Ministry of the Attorney General
Constitutional Law Branch

720 Bay Street, 4th Floor
Toronto ON M7A 2S9

Tel: (416) 326-4473
Fax: (416) 326-4015
robert.donato@ontario.ca

Ministère du Procureur général
Direction du droit constitutionnel

4e étage, 720 rue Bay
Toronto ON M7A 2S9

Tél.: (416) 326-4473
Télé.: (416) 326-4015

Ontario

June 23, 2010

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

RE: Motion by the Consumer's Council of Canada ("CCC") in relation to s. 26.1 of the *Ontario Energy Board Act, 1998* (the "Act") and Ontario Regulation 66/10
Board File No.: EB-2010-0184

Please find attached the Book of Authorities of the Attorney General of Ontario on the preliminary motion in the above-captioned matter.

Yours truly,

Robert A. Donato
Counsel

RAD/gb

cc: Robert Warren (by email)
All Intervenors (by email)

File No. EB-2010-0184

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 a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10.

BOOK OF AUTHORITIES OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

(RESPECTING THE PRELIMINARY QUESTIONS STATED BY THE BOARD IN AMENDED PROCEDURAL ORDER NO. 1 – MOTION RETURNABLE JULY 13, 2010)

June 23, 2010

Ministry of the Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto ON M7A 2S9

Janet E. Minor
(LSUC #14898A)
Tel. 416-326-4137
Fax. 416-326-4015
Janet.Minor@ontario.ca

Robert A. Donato
(LSUC #44544F)
Tel. 416-326-4473
Fax. 416-326-4015
Robert.Donato@ontario.ca

Counsel for the Intervener,
The Attorney General of Ontario

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Confédération des syndicats nationaux, Appellant;
v.
Attorney General of Canada, Respondent, and Attorney General of Quebec, Attorney General of New Brunswick and Canadian Labour Congress, Interveners.
And
Syndicat national des employés de l'aluminium d'Arvida inc., Jean-Marc Crevier and Marie Langevin, Appellants;
v.
Attorney General of Canada, Respondent, and Attorney General of Quebec, Attorney General of New Brunswick and Canadian Labour Congress, Interveners.

[2008] 3 S.C.R. 511

[2008] S.C.J. No. 69

2008 SCC 68

File Nos.: 31809, 31810.

Supreme Court of Canada

Heard: May 13, 2008;
Judgment: December 11, 2008.

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

(96 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Catchwords:

Constitutional law -- Division of powers -- Unemployment insurance -- Series of active measures designed to maintain tie between insured persons and labour market -- Whether provisions of federal employment insurance legislation relating to employment service, to [page512] training and work-sharing programs and to employment benefits are valid -- Constitution Act, 1867, s. 91(2A) -- Employment Insurance Act, S.C. 1996, c. 23, ss. 24, 25, 56 to 65.2, 73, 75, 77, 109(c), 135(2).

Constitutional law -- Taxation -- Delegation of taxing authority -- Principle of parliamentary control over collection of taxes -- Employment insurance surpluses accumulated in Consolidated Revenue Fund -- Power to set premium rates delegated without legislated criteria -- Whether employment insurance premiums constitute administrative charge or tax -- If they constitute tax, whether they were collected in accordance with principle of parliamentary control and pursuant to valid delegation -- Constitution Act, 1867, ss. 53, 91(3) -- Employment Insurance Act, S.C. 1996, c. 23, ss. 66 to 66.3, 72.

Summary:

In 1996, the *Employment Insurance Act* established the legal framework for a significant restructuring of the unemployment insurance system. In addition to the usual active measures against unemployment, such as an employment service and training and work-sharing programs (ss. 60, 25 and 24), five types of employment benefits were introduced in this legislation (s. 59): wage subsidies, earnings supplements, self-employment assistance, job creation partnerships and skills loans or grants.

Two events related to the financing of the system laid the groundwork for the new legislation: in 1986, on the recommendation of the Auditor General of Canada, the Employment Insurance Account was consolidated with government revenues as a whole and, in 1990, the government stopped financing the Account out of its general revenues, relying on premiums at an annual rate based, at that time, on the cost over only a few previous years. In the 1996 legislation, Parliament revised the financing of the Account in order to balance the program's budget over the long term. Section 66 set out guidelines for a system under which premiums were to be set high enough to cover the system's current expenditures and ensure the gradual accumulation of a reserve so that rates could be stabilized regardless of the constraints of business cycles. In the space of six or seven years, the deficits were absorbed and surpluses totalling more than $40 billion were accumulated. In 2001, Parliament enacted s. 66.1, which, departing from s. 66, authorized the Governor General in Council to set premium rates directly for 2002 and 2003. For 2004, Parliament set the premium rate in the Act itself. For 2005, it went back, by enacting s. 66.3, to having the Governor General in Council set the rates.

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The appellants brought declaratory actions to challenge the constitutional validity of the "active" measures, the premium-setting mechanisms, the accumulation of surpluses and the allocation of those surpluses to overall federal expenditures. The Quebec Superior Court and Court of Appeal rejected their arguments.

Held: The appeals should be allowed in part. The versions of ss. 66.1 and 66.3 of the *Employment Insurance Act* in force in 2001, 2002 and 2005 were unconstitutional. Employers' and employees' premiums for those years were collected unlawfully. This declaration is suspended for a period of 12 months from the date of this judgment.

The impugned active measures are valid. The programs provided for in the *Employment Insurance Act* reflect changes in the economy and the labour market and are part of the "natural evolution" of the unemployment insurance power conferred on the Parliament of Canada. That power must be interpreted generously. Its objectives are not only to remedy the poverty caused by unemployment, but also to maintain the ties between unemployed persons and the labour market. Thus, regulating unemployment insurance does not mean simply taking passive responsibility for paying benefits to Canadian workers during periods when they are not working. It also means taking on a more active role designed to maintain or restore ties between persons who may become or are unemployed and the labour market. Job placement and training programs are initiatives that fell within Parliament's legislative jurisdiction from the outset. These programs, together with work-sharing programs, retain a close enough connection with the system's basic objectives and form to a sufficient extent an integral part of the system. Furthermore, the labour market has changed, and the way the federal power under s. 91(2A) of the *Constitution Act, 1867* is exercised can reflect this. Employment benefits programs illustrate this change, as they are designed to reinforce ties with the labour market or to prepare workers to re-enter it. For example, job creation partnerships are designed to alleviate some of the consequences of weak labour markets in disadvantaged regions and thus reduce unemployment. Earnings supplements also directly affect ties with the labour market: they temporarily increase the income of workers who would otherwise be more hesitant to accept jobs for less pay. Self-employment assistance fosters the establishment of businesses and helps insured participants re-enter the labour market. Wage subsidies paid to employers specifically facilitate entry into the labour market by disadvantaged persons who wish to improve their productivity or gain work experience, and they help establish or maintain the employability of workers [page514] who might otherwise be condemned to not working. Skills loans and grants enable insured participants to acquire advanced knowledge, and their purpose is to make it easier for such people to obtain employment. [para. 31] [para. 39] [paras. 42-49]

As long as s. 66 of the Act applied, the existence of criteria for the setting of employment insurance premium rates ensured the application of a principle of allocation of and stability in the amounts being levied, and this justifies characterizing those amounts, from a constitutional standpoint, as a regulatory charge despite the existence of large surpluses. Because the federal government made a firm policy decision to put an end to deficits in employment insurance, stabilize fluctuating premium rates and strengthen the system by building up an adequate reserve, the 1996 legislation

made the Employment Insurance Commission responsible for setting premium rates each year in accordance with the objectives set out in s. 66: ensuring that there would be enough revenue over a business cycle to pay the amounts charged to the Account, and maintaining relatively stable rate levels throughout the business cycle. During the period in question, from 1996 to 2001, the contributions collected were paid into the Consolidated Revenue Fund, the monies were used like any other part of the revenues in the Consolidated Revenue Fund, and the appropriate accounts were kept; the amounts needed for the system to function were credited or charged to the Employment Insurance Account. The government's use of them does not, therefore, constitute a misappropriation of employment insurance monies. [para. 59] [para. 66] [paras. 73-74]

When a new rate-setting mechanism was adopted for 2002, 2003 and 2005, the framework under s. 66 ceased to apply. The Act no longer included criteria to guide the setting of rates, which was now within the discretion of the Governor General in Council. Employment insurance premiums continued to be a part of government revenues, whereas, as a result of the disappearance of the relationship between that levy and the regulatory scheme, premiums were at the same time transformed into a payroll tax. But s. 53 of the *Constitution Act, 1867* reflects the ancient, but fundamental, principle of our democratic system that there should be no taxation without representation. Only Parliament may impose a tax *ab initio*. The delegation of taxing authority is constitutional if the legislation provides expressly and unambiguously for the delegation. The versions of ss. 66.1 and 66.3 that applied in 2002, 2003 and 2005 did not state that Parliament was delegating taxing authority. [page515] The delegation they did provide for concerned a charge that had become a levy for general purposes, but it was not specified in the Act that Parliament intended to delegate its taxing authority as such. [para. 60] [para. 70] [para. 75] [para. 82] [para. 87] [paras. 92-93]

Cases Cited

Applied: *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56; *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; **referred to:** *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355, aff'g *Reference re The Employment and Social Insurance Act*, [1936] S.C.R. 427; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134; *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131, 2008 SCC 7; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 SCC 15.

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S.C. 2001, c. 5, s. 9.

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Unemployment Insurance Act, S.C. 1955, c. 50, s. 37.

Unemployment Insurance Act, 1940, S.C. 1940, c. 44, ss. 17, 31, First Schedule, Part II, Second Schedule.

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History and Disposition:

APPEALS from judgments of the Quebec Court of Appeal (Robert C.J.Q. and Gendreau and Brossard JJ.A.), [2006] R.J.Q. 2672, SOQUIJ AZ-50398096, SOQUIJ AZ-50398097, [2006] Q.J. No. 12562 (QL), [2006] Q.J. No. 12563 (QL), 2006 CarswellQue 14211, 2006 QCCA 1453, 2006 QCCA 1454, affirming a decision of Gascon J., [2003] R.J.Q. 3188, SOQUIJ AZ-50206024, [2003] Q.J. No. 15801, 2003 CarswellQue 2667. Appeals allowed in part.

Counsel:

Guy Martin and *Jean-Guy Ouellet*, for the appellant Confédération des syndicats nationaux.

Gilles Grenier, Claude Leblanc and *Bernard Philion*, for the appellants Syndicat national des employés de l'aluminium d'Arvida inc., Jean-Marc Crevier and Marie Langevin.

James Mabbutt, René LeBlanc, Carole Bureau and *Linda Mercier*, for the respondent.

Alain Gingras, for the intervener the Attorney General of Quebec.

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Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Steven Barrett and *Colleen Bauman*, for the intervener the Canadian Labour Congress.

English version of the judgment of the Court delivered by

LeBEL J.:--

I. Introduction

1 In these appeals, a set of issues related to Canada's employment insurance system are once again before this Court. The debate, which was originally political in nature and will no doubt always be partly political, has moved into the judicial realm. The appellants Confédération des syndicats nationaux ("CSN") and Syndicat national des employés de l'aluminium d'Arvida inc. ("Syndicat") are contesting important aspects of the federal employment insurance system in separate declaratory actions. They are, first of all, challenging the constitutional validity of a series of "active" measures that are intended to fight unemployment and not simply to compensate

unemployed persons. In the appellants' opinion, those measures do not fall within the legislative authority over unemployment insurance conferred on the Parliament of Canada by s. 91(2A) of the *Constitution Act, 1867*. The appellants are also contesting the method adopted to finance employment insurance, the accumulation of large surpluses in the Employment Insurance Account and the use of those surpluses by the federal government. For the reasons that follow, I conclude that the active measures adopted by Parliament fall within its legislative authority. In addition, it is my opinion that the system adopted to finance employment insurance has remained consistent with constitutional norms, except in 2002, 2003 and 2005. But the premium-setting mechanism used during those years was inconsistent with the constitutional principles that govern the creation of regulatory charges and the imposition of taxes by Parliament. I would therefore allow the appeals in part.

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II. Origin of the Case

2 This case arose out of efforts by the federal government to stabilize the national system of unemployment insurance or, as it is now called in the legislation, "employment insurance" and to adapt it better to the constraints inherent in changing business cycles. Various reforms were adopted over a period of several years that led to, among other things, the accumulation of large surpluses, political debates over the legitimacy and appropriateness of the surpluses and, finally, court challenges. To fully understand the nature and scope of these challenges, it will be necessary to summarize recent developments in the employment insurance system.

3 The federal employment insurance system dates back to a constitutional amendment passed in 1940. Various changes were made to the system over time, and after 1980 it began to run a deficit. The federal government had to replenish the system's account from time to time, which increased the federal deficit. In 1986, the government incorporated the account into the Consolidated Revenue Fund on the recommendation of the Auditor General of Canada. This account subsequently became known as the "Employment Insurance Account" ("Account"). In 1990, the government stopped covering the deficits in the Account. Successive federal governments then tried to restore financial stability to the employment insurance system and to rethink some of its methods and objectives.

4 In 1996, the *Employment Insurance Act*, S.C. 1996, c. 23, established the legal framework for a significant restructuring of the system of unemployment insurance, which has been known since then as employment insurance. The legislation tightened eligibility requirements for unemployment benefits and included measures of a more interventionist nature that were designed to maintain or improve the ability of workers to enter the labour market. At the same time, the Parliament of Canada reviewed the financing of the Account. It established a system under which premiums were

to be set high enough to cover the system's current expenditures and ensure the gradual accumulation [page519] of a reserve so that raises in premiums would be unnecessary during periods of economic slowdown and higher unemployment. During the years that followed, Parliament changed the premium-setting mechanisms frequently. These reforms led to the emergence and the sometimes rapid growth of surpluses in the Account. The surpluses apparently reached or exceeded $40 billion. Over the same period, employment insurance premiums were paid into the Consolidated Revenue Fund pursuant to the policy adopted in 1986.

5 The emergence of surpluses in the Account has given rise to extensive political debate that falls outside the jurisdiction of the courts. We must consider the appellants' two court challenges, which were heard and decided together. I will therefore now review the nature and purpose of the appellants' actions.

6 The appellants brought separate declaratory actions to challenge what they saw as an abuse of the federal unemployment insurance power; they argued that the limits of that power had been exceeded. In their opinion, s. 91(2A) of the *Constitution Act, 1867* gives the Parliament of Canada the power to establish a scheme to provide compensation to employees during periods of unemployment, but that scheme cannot include active measures to promote employment and is to be financed in accordance with the principle of mutuality. The premiums collected from employees and employers for the operation of the system cannot exceed what is needed to pay current expenditures and establish a reasonable reserve for the system's activities. Allocating premiums and the surpluses generated by the collection of premiums to other purposes, such as the elimination of the federal budget deficit, violates the Constitution. The appellants also argued that the premium-setting mechanism is unconstitutional. If that mechanism were justified as an exercise of the federal taxation power, it was implemented in a manner that violated s. 53 of the *Constitution Act, 1867*. On the basis of these arguments, which for the most part were common to the two proceedings, the Syndicat requested a finding that several provisions of the *Employment Insurance Act* are invalid and a [page520] declaration that the surpluses in the Account belong to the system's contributors, namely employers and employees. The CSN sought similar conclusions.

7 In substance, the primary purpose of the actions was to quash the "active" measures established in the *Employment Insurance Act*, namely the employment service and employment benefits. The appellants also contested the premium-setting mechanism, the federal government's use of premiums and the allocation of the Account's surpluses. The respondent, the Attorney General of Canada, argued that all the "active" measures challenged by the appellants, the allocation of surpluses in the Account and the premium-setting mechanisms are valid. The two declaratory actions were joined for hearing. Both the Superior Court and the Quebec Court of Appeal heard them together.

III. Judicial History

A. *Superior Court* ([2003] R.J.Q. 3188)

8 Gascon J. dismissed the appellants' actions in their entirety. He began by finding that the employment service and the active measures, that is, employment benefits and training and work-sharing programs, fall within the federal unemployment insurance power. Then, in the second part of his decision, he rejected the plaintiffs' arguments about the setting of premiums and the Employment Insurance Account's surpluses. In his opinion, the premium-setting mechanisms are constitutional. Premiums are a regulatory charge tied to the administration and implementation of the employment insurance system. If they were to be regarded as taxes, imposing them constituted a valid exercise of Parliament's taxation power. Moreover, according to Gascon J., the challenge to the premium rates themselves raised an administrative law issue that fell within the jurisdiction of another court. He added that the plaintiffs had at any rate abandoned this branch of their actions. Finally, the Superior Court held that the federal government had not appropriated the Account's surpluses. The federal [page521] government's financial statements continued to show a debt owed by the Consolidated Revenue Fund to the Account. In conclusion, Gascon J. refused to assess the political wisdom of the measures and methods that had led to the accumulation of surpluses in the Account.

B. *Quebec Court of Appeal* ([2006] R.J.Q. 2672, 2006 QCCA 1453, 2006 QCCA 1454)

9 The Quebec Court of Appeal unanimously dismissed the appellants' appeals, thus confirming the constitutionality of all the measures and provisions at issue. However, its reasoning differed in some respects from that of the Superior Court. Its decision comprises two sets of reasons. Robert C.J.Q. wrote the reasons on the constitutional challenge to the "active" measures and dealt with the issue whether those measures fell within Parliament's legislative jurisdiction. Gendreau and Brossard JJ.A. dealt in joint reasons with the setting of premiums and the issue of surplus allocation.

10 Robert C.J.Q. carefully and thoroughly reviewed the statutory provisions and programs at issue to determine whether they are constitutional. He first concluded that the employment service, the work-sharing program and the training measures are perfectly consistent with an approach designed to reduce the risk of unemployment. They therefore fall within the federal unemployment insurance power.

11 According to Robert C.J.Q., employment benefits programs are more problematic. This category of benefits includes five different programs established under s. 59 of the *Employment Insurance Act*: wage subsidies paid to employers as a springboard to possible regular employment (s. 59(*a*)), earnings supplements for employees interested in low-paid jobs (s. 59(*b*)), self-employment assistance to encourage the creation of small businesses (s. 59(*c*)), job creation partnerships involving businesses and community organizations in areas with high unemployment rates (s. 59(*d*)), and [page522] skills loans or grants for workers seeking to obtain advanced skills (s. 59(*e*)).

12 Robert C.J.Q. found on the basis of the principles laid down by the Supreme Court of Canada

in *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56 ("*Reference*"), that some of these programs do not fall within Parliament's jurisdiction over the public employment insurance system. He placed the programs in two categories: income replacement benefits and initiative promotion. According to Robert C.J.Q., the first category includes wage subsidies, earnings supplements and job creation partnerships. In his view, these programs are consistent with the purpose of insurance and meet the tests established in the *Reference*. They therefore fall within the federal unemployment insurance power.

13 However, Robert C.J.Q. did not clearly decide whether the initiative promotion programs, namely self-employment assistance and skills loans or grants, fall within the federal unemployment insurance power. Instead, he concluded that they had been validly adopted pursuant to the federal spending power. He also noted that these programs are not intended to regulate matters within provincial jurisdiction and that the Parliament of Canada had expressly made them subject to provincial consent.

14 In their joint reasons, Gendreau and Brossard JJ.A. rejected the appellants' arguments that the mechanisms for financing employment insurance and the appropriation of the Account's surpluses are unconstitutional. With regard to the premium-setting mechanism, they found that the distinction between regulatory charges and taxes is of little relevance in this case. Ultimately, the system for setting premiums resulted from a valid exercise of the federal taxation power. Moreover, according to Gendreau and Brossard JJ.A., the accumulation of surpluses in the Account is not problematic [page523] from a constitutional standpoint. All amounts collected by the federal government had to be paid into the Consolidated Revenue Fund. The way those amounts were recorded did not affect the claim that the Account continued to have against the Consolidated Revenue Fund.

15 After their case was dismissed by the Quebec Court of Appeal, the appellants appealed to this Court. Their appeals raise the same issues as in the courts below.

IV. Analysis

A. *General Nature of the Issues*

16 In this Court, the appellants first challenge the constitutional validity of the active measures incorporated into the *Employment Insurance Act* to address unemployment. This branch of the appeals concerns the interpretation of s. 91(2A) of the *Constitution Act, 1867* and thus the scope of Parliament's unemployment insurance power. A second branch focuses on the constitutionality of the system adopted to finance employment insurance, the accumulation of surpluses through the collection of premiums from employers and employees, and the allocation of those surpluses to purposes other than compensating unemployed persons.

17 Before turning to the parties' arguments, I note that the Chief Justice of this Court stated the following constitutional questions in an order dated October 17, 2007:

1. Do ss. 66 to 66.3 and 72 of the *Employment Insurance Act*, S.C. 1996, c.

23, exceed, in whole, in part or through their combined effect, the unemployment insurance power provided for in s. 91(2A) of the *Constitution Act, 1867*?

2. If the answer to question 1 is affirmative, do ss. 66 to 66.3 and 72 of the *Employment Insurance Act*, S.C. 1996, c. 23, exceed, in whole, in part or through their combined effect, the taxation power provided for in s. 91(3) of the *Constitution Act, 1867*?

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3. If the answer to question 2 is negative, do ss. 66 to 66.3 and 72 of the *Employment Insurance Act*, S.C. 1996, c. 23, satisfy the requirements of s. 53 of the *Constitution Act, 1867*?
4. Do ss. 24, 25, 56 to 65.2, 73, 75, 77, 109(*c*) and 135(2) of the *Employment Insurance Act*, S.C. 1996, c. 23, exceed, in whole, in part or through their combined effect, the unemployment insurance power provided for in s. 91(2A) of the *Constitution Act, 1867*?
5. If the answer to question 4 is affirmative, are ss. 24, 25, 56 to 65.2, 73, 75, 77, 109(*c*) and 135(2) of the *Employment Insurance Act*, S.C. 1996, c. 23, validly based on the federal spending power?

18 The principal statutory provisions mentioned in these questions are appended to these reasons. I will return to them in the course of my analysis.

B. *Issues Related to Parliament's Unemployment Insurance Power*

19 In this branch of their appeals, the appellants challenge the constitutional validity of the "active" measures to address unemployment. They argue, first of all, that an employment service (s. 60) should not even exist. They also object to the existence of work-sharing programs (s. 24) and benefits associated with participation in training activities. The appellants also contend that the employment benefits programs and support measures established under ss. 57 and 59 are unconstitutional, and thus *ultra vires* Parliament. In substance, according to the appellants, the power conferred on Parliament by the Constitution is limited to paying compensation during periods of unemployment, and Parliament may not exercise it to take action to prevent or limit unemployment; nor may Parliament exercise the federal spending power to intervene in matters under provincial legislative jurisdiction. On this last point concerning the spending power, the Attorney General of Quebec supports the appellants' position.

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20 The Attorney General of Canada disagrees with all the appellants' arguments, submitting that they are inconsistent with the judicial decisions in which the principles for interpreting the federal legislative power in this area were defined. In those decisions, he contends, and in the *Reference* in particular, Parliament's power was held to be broad and flexible, even where measures to prevent unemployment are concerned. In the respondent's view, the spending power need not therefore be considered.

C. *Issues Related to the Financing of the Employment Insurance System and to the System's Surpluses*

21 A second branch of the appeals concerns a set of issues related to the financing of the employment insurance system and the allocation of the surpluses accumulated since 1996 through the collection of premiums from employers and employees. According to the appellants, the statutory provisions applied since 1996 to set premium rates exceed the federal unemployment insurance power, as Parliament's authority to require the payment of premiums is limited to the amounts needed for the system to function properly and for reasonable reserves to be accumulated. In their view, the provisions in question -- ss. 66, 66.1 and 66.3 -- contravene this fundamental principle. Moreover, the appellants contend that the premium-setting mechanisms no longer have any connection with the regulatory framework of the employment insurance system and that they represent an unlawful exercise of the federal taxing power because the procedure followed is not consistent with the principle of parliamentary control over taxation provided for in s. 53 of the *Constitution Act, 1867*. Finally, the appellants argue that the accumulation of surpluses and the allocation of those surpluses to overall federal expenditures, including public debt reduction, are contrary to the principles that determine the constitutional framework for collecting and using employment insurance premiums.

22 According to the respondent, the setting and use of premiums have remained consistent with constitutional requirements. First, the statutory [page526] provisions in question are consistent with the principle that there must be a sufficient connection with the regulatory scheme for employment insurance. If not, the federal taxation power was validly exercised pursuant to a clear and sufficiently complete delegation of authority by Parliament. Finally, the respondent contends that the premiums were used and accounted for in accordance with the rules governing the Consolidated Revenue Fund and that the rights of contributors were not violated.

D. *Parliament's Unemployment Insurance Power*

23 In their arguments, the appellants and the Attorney General of Canada display conflicting visions of the scope of Parliament's unemployment insurance power. The appellants take the position that this power is essentially limited to the payment of benefits during periods of unemployment and the collection of money to pay those benefits. They stress that a close relationship must be maintained between the premiums imposed on employers and employees and

the system those premiums are used to finance. According to the respondent's interpretation, the Parliament of Canada may adopt active measures to prevent unemployment or alleviate its consequences.

24 In light of this fundamental disagreement, it will be necessary to consider the origin of the federal unemployment insurance power, its nature, how it should be interpreted and the constitutional principles governing it. These questions were recently considered by my colleague Deschamps J. in the *Reference*. Her analysis remains valid and must guide the application of s. 91(2A) in the appeals now before the Court.

25 The current employment insurance system originated in the economic and social problems caused by the Depression in the 1930s. In 1937, the Privy Council affirmed a decision of the Supreme Court of Canada that a first federal unemployment insurance statute, the *Employment and Social Insurance Act*, S.C. 1935, c. 38, was invalid (*Attorney-General for Canada v. Attorney-General [page527] for Ontario*, [1937] A.C. 355 (P.C.), aff'g *Reference re The Employment and Social Insurance Act*, [1936] S.C.R. 427). The Privy Council held that the legislation affected property and civil rights in the provinces -- employer-employee relations in particular -- and was therefore *ultra vires* the Parliament of Canada, at pp. 365 and 367.

26 Following that setback, the federal government entered into negotiations with the provinces. The discussions led to an agreement on a constitutional amendment that resulted in s. 91(2A). As Deschamps J. noted, that amendment conferred a new legislative power on Parliament that had been detached from the provinces' general jurisdiction over property and civil rights:

> This means that when the Constitution was amended, a portion of the jurisdiction over property and civil rights was detached so that the aspects relating to unemployment insurance could be assigned to Parliament.
>
> (*Reference*, at para. 37)

27 Deschamps J. then resolved a first issue: whether this new federal jurisdiction was immutable. One argument that had been made in the *Reference* was that the content of the jurisdiction corresponded to the content of the *Unemployment Insurance Act, 1940*, S.C. 1940, c. 44, First Schedule, Part II ("1940 Act"). According to this argument, the 1940 Act essentially restated the provisions of the 1935 legislation that the Privy Council had held to be invalid and that the government had sought to revive through the constitutional amendment. The parameters of the application of s. 91(2A) therefore had to be found in that Act. The Court rejected this argument and concluded that the 1940 Act was merely one way of exercising the new power and did not determine its content:

> The question is therefore not the way in which Parliament initially exercised its jurisdiction, but the scope of its jurisdiction over unemployment insurance.

(*Reference*, at para. 39)

[page528]

28 To determine the content of the power transferred to Parliament, this Court considered the circumstances of the transfer and its objectives. Relying in particular on the correspondence between the federal government and the provinces that led up to the constitutional amendment, the Court noted that the purpose of the 1940 Act had been not only to remedy the destitution caused by unemployment, but also to put an end to unemployment by creating return-to-work mechanisms, including a national employment service (*Reference*, at para. 42). Deschamps J. defined the purpose of the transfer of jurisdiction as follows:

> In essence, the purpose of the transfer of jurisdiction was to equip Canada with the tools it needed to mitigate the effects of anticipated unemployment by providing certain classes of unemployed persons with benefits and by setting up job search centres. The transfer of jurisdiction was to be a tool for internal organization involving both short-term relief measures, namely benefits, and medium-term measures, namely job placement services for the unemployed.

