see Jaffe, *Judicial Control of Administrative Action* (1965), p. 483), and the question that arises is whether the principle of *MacIlreith v. Hart* should be extended to cover such federal taxpayer actions (and, if so, it would extend as well to provincial taxpayer actions), as contended for by the appellant, or whether this kind of action should never be permitted for the reasons given in the *Smith* case, as contended for by the respondents. It is my view that this statement of the issue is both too broad and too narrow. It is too broad because it does not take account of the nature of the legislation whose validity is challenged; it is too narrow because it suggests an "either or" approach by the Courts. I am of the opinion that the Court is entitled in taxpayer actions to control standing no less than it is entitled to control the granting of declaratory orders sought in such actions. In short, the matter to me is one for the discretion of the Court, and relevant to this discretion is the nature of the legislation under attack.

Where regulatory legislation is the object of a claim of invalidity, being legislation which puts certain persons, or certain activities theretofore free of restraint, under a compulsory scheme to which such persons must adhere on pain of a penalty or a prohibitory order or nullification of a transaction in breach of the scheme, they may properly claim to be aggrieved or to have a tenable ground upon which to challenge the validity of the legislation. In such a situation, a mere taxpayer or other member of the public not directly affected by the legislation would have no standing to impugn it. *Smith v. Attorney General of Ontario* is this class of case. Disregarding for this purpose the significant point that the wrong Attorney General was sued, the correctness of the decision might be put in doubt if it be taken to hold that the amended Canada Temperance Act was immune from challenge by a declaratory action at the suit of either *Smith* or the Montreal firm which refused, because of the amended legislation, to fill *Smith's* liquor order and hence brought to a halt a proposed business relationship.

Why, in such a case, should *Smith* be disqualified as a plaintiff in a declaratory action and be compelled to violate the statute and risk prosecution in order to raise the question of its invalidity? The reasons of Duff J. mention this point but then dispose of it in the following passage, at p. 337 of [1924] S.C.R., quoted and relied upon by Houlden J.:

Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal

offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.

We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining ultra vires expenditures by the governing bodies of municipalities; *MacIlreith v. Hart*. We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended.

On the whole we think the principle contended for, since it receives no sanction from legal analogy, and since it is open to serious objection as calculated to be attended by general inconvenience in practice, ought not to be adopted. But the question is an arguable one; and, as the merits of the appeal have been fully discussed, we are loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure; and accordingly we think it right to say that in our opinion the appellant's action also fails in substance.

Much of the argument in the present appeal, especially in the submissions of the appellant, related to the significance of the assertion of Duff J., upon which Houlden J. grounded his decision and which I have already quoted, that "an individual, for example, has no right to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act." The plaintiff's contention was that, on the pleadings, taking the facts alleged as established for the purposes of a motion under R.124 (Ont.), he was within this proposition, and that he was not called upon to show that he was more exceptionally prejudiced than others who, like him, were also exceptionally prejudiced. Put another way, the submission is that the issue is not magnitude of the exceptional prejudice but merely whether it exists in the case of the plaintiff, albeit

many others are under the same exceptional prejudice.

I am of the opinion that the foregoing statement of Duff J. cannot be torn from the context of case law and principle out of which it obviously arises, and that the submissions of the plaintiff become somewhat tortuous in seeking to parse the words "exceptional prejudice" as if they were disembodied terms of a statute. Although Duff J. cited no authority for his assertion, it is a derivation from English cases, relating to private attempts to enjoin a public nuisance. In this class of case, which involves no question of the constitutionality of legislation, there is a clear way in which the public interest can be guarded through the intervention of the Attorney General who would be sensitive to public complaint about an interference with public rights: see *Wallasey Local Board v. Gracey* [(1887), 36 Ch. 593]; *Tottenham Urban District Council v. Williamson & Sons Ltd.* [[1896] 2 Q.B. 353], *Boyce v. Paddington Borough Council* [[1903] 1 Ch. 109]. It is on this basis that the Courts have said that a private person who seeks relief from what is a nuisance to the public must show that he has a particular interest or will suffer an injury peculiar to himself if he would sue to enjoin it.

This is not a principle which is capable of wholesale transfer to a field of federal public law concerned with the distribution of legislative power between central and unit legislatures, and with the validity of the legislation of one or other of those two levels. There is no question in such a case of respecting legislative sovereignty, as in unitary Great Britain, but rather a question of whether Parliament or a Legislature has itself respected the limits of its authority under the Constitution.

The Official Languages Act is not a regulatory type of statute akin to the Canada Temperance Act which was involved in the *Smith* case. It is both declaratory and directory in respect of the use of English and French by and in federal authorities and agencies, including Courts, and in the provision of services to the public through communication in both languages by those authorities and agencies, whether in the national capital region, or at their head or central office elsewhere in Canada, or at each principal office in a federal bilingual district established under the Act. Administration of the Act is confided to a Commissioner of Official Languages who is charged to ensure recognition of the status of both official languages and compliance with the spirit and intent of the Act. He is authorized to inquire into complaints, to recommend remedial action after investigation of any complaint and to report to Parliament if appropriate remedial action is not taken. The Act creates no offences and imposes no penalties; there are no duties laid upon members of the public, although the public service may be said, broadly speaking, to be affected by the promotion of bilingualism in order that members of the public may be served and may communicate in both official languages. Public officials only might be exposed to prosecution under s. 115 of the Criminal Code.

The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain

unsatisfied: *Electrical Development Co. of Ontario v. Attorney General of Ontario* [[1919] A.C. 687], *B.C. Power Corp. Ltd. v. B.C. Electric Co. Ltd.* [[1962] S.C.R. 642]. Should they then foreclose themselves by drawing strict lines on standing, regardless of the nature of the legislation whose validity is questioned?

Short of a reference either to a provincial appellate Court by the Lieutenant Governor in Council or to this Court by the Governor General in Council, is there any other way in which the validity of a statute like the Official Languages Act can be determined in a judicial proceeding when the federal Attorney General has declined to act? Counsel for the respondents contended that a provincial Attorney General could take declaratory proceedings, but he could cite no authority for this proposition nor could I find any. However, want of authority is not an answer if principle supports the submission. I am unable to appreciate upon what principle this submission stands. Can it be said that one Attorney General of one Province is in any different position than any others of other Provinces, or is it suggested that an Attorney General class action be taken? Even if a provincial Attorney General might validly be authorized by provincial legislation to take such declaratory proceedings, I am unaware of any such legislation. As an ordinary common law matter, I do not think a provincial Attorney General is in as strong a position in a case such as the present one as is a federal taxpayer bringing a class action. The provincial Attorney General would be representing the public interest of his Province only, and, moreover, the invalidation of the Official Languages Act would not result in any accretion to, or vindicate any legislative power of the Province.

There is Australian authority to support a declaratory action by a State Attorney General to challenge the validity of Commonwealth legislation where that legislation amounts to an invasion of State legislative power: see *Attorney General for Victoria v. The Commonwealth* [(1946), 71 C.L.R. 237]. This, and other like cases cited therein, represent an adaptation to Australian federalism of the English position of the Attorney General as the guardian of public rights, those rights being the rights of the citizens of the State whom the State Attorney General represents. On the other hand, authority in the United States is to the contrary. In *Massachusetts v. Mellon* [(1923), 262 U.S. 447], a companion case to *Frothingham v. Mellon* considered below, the Supreme Court of the United States said this on the point (at p. 485):

It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof ... While the State, under some circumstances, may sue in that capacity for the protection of its citizens ... it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.

The merit of the Australian position does not reach the present case because, as I have already noted, there is no invasion of provincial legislative power in the enactment of the Official Languages Act even assuming it to be unconstitutional; and the cited Australian case does not go so far as to support the right of a State Attorney General to challenge a mere Appropriation Act of the

Commonwealth.

Counsel for the respondents also relied in this connection upon Reference re Subsections (1) (3) and (4) of S. 11 of the Official Languages Act, S. 23C of the New Brunswick Evidence Act and S. 14 of the New Brunswick Official Languages Act [(1972), 5 N.B.R. (2d) 653], which was a judgment of the New Brunswick Court of Appeal on a reference. There, one Leonard C. Jones applied successfully to the Court for leave to be joined as an interested party and to have all rights as a party including a right of appeal. This does not assist in the present case because a reference was refused by the federal authorities, and I do not think that a plaintiff is compelled to shop around for a reference by one of the ten provincial governments.

I come finally to the judgment of this Court in *MacIlreith v. Hart* [(1907), 39 S.C.R. 657]. In that case a municipal council had paid \$231 to the mayor to reimburse him for his expenses in attending a municipal convention. A ratepayer of the municipality brought a class action against the mayor (the municipal council having refused to do so) for a declaration that the payment was illegal and that the sum in question should be returned by the mayor. There was at the time no authority for the municipal council to pay convention expenses. On the question whether a ratepayer's action lay, the trial judge dismissed the suit on the ground that the Attorney General was a necessary party. The Supreme Court of Nova Scotia en banc reversed, holding the action to be maintainable as brought, and this decision was affirmed by this Court.

Case law in Ontario has sanctioned such actions for a long time. The leading case is *Paterson v. Bowes* [(1853), 4 Gr. 170], and on the merits, sub nom *Toronto v. Bowes* [(1853), 4 Gr. 489 aff'd. (1856), 6 Gr. 1 aff'd (1858), 11 Moo. P.C. 463; 14 E.R. 770]. The law in the United States is the same: see *Crampton v. Zabriskie* [(1879), 101 U.S. 601]. *Paterson v. Bowes* founded itself on *Bromley v. Smith* [(1826), 1 Sim. 8, 57 E.R. 482] which, on its facts, falls short of being in a strict sense a ratepayers' action to challenge an illegal municipal expenditure. It does not seem to have enjoyed any prominence in England, but there is more recent case law there which provides some support for the doctrine stated in *Paterson v. Bowes*: see *Prescott v. Birmingham* [[1955] Ch. 210]; and cf. *Bradbury v. Enfield* [[1967] 1 W.L.R. 1311]. There is also contrary authority in England: see *Holden v. Bolton* [(1887), 3 T.L.R. 676]; and in New Zealand: see *Collins v. Lower Hutt City Corporation* [[1961] N.Z.L.R. 25]. Professor de Smith rightly refers to the Prescott case as a weak authority because standing is approved there sub silentio and he says this on the subject (*Judicial Review of Administrative Action* (1968 2d ed.), at p. 479):

The state of the law is now thoroughly confused, and it is to be hoped that the House of Lords will soon have an opportunity to pronounce upon these matters. The assumption that to proclaim the ratepayer's locus standi in positive terms would let loose a torrent of ratepayers' actions is in fact mere conjecture. But if restrictive principles are to be cast aside, they should be cast aside unequivocally.

In those cases where the restrictive principle of requiring carriage of the suit by the Attorney General and denying any suit if the Attorney General refuses to act, has been cast aside, the rationale of the ratepayer's action has been explained in various ways, dependent, it seems to me, on the factual situation in the particular case. In *Smith v. Bromley*, where a limited number of householders of a parish were subject to rates imposed for the management and cultivation of certain allotments of enclosed waste lands over which rights of common existed, it was held that it was open to a dissident group to seek to reclaim a sum illegally paid out of the collected rates by the treasurer, albeit so paid with the approval of the majority. Sir John Leach V.C. said, briefly,

Where a matter is necessarily injurious to the common right the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit.

The Attorney General may file an information in a case like this in respect of the public nature of the right; and the proceedings must be by the Attorney General when all persons interested are parties to the abuse; but where that is not the case, I am not aware of any principle or authority which makes it necessary that he should be before the Court.

