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Ontario

July 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 respecting Procedural Order No. 4 – Motion for a Stay of Assessments in the above-captioned matter.

Yours truly,

Arif Virani
Counsel

AV/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 and Aubrey LeBlanc 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 PROCEDURAL ORDER NO.4 – MOTION FOR A STAY OF ASSESSMENTS, RETURNABLE JULY 26, 2010)

July 23, 2010

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AND TO: Intervenors of Record

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4. *Airport Limousine Drivers Assn. v. Greater Toronto Airports Authority*, [2005] O.J. No. 3509 (S.C.J.)

5. *Carbert v. Farm Credit*, [1992] S.J. No. 585 (Sask. Q.B.)

6. *Doyle v. Newfoundland and Labrador*, [2005] N.J. No. 222 (N.L.S.C.(T.D.))

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8. *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662

9. *Kimberly Clark v. Ontario (Minister of Natural Resources)*, unreported, February 26, 1996, Borins J., (Gen. Div.), leave to appeal ref'd April 16, 1996 (Div. Ct.)

10. *Ontario Home Builders' Assn. v. York Region Board of Education*, [1993] O.J. No. 1086 (Div. Ct., C.A. endorsement)

11. *Rogers v. Sudbury (Administrator of Ontario Works)* (2002), 57 O.R. (3d) 46 (S.C.J.)

12. *Broomer v. Ontario (Attorney General)*, [2002] O.J. No 2196 (S.C.J.)

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14. *Lowrey (Litigation guardian of) v. Ontario*, (2003) 64 O.R. (3d) 222 (S.C.J.)

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

16. *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131

17. *Confédération des Syndicats Nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511

18. *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1. S.C.R. 3

19. *Gladstone Petroleum Ltd. v. Husky Oil (Alberta Ltd.)*, [1982] S.J. No. 1057 (Sask. C.A.)

20. *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, [1971] S.C.R. 957

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22. *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112; [2004] 1. S.C.R. 629

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24. *Canadian National Railways v. Leger*, [2000] F.C.J. No. 243 (F.C.T.D.)

25. *Brocklebank v. Canada (Minister of National Defence)*, [1994] F.C.J. No. 1496 (F.C.T.D.)

26. *Bell Canada v. Communications, Energy and Paperworks Union*, [1997] F.C.J. No. 207 (F.C.T.D.)

27. *Northwest Territories v. Public Service Alliance of Canada*, [2001] F.C.J. No. 19 (F.C.A.)

28. *Island Telephone Co., Re*, (1987) 206 A.P.R. 168 (P.E.I.C.A.)

29. *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 1822 (Div. Ct.)

30. *Noble v. Noble*, [2002] O.J. No. 4997 (S.C.J.)

31. *Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [1999] O.J. No. 1690 (S.C.J.)

32. *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, [2002] O.J. No. 2 (Div. Ct.)

33. *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721

34. *Rosen v. Ontario (Attorney General)* (1994), 27 C.R.R. (2d) 159 (Ont. Ct. (Gen. Div.))

Legal Writings

35. Horsman, Karen, *Government Liability: Law and Practice*, looseleaf (Aurora, Ont.: Canada Law Book, 2007)

Indexed as:

RJR-MacDonald Inc. v. Canada (Attorney General)

RJR-MacDonald Inc., Applicant;
v.
The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada
And between
Imperial Tobacco Ltd., Applicant;
v.
The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada

[1994] 1 S.C.R. 311

[1994] S.C.J. No. 17

File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

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

Practice -- Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed -- Leave to appeal granted shortly after applications to stay heard -- Whether the applications for relief from compliance with regulations should be granted -- Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. -- Tobacco Products Control Regulations, amendment, SOR/93-389 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) - - Rules of the Supreme Court of Canada, SOR/83-74, s.