(*Reference*, at para. 43)

29 This is the context in which s. 91(2A) became part of the Canadian Constitution. This provision must nonetheless be interpreted in the same way as other provisions relating to the division of powers between Parliament and the provincial legislatures. It is necessary to identify the essential elements of the power and determine whether the adopted measures are "consistent with the natural evolution of that power" (*Reference*, at para. 44).

30 In this analysis of the content of legislative powers, changes in the way such powers are exercised and in the interplay of the powers assigned to the two levels of government often raise difficult problems. The solutions that must be applied when exercising powers change where new problems must be addressed. However, the evolution of society cannot serve as a pretext for changing the nature of the division of powers, which is a fundamental component of the Canadian federal system. The power in question must be interpreted generously, but in a manner consistent with its legal context, having regard to relevant historical elements [page529] (*Reference*, at paras. 45-46; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 201-2).

31 Thus, according to this Court's decision in the *Reference*, the federal unemployment insurance power must be interpreted generously. Its objectives are to remedy the poverty caused by unemployment and maintain the ties between unemployed persons and the labour market. On this

basis, the Court identified four characteristics of unemployment insurance plans under s. 91(2A):

> With these principles and objectives in mind, four characteristics that are essential to a public unemployment insurance plan can be identified:
>
> (1) It is a public insurance program based on the concept of social risk
> (2) the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market
> (3) by paying temporary income replacement benefits
> (4) in the event of an interruption of employment.
>
> (*Reference*, at para. 48)

32 To determine whether the impugned measures fall within the power, the constitutional doctrines governing the division of powers must also be applied. The interplay between legislative powers often becomes complex. A given problem may have various aspects that can relate to different powers assigned to the two levels of government (*Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, at paras. 23-24; *Reference*, at para. 8).

33 The first step is to identify the pith and substance of the legislation in question (*Canadian Western Bank*, at para. 25; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31). To do this, two facets of the legislation must be examined: its purpose and its legal effect. This analysis [page530] requires that the true purpose of the legislation be ascertained (*Canadian Western Bank*, at para. 27; *Reference*, at para. 8).

34 Therefore, it must now be determined whether the measures challenged by the appellants that relate to the employment service, to training and to employment are *intra vires* Parliament. The analysis on this point will focus on the dual purpose of the powers conferred on Parliament: to alleviate the economic consequences of unemployment and to maintain ties with the labour market.

E. *Impugned Legislative Measures*

35 The legislative measures at issue in these appeals were introduced at a time when the federal unemployment insurance system was undergoing changes. Those changes related to the financing of the system, which I will discuss below, and to the nature of the programs it comprises. They are reflected in the very title of the legislation, which is now called the "*Employment Insurance Act*". The new title demonstrates Parliament's commitment to ensuring employment and employability in addition to providing compensation for the loss of income resulting from unemployment. The concept is no longer referred to as unemployment insurance, as it was in 1940 when the constitutional amendment was passed, but as employment insurance.

36 The employment service program has, in one form or another, been part of the system since

the beginning. And the appellants concede that measures involving participation in training programs date back to the origins of the employment insurance system. Thus, s. 31 of the 1940 Act provided that an unemployed person taking an approved training program was still considered available for work and therefore eligible for benefits. Section 39 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, also provided for the extension of benefit periods where a claimant was enrolled in a training program. Work-sharing and job creation programs first appeared in 1977 in the *Employment and Immigration Reorganization Act*, S.C. 1977, c. 54.

[page531]

37 According to the CSN, premiums were not used to finance these additional measures at the time. Rather, the measures were financed through contributions by the Government of Canada to the Account (A.F., at para. 146). The CSN notes that these programs have been financed through the employment insurance system itself since 1990.

38 As I mentioned above, five types of employment benefits were introduced in the 1996 legislation (*Employment Insurance Act*, s. 59): wage subsidies, earnings supplements, self-employment assistance, job creation partnerships and skills loans or grants. These benefits are financed through the employment insurance system and are thus paid for by contributors. They are paid under a large number of programs -- 39 according to the CSN (A.F., at para. 153).

F. *Constitutional Validity of the Legislative Measures*

39 Whether all the legislative measures challenged by the appellants are valid depends on the understanding one has of the federal unemployment insurance power. As I noted above, the appellants, in the position they take, overlook one of the basic reasons why the employment insurance system was created: to maintain ties with the labour market. As this Court stated in the *Reference*, this objective was part of the system from the very beginning. As a result, where some of the impugned measures are concerned, there is no need to invoke the federal spending power to find that they are valid. They retain a close enough connection with the system's basic objectives and form to a sufficient extent an integral part of the system.

40 The Superior Court and the Court of Appeal discussed the content of the benefits in question but did not need to consider in detail all the programs governing the payment of such benefits. By virtue of s. 58 of the *Employment Insurance Act*, the benefits are paid to "insured participant[s]". Section 58 identifies two classes of unemployed persons who, as insured participants, are eligible for such [page532] benefits. The first consists of unemployed persons who have received unemployment benefits during the previous 36 months. The second consists of unemployed persons for whom a benefit period has been established in the previous 60 months and who have during that period received special benefits in respect of a pregnancy or of parental leave, have withdrawn from active participation in the labour force to care for their new-born children or children placed with

them for the purpose of adoption, and want to re-enter the labour force:

> **58.** (1) In this Part, "insured participant" means an insured person who requests assistance under employment benefits and, when requesting the assistance, is an unemployed person
>
> (*a*) for whom a benefit period is established or whose benefit period has ended within the previous 36 months; or
>
> (*b*) for whom a benefit period has been established in the previous 60 months and who (i) was paid special benefits under section 22 or 23 during the benefit period,
>
> (ii) subsequently withdrew from active participation in the labour force to care for one or more of their new-born children or one or more children placed with them for the purpose of adoption, and
> (iii) is seeking to re-enter the labour force.

41 Insured participants are thus eligible even if they have not been claimants. However, they must have been insured persons -- that is, they must have held insurable employment -- and must have been eligible to receive benefits during the prior period provided for in s. 58. They thus have a connection with the system. Robert C.J.Q. correctly noted that [TRANSLATION] "[e]mployment benefits are not temporary income replacement benefits, [but] constitute a new type of employment incentive" (para. 75). The government thus seeks to directly invest greater amounts in improving the employability of unemployed workers (para. 76). Robert C.J.Q. then explained the nature of these employment benefits:

[page533]

> [TRANSLATION] The direct investment in question involves five measures provided for in section 59 of the *Employment Insurance Act*.
>
> The first of these measures is the wage subsidy. A claimant may request that a wage subsidy be granted to an employer who will provide the claimant with a job that will lead to long-term employment or to employment with another employer. This measure is designed more specifically for people facing

> employment disadvantages who need time to become fully productive or who need work experience. Occasionally, this measure may enable employers to create a job that would otherwise not exist.
>
> The second type of employment benefit is the earnings supplement. The purpose of such supplements is to increase, for temporary periods, the incomes of people who would otherwise find it difficult to accept jobs that pay less than their previous jobs. Earnings supplements offer claimants an opportunity to leave employment insurance for work before their income benefits expire.
>
> Self-employment assistance is the third type of employment benefit. This program helps insured participants start businesses and helps them acquire, from service providers, the skills they need to make their proposed businesses viable. This assistance takes several forms, including consulting services and help in preparing a business plan. Insured participants continue to receive benefits while establishing their businesses.
>
> The fourth measure, the job-creation partnership, is designed to create jobs that are sustainable in local economies where there is high unemployment and jobs are scarce. Partnerships may be entered into with the private sector, the provinces, local communities and community organizations in order to provide jobs compatible with provincial and local community plans and priorities for economic development. Such partnerships seem similar to the old job creation measures.
>
> The fifth and final measure is a system of skills loans and grants. This type of financing enables an insured participant to attend an institution to develop needed job skills. In an explanatory document, Human Resources Development Canada stated that, since labour market training is a provincial responsibility, these benefits will be offered in any province only with the agreement of the provincial government. [paras. 77-82]

[page534]

42 Before discussing these benefits, I should mention that job placement was one of the objectives behind the creation of employment insurance. And obtaining additional training is sometimes tied to the receipt of benefits. As well, work sharing limits the impact of unemployment

and fosters entry into the labour market. These initiatives fall within Parliament's legislative jurisdiction. Regulating unemployment insurance does not mean simply taking passive responsibility for paying benefits to Canadian workers during periods when they are not working. It also means taking on a more active role designed to maintain or restore ties between persons who may become or are unemployed and the labour market. This federal power does not, of course, authorize Parliament to create parallel education systems despite the connections between work and training and many other aspects of life in society. It may not be interpreted in the abstract without regard for the federal constitutional context. It must be exercised in a manner consistent with the general framework of the division of powers. This being said, the power may legitimately be exercised to its full extent, having regard to the context, including the problems created by changes in the labour market and the increase in structural unemployment. The labour market has changed since 1940, and the way the federal power under s. 91(2A) is exercised can reflect this. However, the exercise of the federal power does not negate the provincial powers over education and labour market training, which relate to other aspects of these problems in the labour market.

43 Employment benefits programs illustrate this change. They are new initiatives, but they remain related to the objective of maintaining ties with the labour market. All these measures are designed to reinforce ties with the labour market or to prepare workers to re-enter it.

44 For example, job creation partnerships are designed to alleviate some of the consequences of weak labour markets in economically disadvantaged regions by strengthening the labour markets in those regions and thus reducing unemployment.

[page535]

45 Earnings supplements also directly affect ties with the labour market. They temporarily increase the income of workers who would otherwise be more hesitant to accept jobs for less pay. This measure helps speed up an actual return to the labour market before benefit periods expire.

46 Self-employment assistance is also consistent with the goal of maintaining ties with the labour market. Such benefits, which are paid under a variety of programs, enable the recipient to prepare for and consolidate a return to work. Thus, the payment of benefits fosters the establishment of businesses and in so doing helps insured participants re-enter the labour market.

47 Wage subsidies paid to employers have the same objective. They specifically facilitate entry into the labour market by disadvantaged persons who wish to improve their productivity or gain work experience. In this regard, *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532, does not provide a definitive answer to the question whether such benefits are valid. In that case, this Court did not have to explore the federal unemployment insurance power in its entirety. The general framework for the power was subsequently clarified in the *Reference*, in which the Court stressed the relevance and importance of the objective of maintaining ties with the

labour market. From this standpoint, wage subsidies form to a sufficient extent an integral part of the employment insurance system as a whole. They help establish or maintain the employability of workers who might otherwise be condemned to not working.

48 Skills loans and grants enable insured participants to acquire advanced knowledge, and their purpose is to make it easier for such people to obtain employment. Participation in training programs was part of the employment insurance system from the outset. This measure is quite simply targeted differently, as it applies to a pool of insured participants that includes more than just the system's regular claimants. But this does not mean that it does not fall within federal jurisdiction. Furthermore, [page536] this jurisdiction is exercised in a way that does not encroach on the provincial jurisdiction over education, since pursuant to s. 61(2) of the *Employment Insurance Act*, assistance may not be provided under the programs associated with these benefits without the agreement of the provinces.

49 The evolution of the legislation on employment insurance has reflected changes in the economy and the labour market. It is part of the "natural evolution" of the power conferred on the Parliament of Canada. The legislation thus remains consistent with the rules governing the division of powers between the two levels of government. This means that I need not consider the federal government's spending power and its application to the measures I have already discussed. However, this conclusion is not determinative of the appeals. It will also be necessary to consider the second branch of the appeals, which relates to the financing of the system, the surpluses generated by the reforms to the system and the allocation of the surpluses.

G. *Scope of the Appellants' Constitutional Challenge*

50 The second branch of the appeals relates to the financing of the employment insurance system since the *Employment Insurance Act* was passed in 1996. At issue in this branch are, *inter alia*, the existence and use of the surpluses generated by the financing mechanism adopted in 1996 or, in the stronger terms used by the appellants, the appropriation or misappropriation of those surpluses by the federal government.

51 The appellants' arguments raise questions about the nature of a tax in the context of the taxation power of the Parliament of Canada, and about the distinction between a tax and a regulatory charge or levy. The constitutional challenge relates primarily to the validity of ss. 66 to 66.3 and 72 of the *Employment Insurance Act* as enacted by Parliament since 1996.

52 It is therefore important to define the true purpose of the constitutional challenge. There is [page537] nothing unconstitutional about financing the system by requiring employers and employees to pay premiums. This has been the mechanism favoured by Parliament since the employment insurance system was established in 1940, as Gascon J. noted in the Superior Court (para. 202). However, there is no reason why Parliament could not have financed the system differently by means of its general taxing power under s. 91(3) of the *Constitution Act, 1867*. The new legislative power conferred on Parliament in 1940 fell within a constitutional framework that

did not limit Parliament's legislative jurisdiction with regard to federal government activities. Parliament could have decided to finance the new system out of the taxes collected by the federal government. Indeed, this was the source of funding used to absorb deficits in the employment insurance system for several years.

53 In my opinion, it must be determined whether the chosen financing mechanism was valid either as a regulatory charge or as a tax imposed pursuant to the general taxing power under s. 91(3). Finally, the creation of surpluses in the system, the use of those surpluses and what will eventually happen to them must be considered.

H. *Changes in the Financing Scheme*

54 The changes in the mechanisms used to finance employment insurance were part of a package of reforms to the system. Parliament had reviewed the nature of the benefits being paid and the eligibility requirements for benefits. As I mentioned above, Parliament also wanted to change the focus of the system somewhat by fostering a deeper commitment to maintaining the tie between employees and the labour market.

55 Originally, s. 17 of the 1940 Act provided that contribution rates were to be based on the rates set out in the Second Schedule to that Act. In 1955, the *Unemployment Insurance Act* contained a table of fixed rates of contribution (S.C. 1955, c. 50, s. 37). A different mechanism was adopted in the [page538] 1971 legislation, as the Unemployment Insurance Commission was made responsible for setting premium rates with the agreement of the federal Cabinet (s. 62). Section 63 of that Act required that premium rates be sufficient to raise an amount equal to the adjusted basic cost of benefit. That basic cost was derived from the cost over the designated three consecutive previous years, which was adjusted as necessary to account for an accumulated surplus or deficit. This mechanism was employed until 1996, except during a few years when the premium rate was set in the Act itself (Gascon J., at para. 207).

56 According to Gascon J., the financing mechanism used from 1971 on was unsatisfactory. Economic recessions led to increases in benefit payments, which resulted in greater unemployment insurance deficits. As a result, the Commission had to raise premium rates to replenish the Unemployment Insurance Account at times when the economic situation would instead have called for a reduction in contributions (Gascon J., at paras. 208-9).

57 The enactment of s. 66 of the *Employment Insurance Act* in 1996 was intended to correct this situation. The new Act established a system that its originators thought would be more adaptable to changes in and the constraints of business cycles. The government intended to avoid the distortions that had arisen in the former system based on a yearly assessment of results over the designated three previous years.

58 Before the new mechanism began to be employed, Parliament set the premium rate for 1995 and 1996 at three percent of insurable earnings (*Budget Implementation Act, 1994*, S.C. 1994, c. 18,

s. 26). That rate was maintained for 1996 pursuant to a transitional provision of the *Employment Insurance Act* (Schedule II, s. 12).

59 The new premium-setting system became applicable in 1997. At that time, the Act instructed the Employment Insurance Commission to try to maintain relatively stable premium rates throughout a business cycle while at the same time building up [page539] an adequate reserve. The Act made the Commission responsible for setting premium rates each year in accordance with these objectives, with the approval of the Governor General in Council on the recommendation of the Minister of Finance. For this purpose, s. 66 provided as follows:

> The Commission shall, with the approval of the Governor in Council on the recommendation of the Minister and the Minister of Finance, set the premium rate for each year at a rate that the Commission considers will, to the extent possible,
>
> (*a*) ensure that there will be enough revenue over a business cycle to pay the amounts authorized to be charged to the Employment Insurance Account; and
>
> (*b*) maintain relatively stable rate levels throughout the business cycle.

60 For 2002 and 2003, the system for setting premium rates changed once again. Because of problems caused by the growth of the employment insurance surpluses, Parliament made the Governor General in Council responsible for setting the applicable premium rate. The framework under s. 66 ceased to apply. The Act no longer included criteria to guide the setting of rates:

> **66.1** Notwithstanding section 66, the premium rate for each of the years 2002 and 2003 is the rate set for the year by the Governor in Council on the recommendation of the Minister and the Minister of Finance.
>
> (*An Act to amend the Employment Insurance Act and the Employment Insurance (Fishing) Regulations*, S.C. 2001, c. 5, s. 9)

61 For 2004, Parliament set the premium rate in the Act itself (*Budget Implementation Act, 2003*, S.C. 2003, c. 15, s. 21). For 2005, it went back to having the Governor General in Council set the rates by adding s. 66.3 to the *Employment Insurance Act* (*Budget Implementation Act, 2004*, S.C. 2004, c. 22, s. 25).

62 Other amendments were made during the years that followed. I will not comment on them because they are not directly relevant to these proceedings.

[page540]

I. *Surpluses*

63 The statutory amendments relating to the premium-setting mechanism gave rise to the problem of surpluses in the Account and also affected the speed at which that problem developed. The massive increase in those surpluses occurred over a period of just a few years. In the space of six or seven years, the deficits were absorbed and surpluses totalling more than $40 billion were accumulated. I will now look at the origin of the surpluses and the steps in their creation.

64 To understand how the surplus problem developed, it will be helpful to revisit the origins of the system. When the system came into effect, an unemployment insurance fund was established. That fund was replaced with the Account in 1971. At that time, the government's budget absorbed deficits in the Account that resulted from fluctuations in economic activity and in the amounts of benefits paid to unemployed persons. In 1986, on the recommendation of the Auditor General of Canada, the Account was consolidated with government revenues as a whole. In 1990, the government stopped financing the Account out of its general revenues.

65 Throughout that period, premiums, which legally speaking were debts to the Crown, were paid into the Consolidated Revenue Fund and credited to the Account. The amounts needed to manage the system and to pay benefits and the cost of authorized programs were in turn paid out of the Consolidated Revenue Fund and charged to the Account.

66 It is clear that around 1995, the government made a firm policy decision to put an end to deficits in employment insurance, stabilize fluctuating premium rates and strengthen the system by building up an adequate reserve. The legislative amendments summarized above gave effect to that decision. Their impact on the Account was quick, and striking. In 1996, the Account's surpluses already totalled $5 or $6 billion. Even though premium rates were gradually reduced, the surpluses rose to approximately $20 billion in 1998. That amount [page541] corresponded to the maximum reserve recommended by Canada's Chief Actuary (A.F. C.S.N., at p. 35, footnote 116). Starting in 2001, the growth of the surpluses, which then exceeded $40 billion, slowed down or even levelled off. When premium rates were set, the goal seemed to be to attain a relative balance between the system's receipts and current expenditures.

J. *Constitutionality of the Premium-Setting Mechanism*

67 The appellants, supported on this point by one intervener, the Canadian Labour Congress, submit that no provision of the Constitution authorized the premium-setting mechanisms that led to the accumulation of the surpluses in the Account and the use of those surpluses by the Government of Canada. They argue that the federal government misappropriated employment insurance monies.

In short, the appellants submit that amounts collected as premiums were diverted from their intended purposes and allocated to the government's current expenditures, to deficit reduction and to restoring a balance in public finances. According to them, these amounts were also used to finance employment and economic development programs that fell outside the federal unemployment insurance power, as opposed to paying compensation during actual periods of unemployment.

68 I will not discuss this final argument at length, since I rejected it above. In my opinion, the disputed measures, and employment benefits in particular, fall within federal legislative jurisdiction. The expenditures associated with these measures could be financed through premiums. This being said, however, the issue of the allocation of contributions and surpluses to general government expenditures remains to be resolved.

69 I reject from the outset a fact-based submission made by the appellants: that the government in power during the period following the passage of the *Employment Insurance Act* planned to accumulate these surpluses and then to misappropriate them. There was extensive evidence on this point [page542] in the Superior Court, and the parties placed great stress on this in argument. However, neither the Superior Court nor the Court of Appeal accepted this submission, and no error in assessing the facts has been shown that would justify an intervention by this Court on this point.

70 The problem of the surpluses in the Account appears instead to have developed in stages, but quickly. In the end, the enactment in 2001 of the transitional provisions that authorized the Governor General in Council to set premiums directly for 2002 and 2003 was a sign of a recognition that the surpluses were substantial, that they had played a role in restoring financial balance to the federal government's activities and that a solution for the problems they created would be complex. The government considered these surpluses to be part of public revenues and did not agree with returning them to contributors. However, this is not the place to discuss the appropriateness of this policy approach. Rather, the issue is what the legal nature of premiums has been since the *Employment Insurance Act* came into force in 1996.

71 The government could have financed the system through either premiums or taxes, as it had a choice between a special levy and general taxation (P. Issalys and D. Lemieux, *L'action gouvernementale: Précis de droit des institutions administratives* (2nd ed. 2002), at pp. 607-9 and 617-18). The Attorney General of Canada argues first that a premium is a regulatory charge, that is, a form of special levy connected with a government program. In the alternative, he submits that a premium can be considered a tax for the purposes of s. 91(3) of the *Constitution Act, 1867* and that the premiums were imposed in accordance with the Constitution.

72 This question of the validity of imposing regulatory charges has come before this Court on several occasions. In its decisions, the Court has accepted the use of regulatory charges to finance government programs and has developed tests for identifying such special levies. There are two steps in the identification process. First, the existence of a [page543] regulatory scheme must be established. According to the analytical approach adopted in *Westbank First Nation v. British*

Columbia Hydro and Power Authority, [1999] 3 S.C.R. 134, there must be (1) a complete and detailed code of regulation, (2) a regulatory purpose of influencing specific behaviour, (3) the existence of actual or properly estimated costs of the regulation and (4) a relationship between the regulation and the person who either benefits from it or made it necessary (para. 44). Rothstein J. recently reiterated these criteria in *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131, 2008 SCC 7, at paras. 25-26, although he reminded us that the list is not exhaustive. Next, if the court finds that a regulatory scheme exists, it must determine whether there is a relationship between that scheme and the charge (*Connaught*, at para. 27). Revenue collection must be related to the regulation or must in itself have a regulatory purpose of influencing the behaviour of the persons concerned (*Westbank*, at para. 44). As the Court noted in *Connaught*, the accumulation of excessive surpluses may indicate that a levy is a tax and not a regulatory charge (para. 40). However, the test is flexible, and the characterization of a levy as a regulatory charge does not depend primarily on the absence or the amounts of surpluses (*Connaught*, at para. 40). It depends above all else on whether the collected amounts or a substantial part thereof are allocated to the regulated activity.

73 Despite the existence of large surpluses, a sufficient connection was maintained between employment insurance premiums and the regulatory scheme as long as s. 66 of the *Employment Insurance Act* applied. Section 66 contained principles that governed the exercise of the premium-setting power delegated to the Commission: connection with the business cycle, stabilization of premium rates and building up of reserves:

> **66.** The Commission shall, with the approval of the Governor in Council on the recommendation of the [page544] Minister and the Minister of Finance, set the premium rate for each year at a rate that the Commission considers will, to the extent possible,
>
> (*a*) ensure that there will be enough revenue over a business cycle to pay the amounts authorized to be charged to the Employment Insurance Account; and
>
> (*b*) maintain relatively stable rate levels throughout the business cycle.

These principles served as the basis for a policy of allocation of and stability in the amounts being levied that justifies characterizing those amounts, from a constitutional standpoint, as a regulatory charge. I need not decide here whether the relevant tests for the exercise of the Employment Insurance Commission's regulatory power were properly applied. That branch of the proceedings instead concerned administrative law principles. As a result, it is, as Gascon J. pointed out, highly unlikely that this was a matter for the Superior Court; Gascon J. also noted that that branch of the proceedings had been abandoned before him.

74 During the period in question, from 1996 to 2001, the contributions collected were paid into the Consolidated Revenue Fund in accordance with the Act. The amounts needed for the system to function were credited or charged to the Account. However, it is clear that the Account does not constitute -- as is the case of pension fund assets -- a trust fund or patrimony by appropriation. It forms part of Canada's government accounting, and premiums form part of the government's revenues. The government's use of it does not, therefore, constitute a misappropriation of employment insurance monies. Those monies were used like any other part of the revenues in the Consolidated Revenue Fund, and the appropriate accounts were kept.

75 However, this conclusion does not resolve the issue of the legal effects of the situation resulting from the 2001 and 2004 amendments to the *Employment Insurance Act*, under which the power to set premium rates was delegated to the Governor General in Council but the legal framework for exercising the power was eliminated. In my opinion, those amendments had a significant effect on the validity of such levies in the circumstances in [page545] which they were adopted, that is, at a time when government representatives could not have helped but see that employment insurance revenues in fact greatly exceeded what the system required and that those revenues no longer had an actual connection with the system. This confirms that the relationship between the levy and the regulatory scheme had disappeared and that premiums had been transformed into a kind of payroll tax.

76 In 1999, the Minister of Finance of the day firmly believed that premiums formed part of general government revenues (*House of Commons Debates*, vol. 136, 2nd Sess., 36th Parl., Oral Question Period, November 1, 1999). He reaffirmed this position in 2001 (vol. 137, 1st Sess., 37th Parl., Oral Question Period, March 2, 2001). In a report, the House of Commons Standing Committee on Finance recommended a mechanism for setting premium rates in the future, but it was not in favour of going back to what had been done in the past. All the evidence that can be drawn from parliamentary debates or documents confirms that the government and Parliament did not seem willing to reduce premium rates to such an extent as to establish a connection between them and benefits paid under the system. The 2001 legislation, which applied in 2002 and 2003, altered the legal status of premiums. As I mentioned above, the provision delegated a discretion to set premium rates to the Governor General in Council. That discretion does seem to have been exercised in such a way that the surpluses in the Account gradually stabilized. But this fact does not eliminate the legal issue raised by the 2001 and 2004 amendments.

77 As a result of the approach taken by Parliament, premiums collected under this system can no longer be viewed as a regulatory charge. As I mentioned above, s. 66.1 was silent regarding the connection between premiums and benefits.

78 Exactly the same wording was used for s. 66.3, which applied to 2005. Thus, the effect of ss. 66.1 and 66.3 was that s. 66 did not apply. As I mentioned above, s. 66 imposed rules that applied to the Commission's exercise of its regulatory authority and to the preparation of opinions by the Minister and the Minister of Finance. It required [page546] the Commission to set a premium rate

that might establish relatively stable rate levels while at the same time ensuring that enough revenue would be collected to pay all authorized expenditures of the employment insurance system. This resulted in a framework under which it was possible to maintain a connection between the employment insurance program and its expenditures and revenues. It also ensured that premiums continued to constitute a regulatory charge within the meaning of *Westbank* and *Connaught*. When Parliament departed from s. 66 by passing ss. 66.1 and 66.3 in 2001 and 2004, this legal situation was radically altered. Every legal connection between revenues and expenditures disappeared. The collection of premiums ceased to be tied to the system and to its requirements, contrary to the principle laid down in *Westbank* (para. 44). The legal connection between the premium-setting system and the regulatory scheme ceased to exist.

79 Thus, following those statutory amendments, premiums no longer constituted a regulatory charge within the meaning of *Westbank* and *Connaught*. Rather, they became a levy on payrolls and wages. They were transformed into a tax. If this is the case, the Attorney General of Canada argues, the tax was validly imposed pursuant to Parliament's general taxation power under the *Constitution Act, 1867*.

80 The scope of Parliament's taxing power is well known. Parliament may tax by any means. However, if a levy is a tax, it must be imposed in accordance with the Constitution. Section 53 of the *Constitution Act, 1867* therefore poses a problem.

K. *Violation of Section 53*

81 The *Constitution Act, 1867* provides that Parliament alone has the power to impose a tax and that the legislation must originate in the House of Commons:

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

[page547]

82 This Court has confirmed that s. 53 reflects the ancient, but fundamental, principle of our democratic system that there should be no taxation without representation: *Westbank*, at para. 19, and *Connaught*, at para. 4. According to this principle, a tax can be imposed only by Parliament or a clearly authorized delegate of Parliament (J. E. Magnet, *Constitutional Law of Canada* (9th ed. 2007), vol. 1, *Federalism / Aboriginal Peoples*, at p. 626).