Paterson v. Bowes spoke in terms of the interest of inhabitants (it was an inhabitants' class action rather than a ratepayers') to prevent a misapplication of funds which came from municipal rates, and it distinguished the case of the public nuisance. Analogy there to equity jurisdiction to hold a faithless agent to be trustee for his principal was based on the fact that the defendant mayor had obtained 10,000 pounds [Sterling] as a discount on the purchase for the city of debentures in the sum of 50,000 pounds [Sterling], and had retained the sum for his own use. The municipal council refused at first to act and it was only after the question of standing had been resolved in favour of the inhabitants who brought the action that the council agreed to be substituted as plaintiff. In *Crampton v. Zabriskie*, the Supreme Court of the United States said this of a taxpayer's suit against an illegal expenditure of money by a county:

Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation

restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases.

In the Smith case, as already noted, Duff J. regarded *MacIlreith v. Hart* as an exception from a general rule which did not rest upon any clearly defined principle. That was not the view of the Court, of which he was a member, which decided the case. He concurred in the reasons of Davies J. who founded himself on the principle of *Paterson v. Bowes* and who found reconciliation with English authority by concluding that ratepayers, who sue to vindicate a public right to have municipal money lawfully appropriated, suffer damage peculiar to themselves qua ratepayers in the increased rates they would have to pay by reason of illegal expenditures, even though the damage be small. Idington J. proceeded squarely on *Paterson v. Bowes*. So did Maclellan J. (with whom Fitzpatrick C.J. concurred) although he viewed that case as reflecting a trustee-beneficiary relationship between the municipality and its ratepayers. It is quite clear that obeisance to the special damage requirement was purely formal, and that at least equally important was the fact that ultra vires expenditures were involved which the municipal council was unwilling to reclaim.

If the Attorney General should also be unwilling to involve himself in a local municipal matter, that would end the affair unless standing was given to a ratepayer willing to bear the costs of an action to correct a wrong in municipal administration. This was the case in *Bradford v. Municipality of Brisbane* [[1901] Queensland L.J. 44], a judgment of Griffith C.J., where the Attorney General refused to interfere and a ratepayer was denied standing to enjoin an allegedly illegal municipal expenditure. I am unable to appreciate how an argument of principle can be made that such a wrong, an illegality which is certainly justiciable, should go uncorrected at law, whatever may eventuate as political redress.

For myself, I do not think that it was necessary to restrict the doctrine of *MacIlreith v. Hart* in order to decide the Smith case as it was decided. Two entirely different situations were presented in those two cases. In the Smith case, a regulatory, even prohibitory, statute was in issue under which offences and penalties were prescribed; in *MacIlreith v. Hart*, there was a public right involved which had no punitive aspects for any particular ratepayer or class of ratepayers, and it would beget wonder that, in such a case, there should be no judicial means of recovering or controlling an illegal expenditure of public money.

Assuming for the moment that *MacIlreith v. Hart* approved a ratepayers' suit because of the communality of the relationship of persons in the city of Halifax (which had at the time a population of about 47,000) even though only \$231 was involved, I do not see that the principle is any less valid in respect of a taxpayers' suit concerning Halifax in its present-day population of about 125,000, nor in respect of Metropolitan Toronto or Montreal, each of which has a population in excess of two million. The population of Metropolitan Toronto and of Montreal is greater than that

of each of seven of the Provinces of Canada. If the principle of *MacIlreith v. Hart* is applicable to municipal ratepayers' actions, why not to a provincial taxpayers' action to challenge the constitutionality of legislation involving expenditure of public money where no other means of challenge is open?

There is, of course, this difference between an illegal expenditure by a municipality or a public corporation and an allegedly illegal expenditure by a Province or by the Dominion. Neither the Province nor the Dominion is limited in expenditure by the considerations that apply to a municipality or to a corporation. The issue here is not simply one (as it seemed to be in *Frothingham v. Mellon* [(1923), 262 U.S. 447], discussed below) where the challenge is merely to an Appropriation Act. The main challenge is to the Official Languages Act, but, because it has been implemented by the appointment of a Commissioner of Official Languages and other staff, there is the ancillary reference to allegedly illegal expenditures made in respect of an unconstitutional object.

In the United States, a taxpayer class action in respect of an allegedly unconstitutional State expenditure is now generally maintainable: see Douglas J., concurring in *Flast v. Cohen* [(1968), 392 U.S. 83], at p. 108; *Everson v. Board of Education* [(1947), 330 U.S. 1]; and *Doremus v. Board of Education* [(1952), 342 U.S. 429]. However, until recently federal taxpayer suits to challenge unconstitutional federal expenditures had been denied. *Frothingham v. Mellon*, already cited, decided less than a year before the *Smith* case, had laid down the governing rule. The reasons invoke the same concern as did the *Smith* case about multiplicity of actions, inconvenience, and the fact that public and not special individual interest is involved and, in addition, rely on the separation of powers doctrine which is a more explicit matter in the United States than it is here. In the course of his reasons for the Court, Sutherland J. said this:

The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. In cases where it was presented, the question has either been allowed to pass sub silentio or the determination of it expressly withheld....The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. *Crampton v. Zabriskie*, 101 U.S. 601, 609. Nevertheless, there are decisions to the contrary. See, for example, *Miller v. Grandy*, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. IV *Dillon Municipal Corporations*, 5th ed., s. 1580, et seq. But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury--partly realized from taxation and partly

from other sources--is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

There has been a considerable modification of *Frothingham v. Mellon* in the recent decision of the Supreme Court of the United States in *Flast v. Cohen*. There that Court held that a federal taxpayer suit may be pursued to challenge the constitutionality of a federal expenditure pursuant to the federal taxing and spending power where the challenge is also based on a specific constitutional limitation on the exercise of that power. In so far as United States decisions turn on the need for showing a justiciable "case or controversy", within Article III, section 2 of the American Constitution, or otherwise require a constitutional base to support standing by a federal taxpayer, they have no application to Canada. I note, in any event, a recent recession there from the "case of controversy" requirement: see *Sierra Club v. Morton* [(1972), 405 U.S. 727].

In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised, a point that could be said to be involved (although the case was not decided on that basis) in *Anderson v. Commonwealth* [(1932), 47 C.L.R. 50], where the High Court of Australia denied standing to a member of the public to challenge the validity of an agreement between the Commonwealth and one of the States. Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide, as it did in the *Smith* case, that a member of the public, and perhaps even one like *Smith*, is too remotely effected to be accorded standing. On the other hand, where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits.

In his reasons in the *Smith* case, Duff J. concluded his exposition on standing by the statement that "the question is an arguable one". I think that the argument for standing in the present case is fortified by analogy (which Duff J. thought was absent) to the cases on certiorari and prohibition which, even in a non-constitutional context, have admitted standing in a mere stranger to challenge jurisdictional excesses, although the granting of relief remains purely discretionary: see *Wade*, *Administrative Law* (3rd ed. 1971), at p. 138, pointing to the special public aspect of these remedies. Other analogies from English legal history depend on how far back in such history one is prepared to go. Lord Mansfield, for example, looked upon the writ of mandamus as a public remedy which "was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one": *Rex v. Barker* [(1762), 3 Burr. 1265, at p.

1267, 97 E.R. 823, at pp. 824-825]. The expansion of the declaratory action, now well-established, would to me be at odds with a consequent denial of its effectiveness if the law will recognize no one with standing to sue in relation to an issue which is justiciable and which strikes directly at constitutional authority.

I recognize that any attempt to place standing in a federal taxpayer suit on the likely tax burden or debt resulting from an illegal expenditure, by analogy to one of the reasons given for allowing municipal taxpayers' suits, is as unreal as it is in the municipal taxpayer cases. Certainly, a federal taxpayer's interest may be no less than that of a municipal taxpayer in that respect. It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.

In the present case, I would, as a matter of discretion, hold that the appellant should be allowed to proceed to have his suit determined on the merits. Accordingly, I would allow the appeal, set aside the judgments below and dismiss the motion of the respondents under R.124. The appellant should have his costs throughout.

Appeal allowed with costs.

TAB 18

Case Name:

Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)

Between

**Toronto Hydro-Electric System Limited, Appellant (Respondent
in Appeal), and
Ontario Energy Board, Respondent (Appellant in Appeal)**

[2010] O.J. No. 1594

2010 ONCA 284

Docket: C49980

Ontario Court of Appeal
Toronto, Ontario

K.N. Feldman, S.E. Lang and J.L. MacFarland JJ.A.

Heard: October 9, 2009.

Judgment: April 20, 2010.

(69 paras.)

*Natural resources law -- Public utilities -- Regulatory tribunals -- Licensing and rate-making --
Judicial review -- Jurisdiction of board -- Appeal by Hydro-Electric System from Divisional Court
decision declaring that respondent Board exceeded its jurisdiction when it imposed, as a condition
in its 2006 rate decision, a duty on appellant to obtain approval of majority of its independent
directors before declaring any future dividends payable to its affiliates allowed -- Board expressed
concern about level of dividend payments and above-market interest rate paid by appellant as
increased capital spending was required to address aging plant and to maintain system reliability --
Board's power in setting rates to be interpreted broadly -- Board's reasons provided intelligible
explanation for condition.*

Appeal by Hydro-Electric System from a Divisional Court decision declaring that the respondent Board exceeded its jurisdiction and erred in law when it imposed, as a condition in its 2006 rate decision, a duty on the appellant to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates. The appellant was a wholly-owned

subsidiary of Toronto Hydro Corporation. All of the shares of Hydro were owned by the City of Toronto. Hydro funded a significant part of the dividends and interest payments made to the City through substantial annual increases in dividends from the appellant and by charging the appellant an above-market rate of interest on an inter-company loan. The Board expressed concern about the level of dividend payments and the above-market rate of interest paid by the appellant as increased capital spending was required to address the issues of the aging plant and to maintain system reliability. The Board thus disallowed as a regulatory expense any interest charges above market rates, and required a majority of the appellant's independent directors to approve any future dividend payments. In reaching this decision, the Board noted that if a utility like the appellant was to pay all of its retained earnings to its shareholders, this could adversely affect its credit rating, which in turn could harm ratepayer interests by causing higher costs and degradation in services.

HELD: Appeal allowed. The Board did not exceed its statutory grant of power and had the ability, as part of its 2006 rate decision, to require the appellant to obtain the approval of a majority of its independent directors before declaring any dividends. The Board was a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance the interests of ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that was both economically efficient and cost effective. Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it was clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. The Board's power in respect of setting rates was to be interpreted broadly and extended well beyond a strict construction of the task. The legislation reflected a clear intent by legislators to use both a subjective and open-ended grant of power to enable the Board to engage in the impugned inquiry in the course of rate setting. The Board's reasons provided an intelligible explanation for the condition. The reasons both disclosed a concern relating to prices and the adequacy, reliability and quality of service and explained how the chosen remedy would help to alleviate this concern. The Board had crafted a reasonable and less intrusive remedy that balanced the interests of the appellant's shareholders and its ratepayers and was consistent with the regulatory compact.

Statutes, Regulations and Rules Cited:

Electricity Act, 1998, S.O. 1998, c. 15, Sch. A, s. 29, s. 78, s. 78(2), s. 78(3)

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 1(1), s. 23(1), s. 36(3), s. 44(1)

Appeal From:

On appeal from the order of the Divisional Court (Lederman, Kiteley and Swinton JJ.) dated September 9, 2008, with reasons by Kiteley J. and reported at (2008), 93 O.R. (3d) 380.

Counsel:

Glenn Zacher and Patrick G. Duffy, for the appellant Ontario Energy Board.

James D.G. Douglas and Morgana Kellythorne, for the respondent Toronto Hydro-Electric System Limited.

The judgment of the Court was delivered by

1 J.L. MacFARLAND J.A.:-- This is an appeal with leave of this court from the order of the Divisional Court (Kiteley, Swinton JJ., Lederman J. dissenting) dated September 9, 2008. The court declared that the Ontario Energy Board exceeded its jurisdiction and erred in law when it imposed, as a condition in its rate decision for 2006, a duty on Toronto Hydro-Electric System Limited to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates (the "condition").