27 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. which established that the distinction between "suspension" and

"exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory

relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; referred to: R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay v. Daigle, [1989] 2 S.C.R. 530; Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, [1986] 1 S.C.R. 863; Nelles v. Ontario, [1989] 2 S.C.R. 170; Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

Authors Cited

Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following Tobacco Products Control Regulations, amendment, SOR/93-389.) In Canada Gazette, Part II, Vol. 127, No. 16, p. 3284.
Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc.
Simon V. Potter, for the applicant Imperial Tobacco Inc.
Claude Joyal and Yves Leboeuf, for the respondent.
W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.
Solicitors for the respondent: Côté & Ouellet, Montreal.
Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.:--

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under

the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotogravure cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by

Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> ...
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd. [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

20 LeBel J.A. applied the criteria set out in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was intra vires s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal

judgment was rendered.

27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

> 97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the

Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

31 This, in our opinion, is the view taken by this Court in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the

applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in Metropolitan Stores strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

   (i) There is a serious constitutional issue to be determined.
   (ii) Compliance with the new regulations will cause irreparable harm.
   (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In Metropolitan Stores, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In American Cyanamid, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The American Cyanamid standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, Injunctions and Specific Performance (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In Metropolitan Stores, Beetz J. advanced several reasons why the American Cyanamid test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in Metropolitan Stores, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see Metropolitan Stores, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

53 In Tremblay v. Daigle, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in Metropolitan Stores, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant

> School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in Metropolitan Stores, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; Nelles v. Ontario, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which

might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in Metropolitan Stores, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in Metropolitan Stores at p. 139. It was applied by the Trial Division of the Federal Court in Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in Island Telephone Co. Re, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting

the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in Metropolitan Stores, the three-part American Cyanamid test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in R. v. Oakes, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in Metropolitan Stores. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in Metropolitan Stores:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health ... . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

90 The Regulatory Impact Analysis Statement, in the Canada Gazette, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Indexed as:

Harper v. Canada (Attorney General)

The Attorney General of Canada, applicant
v.
Stephen Joseph Harper, respondent.

[2000] 2 S.C.R. 764

[2000] S.C.J. No. 58

2000 SCC 57

File No.: 28210.

Supreme Court of Canada

2000: November 10.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

MOTION FOR A STAY (34 paras.)

Practice -- Stay -- Federal elections -- Spending limits -- Plaintiff granted interlocutory injunction against enforcement of third-party spending limits pending decision on his constitutional challenge to legislation -- Whether injunction should be stayed.

The respondent sought a declaration that the provisions in the Canada Elections Act, S.C. 2000, c. 9, imposing limits on third-party spending on advertising in the course of a federal election campaign are unconstitutional because they unjustifiably limit the right of free expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. The issue has gone to trial but judgment has not yet been rendered. An election writ has been issued with a polling date of November 27, 2000. The respondent immediately applied for an interlocutory injunction restraining the enforcement of the third-party spending limits, pending the decision in the action. The same judge who heard the trial granted the injunction, which was upheld by the Court of Appeal. The Attorney General of Canada applies to this Court for leave to appeal from the interlocutory injunction and, in the interim, for a stay of the injunction.

Held (Major J. dissenting): The stay should be granted.

Per McLachlin C.J., L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.: In considering whether an injunction should be granted, and by extension whether an injunction should be stayed [page765] pending

appeal, the Court considers: (i) whether there is a serious issue to be tried; (ii) whether absent an injunction there will be irreparable harm to the individual seeking the injunction; and (iii) the balance of (in)convenience. This case turns on an analysis of the third ground -- the balance of (in)convenience.

The public interest in maintaining in place the duly enacted legislation on spending limits pending complete constitutional review outweighs the detriment to freedom of expression caused by those limits. To leave the injunction in place is to grant substantial success to the respondent even though the trial has not been completed. It is taken as given at this stage that the legislation imposing spending limits on third parties will serve a valid public purpose. Weighing these factors against the partial limitation on freedom of expression imposed by the restrictions, the balance of convenience favours staying the injunction. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

Per Major J. (dissenting): The interim injunction furthers the Charter's guarantee of freedom of expression, and the respondent has displaced the assumption that the government suffers a greater harm than he does. Thus, the balance of convenience tips sharply in favour of the respondent. The chambers judge made no error and was entitled to reach the conclusion that the balance of convenience favoured injunctive relief. We should be loathe to interfere with political speech, especially in the midst of a federal election.