83 In *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, the majority of this Court held that levies to finance an agricultural products marketing scheme were not taxes, but regulatory charges. There was therefore no need to discuss the delegation of taxing authority. However, in an *obiter dictum* concerning the scope of s. 53, Pigeon J., writing for the majority,

appeared to reduce that provision to a mere rule of internal parliamentary procedure:

> It may be contended that, in authorizing a board or agency to impose and to use levies or charges, Parliament is indirectly doing what it may not do directly, namely, having a tax levied and appropriated otherwise than by means of a bill voted in the House of Commons on the recommendation of the Governor General. In my view this attack fails for two reasons. I agree with the Chief Justice that adjustment levies, as well as levies for expenses, are not taxes. Furthermore, ss. 53 and 54 are not entrenched provisions of the constitution, they are clearly within those parts which the Parliament of Canada is empowered to amend by s. 91(1). [pp. 1290-91]

84 This *dictum* has been criticized by Professor Hogg on the basis that s. 53 is a true constitutional rule. In his view, the fact that it can be amended by statute cannot justify violating it (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at p. 14-6). In *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at para. 34, Major J. stated that "[s]ection 53 is a constitutional imperative" and that the Court is not bound by the *dictum*.

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85 In *Eurig*, following an analysis based on the principles laid down in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, this Court held that amounts collected in respect of grants of letters probate constituted a tax rather than a regulatory fee (*Eurig*, at paras. 15 *et seq.*). Major J., writing for the majority of the Court, held as a matter of policy that, although the requirement that a tax result from the clearly expressed will of Parliament is absolute, this does not mean that Parliament may not delegate the power to establish "the details ... of taxation" as well as its mechanism:

> 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. ...
>
> ...
>
> 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. [Emphasis added; paras. 30 and 32.]

86 Finally, the most recent decision in which this Court considered the delegation of taxing authority under s. 53 is *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*,

[2001] 1 S.C.R. 470, 2001 SCC 15. One of the issues in that case was whether provincial legislation authorizing the Minister of Finance to prescribe tax rates for school purposes was constitutional.

87 Iacobucci J., writing for a unanimous Court, noted that the delegation of the imposition of a tax is constitutional if the legislation provides expressly and unambiguously for the delegation:

> The delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation. The animating principle is that [page549] only the legislature can impose a new tax *ab initio*. But if the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of "no taxation without representation" will be met. In such a situation, the delegated authority is not being used to impose a completely new tax, but only to impose a tax that has been approved by the legislature. [Emphasis added; para. 74.]

88 According to Professor Hogg, it would be difficult to interpret *Ontario English Catholic Teachers' Assn.* as relating to the delegation of control over the details and mechanism of taxation, since "that phrase was never referred to" (p. 14-8). Yet, Iacobucci J. had quoted the relevant passage from *Eurig* (para. 71 of *Ontario English Catholic Teachers' Assn.*). The position taken by the Court in *Eurig* therefore remains valid. According to it, the taxing authority of Parliament or of a legislature may not be delegated unless that body clearly and unambiguously expresses its intent to delegate the authority.

89 In *Eurig*, the majority of the Court disagreed with the view of Gonthier and Bastarache JJ., dissenting, that taxing authority had been validly delegated, because the legislation did not clearly state that the Lieutenant Governor in Council had the power to "tax":

> [T]he 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;

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> (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.
>
> While these provisions authorize the Lieutenant Governor in Council to impose fees, they do not constitute an express delegation of taxing authority... .
>
> ...
>
> Bastarache J. [dissenting] 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... . [T]he 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. [Emphasis added; emphasis in original omitted; paras. 38 and 41.]

90 In *Ontario English Catholic Teachers' Assn.*, the impugned provision of Ontario's *Education Act*, R.S.O. 1990, c. E.2, read as follows:

> **257.12** (1) The Minister of Finance may make regulations,
>
> ...
>
> (b) prescribing the tax rates for school purposes for the purposes of section 257.7;

91 As well, the delegation in the statute of the setting of rates was part of a detailed statutory framework in which the "structure of the tax, the tax base, and the principles for its imposition" were set out (para. 75). Relying on the principles established in *Eurig*, Iacobucci J. concluded that this delegation was constitutional:

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> The *EQIA* meets this requirement, as s. 257.12(1)(b) of the new *Education Act*expressly authorizes the Minister of Finance to prescribe the tax rates for school purposes. When the Minister sets the applicable rates, a tax is not imposed *ab initio*, but is imposed pursuant to a specific legislative grant of authority. [Emphasis added; para. 75.]

92 In short, in this case concerning employment insurance, only Parliament may impose a tax *ab initio*. According to this Court's decisions, taxing authority must be delegated expressly and unambiguously. Once this requirement is met, the delegate may exercise the power to establish the details and mechanisms of taxation.

93 The relevant provisions of the *Employment Insurance Act* must therefore be examined to determine whether, as in *Ontario English Catholic Teachers' Assn.*, they are consistent with the principles laid down in this Court's decisions. The provisions in question, ss. 66.1 and 66.3, do not state that Parliament is delegating taxing authority to the Governor General in Council. The nature of the levy remains ambiguous. It is unclear whether Parliament still considered that it was exercising the authority to impose a regulatory charge in enacting those provisions. At the time Parliament delegated the power to collect employment insurance premiums to the Commission and the Governor General in Council, the legislation contained no statement either that its purpose was to collect a tax or that Parliament's taxing authority was being delegated to the Governor General in Council. The delegation concerned a charge that was no longer a levy for specific purposes but had become a levy for general purposes with the meaning of *Westbank*, but it was not specified in the Act that Parliament intended to delegate its taxing authority as such. Parliament would have had to state that it was delegating that authority to the Governor General in Council. Owing to the ambiguous nature of the levy, whether Parliament intended to delegate its taxing authority remained uncertain.

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94 I accordingly conclude that the version of s. 66.1 of the *Employment Insurance Act* that applied in 2002 and 2003 is invalid. This means that employment insurance premiums were collected unlawfully, without the necessary legislative authorization. The same conclusion must be reached as regards the version of s. 66.3 that applied in 2005 and the premiums collected that year. In the circumstances of this case, which involves the improper exercise of a power conferred on Parliament, I would suspend the declaration of invalidity to allow the consequences of that invalidity to be rectified. I would dismiss the appellants' other claims and affirm the judgments of the Court of Appeal and the Quebec Superior Court with respect to them.

V. Answers to the Constitutional Questions

95 I therefore answer the constitutional questions as follows:

Question 1: No.

Question 2: No.

Question 3: No for the versions of ss. 66.1 and 66.3 of the *Employment Insurance Act* that applied in 2002, 2003 and 2005, but yes for the other provisions of the Act.

Question 4: No.

Question 5: It is not necessary to answer this question.

VI. Conclusion

96 For these reasons, I would therefore allow the appeals in part and declare that the versions of ss. 66.1 and 66.3 of the *Employment Insurance Act* that applied in 2002, 2003 and 2005 are invalid and that employers' and employees' premiums for 2002, 2003 and 2005 were collected unlawfully. I would suspend the declaration for a period of 12 months from the date of this judgment. I would award costs to the appellants throughout.

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* * * * *

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.

Employment Insurance Act, S.C. 1996, c. 23

22. (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant who proves her pregnancy.

...

23. (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.

...

24. (1) The Commission may, with the approval of the Governor in Council, make regulations providing for the payment of work-sharing benefits to claimants who are qualified to receive benefits under this Act and are employed under a work-sharing agreement that has been approved for the purposes of this section by special or general direction of the Commission, ...

...

25. (1) For the purposes of this Part, a claimant is unemployed and capable of and available for work during a period when the claimant is

(*a*) attending a course or program of instruction or training at the claimant's own expense, or under employment benefits or similar benefits that are the subject of an agreement under section 63, to which the Commission, or an authority that the Commission designates, has referred the claimant; or

(*b*) participating in any other employment activity

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(i) for which assistance has been provided for the claimant under prescribed employment benefits or benefits that are the subject of an agreement under section 63 and are similar to the prescribed employment benefits, and

(ii) to which the Commission, or an authority that the Commission

designates, has referred the claimant.

...

57. (1) Employment benefits and support measures under this Part shall be established in accordance with the following guidelines:

(*a*) harmonization with provincial employment initiatives to ensure that there is no unnecessary overlap or duplication;

(*b*) reduction of dependency on unemployment benefits by helping individuals obtain or keep employment;

(*c*) co-operation and partnership with other governments, employers,community-based organizations and other interested organizations;

(*d*) flexibility to allow significant decisions about implementation to be made at a local level;

(*d.*1) availability of assistance under the benefits and measures in either official language where there is significant demand for that assistance in that language;

(*e*) commitment by persons receiving assistance under the benefits and measures to

(i) achieving the goals of the assistance,
(ii) taking primary responsibility for identifying their employment needs and locating services necessary to allow them to meet those needs, and
(iii) if appropriate, sharing the cost of the assistance; and

(*f*) implementation of the benefits and measures within a framework for evaluating their success in assisting persons to obtain or keep employment.

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(2) To give effect to the purpose and guidelines of this Part, the Commission shall work in concert with the government of each province in which employment benefits and support measures are to be implemented in designing the benefits and measures, determining how they are to be implemented and establishing the framework for evaluating their success.

(3) The Commission shall invite the government of each province to enter into agreements for the purposes of subsection (2) or any other agreements authorized by this Part.

58. (1) In this Part, "insured participant" means an insured person who requests assistance under employment benefits and, when requesting the assistance, is an unemployed person

(*a*) for whom a benefit period is established or whose benefit period has ended within the previous 36 months; or

(*b*) for whom a benefit period has been established in the previous 60 months and who

(i) was paid special benefits under section 22 or 23 during the benefit period,
(ii) subsequently withdrew from active participation in the labour force to care for one or more of their new-born children or one or more children placed with them for the purpose of adoption, and
(iii) is seeking to re-enter the labour force.

(2) For the purposes of subsection (1), "benefit period" includes a benefit period established under the *Unemployment Insurance Act* and "special benefits" includes benefits under sections 18 and 20 of that Act.

59. The Commission may establish employment benefits to enable insured participants to obtain employment, including benefits to

(*a*) encourage employers to hire them;

(*b*) encourage them to accept employment by offering incentives such as temporary earnings supplements;

(*c*) help them start businesses or become self-employed;

(*d*) provide them with employment opportunities through which they can gain work experience [page556] to improve their long-term employment prospects; and

(*e*) help them obtain skills for employment, ranging from basic to advanced skills.

60. (1) The Commission shall maintain a national employment service to provide information on employment opportunities across Canada to help workers find suitable employment and help employers find suitable workers.

(2) The Commission shall

(*a*) collect information concerning employment for workers and workers seeking employment and, to the extent the Commission considers necessary, make the information available with a view to assisting workers to obtain employment for which they are suited and assisting employers to obtain workers most suitable to their needs; and

(*b*) ensure that in referring a worker seeking employment there will be no discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act* or because of political affiliation, but nothing in this paragraph prohibits the national employment service from giving effect to

(i) any limitation, specification or preference based on a *bona fide* occupational requirement, or

(ii) any special program, plan or arrangement mentioned in section 16 of the *Canadian Human Rights Act*.

(3) The Commission may, with the approval of the Governor in Council, make regulations for the purposes of subsections (1) and (2).

(4) In support of the national employment service, the Commission may establish support measures to support

(*a*) organizations that provide employment assistance services to unemployed persons;

(*b*) employers, employee or employer associations, community groups and communities in developing and implementing strategies for dealing with labour force adjustments and meeting human resource requirements; and

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(*c*) research and innovative projects to identify better ways of helping persons prepare for, return to or keep employment and be productive participants in the labour force.

(5) Support measures established under paragraph (4)(*b*) shall not

(*a*) provide assistance for employed persons unless they are facing a loss of their employment; or

(*b*) provide direct federal government assistance for the provision of labour market training without the agreement of the government of the province in which the assistance is provided.

61. (1) For the purpose of implementing employment benefits and support measures, the Commission may, in accordance with terms and conditions approved by the Treasury Board, provide financial assistance in the form of

(*a*) grants or contributions;

(*b*) loans or loan guarantees;

(*c*) payments for any service provided at the request of the Commission; and

(*d*) vouchers to be exchanged for services and payments for the provision of the services.

(2) The Commission may not provide any financial assistance in a province in support of employment benefits mentioned in paragraph 59(*e*) without the agreement of the government of the province.

(3) Payments under paragraph (1)(*c*) include the following transitional payments, which may not be made under this section more than three years after it comes into force:

(*a*) payments to a public or private educational institution for providing a course or program of instruction or training at the request of the Commission under employment benefits authorized by paragraph 59(*e*); and

(*b*) payments to a province in respect of the course or program if it is provided by a public educational institution and there is an agreement between the government of the province and the Commission to remunerate the province for all or part of the cost of providing the course or program.

...

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66. The Commission shall, with the approval of the Governor in Council on the recommendation of the Minister and the Minister of Finance, set the premium rate for each year at a rate that the Commission considers will, to the extent possible,

(*a*) ensure that there will be enough revenue over a business cycle to pay the amounts authorized to be charged to the Employment Insurance Account; and

(*b*) maintain relatively stable rate levels throughout the business cycle.

...

71. There shall be established in the accounts of Canada an account to be known as the Employment Insurance Account.

72. There shall be paid into the Consolidated Revenue Fund

(*a*) all amounts received under Parts I and III to IX, as or on account of premiums, fines, penalties, interest, repayment of overpaid benefits and benefit repayment;

(*b*) all amounts collected by the Commission for services rendered to other government departments or agencies or to the public; and

(*c*) all amounts received on account of principal or interest on loans made by the Commission under Part II or as repayment of overpayments made by the Commission under that Part.

73. There shall be credited to the Employment Insurance Account and charged to the Consolidated Revenue Fund

(*a*) an amount in each year equal to the amount receivable as or on account of premiums payable for that year under this Act;

(*b*) any other amounts provided out of the Consolidated Revenue Fund appropriated by Parliament for any purpose related to employment insurance and administered by the Commission; and

(*c*) an amount equal to all benefit repayments receivable under Part VII.

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An Act to amend the Employment Insurance Act and the Employment Insurance (Fishing) Regulations, S.C. 2001, c. 5

9. The Act is amended by adding the following after section 66:

66.1 Notwithstanding section 66, the premium rate for each of the years 2002 and 2003 is the rate set for the year by the Governor in Council on the recommendation of the Minister and the Minister of Finance.

Budget Implementation Act, 2004, S.C. 2004, c. 22

25. The *Employment Insurance Act* is amended by adding the following after section 66.2:

66.3 Notwithstanding section 66, the premium rate for the year 2005 is the rate set for the year by the Governor in Council on the recommendation of the Minister and the Minister of Finance.

Solicitors:

Solicitors for the appellant Confédération des syndicats nationaux: Pepin et Roy, Montréal.

Solicitors for the appellant Syndicat national des employés de l'aluminium d'Arvida inc., Jean-Marc Crevier and Marie Langevin: Philion Leblanc Beaudry, Québec.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

cp/e/qllls

Indexed as:

Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)

Ikechukwu Okwuobi, appellant;
v.
Attorney General of Quebec and François Legault, in his capacity as Minister of Education, respondents.
And between
Edwidge Casimir, appellant;
v.
Attorney General of Quebec and François Legault, in his capacity as Minister of Education, respondents.
And between
Consuelo Zorrilla, appellant;
v.
Attorney General of Quebec, respondent.

[2005] 1 S.C.R. 257

[2005] S.C.J. No. 16

2005 SCC 16

File No.: 29299.

Supreme Court of Canada

Heard: March 22, 2004;
Judgment: March 31, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

(56 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Catchwords:

Administrative law -- Administrative Tribunal of Québec -- Jurisdiction in respect of minority language education claims -- Remedial powers -- Eligibility for public instruction in English in Quebec -- Claimants bypassing administrative appeal process and seeking injunctive and declaratory relief in Superior Court -- Whether claimants must follow administrative [page258] process -- Whether Tribunal has exclusive jurisdiction to hear appeals in respect of entitlement to minority language education -- Whether Tribunal can decide constitutional questions incidental to its determination of entitlement to minority language education -- Whether Tribunal's decision concerning entitlement binding on school board -- Scope of residual jurisdiction of Superior Court in respect of injunctive relief and direct constitutional challenges.

Summary:

The appellant parents are seeking access, for their children, to public instruction in English in Quebec pursuant to s. 73 of the Charter of the French language. They attempted to bypass the administrative appeal process set out in that act by seeking injunctive and declaratory relief in the Superior Court. In the cases of C and O, the Superior Court granted the Attorney General of Quebec's motion to dismiss on jurisdictional grounds. In Z's case, the same motion was dismissed. The Court of Appeal affirmed the Superior Court's decisions in the cases of C and O, and set aside the decision in the case of Z. The court concluded that the Administrative Tribunal of Québec ("ATQ") had jurisdiction to hear the claims for minority language education and that the administrative appeal process could not be circumvented.

Held: The appeal should be dismissed.

The appellants did not have the right to bypass the ATQ since it has exclusive jurisdiction to hear appeals in respect of entitlement to minority language education. The administrative process requires that before turning to the Superior Court to gain access to minority language education in Quebec, a claimant must first apply to a designated person for a certificate of eligibility and, if necessary, appeal that decision to the ATQ pursuant to s. 83.4 of the Charter of the French language. According to s. 14 of the Act respecting administrative justice, the ATQ has exclusive jurisdiction to make determinations in respect of proceedings brought against an administrative authority. When s. 14 is read in conjunction with s. 83.4, it is clear that the Quebec legislature intended to confer on the ATQ exclusive jurisdiction over all disputes relating to s. 73 of the Charter of the French language. Aside from certain specific exceptions, courts should respect the clear intent of the legislature. [para. 19] [para. 25] [para. 38]

The ATQ has the capacity to consider and decide constitutional questions, including the conformity of s. 73 of the Charter of the French language with s. 23 of the [page259] Canadian Charter. The ATQ has explicit jurisdiction, under s. 15 of the Act respecting administrative justice, to decide

questions of law, and there is no indication that the legislature intended to exclude Canadian Charter issues from the ATQ's authority over questions of law. On the contrary, the overall structure of the ATQ, that of a highly sophisticated, quasi-judicial body, indicates that the legislature intended to have the ATQ deal with all legal issues. [paras. 32-35] [para. 37]

The ATQ has, under ss. 74 and 107 of the Act respecting administrative justice, all the remedial powers necessary to exercise its jurisdiction, and the absence of a particular remedy is not a reason to circumvent the administrative process. Although the ATQ cannot issue a formal declaration of invalidity, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the ATQ. If the ATQ finds a violation of the Canadian Charter, it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force. Such a ruling would, however, be subject to judicial review on a correctness standard , and the claimant could then seek a formal declaration of invalidity. Similarly, although the ATQ cannot grant injunctive relief, the broad wording of s. 74 indicates an intention on the part of the Quebec legislature to grant the ATQ the remedial authority needed to safeguard the rights of the parties. [paras. 43-46]

A decision of the ATQ concerning a child's eligibility for instruction in English is binding on a school board even if it is not a party to the appeal. [para. 47]

In light of the exclusive jurisdiction and broad powers accorded to the ATQ, the Superior Court should exercise sparingly its discretion to award injunctive relief in minority language education claims and should only do so to complement, not to weaken, the administrative process. Despite the conferral by the legislature on the ATQ of remedial power with respect to constitutional rights, the residual, inherent jurisdiction of the Superior Court to hear direct constitutional challenges to a legislative scheme remains in place to provide the appropriate and just remedy where required. [paras. 51-55]

Cases Cited

Applied: Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504, 2003 SCC 54; Paul v. British Columbia (Forest Appeals Commission), [page260] [2003] 2 S.C.R. 585, 2003 SCC 55; Mills v. The Queen, [1986] 1 S.C.R. 863; referred to: Gosselin (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 238, 2005 SCC 15; Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14; Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575, 2001 SCC 81; Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; Québec (Procureure générale) v. Barreau de Montréal, [2001] R.J.Q. 2058; 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; Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854.

Statutes and Regulations Cited

Act respecting administrative justice, R.S.Q., c. J-3, ss. 14, 15, 24, 25, 38, 74, 82, 107, 112, Sch. I, s. 3.

Canadian Charter of Rights and Freedoms, ss. 23, 24(1).

Charter of the French language, R.S.Q., c. C-11, ss. 72, 73, 75, 76, 81, 82-83, 83.4, 85, 86.1.

Code of Civil Procedure, R.S.Q., c. C-25, arts. 31, 751.

Rules of procedure of the Administrative Tribunal of Québec, (1999) 131 G.O. II, 4122, s. 17.

Authors Cited

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Ferland, Denis, et Benoît Emery. Précis de procédure civile du Québec, vol. 2, 4e éd. Cowansville, Qué.: Yvon Blais, 2003.

Gendreau, Paul-Arthur, et autres. L'injonction. Cowansville, Qué.: Yvon Blais, 1998.

History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Gendreau, Mailhot and Forget JJ.A.), [2002] R.J.Q. 1278, [2002] Q.J. No. 1130 (QL), affirming a decision of Crôteau J., [2001] Q.J. No. 4191 (QL). Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Gendreau, Mailhot and Forget JJ.A.), [2002] Q.J. No. 1124 (QL), affirming a decision of Viau J. Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Gendreau, Mailhot and Forget JJ.A.), [2002] Q.J. No. 1129 (QL), setting aside a decision of Bishop J., [2001] Q.J. No. 867 (QL). Appeal dismissed.

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Counsel:

Brent D. Tyler and Walter C. Elmore, for the appellants.

Benoît Belleau, for the respondents.

The following is the judgment delivered by

THE COURT:--

I. Introduction

1 This is one of three companion appeals about entitlement to minority language education, the other two being *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 238, 2005 SCC 15, and *Solski (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201, 2005 SCC 14. This appeal concerns the scope of the jurisdiction of the Administrative Tribunal of Québec ("ATQ"), its ability to consider and determine claims to constitutional entitlements, and the obligation of claimants to follow the administrative appeal process. We are in agreement with the Quebec Court of Appeal that the ATQ has this jurisdiction and that the administrative appeal process may not be bypassed. We acknowledge, however, that superior courts retain the residual jurisdiction to grant injunctive relief in certain urgent situations and to consider, in appropriate circumstances, a direct constitutional challenge to the law. For the reasons that follow, we would dismiss the appeal.

II. Background and Judicial History

2 This appeal emerged out of several disputes about entitlement to minority language education. In each case, the claimants attempted to bypass the administrative process and move the dispute to the Superior Court of Quebec. What follows is a brief review of the facts of each case and the outcomes at the Superior Court, followed by a review of the outcome of the joint appeal to the Quebec Court of Appeal.

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A. *The Casimir Case, Viau J. (Superior Court of Quebec)*

3 The appellant Edwidge Casimir, a Canadian citizen and mother of two, registered her children with the English Montreal School Board. She also applied to the Minister pursuant to s. 73(2) of the *Charter of the French language*, R.S.Q., c. C-11, for a certificate of eligibility for her children. The application was denied by the Minister's designated person on the ground that the eldest child had not received the major part of her instruction in English in Canada as required by s. 73(2). Instead of following the regular administrative appeal process, Ms. Casimir filed an "application for interlocutory and permanent declaratory and injunctive relief" in the Superior Court, asking for, *inter alia*, an order that the school board provide public instruction to her children in English and a declaration that she was a "right-holder" under s. 23(2) of the *Canadian Charter of Rights and Freedoms* and had the right to send her children to an English public school in Quebec.

4 On November 13, 2000, the Superior Court granted the Attorney General's motion to dismiss on jurisdictional grounds. In brief reasons, Viau J. ruled that the ATQ had jurisdiction to hear Ms. Casimir's case.

B. *The Zorrilla Case, Bishop J. (Superior Court of Quebec)*

5 The appellant Consuelo Zorrilla is a Canadian citizen. Her son, who was born in 1990, attended an unsubsidized English private school in Quebec from December 2000 to June 2001. Ms. Zorrilla filed an application for declaratory relief in the Superior Court, seeking a declaration that ss. 72 and 73 of the *Charter of the French language* are inconsistent with s. 23(2) of the *Canadian Charter* and are invalid to the extent that s. 73(2), in granting the right to receive instruction in English in Quebec, requires that the major part of the child's instruction in Canada be in English.

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6 On March 7, 2001, the Superior Court dismissed the Attorney General's motion to dismiss the application on jurisdictional grounds ([2001] Q.J. No. 867 (QL)). Bishop J. held that proceeding directly to the Superior Court was the appropriate recourse. One reason for his reaching this decision related to practical issues of timing and cost. Bishop J. also found that the ATQ would have had jurisdiction to hear the constitutional question only if the question had already been heard by the review committee. Since no decision was sought from the review committee, the ATQ did not have jurisdiction to hear the constitutional challenge, whereas the Superior Court did. Finally, the trial judge noted that the relief sought by Ms. Zorrilla was grounded in s. 24(1) of the *Canadian Charter*. She was seeking a formal declaration of invalidity, not only for her son, but also for other children in similar situations. The ATQ could not grant this remedy.

C. *The Okwuobi Case, Crôteau J. (Superior Court of Quebec)*

7 The appellant Ikechukwu Okwuobi is a Canadian citizen and a father of two. He applied pursuant to s. 73(2) of the *Charter of the French language* for a certificate of eligibility to permit his children to attend schools in the Lester B. Pearson School Board . His application was denied by the designated person on the ground that his eldest son had not received the major part of his instruction in English in Canada. Mr. Okwuobi appealed the decision to the review committee and filed an "application for interlocutory and permanent declaratory and injunctive relief" in the Superior Court. He asked the court to declare ss. 72 and 73 of the *Charter of the French language* invalid on the ground that they are inconsistent with s. 23(2) of the *Canadian Charter*. On September 10, 2001, the Superior Court granted the respondents' motion to dismiss on jurisdictional grounds ([2001] Q.J. No. 4191 (QL)). On the same day, the review committee dismissed Mr. Okwuobi's appeal of the administrative decision. He then appealed to the ATQ which, on December 19, [page264] 2001, reversed the review committee's decision and declared the children eligible for public instruction in English in Quebec.

8 As mentioned above, the Superior Court granted the respondents' motion to dismiss on jurisdictional grounds on September 10, 2001. Crôteau J. held that the ATQ had exclusive jurisdiction with respect to all the questions raised in Mr. Okwuobi's application. He ruled that the administrative process had not yet been exhausted and that he should therefore decline to hear Mr. Okwuobi's application. That decision was appealed to the Court of Appeal.

D. *Joined Appeal to the Quebec Court of Appeal*

9 The Quebec Court of Appeal heard the *Casimir*, *Zorrilla* and *Okwuobi* cases together , affirming the decisions in *Casimir* ([2002] Q.J. No. 1124 (QL)) and *Okwuobi* ([2002] R.J.Q. 1278) and reversing the decision in *Zorrilla* ([2002] Q.J. No. 1129 (QL)). The Court of Appeal's reasons for decision are found in *Okwuobi*.

10 The Court of Appeal considered the case law of this Court, and took the decisions in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, and *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81, as authorities for the proposition that where an administrative tribunal is given the power to hear questions of law, this includes the power to interpret and apply the *Canadian Charter*. Citing *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, the Court of Appeal concluded that a model of exclusive jurisdiction was to be preferred to one of concurrent or overlapping jurisdiction. On the basis of *Weber* and *974649 Ontario*, the Court of Appeal concluded that a "court of competent jurisdiction" is one that has jurisdiction over the parties, the subject matter of the litigation and the remedy being sought.

11 The Court of Appeal was convinced that the ATQ had jurisdiction both over the parties and over [page265] the subject matter of the litigation, in that the litigation related to the application of the *Charter of the French language*. The court thus turned to whether the ATQ could grant the remedy being sought by Mr. Okwuobi. It adopted the approach of McLachlin C.J. in *974649 Ontario*, where she developed a functional and structural approach to deciding whether a tribunal may grant the remedy being sought. In particular, McLachlin C.J. stated the following, at para. 45 :

> The question, in essence, is whether the legislature or Parliament has furnished the court or tribunal with the tools necessary to fashion the remedy sought under s. 24 in a just, fair and consistent manner without impeding its ability to perform its intended function.