OVERVIEW

2 Toronto Hydro-Electric System Limited ("THESL") is an electricity distributor licensed and regulated by the Ontario Energy Board ("OEB"). THESL is a wholly-owned subsidiary of Toronto Hydro Corporation ("THC"). All of the shares of THC are owned by the City of Toronto (the "City").

3 In 2004-2005, THC paid over \$116 million to the City in the form of dividends and interest payments. THC funded a significant part of these payments through substantial annual increases in dividends from THESL and by charging THESL an above-market rate of interest on an inter-company loan. At the time THESL made the payments it had not completed a capital plan for reinvestment in its aging infrastructure.

4 When THESL applied to the OEB for approval of its distribution rates to be effective May 2006, the OEB expressed concern about the level of dividend payments and the above-market rate of interest being paid by THESL. Evidence before the OEB disclosed that the City anticipated a significant shortfall in its 2006 operating budget; that the City regarded THC as "a revenue source in the 2006 operating budget"; and that the City demanded substantial increases in dividends from THC which, in turn, demanded increased dividends from THESL.

5 The OEB is the regulator of Ontario's electricity industry, and is statutorily mandated to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service." The OEB manages this mandate primarily by setting just and reasonable rates.

6 In its decision, the OEB disallowed as a regulatory expense any interest charges above market rates, and required a majority of THESL's independent directors to approve any future dividend

payments. In reaching this decision, the OEB noted that if a utility like THESL was to pay all of its retained earnings to its shareholders, this could adversely affect its credit rating, which in turn could harm ratepayer interests by causing higher costs and degradation in services. THESL appealed this decision.

7 In the Divisional Court, THESL argued that the OEB had no jurisdiction to impose the condition it did, either by statute or at common law, and further that the imposition of such a condition represented an unwarranted and indeed unlawful restriction on the authority of the board of directors to declare a dividend.

8 The majority in the Divisional Court accepted THESL's position on both bases advanced, allowed the appeal and set aside the part of the OEB decision that imposed the condition.

9 The OEB argues that the majority of the Divisional Court panel failed to appreciate and distinguish the principles that govern regulated utilities like THESL, which operate as monopolies, from those that apply to private sector companies, which operate in a competitive market. The OEB submits that this distinction is critical because whereas the directors and officers of an unregulated company have a fiduciary obligation to act in the best interests of the company (which usually equates to the interests of the shareholders), a regulated utility must operate in a manner that balances the interests of the utility's shareholders against the interests of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of ratepayers.

10 For the reasons that follow I would allow the appeal, set aside the order of the Divisional Court and restore the part of the rate decision that imposed the condition.

11 The issue for this court is whether the OEB had the ability, as part of its 2006 rate decision, to require THESL to obtain the approval of a majority of its independent directors before declaring any dividends.

ANALYSIS

12 This court has held that the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests: see *Natural Resource Gas Ltd. v. Ontario Energy Board* (2006), 214 O.A.C. 236 (C.A.), at para. 18.

13 The analysis must begin with the legislation that establishes the OEB and gives the OEB its powers. The OEB's objectives in respect of electricity are stated in s. 1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B (the "Act"):

Boards objectives, electricity

1.(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.¹

14 In short, the OEB is to balance the interests of ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective.

15 The *Electricity Act, 1998*, S.O. 1998, c. 15, Sch. A, requires a distributor of electricity to sell electricity to every person connected to the distributor's distribution system (s. 29). However, the distributor can only charge for the distribution of electricity in accordance with an order of the OEB. Section 78 of the Act provides in part:

78(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract.

...

- (3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*.

16 In relation to its ability to make orders the Act provides:

23(1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

17 In order to determine the appropriate standard of review, the inquiry must begin with a consideration of the nature of the OEB's decision.

I. Avoiding the "Jurisdiction" Trap

18 In recent years administrative law has undergone a significant transformation. Ever since Dickson J. championed the notion of increased deference to specialized administrative tribunals in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("CUPE"), courts have sought to avoid labelling matters as jurisdictional where such a label

might lead to a more searching review of the administrative decision than is appropriate in the circumstances. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, Bastarache and LeBel JJ. underlined the importance of *CUPE* in this regard at para. 35:

Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

19 Support for the *CUPE* conceptualization of jurisdiction is also found in the majority reasons of Abella J. in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at paras. 88-89:

The Federal Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court -- its specialized expertise. It ignores Dickson J.'s caution in [*CUPE*] that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".

If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding. Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field". Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority. [Emphasis added; citations omitted.]

20 Genuine questions regarding the boundaries of administrative authority under statute do arise. Administrative bodies must be correct in answering these questions. It is crucial to distinguish, however, between these "true" matters of jurisdiction and the wider understanding of jurisdiction that Dickson J. rebuked in *CUPE*. This point was highlighted by Bastarache and LeBel JJ. in *Dunsmuir* at para. 59:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "*Jurisdiction*" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so. [Emphasis added; citations omitted.]

21 David Phillip Jones and Anne S. de Villars offer a helpful analysis of the difference between the "narrow" and "wide" meaning of jurisdiction in their text, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at pp. 140-41:

In its broadest sense, "jurisdiction" means the authority to do every aspect of an *intra vires* action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors - such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result - which take place *after* the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction.

...

It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's

jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to *exceed* its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction. [*Italics in original; footnotes omitted.*]

22 Further guidance in terms of defining exactly what constitutes "true" questions of jurisdiction can be gleaned from the reasons of Abella J. in *VIA Rail*. At para. 91, she cited *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18, for the proposition that "[t]he test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by legislators to be left to the exclusive decision of the Board?" In the same paragraph, Abella J. also referred to *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1087, where Beetz J. held that "the only question which should be asked [is], 'Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?'"

23 Thus, the focus is on discerning legislative intent with respect to the scope of a tribunal's authority to undertake an inquiry. This reading is consistent with Bastarache and LeBel JJ.'s observation that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir* at para. 54), and Abella J.'s conclusion that "[a] tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation" (*VIA Rail* at para. 92). It also accords with Jones and de Villars observation at p. 146:

[A] conscious and clearly-worded decision by the legislature to use a subjective or open-ended grant of power has the effect of widening the delegate's jurisdiction and, therefore, narrowing the ambit of judicial review of the legality of its actions.

24 Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons - on either a reasonableness or correctness standard - but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". In contrast, where a tribunal is pursuing an illegitimate objective, or is engaging in actions that clearly defy the limits of its statutory authority, then a reviewing court may properly declare its decisions to be *ultra vires*. These principles are consistent with Abella J.'s reasoning in *VIA Rail* at para. 96:

It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction ... in a way that undermines the deference that jurisdiction was conferred to protect. By attributing a jurisdiction-limiting label, such as "statutory interpretation" or "human rights", to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

II. Broad Powers of the OEB

25 The case law suggests that the OEB's power in respect of setting rates is to be interpreted broadly and extends well beyond a strict construction of the task.

26 For example, in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* (2008), 293 D.L.R. (4th) 684 (Ont. Div. Ct.), the majority of the court held that the OEB had the jurisdiction to establish a rate affordability assistance program for low-income consumers purchasing the distribution of natural gas from the utility. Section 36(3) of the Act states that "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique it considers appropriate." In paras. 53-56, the majority noted the breadth of the OEB's rate-setting power when its actions were in furtherance of the statutory objectives:

[T]he Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." ... the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the *Act*. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."

...

[T]he Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."

The Board is engaged in rate-setting within the context of the interpretation of its

statute in a fair, large and liberal manner.

27 The jurisdiction of the OEB was also reviewed in *Enbridge Gas Distribution Inc. v. Ontario Energy Board*. (2005), 74 O.R. (3d) 147 (C.A.). In *Enbridge*, the OEB issued a rule permitting the gas vendor to determine who will bill its customers for the gas they buy from a vendor and for its transportation to them by the distributor. The appellants argued that this rule went beyond the jurisdiction conferred on the OEB by s. 44(1) of the Act, which provides that the OEB may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]". Goudge J.A. ultimately found that the OEB had the jurisdiction to issue the rule. He endorsed a broad understanding of the Act in paras. 27-28:

[The appellants] say that the intention of this subsection is to limit the Board's jurisdiction to a rule governing only the part of a gas distributor's conduct that relates to its business relationship with a gas vendor, such as when the gas vendor acts as agent on behalf of its gas supply customer to arrange with the gas distributor for delivery of that gas supply to that customer. ...

In my view, there is nothing in either the language of s. 44(1)(b) or its statutory context to suggest such a narrow interpretation. ... Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

28 A recent decision from the Divisional Court offers further support for the proposition that the OEB enjoys a wide ambit of power in its rate-setting function. In *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board et al.* (2009), 252 O.A.C. 188 (Div. Ct.), leave to appeal to Ont. C.A. refused, the OEB allocated THESL's net after-tax gains on the sale of three properties to reduce THESL's revenue requirement, and thereby also reduce electricity distribution rates to ratepayers. The court unanimously held that the proper approach to a review of the OEB decision did not involve a "true" jurisdictional analysis as contemplated in *Dunsmuir*. Rather, a reasonableness standard applied because the decision in the case - whether and how the OEB may allocate the net after-tax gains on the sale of properties to reduce THESL's revenue requirement - was squarely within the rate-setting authority of the OEB and went to very core of the OEB's mandate. The court noted the expansive content of the rate-setting power at para. 17:

An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting

formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the *OEBA* which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests. [Citations omitted.]

29 The present appeal does not engage a "true" question of jurisdiction. As confirmed above, the Act is to be interpreted broadly. It is clear that the legislative intent of s. 78 of the Act is that the OEB have the principal responsibility for setting electricity rates. The Act specifies that in carrying out its responsibilities the OEB *shall* be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity service. The Act also permits the OEB in making an order, to impose such conditions as *it* considers proper, and states that these conditions may be general or particular in application (s. 23(1)). Thus, the legislation reflects a clear intent by legislators to use both a subjective and open-ended grant of power to enable the OEB to engage in the impugned inquiry in the course of rate setting.

30 Further, it is apparent that as part of its rate-setting function, the OEB was entitled to consider the history of THESL's dividend payments. This was part of the inquiry into whether and how to control outgoing cash flows from THESL in order to ensure adequate capital. This line of inquiry goes to the heart of the OEB achieving its statutory objectives. In its reasons, the OEB noted that at the hearing there was considerable discussion of the dividend issue and that information concerning the dividend payouts had been filed. An inquiry into dividend payments was an inquiry that all parties believed was within the OEB's jurisdiction. The "true" nature of the respondent's challenge cannot be characterized as a matter of jurisdiction. Of course, it does not follow that the methods chosen are insulated from review (see Part IV).

III. The *ATCO* Decision

31 THESL argues that the Supreme Court of Canada's recent decision in *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, militates in favour of reviewing OEB decisions using a correctness standard. *ATCO* involved an application by ATCO to have the sale of a property approved by the Alberta Energy and Utilities Board as required by the statute. The Board approved the sale and imposed a condition requiring that a certain portion of the sale proceeds be allocated to rate-paying customers. The *Alberta Energy Board Utilities Act* set out that with respect to an order, the Board may "impose any additional conditions that the Board considers necessary in the public interest".

32 Writing on behalf of three other justices, Bastarache J. divided the inquiry into two questions.

The first question was whether the Board had the power pursuant to its enabling statutes to allocate the proceeds from the sale of the utility's asset to its customers when approving the sale. The second question was whether the Board was permitted to allocate the proceeds of the sale in the way that it did. Bastarache J. concluded that the first question was to be reviewed on a correctness standard and the second question was to be reviewed on a more deferential standard.