The Attorney General admitted that there was a violation of s. 2(b) of the Charter, but did not offer any evidence to show that the injunction would cause some harm. The presumption that legislation generally identified as serving a public interest is prima facie valid should not be conclusive where it competes against the acknowledged impediment to an individual's free speech unless there is some evidence demonstrating an [page766] impediment of a public interest. Furthermore, the assumption that the public interest will suffer irreparable harm when an injunction stops an authority from protecting the public good can be overcome when an applicant demonstrates that the injunction itself serves the public interest. Finally, this case falls within an exception to the principle that the effect of democratically enacted legislation should not be suspended before a finding of unconstitutionality or invalidity.

Cases Cited

By McLachlin C.J. et al.

Applied: Gould v. Attorney General of Canada, [1984] 2 S.C.R. 124; Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110; Haig v. Canada, [1993] 2 S.C.R. 995; RJR--MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; referred to: Thomson Newspapers Co. v. Canada (Attorney General), Bulletin of Proceedings of the Supreme Court of Canada, 1997, p. 882.

By Major J. (dissenting)

Switzman v. Elbling, [1957] S.C.R. 285; Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110; RJR--MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042; Attorney General of Canada v. Gould, [1984] 1 F.C. 1133, aff'd [1984] 2 S.C.R. 124.

Statutes and Regulations Cited

Canada Elections Act, S.C. 2000, c. 9, s. 350(1), (2), (3), (4).
Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Authors Cited

Berryman, Jeffrey. The Law of Equitable Remedies. Toronto: Irwin Law, 2000.

Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy", in Jeffrey Berryman, ed., Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
Roach, Kent. Constitutional Remedies in Canada. Aurora, Ont.: Canada Law Book (loose-leaf updated 2000, release 7).
Sharpe, Robert J. Injunctions and Specific Performance. Aurora, Ont.: Canada Law Book (loose-leaf updated 1999, release 7).

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MOTION to stay a judgment of the Alberta Court of Appeal, [2000] A.J. No. 1240 (QL), affirming an order of the Court of Queen's Bench, [2000] A.J. No. 1226 (QL), enjoining the enforcement of s. 350(1), (2), (3) and (4) of the Canada Elections Act. Motion granted, Major J. dissenting.

Written submissions by Graham Garton, Q.C., and Thomas W. Wakeling, for the applicant.
Written submissions by Alan D. Hunter, Q.C., and Eric Groody, for the respondent.

Solicitor for the applicant: The Deputy Attorney General of Canada, Ottawa.
Solicitors for the respondent: Gowling Lafleur Henderson, Calgary.

The following is the order delivered by

1 McLACHLIN C.J. and L'HEUREUX-DUBÉ, GONTHIER, IACOBUCCI, BASTARACHE, BINNIE, ARBOUR and LeBEL JJ.:-- On May 31, 2000, Parliament passed the Canada Elections Act, S.C. 2000, c. 9 (the "Act"), imposing limits on third-party spending on advertising in the course of a federal election campaign. The law came into force on September 1, 2000. Our reasons in this application relate solely to the issue of whether an injunction which suspended the enforcement of certain provisions pertaining to third-party spending limits should be stayed. They do not deal with the granting of leave to appeal the injunction order nor any ensuing appeal. They also do not deal with the question of whether the Act is unconstitutional.

2 The respondent Stephen Joseph Harper commenced an action on June 7, 2000 before the Alberta Court of Queen's Bench, seeking a declaration that the spending limits are unconstitutional because they unjustifiably limit the right of free expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. The trial commenced on October 2 and adjourned on October 13, after nine days of evidence.