The Court of Appeal also referred to the statement in *974649 Ontario*, that the "history and accepted practice of the institution" must be considered in determining whether the tribunal may grant the remedy being sought (para. 46).

12 As a result, the Court of Appeal concluded, based in particular on s. 83.4 of the *Charter of the French language* and s. 14 of the *Act respecting administrative justice*, R.S.Q., c. J-3, that the legislature intended to confer on the ATQ the power to deal with all litigation relating to the application of s. 73 of the *Charter of the French language*. The Court of Appeal found that the ATQ

has exclusive jurisdiction to interpret any law necessary for the exercise of its jurisdiction. Moreover, s. 74 of the *Act respecting administrative justice* provides that the ATQ may make decisions of an interlocutory nature in order to safeguard the rights of the parties. Finally, the Court of Appeal, referring to one of its earlier decisions, *Québec (Procureure générale) v. Barreau de Montréal*, [2001] R.J.Q. 2058, at p. 2090, pointed out that the structure of the ATQ was similar in many ways to that of a court of law.

13 The Court of Appeal accordingly held that the function and structure of the ATQ conferred exclusive jurisdiction over this matter on the ATQ and gave it the authority to grant a remedy pursuant to s. 24 of the *Canadian Charter*. The Superior Court's [page266] judgments in *Okwuobi* and *Casimir* were affirmed, while its judgment in *Zorrilla* was set aside.

III. Relevant Legislative Provisions

14 *Canadian Charter of Rights and Freedoms*

> **23.** (1)Citizens of Canada
>
> (*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> (*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
>
> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Charter of the French language, R.S.Q., c. C-11

> **72.** Instruction in the kindergarten classes and in the elementary and secondary schools shall be in French, except where this chapter allows otherwise.

...

73. The following children, at the request of one of their parents, may receive instruction in English:

(1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;

(2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada;

(3) a child whose father and mother are not Canadian citizens, but whose father or mother received [page267] elementary instruction in English in Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Québec;

(4) a child who, in his last year in school in Québec before 26 August 1977, was receiving instruction in English in a public kindergarten class or in an elementary or secondary school, and the brothers and sisters of that child;

(5) a child whose father or mother was residing in Québec on 26 August 1977 and had received elementary instruction in English outside Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received outside Québec.

However, instruction in English received in Québec in a private educational institution not accredited for the purposes of subsidies by the child for whom the request is made, or by a brother or sister of the child, shall be disregarded. The same applies to instruction in English received in Québec in such an institution after 1 October 2002 by the father or mother of the child.

Instruction in English received pursuant to a special authorization under section 81, 85 or 85.1 shall also be disregarded.

75. The Minister of Education may empower such persons as he may designate to verify and decide on children's eligibility for instruction in English under any of sections 73, 81, 85 and 86.1.

83.4. Any decision concerning a child's eligibility for instruction in English made pursuant to section 73, 76, 81, 85 or 86.1 by a designated person may, within 60 days of notification of the decision, be contested before the Administrative Tribunal of Québec.

Act respecting administrative justice, R.S.Q., c. J-3

14. The Administrative Tribunal of Québec is hereby instituted.

The function of the Tribunal, in the cases provided for by law, is to make determinations in respect of proceedings brought against an administrative authority or a decentralized authority.

Except where otherwise provided by law, the Tribunal shall exercise its jurisdiction to the exclusion of any other tribunal or adjucative body.

15. The Tribunal has the power to decide any question of law or fact necessary for the exercise of its jurisdiction.

In the case of the contestation of a decision, the Tribunal may confirm, vary or quash the contested [page268] decision and, if appropriate, make the decision which, in its opinion, should have been made initially.

24. In matters of health services and social services, education and road safety, the social affairs division is charged with making determinations in respect of the proceedings referred to in section 3 of Schedule I pertaining in particular, as regards health services and social services matters, to decisions relating to access to documents or information concerning a beneficiary, a person's eligibility for a health insurance program, the identification of a handicapped person, the

evacuation and relocation of certain persons, a permit issued to a health services or social services institution, to an organ and tissue bank, to a laboratory or to other services or an adapted work centre certificate, or decisions concerning a health professional or the members of the board of directors of an institution.

25.... Proceedings referred to in paragraphs 2.1 and 5.1 of section 3 of Schedule I shall be heard and determined by a panel of two members, one of whom shall be an advocate or notary and the other, a person well-acquainted with the field of education.

...

38. The Tribunal shall be composed of members who are independent and impartial, appointed by the Government in the number determined by the Government.

74. The Tribunal and its members are vested with the powers and immunity of commissioners appointed under the Act respecting public inquiry commissions (chapter C-37), except the power to order imprisonment.

They are also vested with all the powers necessary for the performance of their duties; they may, in particular, make any order they consider appropriate to safeguard the rights of the parties.

...

82. The president, the vice-president responsible for the division or any member designated by either shall determine which members are to take part in each sitting.

The president may, where he considers it expedient in view of the complexity of a case or importance of a matter, form a panel comprising a greater number of members than that provided for in Chapter II, but not exceeding five.

...

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107. A proceeding before the Tribunal does not suspend the execution of the contested decision, unless a provision of law provides otherwise or, upon a motion heard and judged by preference, a member of the Tribunal orders otherwise by reason of urgency or of the risk of serious and irreparable harm.

If the law provides that the proceeding suspends the execution of the decision, or if the Tribunal issues such an order, the proceeding shall be heard and judged by preference.

SCHEDULE I

3. In matters of health services and social services, education and road safety, the social affairs division hears and determines

...

(2.1) proceedings under section 83.4 of the Charter of the French language (chapter C-11);

Rules of procedure of the Administrative Tribunal of Québec, (1999) 131 G.O. II, 4122

17. Any party to a recourse may, with the authorization of the Tribunal and on the conditions it determines, implead a third party whose presence is necessary to resolve the dispute completely.

The Tribunal may, *ex officio*, order the impleading of any person whose interests could be affected by its decision.

Code of Civil Procedure, R.S.Q., c. C-25

31. *The Superior Court is the court of original general jurisdiction; it hears in first instance every suit not assigned exclusively to another court by a specific provision of law.*

751. *An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his senior officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.*

IV. Issues

[para15] Three related issues are raised in this appeal. The first concerns the scope of the ATQ's jurisdiction and whether the ATQ may deal with constitutional [page270] questions incidental to its determination of entitlement to minority language education. The second issue relates to the ATQ's remedial powers and whether its decisions concerning entitlement are binding on school boards. The third issue concerns the scope of the residual jurisdiction of superior courts in respect of injunctive relief and direct constitutional challenges.

V. Analysis

[para16] These three related issues will be dealt with as follows. First, we will review the decision-making process in respect of claims for minority language education, including the administrative appeal process. We will also review the nature and organization of the ATQ, and this review will be followed by an outline of the jurisdiction of the ATQ in respect of language matters. This review will show that the legislature has granted the ATQ the power to consider and decide legal issues, including constitutional questions, and that the ATQ cannot therefore be bypassed in favour of the Superior Court. Second, we will consider the extent to which the ATQ has the necessary remedial authority to deal with incidental constitutional questions, and will discuss whether its decisions are binding on school boards. We will end our analysis by briefly discussing the residual authority of superior courts to issue injunctive relief in urgent situations and to rule on direct constitutional challenges to a legislative scheme.

A. The Decision-Making Process for Minority Language Education Claims

17 Section 72 of the *Charter of the French language* requires that instruction in kindergarten classes and in elementary and secondary schools, in public and subsidized private institutions, be in French. Exceptions to this rule exist, most notably for our purposes in s. 73 of the same statute. The parents of a child who seek to avail themselves of these exceptions must apply to persons designated by the Minister of Education under s. 75 of [page271] the *Charter of the French language*. These designated persons decide on eligibility for instruction in English.

18 The initial decision of the designated person is subject to review. At the time relevant to these cases, the initial appeal from a decision of a designated person was to a review committee under ss. 82 and 83 of the *Charter of the French language*, and then to the ATQ under s. 83.4. However, ss. 82 and 83 were repealed effective October 1, 2002, meaning that now any decision concerning a child's eligibility for instruction in English made by a designated person pursuant to ss. 73, 76, 81, 85 or 86.1 may, within 60 days of notification of the decision, be appealed directly to the ATQ (see s. 83.4 of the *Charter of the French language*).

19 The administrative process thus requires that before turning to the Superior Court to gain access to minority language education in Quebec, a claimant must first apply to a designated person for a certificate of eligibility and, if necessary, appeal that decision to the ATQ. Following a

determination by the ATQ, it is possible for the claimant to seek relief from the Superior Court.

B. *The Nature and Organization of the ATQ*

20 The ATQ was instituted by the *Act respecting administrative justice* which states that the function of the ATQ is, where provided by law, to make determinations in respect of proceedings brought against an administrative or decentralized authority.

21 The Tribunal consists of four divisions: (1) the social affairs division, (2) the immovable property division, (3) the territory and environment division, and (4) the economic affairs division. As will be shown below, the ATQ's jurisdiction in respect of minority language education is the responsibility of the social affairs division.

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22 Proceedings are heard by a panel whose members are selected based on the nature of the appeal. Proceedings in respect of minority language education claims are heard by a two-member panel, one of whose members is to be an advocate or notary and the other a person well acquainted with the field of education (s. 25). The Act also allows for the formation of a panel of up to five members where a case is particularly complex or important (s. 82). Section 38 requires that the ATQ be composed of members who are independent and impartial. The ATQ also has its own rules of evidence and procedure (Chapter VI).

23 All told, the ATQ is a highly sophisticated tribunal, similar in many ways to Canadian courts of law. The following comment by Dussault J.A. of the Quebec Court of Appeal in *Québec (Procureure générale) v. Barreau de Montréal*, at p. 2090, speaks to this high degree of sophistication:

> [TRANSLATION] ... the ATQ fulfils an exclusively jurisdictional function that, despite the stated objectives of promptness and accessibility, requires the implementation of procedures similar to the procedures of courts of law. Next, the ATQ has powers ordinarily conferred on courts of law, such as the powers to decide constitutional questions and to assess the grounds for an application for administrative secrecy. Finally, and most importantly, the ATQ is required to decide a very large number of cases involving the financial or political interests of the state as a party to the case. Taken as a whole, these factors seem to me to justify placing the ATQ on the spectrum of administrative tribunals, at a higher level as regards the requirement of judicial independence of its members.

C. *Jurisdiction of the ATQ in Respect of Minority Language Education*

24 We turn now to the jurisdiction of the ATQ in respect of minority language education claims. Jurisdiction over claims of this type is essentially derived from the interplay between s. 14 of the *Act respecting administrative justice* and s. 83.4 of the *Charter of the French language*.

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25 Section 14 of the *Act respecting administrative justice* sets out the scope and the exclusive nature of the jurisdiction of the ATQ:

> **14.** The Administrative Tribunal of Québec is hereby instituted.
>
> The function of the Tribunal, in the cases provided for by law, is to make determinations in respect of proceedings brought against an administrative authority or a decentralized authority.
>
> Except where otherwise provided by law, the Tribunal shall exercise its jurisdiction to the exclusion of any other tribunal or adjudicative body.

According to s. 14, the ATQ has exclusive jurisdiction to make determinations in respect of proceedings brought against an administrative authority. The term "administrative authority" includes the designated person in matters relating to entitlement to minority language education. When s. 14 of the *Act respecting administrative justice* is read in conjunction with s. 83.4 of the *Charter of the French language*, it is clear that the Quebec legislature intended to confer on the ATQ exclusive jurisdiction over all disputes relating to s. 73 of the *Charter of the French language*. Section 83.4 reads as follows:

> **83.4.** Any decision concerning a child's eligibility for instruction in English made pursuant to section 73 ... by a designated person may, within 60 days of notification of the decision, be contested before the Administrative Tribunal of Québec.

26 The respondents correctly note that s. 14 of the *Act respecting administrative justice* and s. 83.4 of the *Charter of the French language* effectively round out, or complete, the jurisdiction the ATQ possesses under s. 24 of the *Act respecting administrative justice* in combination with s. 3, para. 2.1 of Schedule I to that Act. Section 24 states that in matters relating to education, *inter alia*, the social affairs division of the ATQ is charged with making determinations in respect of the proceedings referred to in s. 3 of Schedule I. Section 3, para. 2.1 of Schedule I states that in matters relating to education, the social affairs division hears and determines "proceedings under section 83.4 of the Charter of the French language".

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27 The *Act respecting administrative justice* also speaks directly to the powers the ATQ is meant to possess, in these cases, when adjudicating on minority language education claims. Most importantly, for our purposes, the ATQ has the power, under s. 15, to decide any question of law or fact necessary for the exercise of its jurisdiction. It "may confirm, vary or quash the contested decision and, if appropriate, make the decision which, in its opinion, should have been made initially" (s. 15). It is also significant that under s. 74, the ATQ and its members "are ... vested with all the powers necessary for the performance of their duties", including the power to "make any order they consider appropriate to safeguard the rights of the parties". The Quebec legislature has granted a broad range of remedial powers to the ATQ. Moreover, based on the explicit wording of s. 14, the Quebec legislature intended the Tribunal's jurisdiction to be exclusive ("the Tribunal shall exercise its jurisdiction to the exclusion of any other tribunal or adjudicative body").

D. *The Power to Consider and Decide Constitutional Questions -- The Principles Laid Down in Martin and in Paul*

28 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. These cases provide a more direct route to the result reached in the instant cases by the Court of Appeal and two of the three trial judges.

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29 In *Martin*, the question was whether the Nova Scotia Workers' Compensation Appeals Tribunal ("Appeals Tribunal"), an administrative tribunal set up to hear appeals from decisions of the Workers' Compensation Board of Nova Scotia, had jurisdiction to decline to apply certain legislative provisions to the appellants on the ground that the provisions violated the *Canadian Charter*. This Court held that the Appeals Tribunal did have jurisdiction to consider the constitutionality of the impugned provisions. In so holding, Gonthier J. "reappraised and restated" (at para. 3) the rules concerning the jurisdiction of administrative tribunals to apply the *Canadian Charter* that had previously been established by this Court in *Douglas/Kwantlen Faculty Assn.*, *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.

30 Gonthier J. stated, at para. 3, that where an administrative tribunal has either explicit or implied jurisdiction to decide questions of law arising under a legislative provision, it is presumed that the tribunal also has concomitant jurisdiction to decide on the constitutional validity of that provision. The only way to rebut this presumption is to show that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law. Gonthier J. discussed at length the policy reasons for allowing administrative tribunals to deal with constitutional matters (see paras. 27-32 of *Martin*). We will not reiterate them here.

31 In *Martin*, the Court created a general standard for determining whether a particular administrative tribunal can decline to apply a provision of its enabling statute on the ground that the provision violates the *Canadian Charter*. First of all, it must be determined whether the administrative tribunal has jurisdiction, express or implied, to decide [page276] questions of law arising under an impugned provision (para. 35). Furthermore, as this Court noted in *Martin*, at para. 35, "[t]he question is not whether Parliament or the legislature intended the tribunal to apply the *Charter*." The only question is whether the tribunal can decide any question of law (para. 36).

32 In the cases at bar, the ATQ has explicit jurisdiction, under s. 15 of the *Act respecting administrative justice*, to decide questions of law. This is a clear, unequivocal and express grant of jurisdiction to decide questions of law. If, as here, there is explicit jurisdiction to determine questions of law, a court need not go on to consider whether such jurisdiction is to be implied from the legislative scheme as a whole (*Martin*, at para. 51). As a result, the presumption from this point on is that the ATQ can consider and decide constitutional questions.

33 Once a presumption has been raised that the tribunal can decide questions of law, the burden falls on the party who alleges that the administrative body lacks jurisdiction to apply the *Canadian Charter* to rebut the presumption (*Martin*, at para. 42). Gonthier J. laid out certain ways in which this presumption can be rebutted. He suggested that nothing less than an explicit withdrawal of authority to decide constitutional questions, or a clear implication of such intent, would suffice (at para. 42):

> 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 [page277] that the initial

decision maker was not intended to decide constitutional questions.

34 No such express conferral of jurisdiction on another administrative body, or on a court for that matter, can be found in the relevant legislation in this appeal. In fact, the explicit wording of s. 14 of the *Act respecting administrative justice*, the ATQ's constituting statute, confers exclusive jurisdiction on the ATQ to decide on minority language education claims brought before it on appeal. This was made clear above and need not be addressed again. Nor does the legislative scheme give rise to an implication to the effect that more complex issues, such as *Charter* issues, should be decided by a different adjudicative body, such as the Superior Court. The implication is to the contrary. Section 82 authorizes the ATQ to create panels of up to five members in order to deal with more complex issues. This implies that even complex questions of law were meant to be dealt with by the ATQ. Even more revealing in this respect, the overall structure of the ATQ, that of a highly sophisticated, quasi-judicial body, indicates that the legislature intended to have the ATQ deal with all legal issues, big and small. Finally, s. 112 explicitly provides for the proper procedure to follow when raising a constitutional ground before the ATQ. Based on the revised approach from *Martin*, the only conclusion that can be drawn is that the ATQ has the capacity to consider and decide constitutional questions, including the conformity of s. 73 of the *Charter of the French language* with s. 23 of the *Canadian Charter*.

35 The appellants put forth a further argument. They argue that, owing to the special nature of the rights conferred by s. 23 of the *Canadian Charter*, an ordinary provincial statute like the *Charter of the French language* cannot confer jurisdiction over the determination of the status of s. 23 rights-holders on an administrative tribunal to the exclusion of the Superior Court. Again, the recent case law of this Court, this time in *Paul*, puts to rest this portion of the appellants' submissions.

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36 In *Paul*, the B.C. Ministry of Forests seized four logs in the possession of Mr. Paul, a registered Indian. Paul intended to use the wood to build a deck for his home, and he asserted that he had an aboriginal right to cut timber for house modification. He thus argued that s. 96 of the *Forest Practices Code*, a general prohibition against cutting Crown timber, did not apply to him. The Forest Appeals Commission decided that it had jurisdiction to hear and determine aboriginal rights issues. The British Columbia Supreme Court agreed, but its decision was reversed by a majority of the Court of Appeal. In this Court, Bastarache J. applied the same reasoning as in *Martin* and ruled that since the Forest Appeals Commission was empowered to hear questions of law, it could hear and decide constitutional questions (paras. 39 and 41). He further reasoned that questions relating to s. 35 of the *Constitution Act, 1982* are not distinct from other constitutional matters in this respect. Quoting McLachlin J. (as she then was) in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, Bastarache J. stated the following, at para. 36: "Section 35 is not, any more than the *Charter*, 'some holy grail which only judicial initiates of the superior courts

may touch'."

37 The same legal reasoning can be applied to the cases at bar. Section 23 is not within the exclusive province of the courts. The ATQ is empowered to decide questions of law. It is therefore empowered to consider and decide constitutional questions. This includes the power to consider s. 23, and to decide whether s. 73 of the *Charter of the French language* restricts the scope of s. 23 rights. The Forest Appeals Commission could rule on s. 35 matters in *Paul*. Here, the ATQ may rule on s. 23 matters that come before it.

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E. *The Appellants Could Not Bypass the ATQ in Favour of the Superior Court*

38 We are therefore of the view that the appellants did not have the right to bypass the ATQ by seeking injunctive and declaratory relief in the Superior Court. The ATQ clearly has jurisdiction to hear appeals from decisions of the designated person and, in the instant cases, from the review committee in respect of entitlement to minority language education. Moreover, the Quebec legislature intended this jurisdiction to be exclusive. Aside from certain specific exceptions to be discussed below, this Court, and all courts, should respect the clear intent of the legislature.

39 The exclusive jurisdiction of the ATQ in this respect is further confirmed by art. 31 of the *Code of Civil Procedure*, R.S.Q., c. C-25, which states that the Superior Court is the court of original jurisdiction, except in matters in which original jurisdiction is assigned exclusively to another court by a specific provision of law. That is in fact the situation in the cases at bar, as the Quebec legislature has specifically assigned the jurisdiction in issue to the ATQ. Article 31 reads as follows:

> **31.** The Superior Court is the court of original general jurisdiction; it hears in first instance every suit not assigned exclusively to another court by a specific provision of law.

40 The ATQ has been granted exclusive jurisdiction to hear appeals in respect of entitlement to minority language education. The administrative appeal process should be respected.

F. *Remedial Authority of the ATQ, and the Binding Effect of Its Decisions on School Boards*

41 The appellants argue that even if the ATQ has jurisdiction over the subject matter at hand, namely the rights of claimants under s. 23, it still does not have the ability to provide the remedies being sought by the appellants, nor does it have jurisdiction over the English school boards in

question. The ATQ lacks the power, say the appellants, to grant the remedies being sought. First, it cannot issue a [page280] formal declaration of invalidity. Second, it lacks jurisdiction to grant injunctive relief, although the appellants acknowledge that the ATQ may issue a safeguard order under s. 74 of the *Act respecting administrative justice*.

42 As for the English school boards, the appellants argue that it is evident from the provisions of the *Charter of the French language* that they are not parties before the ATQ. Only the parents and the Minister of Education are parties. The appellants thus argue that in circumstances where rights-holders seek to enforce their right to have their children receive public instruction in English by way of an order against an English school board, the ATQ is powerless to issue such an order.

43 The respondents counter that the ATQ has all the remedial powers necessary to exercise its jurisdiction. Section 74 vests the Tribunal and its members with "all the powers necessary for the performance of their duties; they may, in particular, make any order they consider appropriate to safeguard the rights of the parties". The respondents cite, as one particular manifestation of this broad remedial power, the power granted under s. 107 of the *Act respecting administrative justice* to make a motion before a member of the Tribunal to suspend the execution of a contested decision by reason of urgency or serious and irreparable harm:

> **107.** A proceeding before the Tribunal does not suspend the execution of the contested decision, unless a provision of law provides otherwise or, upon a motion heard and judged by preference, a member of the Tribunal orders otherwise by reason of urgency or of the risk of serious and irreparable harm.
>
> If the law provides that the proceeding suspends the execution of the decision, or if the Tribunal issues such an order, the proceeding shall be heard and judged by preference.

44 We are in substantial agreement with the respondents. On the question of remedies, the appellants correctly point out that the ATQ cannot issue a formal declaration of invalidity. This is not, in our opinion, a reason to bypass the exclusive jurisdiction of the Tribunal. As this Court stated in *Martin*, the [page281] constitutional remedies available to administrative tribunals are indeed limited and do not include general declarations of invalidity (para. 31). Nor is a determination by a tribunal that a particular provision is invalid pursuant to the *Canadian Charter* binding on future decision makers. As Gonthier J. noted, at para. 31: "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."

45 That said, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the ATQ. If the ATQ finds a breach of the *Canadian Charter* and concludes that the provision in question is not saved under s. 1, it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force (

Martin, at para. 33). Such a ruling would, however, be subject to judicial review on a correctness standard, meaning that the Superior Court could fully review any error in interpretation and application of the *Canadian Charter*. In addition, the remedy of a formal declaration of invalidity could be sought by the claimant at this stage of the proceedings.

46 It should also be noted on the topic of remedies that, while it is true that only the Superior Court or a judge thereof may issue an injunction (this will be discussed further below), the ATQ has nevertheless been granted a broad remedial power under ss. 74 and 107 of the *Act respecting administrative justice*. The broad wording of s. 74 indicates an intention on the part of the Quebec legislature to grant the ATQ the remedial authority needed to safeguard the rights of the parties. The appellants, or any other claimants before the ATQ, should attempt to exhaust the remedies available from the ATQ rather than arguing that the absence of a particular remedy requires them to circumvent the administrative process entirely.

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47 As for the question of the binding effect of a ruling by the ATQ on the English school boards, we would reiterate that the Quebec legislature has chosen to grant the ATQ exclusive jurisdiction to hear appeals concerning access to minority language education. On appeal, the ATQ will decide whether the claimant's child should be admitted to an English school board. That decision is binding on the school board even if it is not a party to the appeal. The appellants raise the hypothetical possibility that a school board not directly involved as a party to an appeal before the ATQ might refuse to obey an order of the ATQ. This is a hypothetical situation, and this Court must operate on the assumption that citizens, including those on school boards, are law-abiding and will comply with the order of a properly constituted administrative tribunal that has jurisdiction over entitlement to minority language education.

48 If, however, the hypothetical situation raised by the appellants should occur, we have already shown that the ATQ has broad remedial powers under its enabling statute. Moreover, under s. 17 of the *Rules of procedure of the Administrative Tribunal of Québec*, (1999) 131 G.O. II, 4122, the ATQ may implead a third party whose presence is necessary to resolve the dispute completely:

> **17.** Any party to a recourse may, with the authorization of the Tribunal and on the conditions it determines, implead a third party whose presence is necessary to resolve the dispute completely.
>
> The Tribunal may, *ex officio*, order the impleading of any person whose interests could be affected by its decision.

Conceivably, the ATQ could apply this provision at the request of a claimant to acquire jurisdiction

over a school board that the claimant has grounds to believe will be uncooperative. The ATQ could then make creative use of its broad remedial powers under s. 74 of the *Act respecting administrative justice* to ensure that justice is done.

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49 In the event that such a solution is not feasible, the Superior Court does have residual jurisdiction to grant injunctive relief in urgent situations. We turn now to a discussion of the residual jurisdiction of the Superior Court.

G. *The Residual Jurisdiction of the Superior Court*

50 The thrust of our judgment to this point has been to emphasize the exclusive nature of the ATQ's jurisdiction to hear appeals in respect of entitlement to minority language education. We feel it necessary, however, to mention the following two caveats relating to the Superior Court's residual jurisdiction to grant injunctive relief in urgent situations and, potentially, to hear direct constitutional challenges to a legislative scheme.

(1) Injunctive Relief in Urgent Situations

51 The legislature's intention to confer exclusive jurisdiction over the matter in issue on the ATQ should be respected to the greatest extent possible. However, the fact remains that an injunction is defined in art. 751 of the *Code of Civil Procedure* as "an order of the Superior Court or of a judge thereof". Thus, the Superior Court has exclusive jurisdiction to grant an injunction, in the strict sense of the word.

52 That said, an injunction is a discretionary remedy that courts have on many occasions declined to grant where other avenues of recourse were available (see D. Ferland and B. Emery, *Précis de procédure civile du Québec* (4th ed. 2003), vol. 2, at p. 435). We have accordingly been at pains in this judgment to emphasize the exclusive jurisdiction and broad remedial powers accorded to the ATQ. As a result, the Superior Court should exercise sparingly its discretion to award injunctive relief in minority language education claims. Such injunctive relief should be granted only to fill in the cracks in the administrative process, so to speak. In this way, injunctive relief can complement the administrative process rather than serving to weaken it.

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53 As a result, recourse to urgent injunctive relief remains possible in certain circumstances, but it should remain the rare exception, rather than the rule. Seeking injunctive relief should not be

allowed to develop into a means of bypassing the judicial process, or as P.-A. Gendreau et al. note in *L'injonction* (1998), at p. 201: [TRANSLATION] "... neither the injunction nor any other procedure may be used to short-circuit an administrative tribunal's exercise of its exclusive jurisdiction or to obtain a review of its decision ...".

(2) Direct Constitutional Challenges to the Legislative Scheme

54 Superior courts may also retain residual jurisdiction to hear direct constitutional challenges to a legislative scheme, should the proper circumstances arise. Such a challenge would have to be distinguishable from the facts of the cases at bar in which the appellants have, in effect, attempted to obtain relief (the right to minority language education) by circumventing the administrative process and bringing their claims directly to the Superior Court. That said, the residual jurisdiction of superior courts cannot be entirely ousted by the legislature, in particular where recourse to such courts is necessary to obtain an appropriate and just remedy. As Lamer J. noted in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 882:

> ... a person whose Canadian *Charter* rights have been infringed or denied has the right to obtain the appropriate and just remedy under the circumstances. A corollary which flows from this is the fundamental principle that there must always be a court available to grant, not only a remedy, but the remedy which is the *appropriate* and *just* one under the circumstances. [Emphasis in original.]