33 This case is distinguishable from *ATCO*. The statutory grant of power in *ATCO* to "impose any additional conditions that the Board considers necessary in the public interest" is different than the statutory grant of power in this case. Bastarache J. referred to this provision as vague, elastic, and open-ended. In the present case, the OEB's imposition of a condition it considers proper (s. 23(1)) has to be guided by the legislated objectives set out in s. 1(1). These objectives are not vague, elastic, and open-ended. To the extent that there is uncertainty with respect to the achievement of the s. 1(1) objectives, that is a matter undeniably within the expertise of the OEB. Further, unlike the *ATCO* provision, the objectives in the Act require that the OEB protect the interests of *both* the customer and the utility.

34 There are four other factors that support distinguishing *ATCO* from this case. First, the decision in *ATCO* reveals that Bastarache J. reasoned that *ATCO* was not a rate-setting case. He noted that the provision granting the power to impose conditions could not be read in isolation. Rather, he explained that the provision had to be considered within the context of the purpose and scheme of the legislation. Bastarache J. stated that the main purpose of the Board is rate setting. The allocation of the sale proceeds did not fit within the limits of the powers of the Board, which "are grounded in its main function of fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system" (para. 7).

35 Second, at para. 30, Bastarache J. determined that the Board's protective role - safeguarding the public interest in the nature and quality of the service provided to the community by public utilities by ensuring that utility rates are always just and reasonable - did not come into play. This factor pointed to a less deferential standard of review. In the present case, the OEB's "protective role" was central to the dividend condition.

36 Third, Bastarache J., viewed the issue in *ATCO* as the Board's power to transfer proprietary rights in the assets of the utility to the customers. In this case, the dividend condition did not result in the transfer of proprietary rights.

37 Fourth, in giving examples of conditions that could attach to the approval of a sale, Bastarache J. stated at para. 77 that the Board "could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system." As will be explained, the OEB placed the condition on the payment of dividends to ensure that dividends would not be paid when there was insufficient capital for plant maintenance.

IV. Reviewing the Exercise of OEB Jurisdiction: The Reasonableness Standard

38 Having determined that the OEB did not exceed its statutory grant of power, the question remains whether it could order that the declaration of a dividend requires the approval of the majority of THESL's independent directors. This question is reviewable on a reasonableness standard.

39 Recently, a reasonableness standard was used by this court in *Natural Resource Gas v. Ontario Energy Board* (2006), 214 O.A.C. 236 (C.A.). The case arose from the application by a gas distributor seeking an order increasing its rate over a 12-month period, in order to allow for the recovery of unrecorded costs which were the result of an accounting error. Writing for the panel, Juriansz J.A. reviewed some of the recent appellate jurisprudence and concluded that reasonableness was the appropriate standard of review as the question was one of mixed fact and law, and also involved policy considerations:

In two recent decisions, *Graywood Investments Ltd. v. Toronto Hydro-Electric System*, [2006] O.J. No. 2030 (C.A.) and *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, [2006] O.J. No. 1355 (C.A.), this court has considered the standard of review of decisions of the OEB.

In *Enbridge*, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".

In *Graywood*, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):

First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its decisions are, therefore, entitled to substantial deference.

In order to take this case outside the application of this general conclusion, [the distributor] must establish that the nature of the question in dispute and the relative expertise of the OEB regarding that question are different in this case than in *Graywood*. [At paras. 7-10.]

...

It is clear that the Act constitutes the OEB as a specialized expert tribunal with

the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.

The Act does not contain a privative clause. Section 33 provides a right of appeal to the Divisional Court from an order of the OEB "only upon a question of law or jurisdiction". [At paras. 18-19.]

...

While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations as well. The OEB possesses greater expertise relative to the court in determining the question.

Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness. [At paras. 23-24.]

40 The facts of this case do not warrant departure from the reasonableness analysis. In my view, the nature of the OEB decision - structuring a condition that will protect the long-term integrity of THESL's energy infrastructure - falls squarely within the category of "mixed fact and law" with "policy considerations".

41 One of the reasons given by the majority below for applying a correctness standard was because the case dealt with principles of corporate law. When dealing with a regulated corporation the fact that corporate law principles are at play does not alone suggest a correctness standard of review. Corporate law principles will often be engaged when making decisions in respect of regulated corporations. It is the regulator's duty to use its expertise to apply corporate law principles within the context of its objectives; this implies a reasonableness standard.

V. Is the Decision a Reasonable One?

42 At para. 47 of *Dunsmuir*, Bastarache and LeBel JJ. described the two inquiries involved in assessing the reasonableness of a decision:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain

questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.* [Emphasis added.]

43 The first inquiry of the reasonableness analysis is into the "existence of justification, transparency and intelligibility within the decision-making process." The second inquiry is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law." Thus, the first inquiry deals with the justification process as articulated in the reasons for the decision and the second inquiry looks at the outcome. As noted in *Dunsmuir*, the reasonableness analysis will concern mostly the first inquiry.

(a) Justification, transparency and intelligibility

44 The inquiry into the justification, transparency and intelligibility of the decision-making process is focused on the reasons for the decision. In an oft-cited passage from *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, Iacobucci J. at para. 55 articulated the relationship between the reasons of a tribunal and the ultimate reasonableness of its decision:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. *This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.* [Emphasis added; citations omitted.]

45 Further, as Abella J. explained in *Via Rail* at para. 104:

Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

46 And as more recently noted by Binnie J. in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 59:

Reasonableness is a single standard that take its colour from the context. ... [A]s long as the process and the outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

and at para. 63:

Dunsmuir thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court.

47 The OEB's reasons provide an intelligible explanation for the condition. The reasons both disclose a concern relating to "prices and the adequacy, reliability and quality" of service and explain how the chosen remedy will help to alleviate this concern.

48 Before addressing these two elements, it is important to note one factor about the context of the decision. THESL is what has been described as a "regulated monopoly". As Bastarache J. explained in *ATCO* at para. 3, "utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service". In other words, the OEB's regulatory power is designed to act as a proxy in the public interest for competition: see *Advocacy Centre for Tenants-Ontario*. Because there is no competition, THESL could easily pass on the expense of business decisions to ratepayers through increased utility prices, or through the degradation of the quality of service, without the usual risk of losing customers. As was explained in para. 39 of *Advocacy Centre for Tenants-Ontario*, "[t]he Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service."

49 While THESL is incorporated, as is required by s. 142 of the *Electricity Act*, under the provisions of the *Business Corporation Act*, R.S.O. 1990, c. B.16, ("*OBCA*") it is publicly regulated rather than a private corporation. This distinction is an important one. As Lederman J. noted in his dissenting reasons in the court below at para. 78:

At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large.

50 The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.

51 The decision reveals that the OEB was concerned about the aging plant and the lack of necessary capital. At the hearing it was argued that there appeared to be underinvestment in the physical plant over the past several years (para. 4.4.1). Evidence was presented that 30 to 40 per cent of the plant in service had exceeded its expected life (para. 4.5.3). The Board concluded that increased capital spending was required to address the issues of the aging plant (para. 4.7.1) and to maintain system reliability (para. 4.10.8).

52 However, despite the need for capital, the evidence was that there was a very dramatic increase in the dividend payouts in 2004 and 2005. As the OEB noted at para. 6.4.1, "[t]he level of dividends appears to be greater than the net income of the utility over at least a two year period." At para. 6.4.4 the OEB explained why these events were of concern:

The question arises as to whether the Board should restrict the dividend payout by the utility. To the extent a utility pays all of its retained earnings to the shareholder, it will become more dependent on borrowing and this may have an adverse effect on its credit rating.

53 In sum, the OEB was concerned because THESL was paying THC very large dividends even though increased capital spending was going to be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately, as the OEB explained, have adverse effects on ratepayers. Lederman J. effectively summarized these circumstances at paras. 80 and 85:

The setting of rates will accomplish little in terms of public protection if the revenue can be stripped out of the company without any controls.

...

The OEB had evidence before it that THESL was paying increased dividends and an above market rate of interest while it was under investing by about \$60 million in its capital expenditures. The OEB noted that if a utility like THESL was to pay all its retained earnings to its shareholder, this could adversely impact its credit rating, which in turn, could cause higher costs and degradation in service to electricity consumers.

54 The OEB also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts, was to require that any dividend paid by THESL be approved by a majority of its independent directors.

55 At the time of the hearing, the composition of the board of directors of THESL was identical to the THC. The reasons reveal that the OEB was very concerned about the about the relationships between THESL, THC, and the City. For example, at para. 3.2.3 the OEB questioned the percentage of THC's costs recovered from THESL:

It is readily apparent to the Board that allocating these costs based on gross revenues produces an unwarranted bias against the ratepayers. The revenues of the utility are inflated by the high cost of wholesale power. That is an ever increasing amount. Because these costs are increasing, it does not follow the utility's share of the overhead costs should be increasing. In short, there is no necessary relationship between the revenue share and the share of overhead cost.

56 The reasons also discuss the above-market interest rate THESL was paying the THC on a loan (s. 5.3), as well as the purchase of the City's street lighting business (para. 6.4.3). According to the OEB, the above-market interest rate resulted in THESL paying approximately an additional \$16 million per year which was being borne by the ratepayers. Amplifying the concern was the City's decision after the hearing, but before the decision was released, to extend the loan to 2013. This led the OEB to note at para. 5.3.8, it is "apparent that the financing decisions are being made unilaterally by the City, which is the sole shareholder of the utility."

57 With respect to dividends, as already noted, the OEB was concerned about the very dramatic increase in the dividend payouts in 2004 and 2005. At para. 5.3.18 the OEB stated:

Nor is it any defence to say this is not a decision of the utility but is being made unilaterally by the City of Toronto. That is exactly the problem. In fact it could be argued that this is part of a pattern. The City has extracted extensive dividends from this utility in recent years. It is likely one of the rare occurrences in Canadian financial markets where the level of dividends exceeds the net income. [Emphasis added.]

58 Moreover, the OEB was aware of a change in a shareholder direction and the payment of special dividends. These facts are referred to in para. 6.4.2:

At one time, there was a shareholder direction that limited the dividend payout to 40% of the utility's income, but that was changed to 50% of consolidated income. Moreover, it appears that were special dividends over and above that amount.

59 Thus, the OEB was of the opinion that one of the reasons for the THESL's unusual dividend payouts was the THC's, and ultimately the City's, control over THESL's decision making. The OEB

explained at paras. 6.4.5 and 6.4.6 of the decision:

A related question is the independence of the directors. The evidence in the hearing is that the directors of the utility and the parent, Toronto Hydro Corporation are currently identical. And none of the members of management are to be on the Board. This is an unusual situation.

There is a requirement that at least one third of the directors of the distributor must be independent but that rule will not apply to this utility until July 1, 2006. In the course of these hearings the utility has confirmed that it will comply with the requirement and at that time, the independent directors will be appointed.

60 Concern about affiliate transactions is not unique to THESL. The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate (para. 5.3.17). The OEB has also established the *Affiliate Relationship Code for Electricity Distributors and Transmitters* ("ARC") with a separate compliance procedure to guard against harm to ratepayers that may arise as a result of dealings between a utility and its affiliates. One of the provisions of the ARC required that one third of the board of directors of a distributor be independent from any affiliate by July 1, 2006. It is evident that independence is viewed as a guard against harmful decisions that arise as a result of dealings between a utility and its affiliates.

61 Following this line of reasoning, the Board concluded at paras. 6.4.7 to 6.4.9 that the condition was needed to balance the interests of *both* the customer and the shareholder:

Given the unusual high level of dividend payout and the concern expressed by a number of parties, the Board believes that it is appropriate that any dividend paid by the utility to the City of Toronto should be approved by a majority of the independent directors.

Much of the controversy in this case has been dominated by discussion about non arms length transaction between the utility and the City of Toronto, whether it relates to dividend payouts, payment of interest on loans or the purchase of goods and services. *The introduction of independent directors will be a step in the right direction. The requirement that independent directors approve dividend payouts to affiliates will give the public greater assurance that the interests of ratepayers are not subservient to those of the shareholders.* The Board believes this is in keeping with the policy intent of Section 2 of the ARC.