3 On October 22, an election writ was issued, with a polling date of November 27, 2000. Mr. Harper applied to the same trial judge (Cairns J.), who heard the action seeking a declaration that the spending limits are unconstitutional, for an interlocutory [page768] injunction restraining the Chief Electoral Officer of Canada and the Commissioner of Canada Elections from enforcing the third-party spending limits, pending the decision in the action. The trial judge granted the injunction ([2000] A.J. No. 1226 (QL)), and the Alberta Court of Appeal upheld it ([2000] A.J. No. 1240 (QL)). The Attorney General of Canada now applies to this Court, seeking leave to appeal from the interlocutory injunction and, in the interim, a stay of the injunction. The application for leave to appeal is granted, by separate order, released concurrently. This leaves the question of whether the injunction restraining the enforcement of the law imposing spending limits should be stayed.

4 In considering whether an injunction should be granted, and by extension whether an injunction should be stayed pending appeal, the Court considers: (i) whether there is a serious issue to be tried; (ii) whether absent an injunction there will be irreparable harm to the individual seeking the injunction; and (iii) the balance of (in)convenience. Without prejudging the appeal, we are satisfied there is a serious issue to be tried. The issue is no less than the constitutionality of provisions of the electoral law passed by the Parliament of Canada which no court has held to be invalid. This is a serious issue not only because the constitutionality of the provisions is challenged, but because it is common ground that the determination of the constitutionality will turn on the application of s. 1 of the Charter, which is always a complex factual and legal analysis. We also assume that the provisions in issue may occasion "irreparable harm" to the capacity of third parties to participate as they wish in the election campaign to the extent of the spending limits on advertising imposed on them. This leaves the third ground, the balance of convenience.

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5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, Injunctions and Specific Performance (loose-leaf ed.), at para. 3.1220.

6 The trial judge found that the freedom of speech interest raised by the applicant Harper to be of great importance. On the other side of the balance, he found that the Attorney General of Canada had called no evidence on the harm that would result from suspending the operation of the law. In the absence of evidence, he characterized this harm as "notional unproven unfairness" (para. 35). Accordingly, he found that the balance of convenience favoured the grant of an injunction.

7 We cannot, with respect, agree. This application is governed by the principles set forth in previous cases. On appeal the applicant Harper may seek alteration of these principles, but for the moment they govern. Applying these principles, the balance of convenience in this case favours granting the stay of the injunction. One of these principles is the rule against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes: Gould v. Attorney General of Canada, [1984] 2 S.C.R. 124; see also Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, per Beetz J., at p. 144; Haig v. Canada, [1993] 2 S.C.R. 995. In this case, [page770] allowing the injunction to stay in place will in effect give Mr. Harper the ultimate relief he seeks in his action, at least with respect to the current election. The trial judge, however, did not address this factor, nor the case law which addresses it.

8 It may also be noted that, in Thomson Newspapers Co. v. Canada (Attorney General), S.C.C., No. 25593, May 7, 1997 (published in the Bulletin of Proceedings of the Supreme Court of Canada, 1997, at p. 882), this Court refused to grant a stay suspending the enforcement of the provisions mandating publication bans on opinion polls set forth in the Canada Elections Act, R.S.C., 1985, c. E-2, s. 322.1. In so doing, the Court relied on its previous decision in Gould, supra. The Court refused the stay even though the ultimate decision found the poll prohibition to be unconstitutional.

9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in RJR--MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at pp. 348-49:

> When the nature and declared purpose of legislation is to promote the public interest, a motions

> court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law -- in this case the spending limits imposed by s. 350 of the Act -- is directed to the public good and serves a valid [page771] public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in RJR--MacDonald was of s. 2(b). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

10 Again, the trial judge appears not to have applied this principle in weighing the benefits of the law against its impact on free expression. Instead of assuming that the legislation has the effect of promoting the public interest as RJR--MacDonald directs, the trial judge based his conclusion on the fact that the Government "has not adduced any evidence to illustrate unfairness in any of these elections in Canada caused by third-party spending limits" (para. 33). He went on to repeat that the "Government simply asserts that third-party spending limits, if not controlled, may (and that is notional only) impact adversely on the fairness of elections" (para. 34), and moved directly from this to the conclusion that leaving the spending limits in place "would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government" (para. 35). Moreover, the trial judge made no mention of the fact that the law may be seen not only as limiting free expression but as regulating it in order to permit all voices during an election to be heard fairly.