Lamer J. went on to recognize the unique nature of constitutional remedies. He noted, at p. 893, that where inferior courts are endowed by the legislature with the power to grant constitutional remedies, [page285] this delegation of remedial power cannot completely oust the jurisdiction of superior courts:

> ... a "special law" is not sufficient to oust the jurisdiction of the superior courts, for a constitutional remedy and its accessibility should not in principle be open to statutory limitation. While limitation of the remedial power to inferior courts may well be permissible, this, in my view, can only be possible if the superior court is available to fill the remedial vacuum that would result.

As H. Brun and G. Tremblay note in *Droit constitutionnel* (4th ed. 2002), at p. 187, superior courts [TRANSLATION] "theoretically have the power to review the constitutionality of legislation". This inherent power to ensure that the Constitution is adhered to necessarily requires that superior courts retain jurisdiction, where the circumstances are appropriate, to "fill the remedial vacuum" mentioned by Lamer J. in *Mills*.

55 Lamer J.'s words in *Mills* are equally applicable in a situation like the one in the cases at bar, in which remedial powers with respect to constitutional rights have been conferred by the legislature on an administrative body. Despite this conferral of remedial power, the residual, inherent jurisdiction of superior courts remains in place to provide the appropriate and just remedy

where required.

VI. Disposition

56 For the above reasons, the appeal is dismissed. The Court makes no order with respect to costs.

Solicitors:

Solicitor for the appellants: Brent D. Tyler, Montréal.

Solicitors for the respondents: Bernard, Roy & Associés, Montréal; Department of Justice, Montréal.

cp/e/qw/qllls

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.

[1978] 2 S.C.R. 662

Supreme Court of Canada

1977: May 24, 25 / 1978: January 19.

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

Constitutional law -- Provincial regulatory statute -- Legislative authority -- Censorship -- Films and theatrical performances -- Presumption of validity of provincial statute -- Essential nature of statute -- Theatres and Amusements Act, R.S.N.S. 1967, c. 304 -- British North America Act, 1867, ss. 91(27), 92(13), (16).

Civil rights -- Fundamental freedoms -- Power of legislature to determine in light of local standards what is fit for viewing on moral grounds -- Theatres and amusements Act, R.S.N.S. 1967, c. 304 -- British North America Act, 1867, ss. 91(27), 92(13), (16).

The respondent had become concerned about the wide powers of the Nova Scotia Board of Censors (also known as the Amusements Regulation Board of Nova Scotia) and, after the Board, in exercising the authority which the Theatres and Amusements Act, R.S.N.S. 1967, c. 304, purported to confer on the Board, prevented the film "Last Tango in Paris" from being exhibited in the theatres of Nova Scotia, the respondent made application for a declaration that certain sections of the Act as amended and certain regulations made thereunder were ultra vires and beyond the legislative competence of the Province of Nova Scotia. Respondent's standing to take the proceedings was confirmed (see [1976] 2 S.C.R. 265). The challenge was to the statutory provisions purporting to

authorize the Board to regulate and control the film industry within the Province of Nova Scotia according to standards fixed by the Board, on the ground that citizens of Nova Scotia are thereby denied, on moral grounds, their right to exercise their freedom of choice in the viewing of films and theatre performances which might otherwise be available to them. It was also alleged that the legislation constituted an invasion of fundamental freedoms. The questions raised on the application were reserved for the consideration of the Appeal Division, which granted the application by declaring "that the word 'prohibiting' in Sections 2(1)(b) and 2(1)(g) and subsections (2) and (3) of Section 3" of the Act and "that regulations 4, 5(1), 13, 18 and 32 made pursuant to" the Act were null and void and of no effect being ultra vires the legislature of Nova Scotia.

Held (Laskin C.J. and Judson, Spence and Dickson JJ. dissenting): The appeal should be allowed.

Per Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.: The Court cannot ignore the rule that any question as to the validity of provincial legislation is to be approached on the assumption that it was validly enacted. The Act and Regulations read as a whole were primarily directed to the regulation, supervision and control of the film business within the Province of Nova Scotia and the impugned provisions were enacted to reinforce the authority of the Board to perform that regulatory task which included the authority to prevent the exhibition of films which the Board, applying its own local standards, considers as unsuitable for viewing by provincial audiences. The impugned legislation was concerned with dealings in and the use of property (in this case films) wholly within the Province and constituted nothing more than the exercise of provincial authority over transactions wholly within the Province, i.e. the "regulating, exhibition, sale and exchange of films" irrespective of the origin of those films. Morality and criminality are not to be regarded as co-extensive. The impugned legislation was not concerned with criminality as such i.e. the creation of a criminal offence per se but rather in regulating a business within the province so as to prevent exhibitions which did not comply with the standards of propriety established by the Board. Its true object, purpose, nature and character was the regulation of a local trade. The legislation had a valid provincial purpose and therefore was valid.

That is not to say that Parliament is in any way restricted in its authority to pass laws penalizing immoral acts or conduct but simply that the provincial legislature in regulating a local trade may set its own standards which in no sense exclude the operation of the federal law.

Regulations 4 and 5(1) which provide that no theatre owner shall permit the use of any unauthorized film or theatrical performance in his theatre, Reg. 13 which prohibits advertising a performance without the permission of the Board, and Reg. 18 are of the same character as those considered in Quong Wing v. The King (1914), 49 S.C.R. 440 and therefore valid.

Regulation 32 is invalid as being virtually indistinguishable from s. 159(2) of the Criminal Code, the use of the word "indecent" being the common factor. That Regulation is however clearly severable from the balance of the Regulations and the statute and it in no way detracts from, varies or curtails the authority vested in the Board under the statute.

The validity of the legislation might also be sustained by viewing the determination of what is and what is not acceptable for public exhibition on moral grounds as a matter of a "local and private nature in the Province" within the meaning of s. 92(16) of the B.N.A. Act, and, as this is not a matter coming within any of the enumerated classes in s. 91, it is in a field in which the Legislature is free to act.

Having regard to the presumption of constitutional validity there was no basis for finding that the legislation was invalid as infringing fundamental freedoms such as freedom of association, of assembly, of speech, of the press, of other media, of conscience or religion.

Per Laskin C.J. and Judson, Spence and Dickson JJ. dissenting: The Appeal Division invalidated certain provisions of the Act and the Regulations on the basis that they invaded exclusive federal power in relation to the criminal law. The Board had refused to sanction the showing of "Last Tango in Paris" and gave no reason for rejecting it and respondent had failed in his efforts to appeal the decision to the Governor in Council. An administrative authority like the Board, which is given unfettered and unguided power and discretion to prohibit the public exhibition of a film, and whose statutory power is challenged as being unconstitutional, cannot shield its exercise of that power by refusing to disclose the grounds upon which it has acted. Such an administrative authority must act in good faith, however wide its powers and regardless of the ambit of its discretion. Further, on the constitutional side, the validity of legislation (or a power given by legislation) is not to be judged from the standpoint of matter to which it might be limited, but upon the general terms in which it is in fact couched. In this case the issues before the Court did not engage the licensing authority of the Board, did not relate to any film classification system and were not concerned with the safety or suitability of premises. The Board asserted an unlimited statutory authority to determine for the general public what films were fit for viewing. There were no criteria set by the Act and no provision distinguishing or classifying films as being fit for viewing by adults but not by children. Only Reg. 32 purports to establish any criteria, namely "indecent or improper performance". Thus what was involved was the unqualified power of the Board to determine the fitness of films for public viewing on considerations which might extend beyond the moral and include the political, the social and the religious. At its narrowest, in this case the Board asserted authority to protect public morals and to safeguard the public from exposure to ideas and images in films that it regarded as morally offensive, indecent, or probably obscene. The determination of what is decent or indecent or obscene in conduct or in a publication, what is morally fit for public viewing in films, art or in a live performance is, as such, within the exclusive power of the Parliament of Canada under its enumerated authority to legislate in relation to the criminal law. The contention that morality is not coextensive with the criminal law cannot of itself bring legislation respecting public morals within provincial competence. The federal power in relation to the criminal law extends beyond control of morality and is wide enough to embrace antisocial conduct or behaviour.

It was not enough to save the provisions of the impugned legislation that they were part of a wider legislative scheme. The provisions in question went beyond the licensing provisions and engaged the public directly. The appeal should be dismissed and the impugned provisions held ultra vires.

Cases Cited

Severn v. The Queen (1878), 2 S.C.R. 70; Reference re The Farm Products Marketing Act, [1957] S.C.R. 198; Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708; Home Oil Distributors Limited v. A.G. of British Columbia, [1940] S.C.R. 444; Caloil Inc. v. Attorney General of Canada, [1971] S.C.R. 543; Lord's Day Alliance of Canada v. A.G. of British Columbia, [1959] S.C.R. 497; Proprietary Articles Trade Association v. Attorney-General of Canada, [1931] A.C. 310; Bédard v. Dawson, [1923] S.C.R. 681; O'Grady v. Sparling, [1960] S.C.R. 804; Smith v. The Queen, [1960] S.C.R. 776; Stephens v. The Queen, [1960] S.C.R. 823; Mann v. The Queen, [1966] S.C.R. 238; Quong Wing v. The King, (1914), 49 S.C.R. 440; Johnson v. Attorney General of Alberta, [1954] S.C.R. 127, referred to.

APPEAL from a judgment of the Supreme Court of Nova Scotia, Appeal Division [(1976), 36 C.C.C. (2d) 45], to which consideration of questions raised by an application for a declaration were reserved by order of Hart J. made pursuant to s. 30(3) of the Judicature Act, 1972 (N.S.), c. 2, granting an Order declaring ultra vires certain sections of the Theatres and Amusements Act, R.S.N.S. 1967, c. 304, and certain regulations made there under. Appeal allowed, Laskin C.J. and Judson, Spence and Dickson JJ. dissenting.

Donald G. Gibson and William M. Wilson, for the appellants.
Robert Murrant, Dereck M. Jones and B. McIsaac, for the respondent.
T.B. Smith, Q.C., and M.L. Basta, for the intervenant Attorney General of Canada.
J. Polika, for the intervenant Attorney General of Ontario.
Gil Rémillard and Anne Laberge, for the intervenant Attorney General of Quebec.
Louis Lindholm, Q.C., and Paul Pearlman, for the intervenant Attorney General of British Columbia.
Hugh MacIntosh, for the intervenant Attorney General of Prince Edward Island.
W. Kenkel, Q.C., for the intervenant Attorney General of Alberta.
E.J. Ratushny, for the intervenant Canadian Civil Liberties Association.

Solicitors for the appellants: J.W. Kavanagh and Donald G. Gibson, Halifax.
Solicitors for the respondent: Boyne, Crocker, Jones & Murrant, Halifax.
Solicitor for the Attorney General of Canada: D.S. Thorson, Ottawa.
Solicitors for the Attorney General of Ontario: Soloway, Wright, Houston & Co., Ottawa.
Solicitors for the Attorney General of Quebec: G. Rémillard and Anne Laberge, Quebec City.
Solicitors for the Attorney General of British Columbia: Burke-Robertson, Chadwick & Ritchie, Ottawa.
Solicitors for the Attorney General of Prince Edward Island: Beament, Fyfe, York, Boucher, Ottawa.
Solicitors for the Attorney General of Alberta: Gowling & Henderson, Ottawa.
Solicitor for the Canadian Civil Liberties Association: E.J. Ratushny, Ottawa.

The judgment of Laskin C.J. and Judson, Spence and Dickson JJ. was delivered by

THE CHIEF JUSTICE (dissenting):-- The Attorney General of Nova Scotia appeals, with leave of this Court, from a judgment of the Appeal Division of the Nova Scotia Supreme Court declaring, by unanimous decision of the four members of the Appeal Division, that (1) it was ultra vires the Legislature of Nova Scotia to enact, by use of the word "prohibiting", s. 2(1)(b)(g) and s. 3(2) (3) of the Theatres and Amusements Act, R.S.N.S. 1967, c. 304, as amended, and (2) Regulations 4, 5(1), 13, 18 and 32, made pursuant to the Act were also ultra vires.

The issue in this appeal which gave rise to the declaration of invalidity was precipitated by the banning by the Amusements Regulation Board (a tribunal established under the aforementioned Act and known prior to May 15, 1972, as the Nova Scotia Board of Censors) of the film "Last Tango in Paris" from public viewing in theatres or other places in the Province. The ban was announced on or about January 8, 1974. No reasons were given for the prohibition and, indeed, it was one of the submissions of the Attorney General of Nova Scotia that reasons were not obligatory because there was no requirement under the Act or Regulations that the Board give reasons. The Attorneys General of Ontario, Quebec, British Columbia, Prince Edward Island and Alberta intervened to oppose the judgment in appeal and the Attorney General of Canada and the Canadian Civil Liberties Association intervened in support of the judgment.

In this Court, following the granting of leave to appeal, the constitutional question to be considered was formulated as follows by an order of June 4, 1976, amended by an order of July 5, 1976:

> Are Sections 2(1)(b), 2(1)(g), 3(2) and 3(3) of the Theatres and Amusements Act, R.S.N.S., 1967 c. 304 and Regulations 4, 5(1), 13, 18 and 32 made under the provisions of that Act, intra vires the Legislature of Nova Scotia?

Provision for interventions was also made under the order.

The present case came before this Court earlier on the question of the plaintiff's standing to challenge the constitutionality of the legislation under which the Amusements Regulation Board acted; and in sustaining the Courts below, which had rejected the challenge to the plaintiff's standing (see [1976] 2 S.C.R. 265) this Court noted that the Theatres and Amusements Act was not only a statute authorizing the licensing of theatres, film exchanges, cinematograph operators and apprentices as well as theatre performances (including, by definition, moving picture performances or exhibitions) and envisaging too regulations in connection therewith, but it was also a statute operating directly upon the public by empowering the Amusements Regulation Board to permit or prohibit the public exhibition of any film and any performance in any theatre. (The Act also

provided for an amusement tax payable by members of the public attending places of amusement but nothing turns on this feature of the Act.). The licensing power operated upon those engaged in the theatre business or in the film business or who worked as motion picture projectionists. As to them, s. 2(3) of the Act is explicit that "The Board may in its absolute discretion revoke or suspend any license issued under the authority of this Act or of the regulations". Whether the Board's licensing control is exercisable in terrorem with respect to any particular film which an exhibitor or theatre operator may wish to show for public viewing is not a question that arises here. Clearly, the Board's censorship authority, given by s. 3(2)(3) of the Act, is an overriding authority, and in this respect engages the interests of members of the public beyond the interests of exhibitors or theatre owners or operators as licensees under the Act.

The following are the provisions of the Act and Regulations which are relevant to the determination of the constitutional question that arises in this case:

Provisions of the Act

1 In this Act,

...

(g) "performance" means any theatrical, vaudeville, musical or moving picture performance or exhibition for public entertainment, or any other performance or exhibition for public entertainment, whether or not of the kind hereinbefore enumerated;

...

2 (1) The Governor in Council may from time to time make regulations for or in relation to or incidental to any one or more or to any part or parts of any one or more of the following matters:

(a) the licensing and regulating of theatres and places of amusement;

(b) regulating and licensing or prohibiting any performance or performances in a theatre or theatres, and any amusement or amusements or recreation or recreations in a place or places of amusement, and any amusement or amusements, recreation or recreations for participating or indulging in which by the public or some of them, fees are charged by any amusement owner;

(c) the construction, use, safety, inspection and supervision of theatres;

(d) the licensing, using and operating of cinematographs;

(e) prescribing the terms and conditions under which cinematographs shall be operated;

(f) the licensing, operating and defining of film exchanges;

(g) prohibiting or regulating the exhibition, sale, lease, and exchange of films;

(h) the examining, regulating and licensing of cinematograph operators and apprentices

(i) prescribing the terms and conditions under which films shall be exhibited, sold, leased and exchanged;

(j) prescribing the term or period during which any class of license shall be in force;

(k) prescribing and regulating the fees, including methods for ascertaining, calculating or determining the fees to be paid for licenses, and for examinations of cinematograph operators, and for examinations of films;

(l) prescribing by whom licenses shall be issued ...

...

(3) The Board may in its absolute discretion revoke or suspend any license issued under the authority of this Act or of the regulations.

3

(1) ...

(2) The Board shall have power to permit or to prohibit

(a) the use or exhibition in Nova Scotia or in any part or parts thereof for public entertainment of any film;

(b) any performance in any theatre;

(c) any amusement in a place of amusement or any amusement or recreation for participating or indulging in which by the public or some of them fees are charged by any amusement owner.

(3) Any power mentioned in subsection (2) may be exercised by the Board, notwithstanding that the Board has previously permitted the use or exhibition of the film, or that a license respecting the theatre is in force.

(4) There shall be an appeal from the Board to the person, body or court designated, and subject to the conditions prescribed by regulation of the Governor in Council.

...

8 Any person who violates this Act or who violates any of the regulations made under this Act, shall be liable to a penalty of not less than twenty dollars or more than two hundred dollars.

20 (1) Where the Board is satisfied after due inquiry that any film exchange or theatre owner has violated this Act or any regulations made hereunder the Board may:

(a) revoke or cancel any license of such film exchange; or

(b) revoke or cancel any license of such theatre owner; or

(c) attach to any of such licenses such terms, conditions or restrictions as it deems advisable.

...

Provisions of the Regulations

...

2. An appeal from a decision of the Board shall be to the Governor in Council.

3. (1) No theatre owner shall give any performance in his theatre unless he holds in respect of the theatre a license which is in force.

...

4. No theatre owner shall permit any performance to be given in his theatre unless the same is authorized under the Regulations.

5. (1) No theatre owner shall permit the use or exhibition in his theatre of any film which has not been authorized by the Board.

...

13. No person shall advertise any performance unless the permission of the Board has first been obtained.

16. (1) No 35 mm film exchange shall carry on business in the Province unless it holds a license which is in force....

...

18. (1) No film shall be used or exhibited in the Province unless the film has been submitted to the Board and the Board has authorized the use or exhibition thereof.

(2) The Board may authorize or prohibit the use or exhibition of any film

or may authorize the use of any film with such changes as it may direct. No film shall be so changed without the consent of the film exchange.

(3) The Board shall give a certificate in respect of every film which it has authorized for use or exhibition in the Province.

(4) The Board may at any time or from time to time re-examine any film and may prohibit the use or exhibition of any film which it has previously authorized for use or exhibition or may permit its use or exhibition with such further changes as the Board may direct.

...

(5) No film exchange shall use, exhibit, sell, lease or exchange any film unless a certificate of the Board has been issued in respect thereof and any film which is used, exhibited, sold, leased or exchanged in violation of this regulation may be confiscated by the Board.

...

32. (1) No theatre owner or amusement owner shall permit any indecent or improper performance in his theatre or place of amusement.

(2) No performer shall take part in any indecent or improper performance.

(3) The Board may from time to time define what constitutes an indecent or improper performance within the meaning of these Regulations.

The ground upon which the members of the Appeal Division proceeded in invalidating certain provisions of the Act and Regulations was, simply stated, that they invaded exclusive federal power in relation to the criminal law. MacDonald J.A., who delivered the principal set of reasons, noted that the Appeal Division was sitting as a Court of first instance by reason of a reference of the constitutional issue to it by Hart J. pursuant to s. 30(3) of the Judicature Act, 1972 (M.S.), c. 2. Factually the situation was that the Board had refused to sanction the showing of the film "Last Tango in Paris"; that it gave no reason for rejecting it and the plaintiff failed in his efforts to appeal the decision to the Governor in Council. The learned Justice of Appeal said in his reasons that "it appears to be common ground between the parties that the Board has never given reasons for prohibiting the showing of any film nor has the Board ever publicly stated the guidelines, if any, it follows in considering films". He noted that there were statutory criteria in comparable legislation

in other Provinces, these being (as he said) "of the usual 'sex, morals and violence' type that are normally associated with film censorship"; however, in the present case, the censorship criterion, being left to the Board to determine, could be much wider and encompass political, religious and other matters".

Cooper J.A. was of the opinion that it was clear from the material before the Court that the film was placed in the rejected classification because it was considered by the Board to offend against acceptable standards of morality. The only material before the Court consisted of various affidavits and of letters exchanged between counsel for the parties. There were affirmations in some of the affidavits of belief that the film was banned because offensive to public morality and because it was obscene. However, the Chairman of the Board, although swearing an affidavit, did not disclose in it any reason for the ban and counsel for the Board and for the Attorney General refused in an answering letter to assign any reason for the ban when asked directly by counsel for the respondent to provide the reason. MacKeigan C.J.N.S. said flatly that "censorship of this type is obviously directed at obscenity and other immoral exhibitions".

An administrative authority like the Board, which is given unfettered and unguided power and discretion to prohibit the public exhibition of a film, and whose statutory power in that respect is challenged as being unconstitutional, cannot shield its exercise of that power by refusing to disclose the grounds upon which it has acted. Although counsel for the Attorney General of Nova Scotia stated in the course of his submissions that there was no limit to the Board's power to prohibit, his proposition is incorrect on administrative law grounds as well as on constitutional law grounds. It is enough, on the administrative side, to offer the reminder that an administrative authority must act in good faith, however wide its powers and regardless of the ambit of its discretion: see Roncarelli v. Duplessis [[1959] S.C.R. 121]. On the constitutional side, there is the principle laid down by Kellock J. in Saumur v. Quebec and Attorney General of Quebec [[1953] 2 S.C.R. 299], at p. 339 where, speaking in relation to a Quebec city by-law which similarly gave unfettered and unguided discretion (to the Chief of Police) to refuse or grant permission to distribute pamphlets in the streets of the city, he said of the by-law:

> Its validity is not to be judged from the standpoint of matters to which it might be limited, but upon the completely general terms in which it in fact is couched.

It is apt in this connection to refer to a preceding paragraph of Kellock J.'s reasons because they illuminate the issue raised here by the generality of the statute and the refusal of the Board to be candid about its exercise of authority. He says this (at p. 338):

> Being perfectly general in its terms and setting no standard by which the official it names is to be governed in granting or refusing licences, the by-law can be used, as it has been, to deny distribution of its literature to one religious denomination, while granting that liberty to another or others. The by-law is equally capable of being applied so as to permit distribution of the literature of

> one political party while denying that right to all others, or so as to refuse to allow the selling in the streets of some newspapers while permitting others. In any or all of these cases, the same physical acts would be involved occasioning the same degree of obstruction, if obstruction there would be. Nothing more is needed to demonstrate, in my opinion, that such a by-law was not enacted "in relation to" streets but in relation to the minds of the users of the streets.

A more recent instance of this approach, although not arising in a strictly constitutional context, is seen in the decision of this Court in City of Prince George v. Payne [[1978] 1 S.C.R. 458]. There the question was whether the City could lawfully refuse a business licence to a so-called sex shop under the broad mandate of the applicable British Columbia Municipal Act which, as here, contained no guidelines or standards but provided only that a licence or a renewal of licence shall not be unreasonably refused. This Court held, inter alia, that the City exceeded its powers in exercising its licensing authority to prohibit wholesale a particular business, a particular land use.

The issues before this Court in the present case do not engage the licensing authority of the Amusements Regulation Board, they do not relate to any film classification system, they are in no way concerned with the safety or suitability of premises in which films are sought to be exhibited or presented. The only inference that can be, indeed must be, drawn from the bare facts on the record is that the Board presumes to protect the general public from exposure to certain kinds of films, to insulate members of the public from viewing those films because, in the Board's allegedly unchallengeable judgment, the general public should not see them. Put another way, the Board asserts an unlimited statutory authority to determine for the general public what films are fit for public viewing.

The challenged provisions of the Act authorize regulations for (1) regulating and licensing or prohibiting any performance (which, as defined, includes film showings) and (2) prohibiting or regulating the exhibition of films. They go on to empower the Board to permit or to prohibit the exhibition of any film and, indeed, to prohibit notwithstanding a previous permission to exhibit. The Regulations that were attacked forbid theatre owners to permit any performance unless it has been authorized under the Regulations and, similarly, forbid any theatre owner to permit exhibition of any film in his theatre which has not been authorized by the Board. These are supplementary provisions to the Board's power to permit or prohibit and are fed by Regulation 18 which requires submission of films to the Board and Board authorization for their use or exhibition. Under that Regulation, the Board may authorize or prohibit use or exhibition of a film or may authorize use with directed changes. Regulation 32 forbids any theatre owner to permit "any indecent or improper performance in his theatre", the Board being left to define what those terms mean. The sanction for any" breach of the Act or Regulations by any person is a moneta;y penalty and also revocation or cancellation of licence if the offender is a licence holder, thus emphasizing the Board's complete control over the exhibition of films in the Province. One other Regulation was invalidated by the judgment below, namely, Regulation 13, forbidding the advertising of any performance without the

prior permission of the Board. It too reinforces the prohibitory authority of the Board over the exhibition of films.

There are no criteria fixed by the Statute upon which the Board is required to act, no provision distinguishing or classifying films as being fit for viewing by adults but not by children. Only Regulation 32 purports to establish criteria but they are at large, namely "indecent or improper performance" as the Board may define; and although they are addressed to theatre owners and amusement owners they relate directly to the general public's opportunity to view films that are sought to be exhibited. All of this is by way of prior determination, by way of anticipatory control of public taste.

Nova Scotia is not the only Province where censorship of films is left at large to a tribunal upon whose judgment the public is required to rely as to what may or may not be seen. The position is the same in Ontario, which was the first Province to enact film censorship legislation (see 1911 (Ont.), c. 73): see now The Theatres Act, R.S.O. 1970, c. 459, am. 1972, c. 1, s. 56. The arbitrary power of the Ontario Board of Censors is qualified only by a right of appeal to the Minister of Consumer and Commercial Relations who is likewise left without criteria, there being none under the Statute and there being no regulations. The Ontario Statute envisages, however, a classification system since s. 24(1) concerns signs or advertising referable to the classification of a film as adult or restricted entertainment, and under s. 21(4) persons "apparently under eighteen years of age" are not permitted to purchase tickets or to be granted admission to a theatre exhibiting a film classified as restricted entertainment. In Alberta, the Amusements Act, R.S.A. 1970, c. 18, empowers a board of censors to permit or prohibit the exhibition of any film in Alberta. Classification of films may be prescribed by regulation, and apart from certain exemption from censorship by the responsible Minister in favour of an educational organization, all films to be shown in Alberta must have a stamped approval of the censors. In New Brunswick, under the Theatres, Cinematographs and Amusements Act, R.S.N.B. 1973, c. T-5 the New Brunswick Film Classification Board is empowered to prohibit the exhibition of any film or any performance in a theatre "for cause", a term left to ad hoc definition by the Board.

In those Provinces where criteria were set out in film censorship legislation, general terms were used in giving direction to film censors to determine the fitness of films for public viewing. For example, they were to determine whether the films depicted "scenes of an immoral or obscene nature" or suggested "lewdness or indecency" or were "injurious to the morals of the city or any citizen thereof" or offered "evil suggestions to the minds of children" or were against the public welfare or likely to offend the public. These terms were found in the early legislation of Manitoba, British Columbia, Saskatchewan and Newfoundland: see Jewett, Censorship of Movies for Canadian Television (1972), 30 Fac. of Law Rev. (U. of T.), 1, at pp. 6 et seq. Newfoundland still retains as the criteria for "summarily" prohibiting the exhibition of any film whether the Board of Censors considers it to be "injurious to the morals of the public, or against the public welfare or offensive to the public": see The Censoring of Moving Pictures Act, R.S. Nfld. 1970, c. 30.

In the other Provinces just mentioned, significant changes have occurred in the past few years in their censorship legislation. In Manitoba, The Amusements Act, R.S.M. 1970, c. A70 was amended by 1972 (Man.), c. 74 to substitute a film classification board for the previous censor board, and the power given to the latter to permit or prohibit the exhibition of any film is replaced by power to classify and to control and regulate the advertising of films. The classification basis is set out in s. 23(2) as follows:

> 23 (2) The board shall
>
> (a) classify any film or slide which in its opinion is unsuitable for viewing by children or by a family by reason of sex, nudity, violence, foul language or other reason, in such a manner that the film or slide shall be restricted to viewing only by persons eighteen years of age and over; and
> (b) ensure that all classifications made by it are properly advertised by the owner or operator of the place of amusement where the film or slide is proposed to be exhibited, in such manner as the board may require.