This provision will be reviewed by the Board in the next rate case. At a minimum it will signal the Board's serious concern with the state of inter-affiliate relations.

[Emphasis added.]

62 For the reasons set out above, this was a reasonable decision.

(b) Acceptable Outcomes

63 To reiterate, the second inquiry in a reasonableness analysis is that the decision fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." It is in this part of the analysis where, in my opinion, this court should address THESL's argument that the imposed condition violated corporate law.

64 THESL argued at the Divisional Court, and argues before this court, that the OEB order was contrary to settled principles of corporate law that the directors of a public company cannot delegate their power to declare dividends. Section 127(3)(d) of the *OBCA* confirms this prohibition by expressly excluding any delegation of the board of directors' power to declare a dividend from the general rule permitting delegation to a managing director or committee of directors.

65 The OEB submits that the authority to approve dividends was not taken away from the directors. Approval by the entire board is still required before a dividend can be issued. The independent directors are simply an additional check on the authority of the full board. The OEB also relies on s. 128(1) of the Act which provides that, "[i]n the event of a conflict between this Act and any other general or special act, this Act prevails."

66 The majority judgment below accepted THESL's argument, and found that the OEB had effectively delegated the power to declare dividends to the majority of the independent directors contrary to the *OBCA* and long-standing corporate law principles.

67 In dissenting reasons, Lederman J. accepted the submission of the OEB - that the order leaves the discretion to declare a dividend in the hands of THESL's directors, albeit with an additional check by THESL's independent directors.

68 In the context of a regulated corporation, I agree with Lederman J. As he explained at para. 81, "the OEB has crafted a reasonable and less intrusive remedy that balances the interests of THESL's shareholder and its ratepayers and is consistent with the 'regulatory compact'."

CONCLUSION

69 For these reasons, I would allow the appeal, set aside the order of the Divisional Court and in its place make an order in accordance with these reasons. In the circumstances, I would not order costs.

J.L. MacFARLAND J.A.

K.N. FELDMAN J.A.:-- I agree.

S.E. LANG J.A.:-- I agree.

cp/e/qllxr/qljxr

1 On September 9, 2009, three additional objectives were added to s. 1(1).

TAB 19

Indexed as:
**Westbank First Nation v. British Columbia Hydro and Power
Authority**

Westbank First Nation, appellant;
v.
British Columbia Hydro and Power Authority, respondent, and
The Attorney General of Quebec, the Attorney General of
Manitoba and the Attorney General of British Columbia,
interveners.

[1999] 3 S.C.R. 134

[1999] S.C.J. No. 38

File No.: 26450.

Supreme Court of Canada

Hearing and judgment: June 21, 1999.
Reasons delivered: September 10, 1999.

Present: Lamer C.J. and Gonthier, McLachlin, Iacobucci,
Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (46 paras.)

Constitutional law -- Crown -- Immunity -- Taxation -- Exemption of public lands -- Indian band passing assessment and taxation by-laws pursuant to the Indian Act -- Whether by-laws impose taxes -- Whether by-laws constitutionally inapplicable to provincial utility -- Constitution Act, 1867, s. 125.

Indians -- Taxation -- Money by-laws -- Indian band passing assessment and taxation by-laws pursuant to Indian Act -- Whether by-laws constitutionally inapplicable to provincial utility -- Constitution Act, 1867, s. 125 -- Indian Act, R.S.C., 1985, c. I-5, s. 83(1)(a).

Between 1951 and 1978, the respondent hydroelectric utility was granted from Her Majesty the

Queen in Right of Canada eight permits to use and occupy various lands located on two Indian reserves in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the reserves. In 1990, the appellant passed the Westbank Indian Band Assessment [page135] By-law and the Westbank Indian Band Taxation By-law, pursuant to its authority under s. 83(1)(a) of the Indian Act. The appellant passed additional by-laws from 1991 to 1995, under which the respondent was assessed \$124,527.25 in taxes, penalties, and interest. The respondent refused to pay the assessed taxes, and did not appeal the assessment notices. The appellant brought an action to recover the unpaid amount. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal. The issue in this appeal is whether s. 125 of the Constitution Act, 1867 prevents the appellant from applying its assessment and taxation by-laws to the respondent, an agent of the provincial Crown.

Held: The appeal should be dismissed.

Section 125 of the Constitution Act, 1867 renders the impugned by-laws constitutionally inapplicable to the respondent. The by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(a) of the Indian Act, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes".

Section 125 of the Constitution Act, 1867 is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It advances the goals of federalism and democracy by according a degree of operational space to each level of government, free from interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several [page136] key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

The levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the Constitution Act, 1867. They are enforceable by law, imposed under the authority of the

legislature, and levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between the respondent and any regulation to which these charges adhere. Although the Indian Act is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

As these taxes are imposed on the respondent, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. The taxation and assessment by-laws are accordingly inapplicable to the respondent.

Cases Cited

Applied: *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004; *Attorney-General of British Columbia v. Attorney-General of Canada* (1922), 64 S.C.R. 377, aff'd [1924] A.C. 222; referred to: *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Attorney General of Canada v. City of Toronto* (1892), 23 S.C.R. 514; *Attorney-General of Canada v. Registrar of Titles*, [1934] 4 D.L.R. 764; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371 [page 137]; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929; *Re Ottawa-Carleton (Regional Municipality) By-law 234-1992*, [1996] O.M.B.D. No. 553 (QL); *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536, aff'd (1997), 151 D.L.R. (4th) 575, leave to appeal refused, [1997] 3 S.C.R. vii; *Minister of Justice v. City of Levis*, [1919] A.C. 505; *Urban Outdoor Trans Ad v. Scarborough (City)* (1999), 43 O.R. (3d) 673; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 53, 91(3), (24), 92(2), (9), (13), 125.
 Indian Act, R.S.C., 1985, c. I-5, ss. 28(2), 83(1)(a) [rep. & sub. c. 17 (4th Supp.), s. 10(1)].
 Interpretation Act, R.S.C., 1985, c. I-21, s. 17.
 Westbank Indian Band Assessment By-law (1990), s. 36(1).
 Westbank Indian Band Property Taxation Bylaw (1994), ss. 2(1), 8(1), 28, 30, 35, 36.
 Westbank Indian Band Taxation By-law (1990), ss. 2(1), 8(1), 41(1), 45, 46(1), 49.

Authors Cited

Browne, Gerald P. Documents on the Confederation of British North America. Toronto: McClelland and Stewart, 1969.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, 3rd ed. Toronto: Carswell, 1992 (loose-leaf updated 1997, release 2).

La Forest, Gérard V. *The Allocation of Taxing Power Under the Canadian Constitution*, 2nd ed. Toronto: Canadian Tax Foundation, 1981.

Lordon, Paul. *Crown Law*. Toronto: Butterworths, 1991.

Magnet, Joseph E. *Constitutional Law of Canada*, vol. 1, 7th ed. Edmonton: Juriliber Limited, 1998.

APPEAL from a judgment of the British Columbia Court of Appeal (1997), 45 B.C.L.R. (3d) 98, 154 D.L.R. (4th) 93, 100 B.C.A.C. 92, [1998] 2 C.N.L.R. 284, affirming a decision of the British Columbia Supreme Court (1996), 138 D.L.R. (4th) 362, [1997] 2 C.N.L.R. 229, granting summary judgment to the respondent. Appeal dismissed.

[page138]

Jack Woodward, Robert J. M. Janes and Patricia Hutchings, for the appellant.

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Monique Rousseau, for the intervener the Attorney General of Quebec.

Heather J. Leonoff, Q.C., for the intervener the Attorney General of Manitoba.

George H. Copley, Q.C., and Jeffrey M. Loenen, for the intervener the Attorney General of British Columbia.

Solicitors for the appellant: Woodward & Company, Victoria.

Solicitors for the respondent: Lawson, Lundell, Lawson & McIntosh, Vancouver.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

The judgment of the Court was delivered by

GONTHIER J.:--

I - Introduction

1 The issue in this appeal is whether s. 125 of the Constitution Act, 1867 prevents Westbank First Nation from applying its assessment and taxation by-laws to B.C. Hydro, an agent of the provincial Crown. The answer to that question depends upon whether the by-laws enact a system of taxation, which is subject to s. 125, or some other form of regulation which is not subject to the application of s. 125. If the by-laws impose taxes, then they are constitutionally inapplicable to the provincial Crown or its agents. For the reasons that follow, it is my opinion that these by-laws are properly described as taxes, and as such, cannot be imposed on B.C. Hydro.

2 The proper approach to characterizing a governmental levy has been considered on numerous occasions by this Court in various contexts. The characterization is relevant when determining the constitutionality of a provincial levy that has indirect tendencies, for if it is a regulatory charge, or otherwise is a component of a regulatory scheme, then the provinces are constitutionally competent to impose such a charge. It is equally relevant [page139] when considering s. 53 of the Constitution Act, 1867, because if the levy is a tax, then it must be imposed by the legislature. And, as I discuss below, if the levy is characterized as a tax, then it is constitutionally inapplicable to the other level of government.

3 The impugned by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes". There are no restrictions to the expenditure of these revenues; they are simply revenues for the discretionary spending of the Westbank First Nation.

4 The impugned charges bear all of the traditional hallmarks of a "tax". They are enforceable by law, imposed pursuant to the authority of Parliament, levied by a public body, and are imposed for a public purpose. There is no "nexus" between the revenues raised and the cost of any services provided. As such, they do not resemble a user fee, nor any other form of a regulatory charge. I disagree with the submissions of the appellant that they are attached to a regulatory scheme, as none of the indicia of a "regulatory scheme" recognized by this Court in constitutional law are present in this case. As such, these charges are properly characterized as being in pith and substance "taxation" levied under s. 91(3) of the Constitution Act, 1867, and as such, are rendered inapplicable to the provincial government by s. 125 of the Constitution Act, 1867. As it is my opinion that s. 125 prevents the application of the by-laws to the respondent, it is unnecessary to address the additional arguments [page140] raised concerning s. 17 of the Interpretation Act, R.S.C., 1985, c. I-21.

II - Facts

5 The relevant facts of this appeal are not in dispute. Between 1951 and 1978, the respondent acquired eight permits from Her Majesty the Queen in Right of Canada to use and occupy various lands on the Tsinstikeptum Indian Reserves No. 9 and No. 10 in British Columbia. The permits were granted pursuant to s. 28(2) of the Indian Act with the consent of the appellant. The

respondent held the permits in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the Reserves. In 1990, the appellant passed the Westbank Indian Band Assessment By-law ("1990 Assessment By-law") and the Westbank Indian Band Taxation By-law ("1990 Taxation By-law"), pursuant to its authority under s. 83(1)(a) of the Indian Act. These by-laws were amended in subsequent years, but the relevant provisions remained the same. The appellant passed additional by-laws from 1991 to 1995, and under these by-laws the respondent was assessed \$124,527.25 in taxes, penalties, and interest. The respondent refused to pay the assessed taxes, and did not appeal the assessment notices.

6 The appellant brought an action against the respondent to recover the unpaid amount. The respondent counterclaimed for declaratory relief stating that it was not subject to taxation under the by-laws. Both parties brought applications to the Supreme Court of British Columbia for summary judgment under Rule 18A of the British Columbia Rules of Court. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal.

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III - Relevant Constitutional and Statutory Provisions

7 A. Constitution Act, 1867

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, ____

...

3. The raising of Money by any Mode or System of Taxation.

...

24. Indians, and Lands reserved for the Indians.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, ____

...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

...

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

...

13. Property and Civil Rights in the Province.

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

[page142]

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

28. ...