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11 Applying the principles enunciated in previous decisions of this Court, and without prejudging the outcome of any appeal from the injunction, we are satisfied that the public interest in maintaining in place the duly enacted legislation on spending limits pending complete constitutional review outweighs the detriment to freedom of expression caused by those limits. To leave the injunction in place is to grant substantial success to the applicant Harper even though the trial has not been completed. Moreover, applying RJR--MacDonald, we must take as given at this stage that the legislation imposing spending limits on third parties will serve a valid public purpose. Weighing these factors against the partial limitation on freedom of expression imposed by the restrictions, we conclude that the balance of convenience favours staying the injunction granted by the trial judge.

Conclusion

12 We therefore conclude that a stay of the order enjoining the enforcement of s. 350(1), (2), (3) and (4) of the Canada Elections Act should be granted.

The following are the reasons delivered by

13 MAJOR J. (dissenting):-- The facts that accompany this application by the Attorney General of Canada for a stay of the injunction obtained in Alberta are not in dispute. The chambers judge, relying on the pleadings and the evidence at the trial, faced the concession that the plaintiff Mr. Harper's freedom of expression was restricted by the legislation. Weighed against this was the inability of the Attorney General to demonstrate that the injunction would cause any inconvenience (see [2000] A.J. No. 1226 (QL), at paras. 34-35, per Cairns J.):

> The Government simply asserts that third-party spending limits, if not controlled, may (and this is notional only) impact adversely on the fairness of elections. Yet, it can point to no evidence to illustrate unfairness [page773] in the Canadian elections caused by third-party spending.
>
> In my judgment, the spending limits having the deleterious effect of fettering the core freedom of expression and speech as enshrined in the Charter, as they do and as admitted by the Attorney General of Canada, would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government.

14 As described in the reasons of the majority, an injunction should be granted where: (1) there is a serious question to be tried, (2) there is irreparable harm to the person seeking the injunction if no injunction is issued, and (3) the balance of convenience favours an injunction.

15 It is on the determination of the balance of convenience that I disagree with the majority. The chambers judge, who was also the trial judge in the recently concluded trial, was in a unique position to weigh the balance of convenience.

16 The trial judge did not, nor do I, intend the interim injunction to reflect on the validity of the new elections legislation. The question of whether the limits on election spending are constitutional will only be decided once there is a determination on the merits.

17 It is inescapable to me that the balance of convenience tips sharply in favour of the plaintiff. The proposition advanced to counter the obvious inconvenience to Mr. Harper is that legislation generally identified as serving a public interest carries a prima facie assumption of validity. But that presumption should not be conclusive where, as here, it competes against the acknowledged impediment to the plaintiff's free speech unless there is some evidence demonstrating an impediment of a public interest. Here there is none.

[page774]

18 The chambers judge was careful to note that the interim injunction was just that. He stated that his ultimate disposition may be that the legislation is constitutional. But he could not ignore the evidence produced during the two-week trial to the extent it bore on granting an interim injunction.

19 The interim injunction would safeguard important constitutional rights guaranteed by the Canadian Charter of Rights and Freedoms and protect the freedom of political speech during a federal election. The law is clear that -- in the absence of an error in principle -- the trial judge has the discretion, and is entitled to appellate deference.

20 In this application, we are dealing with one of the most valuable forms of speech: political speech. Canadians cherish the unimpeded diffusion of political ideas and opinions, and this Court has long recognized that freedom of expression is "essential to the working of a parliamentary democracy such as ours" (Switzman v. Elbling, [1957] S.C.R. 285, per Abbott J., at p. 326). Hence we must tread carefully in limiting political speech. It is speech that we recognize as invaluable, given its significance in our democratic process. We should be loathe to interfere with it, especially in the midst of a federal election.

21 I am of the view that the trial judge did not err in applying the three-part test for an injunction in a constitutional context, as set out in Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, and RJR--MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, both cases that the trial judge referred to and relied upon. As stated, I agree with the majority that the first two requirements are met.