In British Columbia, a new Act, the Motion Pictures Act, 1976 (B.C.), c. 27 provides for the appointment of a film classification director to whom films must be submitted for approval and he is required to classify every film which he approves for exhibition under one of three classifications; (1) general, suitable for all persons; (2) adult, unsuitable for or of no interest to persons under age 18; (3) restricted, suitable only for persons age 18 or over. There are no criteria for classification in the Act which gives the director power to order, as a condition of approval, the cutting or otherwise from the film of any portion that he does not approve for exhibition. He is further empowered "subject to the Act and regulations, to approve, prohibit or regulate the exhibition of any film in the Province".

In Saskatchewan, under The Theatres and Cinematographs Act, 1968 (Sask.), c. 76, a Film Classification Board is established with power to approve or disapprove of films intended for exhibition in the Province, power to order removal by cutting or otherwise of any disapproved portion, and power to classify all films presented to it for review as either general, adult or restricted adult.

In Quebec, the Cinema Act, R.S.Q. 1964, c. 55, as amended by 1966-67 (Que.), c. 22 provided for the establishment of a Cinema Supervisory Board in place of a Board of Cinema Censors, and whereas the latter was empowered without qualification to examine films and to permit or deny their use in the Province, the former was empowered (under the 1967 amending legislation aforementioned) to permit a film to be shown "if in its opinion its showing is not prejudicial to public order or good morals"; and, in addition, all authorized showings were to be by

way of classification under either (1) film for all; (2) film for adolescents and adults (spectators at least 14 years of age); (3) film for adults only (spectators at least 18 years of age). Before the 1967 amendment, the Act was known as the Moving Picture Act, and the Board of Censors thereunder was given authority under the Publications and Public Morals Act, R.S.Q. 1964, c. 50 to examine at the request of the Attorney-General, any periodical in order to determine whether any illustration therein was an immoral one within the Act which defined "immoral illustration" as any drawing, photograph, picture or figure which evokes real or fictitious scenes of crime or of the habitual life of criminals, or morbid or obscene situations or attitudes, tending to corrupt youth and pervert morals. Upon an order being made by the Board that any periodical contains an immoral illustration, and upon the posting of the order as provided by the Act, the periodical involved, subsequent copies included, could no longer be the object of ownership or possession, a type of sanction which was applied to slot machines under the provincial legislation held to be invalid as an invasion of the federal criminal law power in Johnson v. Attorney-General of Alberta [[1954] S.C.R. 127].

I mention the Publications and Public Morals Act because it was considered and held ultra vires by Batshaw J., Quebec Superior Court, in Regina v. Board of Cinema Censors, ex parte Montreal Newsdealers Supply Co. Ltd. [(1967), 69 D.L.R. (2d) 512], a judgment relied on in opposition to the proponents of the Nova Scotia Theatres and Amusements Act. Batshaw J. came to the conclusion, in a lengthy review of the legislation and of a large number of cases put forward in its support, that there was no valid provincial object served by the legislation, unlike such cases in this Court as O'Grady v. Sparling [[1960] S.C.R. 804], and Mann v. The Queen [[1966] S.C.R. 238], but, rather, it dealt with public morals in an aspect falling within the federal criminal law power and, moreover, the federal Criminal Code applied in the very situation before the Court.

In 1975, Quebec replaced its Cinema Act by a new statute similarly named: see 1975 (Que.), c. 14. It goes beyond censorship and deals, inter alia, with the promotion of a Quebec film industry. I need only refer here to those of its provisions which relate to censorship. The new Act retains the classification system found in the superseded Act but the provision in the former Act that a film may be shown if it is not prejudicial to public order and good morals is gone. Instead, there are provisions governing the advertising of films and requiring approval of such advertising, such approval depending, under s. 29, on the film classification director's opinion that the advertising is not likely to mislead the viewing public and is not contrary to public order, good morals or common decency.

I have referred to provincial censorship legislation in the other Provinces not to pass any judgment on any of it but simply to show the various ways in which movie censorship is being handled in the various Provinces, the more recent legislation having moved to a classification scheme and to advertising control. The former is not involved in the present case and the latter in only a supplementary way.

What is involved, as I have already noted, is an unqualified power in the Nova Scotia Board to determine the fitness of films for public viewing on considerations that may extend beyond the

moral and may include the political, the social and the religious. Giving its assertion of power the narrowest compass, related to the film in the present case, the Board is asserting authority to protect public morals, to safeguard the public from exposure to films, to ideas and images in films, that it regards as morally offensive, as indecent, probably as obscene.

The determination of what is decent or indecent or obscene in conduct or in a publication, what is morally fit for public viewing, whether in films, in art or in a live performance is, as such, within the exclusive power of the Parliament of Canada under its enumerated authority to legislate in relation to the criminal law. This has been recognized in a line of cases in which, beginning with the seminal case of Attorney-General of Ontario v. Hamilton Street Rwy. [[1903] A.C. 524], (where it was said that it is the criminal law in the widest sense that falls within exclusive federal authority), the criminal law power has been held to be as much a brake on provincial legislation as a source of federal legislation. For example, in Switzman v. Elbling [[1957] S.C.R. 285], the supreme Court invalidated a provincial statute which not only made it illegal for the possessor or occupier of a house to use or permit it to be used to propagate communism or bolshevism (which were not defined), but also made it unlawful to print, publish or distribute any newspaper or writing propagating or tending to propagate communism or bolshevism. Fauteux J., as he then was, said this, in a passage of his reasons, at p. 320, which can equally be applied here:

> ... In this specific instance, the subject-matter of the main provision--the prohibition of Communistic propaganda--is certainly one not coming, by itself, within the class of subjects enumerated in s. 92 as being within the competence of the Legislature. Parliament alone, legislating in criminal matters, is competent to enact, define, prohibit and punish these matters of a writing or of a speech that, on account of their nature, injuriously affect the social order or the safety of the state. Such are, for example, defamatory, obscene, blasphemous or seditious libels. In such cases, the rights being encroached upon are not those of an individual entitling him to a monetary compensation. The rights encroached upon are those of society itself, involving punishment.

...

Similarly apt here is Harrell v. Montreal [[1963] Que. P.R. 89], where a by-law which forbade the display of pictures of nudes or semi-nudes on news stands without the prior approval of the Chief of Police was held invalid, especially in the light of the obscenity provisions of the Criminal Code.

It is beside the point to urge that morality is not co-extensive with the criminal law. Such a contention cannot of itself bring legislation respecting public morals within provincial competence. Moreover, the federal power in relation to the criminal law extends beyond control of morality, and is wide enough to embrace anti-social conduct or behaviour and has, indeed, been exercised in those respects.

Films have been held to fall within s. 159 of the Criminal Code, dealing with obscene

publications: see R. v. Fraser [[1966] 1 C.C.C. 110 aff'd [1967] S.C.R. 38]; R. v. Goldberg and Reitman [[1971] 3 O.R. 323]; Daylight Theatre Co. Ltd. v. The Queen [(1973), 24 C.R.N.S. 368]. Indeed, the very film, Last Tango in Paris, out of which this case arose, was the subject of a prosecution under s. 159 which was unsuccessful: see R. v. Odeon Morton Theatres Ltd. [(1974), 45 D.L.R. (3d) 224]. I draw attention as well to s. 163 of the Criminal Code dealing with the presentation or giving of immoral, indecent or obscene performances, entertainments or representations, and it seems to me that if films are within s. 159 they are a fortiori within s. 163. This is indicated in St. Leonard v. Fournier [(1956),) D.L.R. (2d) 315], where the New Brunswick Appeal Division held that a municipal theatre licensing by-law, which authorized cancellation of a licence for a moving picture theatre where an immoral, profane or indecent show or performance takes place, was invalid in the face of what is now s. 163 of the Criminal Code. The by-law provisions considered in St. Leonard v. Fournier are similar to the provisions of Regulation 32 herein coupled with the sanction of s. 20 of the Nova Scotia Act by way of cancellation of licence.

This is not a case where civil consequences are attached to conduct defined and punished as criminal under federal legislation, as in McDonald v. Down [(1939), 71 C.C.C. 179 aff'd 75 C.C.C. 404], but rather a case where a provincially authorized tribunal itself defines and determines legality, what is permissible and what is not. This, in my view, is a direct intrusion into the field of criminal law. At best, what the challenged Nova Scotia legislation is doing is seeking to supplement the criminal law enacted by Parliament, and this is forbidden: see Johnson v. Attorney-General of Alberta [[1954] S.C.R. 127], per Rand J. at p. 138 (see also St. Leonard v. Fournier, supra, at p. 320).

It was contended, however, by the appellant and by supporting intervenants that the Nova Scotia Board was merely exercising a preventive power, no penalty or punishment being involved, no offence having been created. It is true, of course, that no penalty or punishment is involved in the making of an order prohibiting the exhibition of a film, but it is ingenuous to say that no offence is created when a licensee who disobeyed the order would be at risk of a cancellation of his licence and at risk of a penalty and any one else who proposed to exhibit the film publicly would likewise be liable to a penalty. Indeed, the contention invites this Court to allow form to mask substance and amounts to an assertion that the provincial legislature may use the injunction or prohibitory order as a means of controlling conduct or performances or exhibitions, doing by prior restraint what it could not do by defining an offence and prescribing post facto punishment. This was attempted in the Ontario legislation that was considered and held unconstitutional in Attorney-General of Ontario v. Koynok [[1941] 1 D.L.R. 548] (judgment set aside on appeal on other grounds: see [1941] 1 D.L.R. 554n), legislation authorizing the Attorney-General to obtain an injunction restraining the publication of printed matter which continuously or repeatedly publishes writings that are obscene or immoral. The short answer, in any event, to the provincial contention is that given by the Privy Council in Attorney-General of Ontario v. Canada Temperance Federation [[1946] A.C.193], at p. 207 where Viscount Simon noted that "to legislate for prevention appears to be on the same basis as legislation for cure", a proposition that was applied by this Court in Goodyear Tire & Rubber Co. of Canada Ltd. v. The Queen [[1956] S.C.R. 303], at p. 309.

It does not follow from all of the foregoing that provincial legislative authority may not extend to objects where moral considerations are involved, but those objects must in themselves be anchored in the provincial catalogue of powers and must, moreover, not be in conflict with valid federal legislation. It is impossible in the present case to find any such anchorage in the provisions of the Nova Scotia Statute that are challenged, and this apart from the issue of conflict which, I think, arises in relation to ss. 159 and 163 of the Criminal Code. What is asserted, by way of tying the challenged provisions to valid provincial regulatory control, is that the Province is competent to licence the use of premises, and entry into occupations, and may in that connection determine what shall be exhibited in those premises. This hardly touches the important issue raised by the present case and would, if correct, equally justify control by the Province of any conduct and activity in licensed premises even if not related to the property aspect of licensing, and this is patently indefensible. Moreover, what is missing from this assertion by the appellant is a failure to recognize that the censorship of films takes place without relation to any premises and is a direct prior control of public taste. Bédard v. Dawson [[1923] S.C.R. 681], which was heavily relied on by the appellant, does not assist the provincial contention because there, in the view of this Court at the time, the challenged provincial legislation related to the occupation and enjoyment of premises, and it was distinguished on that account from the wider legislation that was invalidated by this Court in Switzman v. Elbling, supra. For similar reasons, the appellant can find no comfort in R. v. Telegram Publishing Co. Ltd. [(1960), 25 D.L.R. (2d) 471 (Ont.)], holding that prohibition of liquor advertising could be validly enacted as part of the scheme of control of the sale of liquor in the Province, a matter which itself fell within provincial competence. Benson and Hedges (Canada) Ltd. v. Attorney-General of British Columbia [(1975), 5 W.L.R. 32] is of the same order, and likewise does not touch the present case. Distinguishable on the same ground of a valid provincial scheme of liquor control is R. v. Skagstead and Skagstead [[1964] 2 C.C.C. 295 (Man. C.A.)], where the prohibition against being disorderly in licensed premises, operating post facto, fortified the scheme of control of liquor licensees whose licence would be in jeopardy if disorderliness was permitted on the licensed premises. Millar v. The Queen [[1954] 1 D.L.R. 148 (Man. C.A.)] was also urged by the appellant as relevant but I note that it involved a by-law against permitting gambling in licensed premises directed against the licensee, again post facto, and hence is distinguishable even if it be taken as correctly decided, there being a strong dissent in the case.

Much more relevant here than the principle sought to be applied on the basis of Bédard v. Dawson, supra, is that which is reflected in Henry Birks and Sons (Montreal) Ltd. v. Montreal [[1955] S.C.R. 799]. In invalidating provincial prohibitory legislation directed to compulsory observance of certain religious or feast days this Court made it clear that a tenuous connection with property (the operation of shops and businesses) will not save provincial legislation which is paramountly directed to religious or moral observance. Even the tenuous connection with property in the Birks case is absent here. Similarly relevant is R. v. Hayduck [[1938] O.R. 653] where provincial legislation making it an offence for a man to register at a hotel with a woman falsely held out to be his wife was struck down, nothing in the legislation touching the hotel operator.

It is not enough to save the challenged prohibitory provisions of the Nova Scotia Statute, if

they are otherwise invalid, that they are part of a legislative scheme which embraces licensing of theatres and of motion picture projectionists. As I have already noted, the provisions now challenged go beyond the licensing provisions and engage the public directly. The position here is no different from that presented in relation to federal legislation in MacDonald v. Vapour Canada Ltd. [[1977] 2 S.C.R. 134] where a provision in the Trade Marks Act characterized as unrelated to matters within federal competence, was not saved because of its alleged affinity with the general scheme of the Act.

This is not the first time that the Courts have been faced with the problem of assessing the validity of broadly-drawn provincial legislation and of determining, in line with the preferable approach in such cases, whether it can reasonably be confined to matters within provincial competence. That can properly be done in cases like Shannon v. Lower Mainland Dairy Products Board [[1938] A.C. 708] where the marketing or other regulatory scheme, although on its face susceptible of an extra-provincial application, is restricted to intra-provincial transactions. Another illustration, more germane and still outside the present case, is McKay v. The Queen [[1965] S.C.R. 798] where a municipal zoning by-law prohibiting signs on residential property was construed by the majority of this Court to be inapplicable to the posting of federal election signs, this being a matter outside of provincial competence.

For all the foregoing reasons I would dismiss this appeal and answer the constitutional question in the negative. The respondent is entitled to its costs in this Court but there will be no costs to or against any of the intervenants. In view of the conclusion to which I have come on the basis of the federal criminal law power and the exercise thereof, I find it unnecessary to consider the larger issue, raised but not pressed by the intervenant the Canadian Civil Liberties Association, of the relation of censorship to free speech and the constitutional authority in that respect of Parliament and the provincial Legislatures.

The judgment of Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ. was delivered by

RITCHIE J.:-- This is an appeal brought with leave of this Court from a judgment of the Appeal Division of the Supreme Court of Nova Scotia rendered pursuant to an application made at the instance of the respondent McNeil whose standing to initiate the proceedings in a representative capacity on behalf of other Nova Scotians was confirmed by order of this Court (see [1976] 2 S.C.R. 265).

The respondent's application was for a declaration that certain sections of the Theatres and Amusements Act, R.S.N.S. 1967 c. 304 as amended, and certain Regulations made thereunder were ultra vires and beyond the legislative competence of the Province of Nova Scotia.

The exciting cause of the application appears to have been the exercise by the Nova Scotia Amusements Regulation Board (hereinafter referred to as "the Board") of the authority which the Act purports to confer on it, to prevent a film entitled "Last Tango in Paris" from being exhibited in the theatres of Nova Scotia.

It is the statutory provisions purporting to authorize the Board to regulate and control the film industry within the Province of Nova Scotia according to standards fixed by it, which are challenged by the respondent on the ground that the citizens of Nova Scotia are thereby denied, on moral grounds, their right to exercise their freedom of choice in the viewing of films and theatre performances which might otherwise be available to them, and it is further alleged that the legislation constitutes an invasion of fundamental freedoms.

The questions raised by the application were reserved for the consideration of the Appeal Division by order of Mr. Justice Hart made pursuant to s. 30(3) of the Judicature Act, c. 2 of the Statutes of Nova Scotia, 1972, and that Division having reserved its decision granted the following Order:

> IT IS HEREBY DECLARED that the words 'prohibiting' in Sections 2(1)b and 2(1)g and subsections (2) and (3) of Section 3 of the Theatres and Amusements Act are null and void and of no effect being ultra vires the legislature of Nova Scotia.
>
> IT IS FURTHER DECLARED that regulations 4, 5(1), 13, 18 and 32 made pursuant to the Theatres and Amusements Act are null and void and of no effect being ultra vires the legislature of Nova Scotia; ...

I should say that I have had the benefit of reading the reasons for judgment prepared for delivery by the Chief Justice in which he has recited the relevant sections of the Act and of the Regulations made thereunder which relieves me of the task of reproducing them once again and at the same time enables me to refer to such sections and Regulations as I find necessary for the development of these reasons in the knowledge that they will be read in their proper context.

In all such cases the Court cannot ignore the rule implicit in the proposition stated as early as 1878 by Mr. Justice Strong in Severn v. The Queen [(1878), 2 S.C.R. 70], at p. 103, that any question as to the validity of provincial legislation is to be approached on the assumption that it was validly enacted. As was said by Fauteux J., as he then was, in the Reference re The Farm Products Marketing Act [[1957] S.C.R. 198], at p. 255:

> There is a presumptio juris as to the existence of the bona fide intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature.

When the Act and the Regulations are read as a whole, I find them to be primarily directed to the regulation, supervision and control of the film business within the Province of Nova Scotia, including the use and exhibition of films in that Province. To this end the impugned provisions are in my view enacted for the purpose of reinforcing the authority vested in a provincially appointed

Board to perform the task of regulation which includes the authority to prevent the exhibition of films which the Board, applying its own local standards, has rejected as unsuitable for viewing by provincial audiences. This legislation is concerned with dealings in and the use of property (i.e. films) which take place wholly within the Province and in my opinion it is subject to the same considerations as those which were held to be applicable in such cases as Shannon v. Lower Mainland Dairy Products Board [[1938] A.C. 708], Home Oil Distributors Limited v. A.G. of British Columbia [[1940] S.C.R. 444] and Caloil Inc. v. Attorney General of Canada [[1971] S.C.R. 543].

In the Shannon case, the Natural Products Marketing legislation was put in issue as constituting an encroachment on "the regulation of trade and commerce" a subject assigned exclusively to the Parliament of Canada by s. 91(2), and in the course of delivering the opinion of the Judicial Committee, Lord Atkin had occasion to say of this ground:

> It is sufficient to say upon the first ground that it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province, and are therefore within the sovereign powers granted to the Legislature in that respect by s. 92 of the British North America Act.

More recently, in commenting on that case and the Home Oil case (supra) Mr. Justice Pigeon had occasion to say in Caloil Inc. v. Attorney General of Canada [[1971] S.C.R. 543], at p. 549:

> It is to be noted that the Shannon and Home Oil cases both dealt with the validity of provincial regulation of local trades. They hold that provincial authority over transactions taking place wholly within the province is, as a rule, applicable to products imported from another country, or brought in from another province, as well as to local products. However, it must be borne in mind that the division of constitutional authority under the Canadian Constitution often results in overlapping legislation.

It will be seen that, in my opinion, the impugned legislation constitutes nothing more than the exercise of provincial authority over transactions taking place wholly within the province and it applies to the "regulating, exhibition, sale and exchange of films" whether those films have been imported from another country or not.

We are concerned however in this appeal with a decision of the Appeal Division of the Supreme Court of Nova Scotia in which the majority quite clearly struck down the legislation as ultra vires on the sole ground that it was concerned with morality and as such constituted an invasion of the criminal law field reserved to the exclusive legislative authority of Parliament under s. 91(27) of the B.N.A. Act.

The following passage from the reasons for judgment of the judges concerned serve to

indicate the narrow basis on which they proceeded. In my view this is most clearly stated by Mr. Justice Cooper when he says:

> Although the Amusements Regulation Board gave no reasons for placing 'Last Tango in Paris' in the so-called rejected classification and thus prohibiting the showing of this film in theatres in this Province I think it clear from the material before us that this action was taken because the film was considered by the Board to offend against acceptable standards of morality.
>
> This leads me to what in my opinion is the sole issue before us in this appeal, namely, has the legislature of this Province power to enact legislation under which a board or any other body or person may, in the interests of public morality, be authorized to prohibit the showing of a film or is the power to enact such legislation solely reserved for the Parliament of Canada? The short answer to this question is that the field of public morals is an aspect of criminal law which falls within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the British North America Act, ...

The same question was answered by Chief Justice MacKeigan in the following terms:

> Censorship of this type is obviously directed at obscenity and other immoral exhibitions. Provincial legislation purporting to make such exhibitions offences punishable by prosecution would indisputably be a direct and invalid invasion of the federal criminal field.

Mr. Justice Coffin expressed himself to the same effect saying:

> I am limiting my conclusions to the jurisdictional point that the legislation is valid criminal law and I am not entering the field of fundamental freedoms.

Mr. Justice MacDonald on the other hand, while agreeing with the other members of the Court, expressed the view that the legislation was ultra vires on the further ground, which had been advanced by the applicant, that it was potentially offensive as constituting "an unwarranted and illegal intrusion upon the fundamental freedoms of the citizens of Canada and in particular the Province of Nova Scotia."

As the latter ground formed no part of the reasoning upon which the judgment appealed from is based, I think it more satisfactory to proceed first to a consideration of the morality issue.

Although no reasons were given by the Board for the rejection of "Last Tango in Paris", all members of the Appeal division were satisfied that its exhibition was prohibited on moral grounds and under all the circumstances I think it to be apparent that this was the case. In any event, I am

satisfied that the Board is clothed with authority to fix its own local standards of morality in deciding whether a film is to be rejected or not for local viewing.

Simply put, the issue raised by the majority opinion in the Appeal Division is whether the Province is clothed with authority under s. 92 of the British North America Act to regulate the exhibition and distribution of films within its own boundaries which are considered unsuitable for local viewing by a local Board on grounds of morality or whether this is a matter of criminal law reserved to Parliament under s. 91(27).

In the present context, the question of whether or not the impugned legislation encroaches on the criminal law authority is, in my opinion, best approached in light of the statement made by Kerwin, C.J., in the course of his reasons for judgment in the Lord's Day Alliance [[1959] S.C.R. 497], at p. 503, where he said:

> In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation in question must be looked at.

Under the authority assigned to it by s. 91(27), the Parliament of Canada has enacted the Criminal Code, a penal statute the end purpose of which is the definition and punishement of crime when it has been proved to have been committed.

On the other hand, the Theatres and Amusements Act is not concerned with creating a criminal offence or providing for its punishment, but rather in so regulating a business within the Province as to prevent the exhibition in its theatres of performances which do not comply with the standards of propriety established by the Board.

The areas of operation of the two statutes are therefore fundamentally different on dual grounds. In the first place, one is directed to regulating a trade or business where the other is concerned with the definition and punishment of crime; and in the second place, one is preventive while the other is penal.

As the decision of the Appellate Division depends upon equating morality with criminality, I think it desirable at this stage to refer to the definitive statement made by Lord Atkin in this regard in the course of his reasons for judgment in Proprietary Articles Trade Association v. Attorney-General of Canada [[1931] A.C. 310], where he said, at p. 324:

> Morality and criminality are far from coextensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality--unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; ...

I share the opinion expressed in this passage that morality and criminality are far from coextensive and it follows in my view that legislation which authorizes the establishment and enforcement of a local standard of morality in the exhibition of films is not necessarily "an invasion of the federal criminal field" as Chief Justice MacKeigan thought it to be in this case.

Even if I accepted the view that the impugned legislation is concerned with criminal morality, it would still have to be noted that it is preventive rather than penal and the authority of the Province to pass legislation directed towards prevention of crime is illustrated by the case of Bédard v. Dawson [[1923] S.C.R. 681], which was concerned with the validity of a statute of the Province of Quebec entitled "An Act respecting the owners of houses used as disorderly houses", by which the judge was authorized to order the closing of a disorderly house. The legislation was held to be intra vires on the ground that it was concerned with property within the Province and Mr. Justice Anglin said, at p. 685:

> ... I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it a pure matter of civil right. In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

The law of nuisance was undoubtedly a factor in the reasoning of some of the judges in this Court and in the Court of King's Bench of Quebec, but in my view the matter was not too broadly stated by Duff, J., as he then was, at p. 684, where he said:

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

As I have already said, however, I take the view that the impugned legislation is not concerned with criminality. The rejection of films by the Board is based on a failure to conform to the standards of propriety which it has itself adopted and this failure cannot be said to be "an act prohibited with penal consequences" by the Parliament of Canada either in enacting the Criminal Code or otherwise. This is not to say that Parliament is in any way restricted in its authority to pass laws penalizing immoral acts or conduct, but simply that the provincial government in regulating a local trade may set its own standards which in no sense exclude the operation of the federal law.

There is, in my view, no constitutional barrier preventing the Board from rejecting a film for exhibition in Nova Scotia on the sole ground that it fails to conform to standards of morality which the Board itself has fixed notwithstanding the fact that the film is not offensive to any provision of the Criminal Code; and, equally, there is no constitutional reason why a prosecution cannot be

brought under s. 163 of the Criminal Code in respect of the exhibition of a film which the Board of Censors has approved as conforming to its standards of propriety.

In the case of O'Grady v. Sparling [[1960] S.C.R. 804], the question was whether a section of The Manitoba Highway Traffic Act creating the offence of driving a motor vehicle on a highway without due care and attention was ultra vires the Province as being an invasion of the criminal law field and in conflict with the provisions of the Criminal Code making criminal negligence in the operation of a motor vehicle an indictable offence. In the course of the reasons for judgment delivered on behalf of the majority of this Court, Mr. Justice Judson had occasion to say, at p. 807:

> The central point of this appeal is the appellant's submission that whenever Parliament chooses to attach penal consequences to negligence of whatever degree, then any provincial legislation relating to negligence with penal consequences attached to it must be legislation in relation to criminal law. This submission assumes a complete identity of subject-matter which in my opinion does not exist. It is also founded, in part at least, upon a theory of the existence of a 'general area' or 'domain' of criminal law which has been considered and rejected by this Court.

Having concluded that the provincial legislation "has for its true object, purpose, nature or character the regulation and control of traffic on highways and that, therefore, it is valid provincial legislation", Mr. Justice Judson went on to deal with the alleged conflict between The Manitoba Highway Traffic Act and the Criminal Code and determined that: "Both provisions can live together and operate concurrently."

Shortly after hearing the last-mentioned case, this Court had to consider the case of Smith v. The Queen [[1960] S.C.R. 776], where the question was whether s. 63 of The Securities Act, R.S.O. 1950 c. 351, was ultra vires as criminal law, and in the course of the reasons for judgment delivered by Chief Justice Kerwin on behalf of the majority of the Court, he said of the legislation in question, at p. 779:

> The general aim of the Act is to regulate the security business (there being a wide definition of 'security') and this is accomplished by the setting-up of The Ontario Securities Commission, with power to it to supervise the trading in securities by regulation and also power to supervise the trading in securities during a primary distribution by requiring the filing of a prospectus.

By section 63 of The Securities Act offences were created punishable by summary conviction for furnishing false information and for "the commission of any act or failure to perform any act where such commission or failure constitutes a violation of any provision of this Act or the regulations". Yet, Chief Justice Kerwin held that:

> This section is not criminal law within Head 27 of s. 91 of the British

> North America Act, 1867, as it is not a provision the pith and substance of which is to prohibit an act with penal consequences. It is merely incidental to the main purpose and aim of the enactment. The words of Lord Atkin, Speaking for the Judicial Committee in Lymburn v. Mayland, [1932] A.C. 318, at p. 324, are particularly apt:
>
> > There was no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in that way to protect the public from being defrauded.

Before leaving the question of whether or not the impugned legislation is criminal law, I should say that I now recognize the authority of the statement made by Mr. Justice Martland in the course of his reasons for judgment in the Smith case (supra) where he said of the legislation in question, at p. 800:

> The fact that both provisions prohibit certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that compliance with one law involves breach of the other.

The cases of Stephens v. The Queen [[1960] S.C.R. 823] and Mann v. the Queen [[1966] S.C.R. 238], are to the same effect.