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for

any or all of the following purposes, namely,

- (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

C. Westbank Indian Band Taxation By-law (1990)

2. (1) As provided in this by-law, and for raising revenue for local purposes,

- (a) land and interests in land are subject to taxation;
- (b) subject to any exemption contained in this by-law, every interest holder of land shall be assessed and taxed on his interest in such land...

D. Westbank Indian Band Assessment By-law (1990)

36. (1) Land held or occupied by a municipality or the Crown in Right of the Province of British Columbia, held or occupied by, or on behalf of, a municipality or the Crown in Right of the Province of British Columbia, is, with the improvements on it, liable to assessment under this section, subject to the Constitution Act, S.C.

IV - Judgments Below

A. Supreme Court of British Columbia (1996), 138 D.L.R. (4th) 362

8 Downs J. held that s. 125 of the Constitution Act, 1867, exempted B.C. Hydro from taxation imposed by the appellant. At trial, the parties agreed that the respondent is an agent of the provincial Crown and that s. 125 applies to agents of [page143] the Crown. The appellant argued that s. 125 only confers immunity from taxation imposed under s. 91(3) of the Constitution Act, 1867, and the tax imposed in this case was founded on s. 91(24) of the Constitution Act, 1867. This argument was also rejected by Downs J., who held that the legislation in pith and substance fell under s. 91(3) of the Constitution Act, 1867. Downs J. distinguished this type of tax from regulatory charges, which would not attract the scrutiny of s. 125.

9 Downs J. further rejected the appellant's alternative argument that the Westbank by-laws bound the Crown because of s. 17 of the Interpretation Act. After reviewing s. 17 of the Interpretation Act, Downs J. held that s. 83(1)(a) of the Indian Act did not expressly bind the Crown, nor would the Band's taxation regime be "wholly frustrated" if the Crown were not bound. Therefore, she held that s. 83(1)(a) and the Westbank by-laws were not binding on the provincial Crown by implication.

10 Related to this issue was the argument that the respondent was bound to accept the burden of the assessment by-law because it accepted the benefit of the permits for the rights of way. Here, Downs J. held that there was no nexus between the permits and the taxes, given that the respondent held the permits long before s. 83 of the Indian Act was enacted. Further, the by-law itself expressly stated that it was subject to the Constitution Act, and as such, the "benefit/burden" principle did not apply.

11 Downs J. also rejected numerous other arguments advanced by the appellant, which either have not been appealed or have been conceded by the appellant before this Court. As such, Downs J. granted the respondent's application for summary judgment.

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B. British Columbia Court of Appeal (1997), 154 D.L.R. (4th) 93

12 Writing for the Court, Goldie J.A. found that B.C. Hydro was clearly an agent of the Crown, and held that it "at no time acted in these proceedings other than as an agent of the Crown in right of the Province" (p. 101). As B.C. Hydro was an agent of the provincial Crown, Goldie J.A. then considered the application of s. 125 of the Constitution Act, 1867. Having regard to the by-laws' preambles and effects, Goldie J.A. agreed with the trial judge that the by-laws were properly characterized as by-laws to "raise revenue for local purposes". As such, the charges were imposed pursuant to s. 91(3) of the Constitution Act, 1867, not s. 91(24). Section 91(24) could not allow the federal government "to do indirectly what it could not do directly, namely, tax the Province through its agent for the purpose of raising a revenue" (p. 103). He accordingly dismissed the appeal.

V - Issues

13 On December 1, 1998, the Chief Justice stated the following constitutional questions:

1. Is the Province constitutionally competent to constitute the Respondent, British Columbia Hydro and Power Authority ("B.C. Hydro"), an agent of the Province for the purpose of acquiring and holding interests within exclusive federal jurisdiction, namely an interest in land on an Indian Reserve?
2. If the answer to question 1 is yes, is the interest of B.C. Hydro, an agent of Her

Majesty the Queen in Right of British Columbia, in land and improvements located on the reserves ("Reserves") of the Appellant, Westbank First Nation ("Westbank") immune, as a result of the application of s. 125 of the Constitution Act, 1867, from taxation imposed by Westbank pursuant to assessment and taxation by-laws ("By-law") promulgated pursuant to the authority of s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5? If so, are such By-laws purporting to impose such taxation ultra vires, or inapplicable to B.C. Hydro?

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3. If the answer to question 2 is no, does the Indian Act, R.S.C., 1985, c. I-5, authorize the passing of by-laws imposing taxation on the interests of the Provincial Crown or its agents on Indian reserves? If not, are the By-laws ultra vires or inapplicable to the extent that they purport to impose taxation on the interests of B.C. Hydro on the Westbank Reserves?

14 At the outset of the hearing before this Court, counsel for the appellant stated that he was "abandoning" his arguments concerning the first constitutional question, and arguments relating to a "commercial activity" exception to s. 125. Although this Court is not bound by these concessions, in my view, it was quite proper for counsel to have abandoned these arguments, which were either not raised in the courts below, or are not necessary to be decided on this appeal. I therefore find it unnecessary to consider these arguments any further.

VI - Analysis

15 The only issue to be determined in this appeal is whether s. 125 of the Constitution Act, 1867, precludes the Westbank First Nation from imposing its taxation and assessment by-laws on B.C. Hydro, an agent of the provincial Crown. To answer this question, it is useful to first understand the underlying purpose of s. 125. It is these constitutional values that inform the constitutional distinction between "taxes" and "regulatory charges", and which explain why s. 125 applies to the former but not the latter. As I explain in this section, the impugned charges are best characterized as taxation by-laws, which are constitutionally inapplicable to the respondent.

A. Section 125 of the Constitution Act, 1867

16 Section 125 of the Constitution Act, 1867 was not originally considered at the Charlottetown Conference in September 1864. It was first tabled by the then Attorney General, Sir John A. Macdonald on October 26, 1864, at the Quebec [page146] Conference (G. P. Browne, Documents on the Confederation of British North America (1969), at p. 88). The motion read: "That no lands or property belonging to the General or Local Governments shall be liable to taxation". Macdonald

proposed the section along with a series of other miscellaneous clauses that dealt with the Crown prerogatives, and rights of Crown representatives. The motion was approved without any notable debate, and inserted into the "Miscellaneous" section of the Quebec resolutions, labelled as clause 47. The resolution attracted no scrutiny during the Confederation debates, although it was relocated several times before receiving its final designation of s. 125. The final text of s. 125 read: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

17 The section is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It grants to each level of government sufficient operational space to govern without interference. It is founded upon the concept that imposing a tax on a level of government may significantly harm the ability of that government to exercise its constitutionally mandated governmental functions. In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), at p. 431, Marshall C.J. explained this concept as follows:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

In *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, the majority of this Court referred to these statements at p. 1056, explaining at p. 1065 that "s. 125 is plainly intended to prevent inroads, by way of taxation, upon the property of one level of government, by another level of government".

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18 While Canadian federalism requires some separation between each level of government, this rule is not absolute. Canada's federal system is a flexible one, and the Constitution does not create "enclaves" around federal or provincial actors. As Dickson C.J. explained in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18, "[t]he history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers" (see also Dickson C.J.'s comments in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669). Flexible federalism demands protection from taxation, but not from all forms of charges, when the charges are levied in support of other regulatory objectives within the competence of the taxing authority.

19 While the primary constitutional value served by s. 125 is federalism, it also secondarily advances the constitutional value of democracy. As this Court recently explained in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at para. 30, the Canadian Constitution (through the operation of s. 53 of the Constitution Act, 1867) demands that there should be no taxation without representation. In

other words, individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated, and determine how it should be spent. Intergovernmental taxation is prohibited, in part, because one group of elected representatives should not be allowed to decide how taxes levied under and within the authority of another group of elected representatives should be spent. At the same time, governments are not immune from paying user fees, such as water rates, in part because the government can choose whether to use the service, and the money charged is spent solely on providing that service: *Attorney General of Canada v. City of Toronto* (1892), 23 S.C.R. 514; *Attorney-General of Canada v. Registrar of Titles*, [1934] 4 D.L.R. 764 (B.C.C.A.), at pp. 771-72. In this way, imposing a user fee is more like charging a fee for [page148] a merchantable commodity than imposing any form of taxation.

20 These principles, and the guiding structure of the Constitution, are as applicable to Indian Band Councils exercising the right of taxation authorized by s. 83 of the Indian Act as they are to the federal and provincial levels of government. The exercise of governmental powers in Canada, by any level of government, must be done in accordance with the constitutional framework of the country. This constitutional framework includes the prohibition contained in s. 125 against taxing another level of government.

B. Regulatory Charges Distinguished from Taxes

21 The natural starting point for characterizing a governmental levy is this Court's decision in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, at pp. 362-63. In that case, Duff J., as he then was, explained that the impugned charges in that case were taxes because they were: (1) enforceable by law, (2) imposed under the authority of the legislature, (3) imposed by a public body, and (4) intended for a public purpose. Duff J. also noted that the charges there were compulsory, and affected a large number of people.

22 These indicia of "taxation" were recently adopted by this Court in *Eurig Estate*, *supra*, at para. 15. Major J., writing for the majority of this Court, added another possible factor to consider when characterizing a governmental levy, stating at para. 21 that "[a]nother factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided". This was a useful development, as it helps to distinguish between taxes and user fees, a subset of "regulatory charges".

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23 A distinction is made between simple "taxation" and "regulation", or what has elsewhere been described as "regulatory charges": P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 30-28; J. E. Magnet, *Constitutional Law of Canada* (7th ed. 1998), vol. 1, at p. 481; G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981). The distinction between taxes, on the one hand, and regulatory charges, on the other, was highlighted by

the majority of this Court in *Re Exported Natural Gas Tax*, supra, at pp. 1055, 1070, 1072 and 1075. In that case, the majority explained at p. 1070 that a tax is to be distinguished from a "levy [imposed] primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme".

24 It goes without saying that in order for charges to be imposed for regulatory purposes, or to otherwise be "necessarily incidental to a broader regulatory scheme", one must first identify a "regulatory scheme". Certain indicia have been present when this Court has found a "regulatory scheme". The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

25 The first factor to consider is the nature of the purported regulation itself. Regulatory schemes are usually characterized by their complexity and detail. In *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at p. 409, the regulatory scheme there was described as a "complete and detailed code for the regulation of the gravel [page150] and soil extraction and removal trade". In *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at para. 28, the charge was described as part of a "complex regulatory framework governing land development". And, in *General Motors of Canada Ltd. v. City National Leasing*, supra, at p. 676, the *Combines Investigation Act* was described as "a complex scheme of economic regulation".

26 A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard. Professor Magnet, supra, at p. 459, correctly explains that a regulatory scheme usually "delineates certain required or prohibited conduct". For example, in *Re Exported Natural Gas Tax*, supra, at p. 1075, the levy there was held to not be a regulatory charge because "the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur". In sum, a regulatory scheme must "regulate" in some specific way and for some specific purpose.

27 Regulatory schemes usually involve expenditures of funds on costs which are either known, or properly estimated. In the indirect tax cases, evidence was provided demonstrating how the revenues would be used and how the regulatory costs of the scheme were estimated. In *Ontario Home Builders'*, supra, at para. 55, the charge levied was "meticulous in its detail" and "clearly operate[d] so as to limit recoupment to the actual costs". In *Allard*, supra, evidence was led by city officials demonstrating the actual costs of annual road repair, based on estimates from similar repairs in the municipality. In both cases, there was a fairly [page151] close "nexus" between the estimated costs and the revenues raised through the regulatory scheme.

28 Finally, the individual subject to the regulatory charge will usually either benefit from the regulation, or cause the need for the regulation: *Magnet*, supra, at p. 459. In *Allard*, supra, the gravel trucks caused the need for the repair to the roads; in *Ontario Home Builders'*, supra, the developers and the new home-owners caused the need for the new schools. In both cases the individuals being charged also benefited from the regulation.