[page775]

22 The third requirement is that the balance of convenience favours granting the injunction. This requirement subsumes the question of what irreparable harm the defendant faces. After nine days of trial, there was no evidence before the Alberta Court of Queen's Bench that the injunction would cause any "inconvenience" or "irreparable harm". Nor has the Attorney General in this application referred this Court to any evidence showing what harm would result from the injunction. Instead, the Attorney General states as a conclusion that suspending the spending limits would result in unfairness, and so the legislation must be applied "in the interests of fairness for all".

23 The Attorney General admitted that there was a violation of s. 2(b), and offered not a scintilla of evidence showing that the injunction would cause some harm. In this light, the trial judge concluded that the balance of convenience favoured injunctive relief. Given the restriction upon a cherished constitutional freedom and the absence of anything tilting the other way, Cairns J. was entitled to reach this conclusion.

24 I acknowledge that in the majority of cases, it may be acceptable to assume that there is irreparable harm to the public interest when an injunction stops an authority from protecting the public good: RJR--MacDonald, supra, at p. 346. But that is an assumption only (as Sopinka and Cory JJ. suggest at p. 349), and it can be overcome when an applicant demonstrates that the injunction itself serves the public interest. In this case, the injunction furthers the Charter's guarantee of freedom of expression, and Mr. Harper has displaced the assumption that the government suffers a greater harm than he does.

25 I find that the suggestion of "irreparable harm" to the government or the public interest is strained [page776] and unpersuasive. To date, Canadian federal elections have not been governed by limits on third-party spending. It is difficult to see how the consequences of undergoing one more election without these limits would somehow cause "irreparable harm" to our democratic institutions, particularly since no such harm occurred in past elections. In my view, the public interest favours granting, rather than refusing, the injunction. Dean Cassels is right to suggest that the "public interest" does not belong exclusively to the Attorney General, and I agree with his rejection of the "assumption that only one party speaks for the public interest" (J. Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives (1991), 271, at pp. 303-5). The question is: will the injunction serve the public good by protecting constitutional rights? Given the need to protect free speech, particularly during an election, it seems reasonable to require the Attorney General to provide something more than a pro forma statement about unfairness. In the absence of anything beyond speculation, and in the face of a serious denial of Charter-protected freedoms, the balance of convenience clearly favours the injunction. I would add that while the Attorney General argues that the public interest is served by seeing the legislation enforced, that argument is countered by the compelling public interest in seeing fundamental Charter-protected freedoms upheld: J. Berryman, The Law of Equitable Remedies (2000), at p. 51.

26 "Because the granting of an interlocutory injunction is a discretionary matter appellate courts have limited the role of review": Berryman, The Law of Equitable Remedies, supra, at p. 37. This Court endorsed the deferential approach in Metropolitan Stores, supra, at pp. 154-56. The standard is high; the reviewing court "must not interfere with [the trial judge's exercise of discretion] merely on the ground that the members of the [page777] appellate court would have exercised the discretion differently": Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042 (H.L.), per Lord Diplock, at p. 1046. To interfere, there must be a clear mistake on the law or the evidence, or some other glaring error. There is no such mistake here.

27 Cairns J. is entitled to appellate deference. He was, in fact, unusually well-placed to grant the injunction. The typical judge faced with this sort of injunction would not have the benefit of having presided over the trial on the merits of the constitutional challenge.

28 It is true, as the majority suggests, that in all but exceptional cases, the effect of democratically enacted legislation should not be suspended before a finding of unconstitutionality or invalidity: Attorney General of Canada v. Gould, [1984] 1 F.C. 1133 (C.A.), aff'd [1984] 2 S.C.R. 124. But this case falls in the narrow category of exceptions. I reach that conclusion for three reasons.

29 First, there is the timing of the challenge. The new Canada Elections Act, S.C. 2000, c. 9, was given royal assent on May 31, 2000. The plaintiff's statement of claim was issued within seven days. The legislation would ordinarily have come into force after the November 27 general election, but it was activated, so to speak, by publication of notice in the Canada Gazette on September 1, 2000. The Attorney General of Canada introduced this legislation in a manner that virtually sealed it from meaningful constitutional scrutiny before the election. These circumstances demand scrutiny. The prospect arises that governments could pass unconstitutional laws immediately prior to an election and leave affected citizens with no remedy. The state could effectively place its election legislation beyond constitutional scrutiny by virtue of when that legislation is enacted. I note that the situation here is unlike that in Gould, supra, where the [page778] impugned provision had been in force for years but was challenged only on the eve of an election.