It will be seen that in my view the impugned legislation "has for its true object, purpose, nature and character" the regulation and control of a local trade and that it is therefore valid provincial legislation.

I now turn to a consideration of the specific section declared to be ultra vires by the Appeal Division of Nova Scotia, the validity of which is the subject of the constitutional question directed by order of the Chief Justice. In this regard it is noteworthy that the 1st paragraph of the Order of the Appeal Division expressly declares that the word "prohibiting" in s. 2(1)(b) and 2(1)(g) and ss. (2) and (3) of s. 3 are null and void and the use of this word in these sections of the statute forms the basis of the Court's declaration that they are ultra vires the Legislature of Nova Scotia. As I find the legislation to have a valid provincial purpose, I take the view that at least the first paragraph of the Order made by the Appeal Division is inconsistent with the judgment of this Court in Quong Wing v. The King [(1914) 49 S.C.R. 440]. In that case the legislation prohibited the employment of white women by Chinese and provided a penalty of $100 for its contravention. In the course of his reasons for judgment, at p. 444, the Chief Justice explained the legislation as follows:

> In terms the section purports merely to regulate places of business and

> resorts owned and managed by Chinese, independent of nationality, in the interest of the morals of women and girls in Saskatchewan.

And in upholding the validity of the legislation he observed that:

> This legislation may affect the civil rights of Chinamen, but it is primarily directed to the protection of children and girls.

In the same case, Duff, J., as he then was, had this to say at p. 462:

> The enactment is not necessarily brought within the category of 'criminal law,' as that phrase is used in section 91 of the 'British North America Act, 1867', by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the nonobservance of the substantive provisions. The decisions in Hodge v. The Queen 9 App. Cas. 117, and in the Attorney-General for Ontario v. The Attorney-General for the Dominion [1896] A.C. 348, as well as in the Attorney-General Manitoba v. The Manitoba Licence Holders' Association, [1902] AC. 73, already mentioned, established that the provinces may, under section 92(16) of the 'British North America Act, 1867,' suppress a provincial evil by prohibiting simpliciter the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable milieu for it, under the sanction of penalties authorized by section 92(15).

In conformity with this authority, Judson, J. stated in O'Grady v. Sparling, (supra), at p. 810:

> What meaning can one attach to such phrases as 'area of criminal law' or 'domain of criminal law' in relation to such a subject-matter? A provincial enactment does not become a matter of criminal law merely because it consists of a prohibition and makes it an offence for failure to observe the prohibition; ...

I conclude from these decisions that if the legislation is found to have been enacted for a valid provincial purpose the prohibition is equally valid. Much the same considerations apply to the Regulations declared to be ultra vires by the second paragraph of the order of the Appeal Division. Regulations 4 and 5(1) simply provide that no theatre owner shall permit the use for exhibition in his theatre of any film which has not been authorized by the Board or any theatrical performance not authorized under the Regulations. These provisions are of the same character as those considered by the Court in the Quong Wing case where the first section of the challenged legislation provided that:

> No person shall employ in any capacity any white woman or girl or permit any white woman or girl ... to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.

and, as I have said, if the Act is for a valid provincial purpose, the Regulations made thereunder may validly preclude theatre owners from producing performances or exhibiting films which are not authorized by the Board. Regulation 13 is to the same effect providing as it does that:

> No person shall advertise any performance unless the permission of the Board has first been obtained.

Regulation 18 is, in my opinion, similarly valid, but I consider it of interest to reproduce subsection (5) of that Regulation as it appears to me to illustrate the fact that the legislation has been enacted to regulate not only the exhibition of films in theatres, but the whole film business as conducted by film exchanges within the Province. The subsection reads:

> (5) No film exchange shall use, exhibit, sell, lease or exchange any film unless a certificate of the Board has been issued in respect thereof and any film which is used, exhibited, sold, leased or exchanged in violation of this regulation may be confiscated by the Board.

Regulation 32 reads as follows:

> 32. (1) No theatre owner or amusement owner shall permit any indecent or improper performance in his theatre or place of amusement.
>
> (2) No performer shall take part in any indecent or improper performance.
>
> (3) The Board may from time to time define what constitutes an indecent or improper performance within the meaning of these Regulations.

In my view the provisions of this Regulation are in their effect and purpose indistinguishable from s. 159(2) of the Criminal Code which provides, in part:

> (2) Every one commits an offence who knowingly, without lawful justification or excuse, ...
>
> (b) publicly exhibits ... an indecent show, ...

The use of the word "indecent" in both ss. (1) and (2) of the Regulation and in the Criminal Code is the common factor making the two enactments virtually identical and the judgment of this Court in Johnson v. Attorney General of Alberta [[1954] S.C.R. 127], constitutes conclusive authority against the validity of such a provincial enactment.

The authority purported to be conferred on the Board by Regulation 32(3) is not an

independent enactment and cannot stand alone, nor is it within the legislative authority of the Province to authorize a provincial authority to define what constitutes an offence proscribed by the Criminal Code.

Unlike the other provisions of the statute and Regulations to which I have referred, this Regulation is not governed by the decisions in O'Grady v. Sparling, (supra), Stephens v. The Queen, (supra) and Mann v. The Queen, (supra), where the offences created by provincial legislation were of a different character to those enacted by the Criminal Code.

In view of the above I find that Regulation 32 is invalid as being indistinguishable from the like provisions of the Criminal Code. I am, however, of opinion that this Regulation is clearly severable from the balance of the Regulations and the statute and that it in no way detracts from, varies or curtails the authority vested in the Board under the statute itself.

As I have said, I take the view that the legislation here in question is in pith and substance directed to property and civil rights and therefore valid under s. 92(13) of the British North America Act, but there is a further and different ground on which its validity might be sustained. In a country as vast and diverse as Canada, where tastes and standards may vary from one area to another, the determination of what is and what is not acceptable for public exhibition on moral grounds may be viewed as a matter of a "local and private nature in the Province" within the meaning of s. 92(16) of the B.N.A. Act, and as it is not a matter coming within any of the classes of subject enumerated in s. 91, this is a field in which the Legislature is free to act.

In the Reference as to the validity of "An Act to amend the Supreme Court Act" [[1940] S.C.R. 49], Chief Justice Duff had occasion to say, at p. 58:

> The legislative powers of the provinces are strictly confined in their ambit by the territorial limits of the provinces. The matters to which that authority extends are matters which are local in the provincial sense. This principle was stated in two passages in the judgment in the Local Option case (Attorney-General for Ontario v. Attorney-General for the Dominion [1896] A.C. 348) delivered by Lord Watson speaking for a very powerful Board at pp. 359 and 365, respectively. I quote them: ...

The second passage to which the Chief Justice referred reads as follows:

> It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as

> supplementary of the enumerated subject, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated.

As I indicated at the outset, I have taken note of the lengthy judgment of Mr. Justice MacDonald in the Appeal Division in which he finds that the impugned legislation is ultra vires as infringing on the fundamental freedoms to which he refers, which include freedom of association; of assembly; of speech; of the press; of other media in the dissemination of news and opinion; of conscience and of religion.

Mr. Justice MacDonald's approach appears to me to be illustrated by the following comment which he makes after referring to censorship legislation relating to morals in other provinces:

> The foregoing criteria are of the usual 'sex, morals and violence' type that are normally associated with film censorship. In the present case, however, the censorship criterion, being left to the Board to determine, could be much wider and encompass political, religious and other matters. In my opinion censorship relating to party politics cannot be tolerated in a free society where unfettered debte on political issues is a necessity, subject, of course, to the criminal law, particularly those provisions of the Criminal Code, relating to sedition, treason and incitement to crime. [The emphasis is added.]

It is true that no limitations on the authority of the Board are spelled out in the Act and that it might be inferred that it could possibly affect some of the rights listed by MacDonald J.A., but having regard to the presumption of constitutional validity to which I have already referred, it appears to me that this does not afford justification for concluding that the purpose of the Act was directed to the infringement of one or more of those rights. With the greatest respect, this conclusion appears to me to involve speculation as to the intention of the Legislature and the placing of a construction on the statute which is nowhere made manifest by the language employed in enacting it.

For all these reasons, I would allow this appeal, set aside the judgment of the Appeal Division of Nova Scotia and substitute for the declaration made thereunder a declaration that Regulation 32 made pursuant to the Theatres and Amusements Act of Nova Scotia is null and void.

This does not appear to me to be a case in which costs should be awarded.

Appeal allowed, no order as to costs, LASKIN C.J. and JUDSON, SPENCE and DICKSON JJ. dissenting.

Ontario Federation of Anglers & Hunters et al. v. Her Majesty the Queen in Right of Ontario as represented by the Ministry of Natural Resources et al. [Indexed as: Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)]

43 O.R. (3d) 760

[1999] O.J. No. 1690

Ontario Superior Court of Justice

Stach J.

April 28, 1999

Administrative law -- Judicial review -- Interim relief -- Injunction -- Minister promulgating regulation to cancel spring bear hunt -- Applicants challenging regulation as illegal and as unjustifiable limit on applicants' freedom of expression or their right to life, liberty and security of the person under Charter -- Applicants applying for interim injunction -- Application for interim injunction dismissed -- Applicants showing serious issue to be tried and irreparable harm but failing on balance of convenience test -- High standard to be met before relief will be granted to interfere with operation of law enacted by democratically elected legislature -- Wildlife Conservation Act, 1997, S.O. 1997, c. 41 -- Judicial Review Procedure Act, R.S.O. 1990, c. J.1, ss. 4, 6(1).

Injunctions -- Interlocutory injunction -- Balance of convenience -- Motion to suspend operation of government regulation -- Public interest -- Minister promulgating regulation to cancel spring bear hunt -- Applicants challenging regulation as illegal and as unjustifiable limit on applicants' freedom of expression or their right to life, liberty and security of the person under Charter -- Applicants applying for interim injunction -- Application for interim injunction dismissed -- Applicants showing serious issue to be tried and irreparable harm but failing on balance of convenience test -- High standard to be met before relief will be granted to interfere with operation of law enacted by democratically elected legislature -- Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41 -- Judicial Review Procedure Act, R.S.O. 1990, c. J.1, ss. 4, 6(1).

The Minister of Natural Resources decided to promulgate O. Reg. 88/99 under the Fish and Wildlife

Conservation Act, 1997. The regulation cancelled the spring bear hunt in Ontario. The cancellation of the spring hunt caused considerable controversy. There was a strong difference of opinion about whether the cancellation was justified to prevent the death of mother bears and the consequent death of their orphaned newly born cubs or whether the spring was a preferable time for a hunt because at that time it was less likely that the mother bears would stray from the cubs and expose themselves to danger. The applicants, who included the Ontario Federation of Anglers & Hunters and the Northern Ontario Tourist Outfitters Association, opposed the cancellation of the spring hunt, and they applied for judicial review to have the regulation struck down as ultra vires, as an unjustifiable limit on the applicants' freedom of expression or their right to life, liberty and security of the person under ss. 2(b) and 7 respectively of the Canadian Charter of Rights and Freedoms. On this motion, the applicants sought an interim injunction suspending the operation of the regulation until there could be a hearing on the merits. The Schad Foundation and the International Fund for Animal Welfare (IFAW), organizations that supported the cancellation of the hunt, applied for intervenor status.

Held, the Schad Foundation should be granted intervenor status, and the motion for interim relief should be dismissed.

The Schad Foundation and IFAW made a strong case to be added as parties under the intervenor rule but it was not necessary or desirable that both be added. They had a common interest and had filed similar material. In as much as the Foundation was the first to file its materials, it should be granted intervenor status.

The test to be followed in determining whether to grant the injunctive relief requested was a three-stage test. First, there was a preliminary assessment of the merits to ensure that there was a serious question to be tried. Second, the applicant must show that it would suffer irreparable harm if the application was refused. Third, 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. The applicants must succeed on each of the tests.

In deciding whether there is a serious issue to be tried, in general, a judge should not engage in an extensive review of the merits and the threshold of whether there is a serious issue is low. One exception to this standard of review arises if, as in this case, some of the issues can be dismissed on purely legal grounds. This exception applied in the immediate case with respect to the argument that the Minister had acted in bad faith. There was no admissible evidence to support this allegation, nor was there merit in the applicants' argument that the Minister exercised his discretion with respect to matters outside the purview of the enabling statute. There was also no triable issue with respect to the allegations of the inadequacy of notice or lack of fairness or the need for an environmental assessment. The applicants did meet the low threshold of showing that there was at least a triable issue that hunting is covered by s. 2(b) of the Charter and that there was a violation of their s. 7 rights. There was evidence of irreparable harm. There was significant evidence that many tourist outfitters suffered serious financial harm from the cancellation of the spring hunt. The applicants,

however, failed to satisfy the third stage of the test. Applicants seeking to restrain the operation of a law enacted by a democratically elected legislature confront a very high standard before relief will be granted and the overwhelming weight of authority points to not granting relief. The applicants failed to demonstrate the public interest benefits that would accrue from an order suspending the regulation. They did not show a means to limit the scope of their request so that the public interest in the continued application of the law was unaffected. Accordingly, their motion should be dismissed.

Cases referred to

Adler v. Ontario (1992), 8 O.R. (3d) 200, 88 D.L.R. (4th) 632, 7 C.P.C. (3d) 180 (Gen. Div.), affd [1996] 3 S.C.R. 609, 30 O.R. (3d) 642n, 140 D.L.R. (4th) 385, 204 N.R. 81, 40 C.R.R. (2d) 1; Aroland First Nation v. Ontario (1996), 27 O.R. (3d) 732, 45 C.P.C. (3d) 223 (Gen. Div.); Canada (Attorney General) v. Cardinal Insurance Co. (1991), 7 C.P.C. (3d) 167 (Ont. Gen. Div.); Canada (Attorney General) v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304 (subnom. Inuit Tapirisat of Canada v. Governor-in-Council, Inuit Tapirisat of Canada v. Leger); Charles v. Canada (Attorney General), [1995] O.J. No. 2223 (Gen. Div.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320, 22 C.P.C. (2d) 131 (H.C.J.); Dunmore v. Ontario (Attorney General), Ont. Gen. Div., November 16, 1995; Falkiner v. Ontario (Attorney General), Ont. Gen. Div., January 11, 1996; Ferrel v. Ontario, Ont. Gen. Div., MacPherson J., December 29, 1995; Horsefield v. Ontario (Registrar of Motor Vehicles), [1999] O.J. No. 967 (C.A.); Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 24 Q.A.C. 2, 58 D.L.R. (4th) 577, 94 N.R. 167, 39 C.R.R. 193, 25 C.P.R. (3d) 417; Kehler v. Surrey, [1991] B.C.J. No. 3019 (S.C.); Kimberly-Clark v. Ontario (Minister of Natural Resources), Ont. Gen. Div., February 26, 1996, leave to appeal to Ont. Div. Ct. refused April 16, 1996; Loomis v. Ontario (Ministry of Agriculture and Food) (1993), 16 O.R. (3d) 188, 108 D.L.R. (4th) 330, 22 C.P.C. (3d) 396 (Div. Ct.); Masse v. Ontario (Attorney General), Ont. Gen. Div., September 29, 1995; Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832, [1987] 1 S.C.R. 110, 46 Man. R. (2d) 241, 38 D.L.R. (4th) 321, 73 N.R. 341, [1987] 3 W.W.R. 1, 25 Admin. L.R. 20, 87 C.L.L.C. 14,015, 18 C.P.C . (2d) 273 (sub nom. Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.); Ontario Society for Prevention of Cruelty to Animals v. Ontario Veterinary Assn. (1986), 57 O.R. (2d) 667, 34 D.L.R. (4th) 246 (H.C.J.); Ontario (Attorney General) v. Dieleman (1993), 16 O.R. (3d) 39, 110 D.L.R. (4th) 343, 19 C.R.R. (2d) 345, 21 C.P.C. (3d) 49 (Gen. Div.); Reichmann v. Toronto Life Publishing Co. (1989), 36 C.P.C. (2d) 176 (Ont. H.C.J.); RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 164 N.R. 1, 20 C.R.R. (2d) D-7, 54 C.P.R. (3d) 114; Roncarelli v. Duplessis, [1959] S.C.R. 121, 16 D.L.R. (2d) 689; Rosen v. Ontario (Attorney General) (1994), 27 C.R.R. (2d) 159 (Ont. Gen. Div.); Vancouver Island Peace Society v. Canada, [1992] 3 F.C. 42 (T.D.); Walire Enterprises Ltd. v. Ottawa (City), [1997] O.J. No. 4253 (Gen. Div.); Wilson v. British Columbia (Medical Serv ices Commission) (1988), 30 B.C.L.R. (2d) 1, 53 D.L.R. (4th) 171, [1989] 2 W.W.R. 1, 41 C.R.R. 276 (C.A.)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7, 24(1)
Constitution Act, 1982, s. 52
Environmental Assessment Act, R.S.O. 1990, c. 27, s. 2(a)
Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41, ss. 1(1) "closed season", "Minister", "open season", 6(1)(a), 22, 113(1) para. 2
Judicial Review Procedure Act, R.S.O. 1990, c. J.1, ss. 4, 6(2)

Rules and regulations referred to

O. Reg. 88/99 (Environmental Assessment Act) O. Reg. 665/98 (Environmental Assessment Act), ss. 25, 61 O. Reg. 670/98 (Environmental Assessment Act), ss. 3.1-3.6 Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.01(2)

Authorities referred to

Black Bear Management Issues in Ontario, Ontario Federation of Anglers and Hunters, 1996
Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", Remedies: Issues and Perspectives, Jeffrey Berryman ed. (Scarborough, Ont.: Carswell, 1991)

MOTION for interim relief in a judicial review proceeding.

Timothy S.B. Danson, for applicants, Ontario Federation of Anglers and Hunters and C. Davison Ankney.
Gordon P. Acton, for applicants, Northern Ontario Tourist Outfitters et al.
Hart Schwartz and R. Charney, for respondents.
Andrew J. Roman, for Schad Foundation.

STACH J.: --

Introduction

In this request for judicial review, the applicants challenge the validity of a provincial regulation cancelling the spring bear hunt in Ontario. Their challenge to the regulation is based both on "process" and constitutional grounds.

In the particular proceeding before me the applicants seek an interim injunction suspending the

operation of the regulation until they can appear before a panel of three judges in the Divisional Court.

Even at this early stage the court received requests by two groups to intervene in the proceedings. It will assist fuller understanding if I outline this court's involvement beginning with the motion for intervenor status and ending with my ruling on the applicant's request for a suspensive interim injunction.

Reasons on Motion for Intervenor Status

Delivered April 21, 1999

Before me now are motions brought by the Schad Foundation (the Foundation) and the International Fund for Animal Welfare (IFAW) on April 19, 1999 in which they seek intervenor status as parties in an application recently begun in this court.

Background

The matter arises out of the announcement by the Minister of Natural Resources for Ontario on January 15, 1999 of the government's intention to cancel the spring bear hunt, and more particularly, out of the promulgation on March 4, 1999 of Ontario Regulation 88/99 made under the Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41 (proclaimed in force January 1, 1999). That regulation had the immediate effect of terminating the spring bear hunt.

On April 12, 1999, the Ontario Federation of Anglers and Hunters (OFAH), the Northern Ontario Tourist Outfitters Association (NOTO) and others launched their application in this court against the Province of Ontario and the Minister of Natural Resources for judicial review. The relief sought includes:

(1) an order suspending the operation of the regulation;

(2) an interim injunction prohibiting the province from enforcing the regulation;
(3) a declaration that the minister, in so acting, exceeded his jurisdiction;
(4) a declaration pursuant to s. 52(1) of the Constitution Act, 1982 and s. 24(1) of the Canadian Charter of Rights and Freedoms that the regulation is contrary to the Charter and of no force and effect.

The application for judicial review was made returnable in this court on April 16, 1999. By teleconference with counsel for the applicants and the Crown Law Office it was determined, on consent, that the injunction hearing would proceed before the Charter hearing and that, to permit the Crown even a modicum of time to respond, the injunction application would be delayed until April 22-23, 1999.

The present motion by the Foundation and IFAW seeking intervenor status, even at the injunction hearing on April 22-23, was conducted by teleconference involving all counsel on April 19, 1999.

Reasons on the Teleconference Motion

Counsel for OFAH and NOTO raised a preliminary objection to this motion for intervenor status. Primarily, they argued that, because they had not yet received the responding material from the Crown including even an outline of the Crown's position, they were handicapped on the present motion in that they were unable to make submissions on whether the prospective intervenors had either a unique, helpful or, indeed, relevant public interest perspective to bring to the proceeding; nor, for the same reason, were they able to make any submissions whether the material to be filed by the proposed intervenors would duplicate the Crown's material or unnecessarily add to the length of the proceedings. I will address the preliminary objection later in these reasons.

The Foundation and IFAW have a longstanding interest in the conservation and preservation of wildlife in Canada and are committed to the prevention of cruelty to animal life. Through various of their endeavours and operations they say they have developed considerable expertise in environmental matters, including related expertise in ethical, public policy and public sentiment issues respecting animal life. Both have engaged in extensive public lobbying against the spring bear hunt. Indeed, both prospective intervenors are identified in the underlying application for judicial review and more particularly in the materials filed by OFAH and NOTO as instrumental in the Minister's decision to terminate the spring hunt. The same materials describe the Minister's decision to ban the spring bear hunt as having been made "in bad faith, arbitrarily and capriciously".

In my opinion, the underlying application for judicial review clearly has a public interest dimension both in its preliminary claim for injunctive relief and in its substantive Charter challenge. It has been said that "the Attorney General is not the exclusive representative of a monolithic 'public' in Charter disputes."[1] at end of document] Subject to further comment below, I conclude that the Foundation and IFAW have made a strong prima facie case to be added as parties under rule 13.01(1)(a) and arguably also under 13.01(1)(c).[2] at end of document] I do not consider it necessary or desirable, however, that both be added.

In para. 10 [p. 764 ante] of these reasons I alluded to a number of similarities and a commonness of interest as between the Foundation and IFAW. Indeed, there is considerable similarity in the material they filed on this motion. More particularly para. 18 of the factum of IFAW contains the following statement: "It may well be that most or even all of the evidence sought to be presented by the two applicants for intervention, IFAW and the Foundation, can be presented jointly." If it is to be presented at all, it is my opinion in the interests of avoiding undue delay or prejudice in the determination of the rights of the existing parties to the proceeding that the evidence and submissions be presented by only one of them.

On the premise that the motion for intervenor status will ultimately succeed, at least in part, I direct that only one intervenor be permitted to participate. In as much as the Foundation was the

first to file its materials, it shall be the Foundation.

I note that some of the case law suggests that intervenor status should be difficult, if not impossible to attain in interlocutory injunctions.[3] at end of document] Like my colleague J. Wright J. in Aroland First Nation v. Ontario (1996), 27 O.R. (3d) 732, 45 C.P.C. (3d) 223 (Gen. Div.), I would distinguish these decisions. There is a more direct nexus in the case before me which, in addition, involves Charter issues where there is significantly greater scope for intervention.[4] at end of document]

The Preliminary Objection

I am sensitive to the position in which counsel for OFAH and NOTO find themselves in on this motion. Their inability to make definitive submissions is not of their making. Rather, it is attributable to the pace of developments and the hard reality that they had not yet received responding material from the Crown when this motion was argued. I propose to address this problem by declining to make a definitive ruling on the intervention issue until after counsel for OFAH and NOTO have the opportunity to make a fuller response on the return of the injunction hearing on April 22, 1999.

I am mindful of the uncertainty this turn of events holds for the Foundation who must appear before me on April 22, still unaware of its fate. In my attempt to be even-handed to other counsel, I can see no alternative. It will be apparent from these reasons that counsel for IFAW need not attend.

The motion is adjourned.

Addendum

April 22, 1999

This addendum is the consequence of hearing further submissions from counsel on the return of the application on April 22, 1999.

In my preliminary reasons on the motion for intervenor status, I concluded that the Foundation had made a strong prima facie case to be granted intervenor status as a party. Although the burden of proof under rule 13.01 has been and remains on the Foundation, I see no reason to diverge from my preliminary view.

I am satisfied at this stage that the addition of the Foundation as a party will not give rise to undue delay or prejudice within the meaning of rule 13.01(2).

I am satisfied also that this case is one of urgency within the meaning of s. 6(2) of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1 and that the delay required for an application to the Divisional Court is likely to involve a failure of justice. Leave as required by s. 6(2) is hereby granted.

Reasons on Injunctive Relief

April 28, 1999

This is an application for judicial review of a decision made by the Minister of Natural Resources to promulgate O. Reg. 88/ 99 under the Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41, as amended (the "Act"), a regulation that cancelled the spring bear hunt in Ontario.

The applicants applied and were granted leave to bring this application before the Ontario Court of Justice under s. 6(2) of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1 ("JRPA") on the grounds that it was made to appear that this case was one of urgency and that the delay required for an application to the Divisional Court was likely to involve a failure of justice.

The applicants have narrowed the issues on this injunction application and are now seeking an interim order under s. 4 of the JRPA that would suspend the operation of O. Reg. 88/99 until this case can be finally determined with a more complete record, and on the full merits of the case by the Divisional Court of Ontario.

The applicants submit that the promulgation of O. Reg. 88/99 is illegal because it is:

a) ultra vires (outside) the authority of the Minister of Natural Resources;
b) an unjustifiable limit on the applicants' s. 2(b) freedom of expression under the Charter of Rights and Freedoms and
c) an unjustifiable limit on their s. 7 right to life, liberty and security of the person under the Charter of Rights and Freedoms.

Legislative and Factual Background

The Minister of Natural Resources has the authority to pass regulations that set bear hunting seasons. His authority is derived from the following sections of the Fish and Wildlife Conservation Act, 1997 (these are not reproduced in the same sequence as they appear in the Act):

> 6(1) Except under the authority of a license and in accordance with the regulations, a person shall not hunt or trap,
>
> (a) a black bear . . .
>
> . . . . .
>
> 113(1) The Minister may make regulations,
>
> . . . . .

2. prescribing open seasons or closed seasons for wildlife;

. . . . .

1(1) In this Act,

. . . . .

"open season" means, with respect to a species, the period during which hunting, trapping or fishing for that species is permitted;

. . . . .

"closed season" means, with respect to a species, the period during which hunting, trapping or fishing for that species is not permitted;

. . . . .

"Minister" means the Minister of Natural Resources;

Prior to March 4, 1999, the regulations permitted a spring and fall bear hunt. Permission to hunt bears during these seasons was granted by way of O. Regs. 665/98 and 670/98. Section 25 of O. Reg. 665/98 prohibits hunting of any species of game wildlife referred to in a table that appears in O. Reg. 670/98, unless that same table specifies an "open season" for that species. Prior to March 4, 1999 items 3.1-3.6 of O. Reg. 670/98 set an open season for black bears in the spring and in the fall. The spring bear hunt was eliminated by O. Reg. 88/99, which amended O. Reg. 670/98 so that the table in O. Reg. 670/ 98 no longer set any open seasons for spring bear hunting.

The elimination of the spring bear hunt has caused considerable controversy. This is particularly true in Northern Ontario. The evidence brought before the court makes it clear that people have very strong opinions regarding this issue. Those who favour the elimination of the spring bear hunt hold the opinion that the spring hunt endangers the lives of mother bears (also called sows) who have newly born cubs. They say that if a sow with young cubs is shot her orphaned cubs are likely to die. There is no definitive evidence before the court as to how many cubs die as a result of being orphaned in the spring hunt. Some evidence suggests that the maximum number of cubs who die during the spring bear hunt is 274, but it could be much less than that. Other opinions suggest a higher rate of orphaned-cub fatality.

Those who oppose the elimination of the spring bear hunt hold the opinion that the hunt poses little danger to sows and their cubs. They submit that the law already prohibits hunting sows and their cubs: O. Reg. 665/98, s. 61. Evidence from tourist outfitters suggests that they regularly instruct their clients on how to avoid killing sows, and that baits are placed in such a fashion that a hunter can tell whether the hunted bear is a lactating sow. Moreover, the applicants submit that the spring may in fact be the safest time to hunt bears, because, on their evidence this is the time that

sows stay closest to their young, making it less likely that they will approach bear baits.