29 A regulatory charge may exist to defray the expenses of the regulatory scheme, as was the case in *Allard* or *Ontario Home Builders'*, or the regulatory charges themselves may be the means of advancing a regulatory purpose. In *Attorney-General of British Columbia v. Attorney-General of Canada* (1922), 64 S.C.R. 377 ("Johnnie Walker" case) (aff'd [1924] A.C. 222), this Court explained that customs duties were the method of advancing the regulatory purpose of encouraging the importation of certain products, and discouraging the importation of others. Anglin J., at p. 387, explained that customs duties "are, it seems to me, something more" than simple taxation. As with customs duties, other types of charges may proscribe, prohibit, or lend preferences to certain conduct with the view of changing individual behaviour. A per-tonne charge on landfill waste may be levied to discourage the production of waste: *Re Ottawa-Carleton (Regional Municipality) By-law 234-1992*, [1996] O.M.B.D. No. 553 (QL). A deposit-refund charge on bottles may encourage recycling of glass or plastic bottles: *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) (aff'd (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), leave to appeal refused, [1997] 3 S.C.R. vii).

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30 In all cases, a court should identify the primary aspect of the impugned levy. This was the underlying current of the earlier cases on s. 125, which focussed on the "pith and substance" of the charge: "Johnnie Walker" case, supra; *Re Exported Natural Gas Tax*, supra. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.

C. Section 125 Treatment of Taxes, User Fees, and Regulatory Charges

31 Section 125 applies only to taxes properly enacted under s. 91(3) or 92(2) of the Constitution Act, 1867. As this Court explained in *Re Exported Natural Gas Tax*, at p. 1068, s. 125 does not purport to affect activities of government other than taxation. Consequently, the section will not usually apply to user fees, for they cannot be considered to be "taxation" in the constitutional meaning of the word, as developed above: *City of Toronto*, supra; *Minister of Justice v. City of Levis*, [1919] A.C. 505; *Registrar of Titles*, supra. In particular, it is difficult to say that payment of

charges for such merchantable commodities are "compulsory" or are used for a "public purpose": Registrar of Titles, *supra*, at pp. 771-72; *Urban Outdoor Trans Ad v. Scarborough (City)* (1999), 43 O.R. (3d) 673 (Sup. Ct.), at p. 683. However, some services may be so essential that although in theory it is not compulsory to pay for the services, in reality it is: *City of Levis*, *supra*, at p. 513; *Eurig Estate*, *supra*, at para. 17.

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32 Nor does s. 125 apply to other types of regulatory charges, as I have described them above. Where a charge itself is the mechanism for advancing a regulatory purpose, such as a charge that encourages or discourages certain types of behaviour, or where a charge is "ancillary or adhesive to a regulatory scheme" which may be used to defray the costs of that scheme, then they will usually be applicable to the other order of government. As the majority of the Court explained in *Re Exported Natural Gas Tax*, *supra*, at p. 1070:

If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the "adjustment levies" considered in *Reference respecting the Agricultural Products Marketing Act*, R.S.C. 1970, s. A-7 et al., [1978] 2 S.C.R. 1198 or the unemployment insurance premiums in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355, then the levy is not in pith and substance "taxation" and s. 125 does not apply.

33 By protecting each level of government from taxation, but not from other types of regulatory charges, the Constitution accords a degree of operational space to the governments in a manner which best advances the goals of Canada's flexible federalism. It is with these concepts in mind that I now turn to the governmental levy at issue in this case.

D. Characterization of the Westbank First Nation Taxation By-laws

34 There is no question that these levies apply to the "Lands or Property" of the Crown agent. However, the parties disagree as to whether the Court of Appeal was correct in describing these by-laws as "taxation", founded upon s. 91(3) of the Constitution Act, 1867. In my view, the Court of Appeal and the trial court below were both correct in [page154] describing these by-laws as imposing "taxation" within the meaning of s. 125.

35 The charges imposed by Westbank bear all of the hallmarks of "taxation". The charges here are enforceable by law. Failure to comply with the by-law can result in all services provided by the Band being cancelled (1990 Taxation By-law, s. 8(1); *Westbank Indian Band Property Taxation*

Bylaw (1994) ("1994 Property Taxation By-law"), s. 8(1)). The taxes form a lien on the property (1990 Taxation By-law, s. 41(1); 1994 Property Taxation By-law, s. 28). The Band can recover the taxes by distress (1990 Taxation By-law, s. 46(1); 1994 Property Taxation By-law, s. 30), forfeiture (1990 Taxation By-law, s. 49; 1994 Property Taxation By-law, s. 35), or by court action (1990 Taxation By-law, s. 45; 1994 Property Taxation By-law, s. 36). The taxes are as compulsory as any municipal tax on land or interests in land.

36 The impugned charges are imposed under the authority of the legislature and levied by a public body. The by-laws are imposed pursuant to the power conferred by s. 83 of the Indian Act. The taxes are levied by the Band Council, under its conferred authority, and are approved by the Minister of Indian Affairs and Northern Development.

37 The charges are levied for a public purpose. In this case, the public purpose is for general Band governance. Section 2(1) of the 1990 Taxation By-law and the 1994 Property Taxation By-law state that the levies are "for raising a revenue for local purposes". As Lamer C.J. explained in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 43, the purposes of these taxes are "to promote the interests of Aboriginal peoples and to further the aims of self-government". Thus, as the Chief Justice pointed out (at para. 43), the taxes here are "more ambitious" than simple taxation. However, the existence of this secondary purpose does not remove these taxes from the head of [page155] power under which s. 83 is founded __ s. 91(3). Indeed, while the intention of Parliament in enacting s. 83 may have been to advance self-government, that does not mean that this is the specific purpose of the taxes themselves. Here, the specific purpose of these taxes is to simply raise revenue, to be brought into the discretionary spending accounts of the Band. No evidence has been brought demonstrating that these charges have a secondary purpose of discouraging or encouraging any behaviour of the respondent, nor have any other regulatory purposes been demonstrated.

38 The appellant has also not demonstrated that these charges form a nexus with any regulatory costs such as to bring it into the type of charge contemplated by Allard, *supra*, and Ontario Home Builders', *supra*. The charge forms no part of a regulatory scheme. Although the Indian Act is legislation in relation to Indian land, this is insufficient to meet the requirements for a "regulatory scheme" in the constitutional sense. There is insufficient evidence demonstrating that the charge is attached to any "complete and detailed code"; nor can it be said that this forms part of a "complex regulatory framework". There are no costs of a regulatory scheme identified. Westbank does not seek to alter B.C. Hydro's behaviour in any way. B.C. Hydro has not caused the need for any regulation, to which the charges adhere. Nor does it benefit from any regulation provided. In summary, these charges do not "regulate" in any sense of the word, and they are not attached to any scheme which does.

39 I am also not convinced that there is any significance that can be attached to the fact that the charges are levied "for local purposes", as opposed to charges which raise revenue for the federal Consolidated Revenue Fund. In *Eurig Estate*, *supra*, para. 20, the charge was directed to the "court

administration in general", as opposed to the general expenses of the province, and yet this was still [page156] held to be a tax. As in *Eurig Estate*, supra, at paras. 18-23, here there is only a loose, if any, relationship between the charge and any costs. I agree with the Attorney General of British Columbia's submissions that the Constitution demands more precision in order to oust the operation of s. 125.

40 None of the foregoing suggests that Westbank is constitutionally incapable of levying properly authorized regulatory charges or user fees on B.C. Hydro. In this regard, I note that the authorizing by-laws and the agreements entered into between B.C. Hydro and Westbank allow for the payment of regulatory charges in a manner which complies with the Constitution. Section 36(1) of the 1990 Assessment By-law states that land held on behalf of the Crown shall be "liable to assessment under this section, subject to the Constitution Act, S.C." (emphasis added). Section 125 was thus contemplated. In addition, clause 2 of the July 22, 1960 agreement between B.C. Hydro and the Crown, for example, states that B.C. Hydro "shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the said lands". Although this clause refers to "taxes", these must be interpreted to refer to those taxes authorized under the Constitution, as explicitly provided by the by-law, such as provincial taxes, which the province can levy on one of its agents: *La Forest*, supra, at pp. 182-83; *P. Lordon*, *Crown Law* (1991), at pp. 487-88. The remainder of this clause provides for the payment of all charges and levies constitutionally applicable to B.C. Hydro. The impugned tax simply is not one of those types of charges. For these reasons, the appeal must fail.

41 As it is my opinion that s. 125 renders these taxation by-laws inapplicable to the respondent, it is [page157] unnecessary to answer the third question framed by the Chief Justice.

VII - Summary

42 Section 125 of the Constitution Act, 1867, advances the goals of federalism and democracy by according a degree of operational space to each level of government, free from interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

43 In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

44 As is evident from the fifth inquiry described above, the Court must identify the presence of a regulatory scheme in order to find a "regulatory charge". To find a regulatory scheme, a court

should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. This list is not exhaustive. In order for a charge to be "connected" or "adhesive" to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This will exist when the revenues are tied to the costs of the regulatory scheme, or where the [page158] charges themselves have a regulatory purpose, such as the regulation of certain behaviour.

45 In the case at bar, the levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the Constitution Act, 1867. They are enforceable by law, imposed under the authority of the legislature, and are levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between B.C. Hydro and any regulation to which these charges adhere. Although the Indian Act is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

46 As these taxes are imposed on B.C. Hydro, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. As such, the taxation and assessment by-laws are inapplicable to the respondent. As this appeal can be dismissed on the second constitutional question, I find it unnecessary to consider the third constitutional question. The respondent does not seek costs in this appeal. Accordingly, it is my opinion that the appeal must be dismissed, without costs. I would therefore answer the constitutional questions as follows:

1. Is the Province constitutionally competent to constitute the Respondent, British Columbia Hydro and Power Authority ("B.C. Hydro"), an agent of the Province for the purpose of acquiring and holding interests within exclusive federal jurisdiction, namely an interest in land on an Indian Reserve?

Answer:

Conceded by the appellant.

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2. If the answer to question 1 is yes, is the interest of B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia, in land and improvements located on the reserves ("Reserves") of the Appellant, Westbank First Nation ("Westbank") immune, as a result of the application of s. 125 of the Constitution Act, 1867, from taxation imposed by Westbank pursuant to assessment and taxation by-laws ("By-law") promulgated pursuant to the authority of s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5? If so, are such By-laws purporting to impose such taxation ultra vires, or inapplicable to B.C. Hydro?

Answer:

Yes. The By-laws are constitutionally inapplicable to B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia.

3. If the answer to question 2 is no, does the Indian Act, R.S.C., 1985, c. I-5, authorize the passing of by-laws imposing taxation on the interests of the Provincial Crown or its agents on Indian reserves? If not, are the By-laws ultra vires or inapplicable to the extent that they purport to impose taxation on the interests of B.C. Hydro on the Westbank Reserves?

Answer:

Given the answer to question 2, it is unnecessary to answer this question.

cp/d/qlhbb

TAB 20

CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 2

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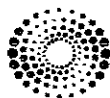
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tendencies".³⁴ If the general tendency is for the tax to be paid by the very person taxed, then the tax is direct; if the general tendency is for the tax to be paid by someone else, then the tax is indirect. The courts have said that they are not concerned with whether the tax is in fact recouped by the taxpayer in a particular case.³⁵ In fact, of course, whenever a tax is levied upon a person in business, the proprietor will seek to recoup the tax as part of the price of the goods or services which he produces. Indeed, he has to do so if he is to make a profit and stay in business. If this recoupment were given constitutional significance, most taxes would be indirect and the tax bases available to the provinces would be seriously inadequate to supply provincial revenue. What the courts have done is to distinguish between, on the one hand, a tax which is likely to be recouped only because, like other expenses, it is a cost of doing business, and, on the other hand, a tax which is likely to be "passed on" as an element of the very good or service or transaction which is taxed.