30 Another compelling factor is that the judge who handled the application for an interlocutory injunction knew the case; he had recently presided over a two-week trial in which the constitutionality of the legislation was debated in great detail. That fact distinguishes this case from Gould, supra, where the judge who granted the injunction had not heard arguments on the constitutionality of the provisions governing prisoners' voting rights. The fact that the same judge heard both the trial and the application for an injunction here argues in favour of considerable deference to his decision.

31 Finally, there is the nature of the constitutional challenge at issue. The speech that is limited here is political expression. It is the epitome of speech that furthers the aspirations of a democratic society. That expression would be limited at its most important moment, during an election, while the Attorney General offers no evidence that the injunction would cause harm.

32 The majority, at para. 7, accepts the Attorney General's submission that an injunction "effectively grants [Mr. Harper] the final relief that he seeks in the trial still under way". I do not, because the "final" question is the constitutionality of the legislation, and that question cannot be answered in these interlocutory proceedings. In any event, it could equally be said that staying the injunction gives the government the final relief it is most concerned about. That argument cuts both ways and does not get us far.

33 This Court, as Professor Roach points out in Constitutional Remedies in Canada (loose-leaf [page779] ed.), at p. 7-7, has "clearly rejected reliance on a presumption that legislation is constitutional in deciding interlocutory applications". In Metropolitan Stores, supra, at p. 124, Beetz J. held that "the presumption of constitutional validity ... is not compatible with the innovative and evolutive character of [the Charter]". It could be said that the majority improperly veers toward an automatic presumption of constitutionality.

34 In RJR--MacDonald, at pp. 333-34, Sopinka and Cory JJ. considered the factors that must govern the balancing process:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

I find those words apt. I would deny the application for a stay.

cp/d/qlhbb

Case Name:

Satschko v. Ontario (Minister of Government Services)

Between
Re: Nicholas Satschko and John David Tatulis,
(Plaintiffs), and
Her Majesty the Queen in Right of Ontario, as
represented by the Minister of Government Services,
(Defendant)

[2007] O.J. No. 1600

156 A.C.W.S. (3d) 1164

Court File No. CV-05-11549-00

Ontario Superior Court of Justice

A.D.K. MacKenzie J.

Heard: October 10 and 11, 2006.
Judgment: April 12, 2007.

(37 paras.)

Civil procedure -- Injunctions -- Interlocutory or interim injunctions -- Involving Crown -- Circumstances when not granted -- Considerations affecting grant -- Serious issue to be tried or strong prima facie case -- Irreparable injury -- Balance of convenience -- Motion by the plaintiffs for an interim injunction dismissed -- The plaintiffs sold and distributed adult sex films -- They commenced an action challenging the validity of the regulatory regime -- They sought an injunction prohibiting the seizure of unapproved adult videos by the film review board -- The court found that there was no serious issue to be tried -- The notion that the regime would cause the plaintiffs' business to fail was unfounded -- The public interest in the operation of duly enacted legislation outweighed the plaintiffs' interest in the sale and distribution of unapproved adult sex films.

Constitutional law -- Division of powers -- Determination of jurisdiction -- Motion by the plaintiffs for an interim injunction dismissed -- The plaintiffs sold and distributed adult sex films -- They commenced an action challenging the validity of the regulatory regime -- They sought an injunction prohibiting the seizure of unapproved adult videos by the film review board -- The court found that there was no serious issue to be tried -- A film censorship regime was found to be a valid exercise of provincial powers in a previous unrelated case.