There is no consensus and no definitive scientific opinion on the effectiveness of the legislation and bear hunting practices in preventing the orphaning of cubs during the spring hunt. The applicants submit that their methods are very effective. The respondent, in turn, refers to evidence that those methods are less effective than claimed, suggesting, in fact, that it is difficult for some hunters, particularly novice hunters and those hunting near dusk, to judge accurately whether the baited bears are indeed lactating. The respondent tendered evidence that sows do in fact leave their cubs to gather food, and when they perceive danger.

It is neither appropriate nor necessary for this court to weigh this evidence or make a determination on its validity. Governments are better suited than courts to balance conflicting social concerns. Moreover, a court considering whether to grant injunctive relief should not generally weigh evidence or make factual findings. This background is raised merely to show that there is considerable debate on these issues, and to explain the context within which this application is brought.

This controversy is not new. Affidavit evidence filed by the applicant suggests that since as early as 1971, government biologists had expressed concerns that spring bear hunting could orphan cubs, and suggested that the government should consider prohibiting spring bear hunting for this reason (affidavit of Dr. L.L. Rogers, sworn April 20, 1999). The applicants' evidence also shows that they have been keenly aware of these issues for some time. For example, in a position paper published in 1996 by the Ontario Federation of Anglers and Hunters (entitled Black Bear Management Issues in Ontario), OFAH anticipated that a campaign might be launched against the spring bear hunt, and recommended certain positions that their allied groups might adopt should the campaign materialize. It states:

> A small vocal minority of anti-hunters would support closures, a slightly larger group of hunters would oppose closures, but most non-hunting Ontarions would probably support closures for a variety of reasons. These would include the wellbeing of the population (it's better to err on the safe side), welfare of individual bears (e.g., orphaned cubs), and concerns about ethics of bear hunting practices (e.g., baiting).

Nevertheless, the applicants submit, that they were surprised when the government announced that it would be cancelling the spring bear hunt this year. There is good reason for their surprise. As recently as December 17, 1998 the Minister of Natural Resources indicated that he had no intention of cancelling the spring bear hunt. Specifically, he stated:

> The spring is in many ways the best time to hunt bears because it tends to target males. Hunting during the spring reduces the chance of hunters encountering female bears with cubs because they are the last to emerge from their winter dens, and their travel and home ranges are very restricted while the cubs are young and vulnerable.

The applicants thus may have good reason for expressing surprise when, on January 15, 1999, the Minister stated that he intended to cancel the spring bear hunt. The applicants submit that the Minister's decision was improper. They posit several reasons for this:

1. First, they argue that the Minister lacked jurisdiction to pass the regulation. Under this "jurisdictional" head there are two sub issues:

    (a) the Minister's regulation was passed for an improper purpose, and
    (b) the Minister did not follow the statutorily required procedure for passing a regulation of this sort.

2. The applicants submit that the decision is unconstitutional because bear hunting is a form of human expression, and the regulation places limits on this right that cannot be justified in a free and democratic society.
3. The applicants submit that the regulation puts hunters and outfitters at risk of punitive internment and occupational jeopardy, thereby raising the spectre that their s. 7 liberty interests have been violated.

In this hearing, the applicants are not asking me to decide the case on a full evaluation of its merits. Rather they are seeking an interim injunction prohibiting the Crown from enforcing the limitations on spring bear hunting instituted by O. Reg. 88/99.

Test for Injunctive Relief

The applicants and the respondents agreed that the test to be followed in determining whether to grant the injunctive relief requested is established by the Supreme Court of Canada in Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832, [1987] 1 S.C.R. 110 at p. 126, 38 D.L.R. (4th) 321 at p. 332, and reapplied by that court in RJR- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at p. 334, 111 D.L.R. (4th) 385 at p. 400:

> 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.

The intervenor in this action, the Schad Foundation, agreed that the RJR-MacDonald test should be used when addressing the constitutional questions, but suggested that I consider applying the test set out in Loomis v. Ontario (Minister of Agriculture and Food) (1993), 16 O.R. (3d) 188, 108

D.L.R. (4th) 330 (Div. Ct.) when considering the administrative law questions that do not also raise Charter issues. In that case the Divisional Court found that an interim declaration should not issue against the Crown unless the Crown is "deliberately flouting the law".

Because the Crown has conceded that the somewhat less onerous test in RJR-MacDonald, supra, should be applied in this case, I have done so. It should be noted that, on the unique facts of this application, the court's ultimate disposition in this case would not have differed had the test in Loomis been applied.

It will be helpful to consider each ground of the appellant's argument, and then to apply the tests in RJR-MacDonald in deciding whether suspensive interim relief should be granted. It is axiomatic that the applicants must succeed on each of the tests if injunctive relief is to issue. If they fail to meet only one of the tests, interim injunctive relief cannot be granted.

Serious Issue Test

It is readily apparent that the spring bear hunt and its cancellation raise serious economic, political, social, cultural, biological and ethical issues. The question which must be asked is whether any of the arguments submitted by the applicants raise a serious issue to be tried. In general, the threshold for determining whether there is a serious issue to be tried is a low one. There are however two exceptions to this:

> 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.
>
> . . . . .
>
> 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 (RJR-MacDonald, supra at 403-04)

In the case before me I have found that some of the issues raised can be dismissed on purely legal grounds.

Did the Minister Exceed his Jurisdiction in Promulgating the Regulation?

In submitting that the Minister exceeded his jurisdiction the applicants have raised several grounds.

First, the applicants submit that the Minister acted in bad faith in promulgating O. Reg. 88/99.

They allege that the Minister's purpose was not the conservation of wildlife, and that he was motivated instead by sheer political expediency. More particularly, the applicants allege that the Minister and/ or the Premier ordered that the spring bear hunt be cancelled to appease Robert Schad, chairperson of the Schad Foundation. The applicants allege that Mr. Schad threatened to run a targeted campaign against the ruling provincial party in "swing" electoral ridings if the government did not cancel the spring bear hunt. The applicants say this is the "real" reason underlying cancellation of the hunt. They say that the Minister had absolutely no jurisdiction to pass regulations for such a purpose.

The applicants rely on the Supreme Court of Canada's decision in Roncarelli v. Duplessis, [1959] S.C.R. 121 at p. 140, 16 D.L.R. (2d) 689 at p. 705, per Rand J. In Roncarelli, the court examined an allegation, clearly proven, that the Premier and Attorney General for Quebec blatantly revoked Roncarelli's restaurateur's liquor licence for his support of certain members in the Jehovah's Witnesses. Rand J. said:

> In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is action that can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another Province, or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted.

Although the applicants' allegations against the Minister in the case before me are indeed serious, they are, on closer examination, little more than allegations. There is no admissible evidence[5] at end of document] in the record before me to support these allegations. What admissible evidence there is suggests only that a meeting between the Schad Foundation and the two applicant organizations was organized by the Deputy Minister of Natural Resources, purportedly at the request of the Minister of Natural Resources, to seek compromise between these groups. That is not evidence of bad faith. Other than this, and apart from innuendo, there is no admissible evidence that bears on whether the Minister may have been affected by any threats that the applicant alleges were made by Mr. Schad or the Schad Foundation. While the Minister's sudden public "turnabout" in his position may be grounds for suspicion, this court cannot conclude, without further admissible evidence, that such allegations raise a triable issue.

The applicants submit further that, even if the "bad faith" argument is not accepted, the Minister's publicly-stated purpose for promulgating the regulation also falls outside the purview of the Act. In

support of their position, the applicants refer to the Minister's "notice of proposal" for O. Reg. 88/99. The notice in question states: "It is not expected that this proposal will have any significant, long term effect on the overall bear population." The applicants submit that this constitutes an admission that there is no conservation purpose behind the regulation. As already noted, the applicants contend that the Act's overriding purpose is the conservation of wildlife. Although the death of orphaned cubs may indeed give rise to ethical concerns, the applicants submit that this issue falls outside the purview of the Act. The applicants rely on Roncarelli v. Duplessis, supra, for the broad proposition that, where discretion is exercised for a purpose not c ontemplated by the enabling statute, that discretion is necessarily ultra vires.

The Crown counters that the Minister's decision is ultra vires only if it can be shown that the dominant or predominant purpose for the Minister's actions fall outside the Act. In my opinion, the Crown is correct on this issue.[6] at end of document] However, even on the test urged by the applicants there is, in my opinion, no triable issue that ethical concerns regarding animal welfare and hunting practices fall outside the purview of the Act.

A careful reading of the Act reveals that, in addition to conservation and public safety, the Act embraces other general purposes that specifically include curbing the commercialization of wildlife and establishing ethical and responsible hunting practices. As but one example, s. 22 of the Act (subject to some exceptions) prohibits the use of body- gripping traps. One of the exceptions permits their use if "the body-gripping trap is prescribed by the regulations as a humane trap." This alone suggests to me that the Act incorporates ethical concerns regarding animal welfare. Numerous other provisions in the Act support this view. Indeed, some of the provisions in the Act address multiple purposes.

Second Jurisdictional Issue: Fairness

The applicants submit that the Minister lacked jurisdiction to pass O. Reg. 88/99 because he failed to meet the requisite duty of fairness required of him.

In general, where a minister makes regulations of a general and legislative nature the required level of fairness is very low. However, if the minister fails to observe a condition precedent to the exercise of that power, a court can declare such purported exercise a nullity.[7] at end of document]

In this case the applicants argue that the Environmental Assessment Act, R.S.O. 1990, c. 27, as amended, imposed a duty of fairness which operates as a condition precedent to passing a regulation of this type. They submit that, because the Minister failed to meet this duty, he lacked jurisdiction to promulgate the regulation.

The applicants submit that the termination of the spring bear hunt comes within the term "undertaking" as defined by s. 2 of the Environmental Assessment Act which reads:

"undertaking" means,

> (a) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities . . . .

Unless exempted from doing so, the Environmental Assessment Act requires the proponent of an undertaking to submit an environmental assessment before beginning an undertaking. The "notice of proposal" for O. Reg. 88/99 suggested that the passage of the regulation was exempt from the requirement for an environmental assessment by virtue of exemption order MNR-42. (MNR-42 is an exemption order that exempts various wildlife population and habitat management activities of the Ministry of Natural Resources from the assessment requirements of the Environmental Assessment Act.) Specifically, MNR-42 imposes special notice requirements:

> Where wildlife population and habitat management activities have, or may have, a significant effect on the environment, MNR shall provide notice of that activity to the affected public or government agencies. The notice, which may be in the form of media advertisements, shall specify the location and description of the project, the scheduled project commencement date, the return period for comments and where additional information on the project is available. The notice shall be issued at least 30 days before the implementation commences.

The applicants acknowledge that a notice was issued. In fact, they concede that their members flooded the Minister's fax machine with submissions responding to this notice. The respondent indicates that over 35,000 faxed responses were received. Nevertheless, the applicants submit that the notice lacked sufficient particulars to permit the public to know the precise ground for cancellation. Counsel for NOTA, particularly, maintained that his organization did not have sufficient information "to know the nature of the debate". He submitted moreover that NOTO was unaware the Minister was addressing ethical issues, because, he argued, ethical issues are not within the purview of the Act. The evidence before me does not support these propositions. In fact, the notice states that "[s]ome people have been concerned about young cubs orphaned each spring by hunters who mistakenly shoot female bears shortly after emerging from winter hibernation with young cubs in the spring." The applicants' material fai ls to support the proposition that its members were truly unaware that ethical issues figured prominently in the Minister's decision. Their position on this issue is "a dog that won't hunt".

There is no triable issue regarding the inadequacy of notice.

Did the Minister Have Jurisdiction to Affect Hunting in Provincial Parks?

The applicants claim that MNR-42 (exemption provision) is insufficient to exempt the impugned regulation from environmental assessment because MNR-42 does not apply to activity being carried out in or recommended for existing provincial parks. They argue that still another exemption order (MNR-59) needs to be utilized for undertakings in provincial parks. The applicants claim that in as

much as some bear hunting takes place in provincial parks, the resort to MNR-42 alone was inadequate.

While a very small percentage of bear hunting does occur in provincial parks, I am not satisfied that a regulatory act that is intended to have province-wide effect should be characterized as an undertaking respecting a provincial park. However, even if exemption order MNR-42 does not apply to the bear hunting that takes place in provincial parks, this would only cause me to consider whether an injunction should issue specifically for bear hunting in such parks. Since such a remedy was not requested, I am not prepared to carve out this small segment and grant injunctive relief for it alone. Moreover, I heard no submissions on the viability of such an injunction from the applicants, and I am not confident that such an order would be feasible. Additionally, I have no current means of assessing how much, if any, irreparable harm might result from the cancellation of the spring bear hunt only as it applies to parks. Given the fact that bear hunting seasons have always been significantly narrower in pr ovincial parks, I am, at bottom, unpersuaded that utilization of MNR-59 is a required step for the Minister. As a final comment on this segment of the argument, I am moved to observe that the text of the exemption provisions, particularly MNR-59 and, indeed portions of the regulations, are painfully obtuse. They would benefit significantly from appropriate revision.

Freedom of Expression

The applicants submit that the elimination of the spring bear hunt violates their s. 2(b) right to freedom of expression and that this constitutes a "triable issue" in these proceedings.

The Charter provides that

> 2. Everyone has the following fundamental freedoms
>
> . . . . .
>
> (b) fredom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Section 1 of the Charter states

> 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.

The applicants submit that hunting is a form of expression and is therefore protected by the Charter.

The courts have adopted a broad and liberal interpretation of s. 2(b), leaving the most serious and strenuous analysis for s. 1. In Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at p. 968, 58 D.L.R. (4th) 577 at p. 607, the Supreme Court of Canada held that "[a]ctivity is expressive if it attempts to convey meaning." It went on to state at p. 969 S.C.R., p. 607 D.L.R.:

> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive con tent, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

The applicants filed a considerable amount of material suggesting that hunting is a self-fulfilling and meaning activity to those that hunt. I have little doubt that this is the case. I remain somewhat sceptical, however, whether hunting should be characterized as an activity that attempts to convey a meaning. I do not accept that every human activity however meaningful to individuals is Charter-protected. Nevertheless, one passage in the affidavit evidence suggests that hunting may sometimes constitute an attempt to convey meaning. One of the affiants states:

> The activity of hunting was used by my parents, both mother and father, to teach us about the cycle of life and how the activity of hunting and taking the life of another living animal pointed out where man fits into the great scheme of life.

I think this evidence does suggest that hunting may sometimes convey a meaning and therefore be expressive. Given the broad definition of expression that exists, I find that the applicants have met the low threshold of showing that there is at least a triable issue that hunting is covered by s. 2(b) of the Charter.

Before leaving this aspect of the matter, I note that the respondent cited Irwin Toy, supra, for the proposition that violent activity (and therefore hunting) is constitutionally unprotected expression. I do not accept that the reference to violence against humans referred to in Irwin Toy has application to otherwise lawful hunting activity. Yet Mr. Charney, for the Crown, repeatedly characterized hunting as "recreational killing". That characterization has a particularly pejorative connotation. It does not lend itself to reasoned debate. It is based moreover, upon logically weak syllogistic reasoning:

(i) hunting is a recreational activity;

(ii) hunting activity frequently involves the killing of game;

(iii) therefore, hunting activity is "recreational killing".

Such characterizations are unhelpful and carry with them considerable offensive bite.

If this were a trial on the merits I would proceed to decide whether the regulation was saved by s. 1. However, on the very limited record that is presently before me, I do not think that this type of analysis should take place in determining whether there is a serious issue to be tried.

Section 7 of the Charter

The applicants submit that the impugned regulation violates their s. 7 rights. Section 7 of the Charter states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to deprived thereof except in accordance with the principles of fundamental justice.

The applicants present several grounds in support of their contention that there is a triable issue whether the regulation in question violates their s. 7 rights.

First the applicants submit that there is a common law right to hunt, and that the deprivation of that right is a breach of s. 7. Even if there was a common law right to hunt (and the applicants offer virtually no authority for this) there is no legal principle which says that statutes or their regulations cannot limit activities permitted at common law. The applicants have not shown that this is a triable issue.

Second, the applicants point to the fact that the Act exposes violators of the new regulation to imprisonment. They suggest that this engages their constitutionally protected liberty interests. However, if the law pursues an otherwise legitimate purpose, it is not unconstitutional to punish with imprisonment those who transgress that law.[8] at end of document] Thus, the penal consequences for breaching the regulation do not by themselves create an independent ground of challenge.

In their factum the applicants also raise as an issue that s. 7 protects the right of tourist outfitters to pursue their calling. There is jurisprudence to suggest that, although the Charter does not protect economic or property interests, s. 7 does protect one's right to choose one's occupation, subject to the right of the Crown to restrict that interest in accordance with principles of fundamental justice.[9] at end of document] While I am uncertain whether economic and occupational interests can be separated in this case, this does appear to raise a triable legal issue. The affidavit evidence shows

that the occupations and livelihoods of tourist outfitters have been threatened and possibly destroyed by the unexpected cancellation of the spring bear hunt. While the evidence adduced to this point does not disturb the Minister's jurisdiction to cancel the spring bear hunt, there may be a triable issue whether his certain assurance that the spring bear hunt would continue one month, and his certain pronouncement that i t would end the next, created a situation of detrimental reliance that put the livelihoods of outfitters in an unnecessarily precarious position that violates principles of fundamental justice.

I conclude that the applicants have met the relatively low threshold in showing that there is a triable issue with regard to violation of their s. 7 rights.

Irreparable Harm

Having found that there may well be a triable issue whether hunting is a constitutionally protected activity, it is necessary for me to assess whether there is evidence of irreparable harm. There was significant evidence before me that many tourist outfitters have suffered serious financial harm from the cancellation of the spring bear hunt, and I am satisfied that some of this harm could be reduced if an injunction were granted at this time. Affidavits filed by the applicants indicate that outfitters and lodges which count heavily on income from the spring bear hunt to sustain their operations will suffer grievous financial consequences from its cancellation. More diversified operators and outfitters too will experience some setback in overall profitability. Small operations may face bankruptcy and financial ruin. Nor do I have any real doubt that attempts by operators to obtain mortgage and other financing through financial institutions will become ever more difficult. The sale value of a number of oper ations is compromised. Even the relative suddenness of the hunt's cancellation means that advertising and other preparatory expenditures already made in anticipation of the hunt may not be recouped.

To be sure, the financial assistance program introduced by government to alleviate the significant economic dislocation to some affected outfitters will already have mitigated, in part, the economic fallout caused by the hunt's precipitous termination. It remains an open question, however, whether this financial assistance program goes far enough. Many outfitters are adamant that it does not.

In general, courts will refuse to grant injunctions where monetary damages will suffice to remedy the harm. In this case, the outfitters' harm is primarily financial, Nevertheless the Supreme Court of Canada stated in RJR-MacDonald, supra [at p. 342 S.C.R., quoting from Beetz J. in Metropolitan Stores, at p. 128]:

> 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. R., [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.

Since RJR-MacDonald was decided, the law of damages for Charter breach has not become significantly clear or more predictable. Therefore, I am persuaded that the court should find that the cancellation of the spring bear hunt will cause irreparable harm.

Balance of Convenience

Considerations of "public interest" weigh heavily in the analysis of "balance of convenience". In its decision in RJR-MacDonald Inc. v. Canada (Attorney General), supra, the Supreme Court of Canada sets out a series of guidelines which Canadian courts are obliged to consider. These guidelines frame the analysis:

-- "public interest" includes both the concerns of society generally and the particular interests of identifiable groups;

-- neither the government nor private litigants have a monopoly on the public interest; either 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. However, when a private litigant alleges that the public interest is at risk, that harm must be demonstrated;

-- it does not assist the private litigant to claim that a given government authority does not represent the public interest; rather the private litigant must convince the court of the public interest benefits which will flow from granting the relief sought (in this case, the suspension of the regulation);

-- in the case of a public authority, the onus of demonstrating irreparable harm to the public interest is lower than that of the private litigant; the test will nearly always be satisfied simply upon proof that the public authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned regulation was undertaken pursuant to that responsibility;

-- the Charter does not give the courts a license to evaluate the effectiveness of government action; a court should not, therefore attempt, as a general rule, to ascertain whether actual harm would result from suspension of the regulation;

-- public interest considerations will weigh more heavily in a "suspension" case than an "exemption" case;

-- even in a "suspension" case, 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 law

> is not affected.

The combined effect of these guidelines has been described as creating "a very low hurdle for governments an high one for applicants seeking an interim injunction to restrain, even briefly, the operation of a law enacted by a democratically elected legislature".[10] at end of document] Counsel for the applicants have been unable to point me to any case in Ontario where the courts have granted interim suspensive relief against a government measure. Indeed, the overwhelming weight of authority points heavily in the opposite direction.[11] at end of document]

Nevertheless, it is useful to remind oneself that each case must be considered and decided on its own particular merits.

The position of the applicants in this proceeding relies heavily on the proposition that the overriding purpose of the Fish and Wildlife Conservation Act is the conservation or "sustainability" of the province's wildlife and that, in cancelling the spring bear hunt by regulation, the Minister was motivated by extraneous considerations unrelated to sustainability of black bear populations in Ontario. For reasons already stated I cannot find merit for these submissions in the material before me. The Act has a broader purview which clearly includes ethical and responsible hunting practices within its reach. Both the stated purpose for the impugned regulation, and its effect, fall within that permissible ambit. Nor does it assist the applicants to assert the existence of a body of scientific and public opinion that is essentially divided on the necessity for, or the desirability of the Minister's action. It is clearly not a proper role for the court to resolve the public policy issue inherent in that debate.

It is apparent from the material before me that, in reaching his decision to terminate the spring bear hunt, the Minister considered the economic consequences that termination would portend for affected outfitters. In his news release of January 15, 1999, he said:

> We realize this action will create problems for some outfitters. We will do whatever is reasonable to address the impact.

At this stage of the analysis, courts must assume that the Minister will make good his promise and that he will do so through an ethical process which includes reasonable inquiry into the true measure of loss.

In weighing the balance of convenience, the applicants invite me to place onto one side of the scale what they submit is the relatively small number of orphaned bear cubs at risk, against the loss of livelihood and financial ruin of several outfitters. In my respectful view this constitutes an invitation to the court to intrude into the kind of public policy debate that more aptly falls to the elected representatives of the people.

In the case before me the applicants have failed to demonstrate the public interest benefits that would accrue from an order suspending the operation of the regulation. Nor have they satisfied me

that there is a means by which I could sufficiently limit the scope of their request for relief so that the general public interest in the continued application of the law is unaffected.

In as much as the applicants have failed to meet the third branch of the test in RJR-MacDonald, supra, I am obliged to dismiss their application for interim suspensive relief and I so order.

I am advised by counsel that the scheduling protocol in the Divisional Court will permit this application for judicial review to come before that court within 30 days of this ruling. Accordingly, I direct that the within application be transferred to the Divisional Court for a hearing on the more complete record that will no doubt be available by then. I also leave to the discretion of the Divisional Court costs in the proceeding before me.

Order accordingly.

Notes

Note 1: See article by Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy" cited in R.J.R. - MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at p. 343, 111 D.L.R. (4th) 385 at 407.

Note 2: See Ontario (Attorney General) v. Dieleman (1993), 16 O.R. (3d) 39, 110 D.L.R. (4th) 343 (Gen. Div.).

Note 3: See Crown Trust Co. v. Rosenberg (1986) 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.); Reichman v. Toronto Life Publishing (1989), 36 C.P.C. (2d) 176 (Ont. H.C.): Canada (Attorney General) v. Cardinal Insurance Co. (1991), 7 C.P.C (3d) 167 (Ont. Gen. Div.);

Note 4: See Adler v. Ontario (1992), 8 O.R. (3d) 200, 88 D.L.R. (4th) 632 (Gen. Div.), aff'd [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385.

Note 5: See rule 39.01(5).

Note 6: Ont. Society for the Prevention of Cruelty to Animals v. Ontario Veterinary Assn. (1996), 57 O.R. (2d) 667, 34 D.L.R. (4th) 246 (H.C.J.); Kehler v. Surrey [1991] B.C.J. No. 3019 (S.C.); Vancouver Island Peace Society v. Canada [1992] 3 F.C. 42 (T.D.).

Note 7: Canada (Attorney-General) v. Inuit Tapirisat of Canada [1980] 2 S.C.R. 735 at p. 748, 115 D.L.R. (3d) 1 at 11.

Note 8: See Horsefield v. Ontario (Registrar of Motor Vehicles), [1999] O.J. No. 967 (C.A.).

Note 9: Wilson v. British Columbia (Medical Services Commission) (1988), 53 D.L.R. (4th) 171, 30 B.C.L.R. (2d) 1 (C.A.).

Note 10: Ferrel v. Ontario (Attorney General) unreported, December 28-29, 1995, Ontario Court (General Division) per J.C. MacPherson J. at p. 4.

Note 11: Rosen v. Ontario (Attorney General) (1994), 27 C.R.R. (2d) 159 (Gen. Div.); Charles v. Canada (Attorney General), [1995] O.J. No. 2223 (Gen. Div.); Masse v. Ontario (Attorney General), Unreported decision, September 29, 1995, Ontario Court (General Division); Dunmore v. Ontario (Attorney General), unreported decision, November 16, 1995, Ontario Court (General Division); Ferrel v. Ontario (Attorney General), supra; Falkiner v. Ontario (Attorney General), unreported decision, January 11, 1996, Ontario Court (General Division); Kimberly Clark v. Ontario (Minister of Natural Resources), unreported decision, February 26, 1996, Ontario Court (General Division), leave to appeal refused April 16, 1996, Ontario Divisional Court; Walire Enterprises Ltd. v. Ottawa (City), [1997] O.J. No. 4253 (Gen. Div.).

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PETER W. HOGG

Professor Emeritus, Osgoode Hall Law School
York University, Toronto

Scholar in Residence,
Blake, Cassels & Graydon, LLP,
Toronto

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is not clear, the choice which will support the legislation is normally to be preferred.

(i) Presumption of constitutionality

Judicial restraint in determining the validity of statutes may be expressed in terms of a "presumption of constitutionality".[96] Such a term transfers from the law of evidence the idea that a burden of demonstration lies upon those who would challenge the validity of a statute which has emerged from the democratic process. The presumption of constitutionality carries three legal consequences. One is the point made in the previous section of the chapter: in choosing between competing, plausible characterizations of a law, the court should normally choose that one that would support the validity of the law.[97] Secondly, where the validity of a law requires a finding of fact (for example, the existence of an emergency), that finding of fact need not be proved strictly by the government; it is enough that there be a "rational basis" for the finding.[98] Thirdly, where a law is open to both a narrow and a wide interpretation, and under the wide interpretation the law's application would extend beyond the powers of the enacting legislative body, the court should "read down" the law so as to confine it to those applications that are within the power of the enacting legislative body.[99] These three doctrines have the effect of reducing interference by unelected judges with the affairs of the elected legislative branch of government. Where a law is challenged on Charter grounds, as opposed to federal grounds, there is no presumption of constitutionality, except for the third doctrine, "reading down", which also applies in Charter cases. Other than the reading down doctrine, determinations of law and fact in Charter cases are subject to their own set of rules, and those rules are not compatible with a presumption of constitutionality.[100]

15.6 Severance

A statute, however complex, is usually the elaboration of a single legislative plan or scheme. The leading feature of that plan or scheme will be the pith and substance (or the matter) of the entire statute. For constitutional purposes the statute is one law, and it will stand or fall as a whole when its validity is ques-

96 *N.S. Bd. of Censors v. McNeil* [1978] 2 S.C.R. 662, 687-688; J.E. Magnet, "The Presumption of Constitutionality" (1980) 18 Osgoode Hall L.J. 87; Strayer, *The Canadian Constitution and the Courts* (3rd ed., 1988), 251-254; Charles, Cromwell and Jobson, *Evidence and the Charter of Rights and Freedoms* (1989), 35-47.

97 *Re Firearms Act* [2000] 1 S.C.R. 783, para. 25; *Siemens v. Man.* [2003] 1 S.C.R. 6, para. 33.

98 See ch. 60, Proof, under heading 60.2(f), "Standard of proof", below.

99 See sec. 15.7, "Reading down", later in this chapter.

100 See ch. 38, Limitation of rights, under heading 38.5 "Presumption of constitutionality", below.