The most useful description of the passing-on characteristic that will make a tax indirect³⁶ is a dictum of Rand J.'s, as follows:³⁷

If the tax is related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.

Take, for example, a tax on the removal of gravel from a quarry. In a case where such a tax was levied on a volumetric basis (26 cents per cubic metres of gravel was the rate of one such tax), the tax was held to be indirect,³⁸ because the tax would tend to cling to the gravel as part of the resale price when the gravel was sold by the quarry company. The purchaser of the gravel was likely to end up bearing the burden of the tax, because the purchaser was likely to have to pay 26 cents more per cubic metre for the gravel than the price that would have been acceptable to the quarry company had there been no tax. If, on the other hand, the tax on the removal of the gravel had been levied on a flat basis (unrelated to

34 *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575, 582.

35 *Id.*, 581; *Brewers' and Malsters' Assn. of Ont. v. A.-G. Ont.* [1897] A.C. 231; *A.-G. B.C. v. Kingcome Navigation Co.* [1934] A.C. 45; *Cairns Construction v. Govt. of Sask.* [1960] S.C.R. 619.

36 In *Re Que. Sales Tax* [1994] 2 S.C.R. 715, 726, Gonthier J. for the Court suggested that "transparency" ("everyone know[ing] how much tax they really pay") was also a characteristic of a direct tax. This does not find support in Mill's definition. Query whether it is correct. If a value-added tax or other form of retail sales tax were embedded in the retail price instead of being charged separately by the retailer, surely this would not convert a direct tax into an indirect one.

37 *C.P.R. v. A.-G. Sask.* [1952] 2 S.C.R. 231, 251-252.

38 *Allard Contractors v. Coquitlam* [1993] 4 S.C.R. 371, 398 (the impost, although indirect, was upheld as a regulatory charge); *folld. in Ont. Home Builders' Assn. v. York Region Bd. of Ed.* [1996] 2 S.C.R. 929 (education development charge imposed on land under development held to be indirect, but upheld as a regulatory charge).

property.⁹⁸ Thus, a province may levy charges in the form of licence fees, rents or royalties as the price for the private exploitation of provincially-owned natural resources; and a province may charge for the sale of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way.⁹⁹ Some of these charges are undoubtedly indirect,¹⁰⁰ but they are valid nonetheless, because they are not taxes.

(b) Regulatory charges

A second category of charges are those of a more governmental or compulsory character, which require legislation for their imposition.¹⁰¹ These charges are not necessarily taxes, and, if they are not, they need not be direct, even if imposed by a province. They are not taxes if they can be supported as regulatory charges imposed under one of the province's regulatory powers, such as natural resources (s. 92A(1)), municipal institutions in the province (s. 92(8)), local works and undertakings (s. 92(10)), property and civil rights in the province (s. 92(13)) or matters of a merely local or private nature in the province (s. 92(16)).¹⁰² Examples of such charges might be licence fees, registration fees, bridge tolls or water rates. These can be supported as regulatory charges if they are taken in payment for a specific governmental service, and if they bear a reasonable relation to the cost

98 Note that once private rights have been created in provincial public property, for example, by the grant of a lease without the reservation of a provincial power of amendment, legislation is then necessary to derogate from the private rights. This is illustrated by the holding with respect to the "royalty surcharge" in the *CIGOL* case, note 92, above. This problem is avoided if the Crown lease includes a "variable royalty clause": see ch. 30, Natural Resources, under heading 30.1(a), "Provincial public property", above.

99 See ch. 29, Public Property, under heading 29.2, "Executive power over public property", above.

100 For example, royalties based on production of a resource: note 92, above.

101 The concepts of "governmental" or "compulsory" charges are intended to be opposed to "commercial" or "voluntary". These words are all admittedly very slippery. There is no principled distinction between the governmental and commercial functions of government; and the distinction between a compulsory and voluntary charge is nearly always a question of degree: even income or sales taxes are voluntary in the sense that they can be avoided by not earning income or buying goods.

102 It is probably better not to describe regulatory charges as "taxes" on the basis that they lack the revenue-raising purpose that characterizes a tax. However, it can certainly be argued that they have a revenue-raising purpose, albeit one that is dedicated to defraying the costs of regulation. In *Allard*, note 108, below, Iacobucci J. for the unanimous Court consistently described the gravel-extraction fees as "fees". In *Ontario Home Builders*, note 112, below, Iacobucci J. for the majority described the educational development charges as "indirect taxation" (para. 49), but upheld them as ancillary to a valid regulatory scheme; La Forest J., concurring, was careful to distinguish a regulatory charge from a tax. While outcomes do not seem to vary with the terminology, the question whether s. 92(9) is needed to sustain a regulatory charge may turn on whether the charge is a tax: see note 24, above.

the duty — to review the validity of legislation when the issue arises in proceedings before them.¹

Judicial review of legislation will occur in a criminal prosecution if the defendant argues that the statute under which the charge was laid is invalid. Judicial review will occur in a civil action if a relevant statute is challenged as invalid by a party whose interest it is to avoid the effect of the statute; for example, the plaintiff in a civil action may allege that a statute of limitation, which apparently bars the action, is unconstitutional. Judicial review will occur before an administrative tribunal if a party claims that the tribunal is acting under, or proposing to apply, an invalid statute. Judicial review of legislation will occur in proceedings to review the decision of an administrative tribunal if the party seeking to overturn the tribunal's decision argues that the tribunal's power stemmed from an unconstitutional statute. It is even possible to bring proceedings in which the only relief sought is a declaration that a statute is invalid. Liberal rules of standing have made declaratory proceedings available to individuals or groups who oppose a particular statute, but who cannot show that the statute has any special impact upon them. The rules of standing are discussed in the next section of this chapter. There is also the uniquely Canadian procedure of the "reference", by which a government (but not a private individual) may refer questions of law to a court for an advisory opinion; although the reference procedure is not confined to constitutional questions, it has been mainly used for that purpose.²

Apart from the declaratory action and the reference procedure, which account for only a small proportion of the constitutional cases decided by the Supreme Court of Canada, judicial review usually occurs on the initiative of a private person (individual or corporation) who is attempting to resist the application of a statute which appears to apply to him or her. The private party who makes a constitutional challenge to a statute is attempting to avoid, by whatever legal means are at hand, the duty ostensibly imposed upon him or her by the statute. Mallory is accurate for most of the cases when he says that "the force that starts our interpretive machinery in motion is the reaction of a free economy against regulation".³ The risk of constitutional issues being resolved by the courts without argument from the interested government has been reduced by rules requiring the party raising a constitutional issue to give notice to the Attorney General, and allowing the Attorney General to intervene in the proceedings. The notice and intervention provisions are discussed later in this chapter.⁴

1 See generally chs. 15, Judicial Review on Federal Grounds, and 40, Enforcement of Rights, above.

2 See ch. 8, Supreme Court of Canada, under heading 8.6, Reference jurisdiction, above.

3 J.R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1944) 10 Can. J. Ec. Pol. Sci. 165.

4 Section 59.6, Intervention, below.

Canada held that the plaintiff should be granted the standing that he sought. There was a serious legal question as to the validity of the provisions, the plaintiff as a homosexual had a genuine interest in the resolution of the question, and it would be wasteful, delaying and unfair to wait for other acts of discrimination and require a separate challenge to each of the provisions. On the merits, the plaintiff succeeded, and the Court added ("read in") the ground of sexual orientation to all of the challenged provisions.

(e) Enforcing other people's rights

As has been explained, a constitutional issue will arise in the course of ordinary civil or criminal litigation if a party alleges that an ostensibly applicable statute is unconstitutional. When the validity of a statute is attacked by a private person on federalism (distribution of powers) grounds, the private challenger is asserting that the statute is outside the power of the enacting legislative body. If the challenged statute is a provincial one, a successful challenge would mean only that the power to enact the statute was possessed by the federal Parliament rather than by the provincial Legislature. It is arguable that only the federal government has the requisite interest in defending the federal domain from encroachment by provincial Legislatures. If this argument were accepted, it would follow that a private individual, motivated only by a desire to avoid compliance with the law, ought to be denied standing to challenge the statute.

Although it has been argued that private persons ought not to be permitted to challenge a statute on federalism grounds,⁴¹ the argument has never been considered by the courts. On the contrary, it has always been assumed that a private person does have standing to challenge on federalism grounds a law that purportedly applies to him. This assumption, although never articulated and defended, accords with a basic notion of constitutionalism that insists that governments must stay within the limits of their legal powers. When a private person challenges a law on federalism grounds, no matter how selfish the motive of the challenger, the private person is enforcing a regime of constitutionalism that requires governments to obey the Constitution.

When the validity of a statute is attacked by a private person on Charter grounds, the challenger is usually enforcing a constitutional right that applies to the challenger. For example, people who were stopped from distributing leaflets at an airport challenged the law prohibiting the activity on the basis that the law deprived the distributors of their right to freedom of expression.⁴² In that case, the distributors were vindicating their own right to freedom of expression, a right that is conferred on "everyone" by s. 2(b) of the Charter of Rights. No issue of standing arose, because it was obvious that the distributors had standing to chal-

41 Weiler, *In the Last Resort* (1974), ch. 6. The argument is criticized in Swinton, *The Supreme Court and Canadian Federalism* (1990), ch. 2.

42 *Committee for Cth. of Can. v. Can.* [1991] 1 S.C.R. 139.

TAB 21

Constitutional Litigation in Canada

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ever, there may be questions as to whether the party seeking to raise the issue has standing to do so. This aspect of standing is also addressed below.^{2.1}

Most of the complexities arise when a party wishes to bring a freestanding constitutional challenge. The courts have devised and applied certain tests to determine the ability of a party to do so. In particular, the courts have developed a doctrine of “public interest standing”, whereby parties whose legal rights are not directly affected by a law may be permitted to challenge its constitutional validity, and even obtain ancillary relief.

(a) Division of Powers

(i) Standing as of Right

Canadian law has always recognized the right of a person or other legal entity to challenge the constitutionality, on division of powers grounds, of a law that applies directly to him or her. Arguably, this is itself a relaxation of the law of standing, on the logic that a strict approach would insist that only the government(s) with a competing jurisdictional claim will have the requisite interest to insist upon the public right in seeing the Constitution properly applied.³ However, this argument does not appear to have been considered by any court, and the assumption is that private persons directly subject to a law can challenge its *vires* either in existing proceedings in which the law is in issue or by bringing a freestanding action or application for a declaration that the law is invalid.⁴ This is consistent with the historical approach of the U.K. courts to the “declaratory action”, often referred to as the “Dyson declaration”,⁵ whereby private persons who were subject to a law of general application (for example, a taxation statute) were permitted to challenge the legality of the law notwithstanding that their interest was no greater than that of any other person who was subject to it. In effect, the courts have recognized the “right” of any person to insist that laws that are applied to them are within the enacting body’s jurisdiction.

2.1 See section 3.2(1)(b)(iv).

3 P. Hogg, *Constitutional Law of Canada*, 4th ed. looseleaf (Toronto: Carswell, 1997) at para. 56.2(e).

4 *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307, 1982 CarswellBC 133, 1982 CarswellBC 743 (S.C.C.) [“*Jabour*”]

5 After *Dyson v. Attorney General* (1910), [1911] 1 K.B. 410 (Eng. C.A.). *Dyson* itself was an action for a declaration that a notice delivered to the plaintiff taxpayer, along with eight million others, was invalid. In *Jabour*, *ibid.* at 323, the Supreme Court of Canada observed that “[t]his form of action takes on much greater significance in a federal system where it has been found to be efficient as a means of challenging the constitutionality of legislation”.

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

AND IN THE MATTER OF Assessments issued by the Ontario
Energy Board pursuant to section 26.1 of the Ontario Energy
Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the
Ontario Energy Board.

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