Constitutional law -- Canadian Charter of Rights and Freedoms -- Freedom of expression -- Pornography -- Motion by the plaintiffs for an interim injunction dismissed -- The plaintiffs sold and distributed adult sex films -- They commenced an action challenging the validity of the regulatory regime -- They sought an injunction prohibiting the seizure of

unapproved adult videos by the film review board -- The court found that there was no serious issue to be tried -- The possibility of a Charter infringement arising out of a particular enactment was a matter for trial rather than an interlocutory motion, and did not detract from the legislative competence of the government.

Motion by the plaintiffs, Satschko and Tatulis, for interim and interlocutory injunctive relief -- The plaintiffs were in the business of making adult sex films available to the public -- The adult video regulatory scheme required all films to be submitted to and approved by the Ontario Film Review Board (OFRB) -- The plaintiffs commenced an action against the defendant, the provincial Crown, seeking a declaration that the regulatory scheme was ultra vires the province, infringed their right to freedom of expression protected by s. 2(b) of the Canadian Charter of Rights and Freedoms, and defied a previous ruling of the Court -- The plaintiffs now moved for an interim injunction prohibiting the seizure of unapproved adult videos by agents of the OFRB -- The defendant submitted that the plaintiffs failed to meet the test for injunctive relief to suspend the operation of legislation, or to exempt a person claiming a Charter breach from legislation, pending challenge of the validity of such legislation -- HELD: Motion dismissed -- The plaintiffs did not establish a serious issue to be tried -- The plaintiffs' submission that the regime defied a previous ruling of the Court was more colourful than substantial -- A film censorship regime was found to be a valid exercise of provincial powers in a previous unrelated case -- The possibility of a Charter infringement arising out of a particular enactment was a matter for trial rather than an interlocutory motion, and did not detract from the legislative competence of the government -- The plaintiffs' submission that compliance with the regime would destroy their business was unfounded in light of the progressive enforcement protocol under the regulatory scheme -- The balance of convenience favoured the defendant, as the public interest in the operation of duly enacted legislation outweighed the plaintiffs' interest in continuing with the sale and distribution of unapproved adult sex films.

Statutes, Regulations and Rules Cited:

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

Constitution Act, 1867, s. 92

Film Classification Act,

Ontario Regulation 452/05, s. 1(1)

Theatres Act, R.S.O. 1990, c. T.6,

Counsel:

Mr. E. Peterson, for the Plaintiff.

Mr. D. Guttman and Mr. A. Virani, for the Defendant.

ENDORSEMENT

A.D.K. MacKENZIE J.:--

Nature of the Proceeding

1 The plaintiffs move for interim and interlocutory injunctive relief to prohibit the seizure by agents of the Ontario Film Review Board (O.F.R.B.) of motion pictures in video products which have not been approved for distribution by the O.F.R.B.

2 The motion is brought in the plaintiffs' action in which they seek, among other things, a declaration that the regulatory scheme or system requiring all adult sex films to be submitted to and approved by the O.F.R.B. is: (a) *ultra vires* Ontario; (b) an infringement of the plaintiffs' right to freedom of expression pursuant to s. 2(b) of the *Charter of Rights and Freedoms*; and (c) in defiance of a decision and ruling of this court: see paragraph 2 - Factum of Plaintiffs.

3 The defendant's position, simply stated, is that the plaintiffs have failed to meet the strict test for injunctive relief to suspend the operation of duly enacted legislation or to exempt a person claiming infringement of a *Charter* right from legislation.

Background

4 The plaintiffs are in the business of making available to the public of what are known and described in law and in ordinary parlance as "adult sex films". Their respective businesses are carried on through corporations operating in the City of Toronto. The plaintiff Satschko's corporation operates a single retail store whose core business is the sale and rental of adult videos to the public. The plaintiff Tatulis' corporation operates out of its Toronto offices and comprises the distribution of adult videos through internet sales to end-users and to retailers for resale to the public.

5 The O.F.R.B. is an agency constituted under the *Film Classification Act*, (*F.C.A.*) 2005 and regulation thereunder, O. Reg. 452/05, which came into force on August 31st, 2005. The immediate predecessor to the *F.C.A.* was the *Theatres Act*, R.S.O. 1990, c. T.6 and regulations thereunder, as amended, the regulatory agency thereunder also being described as the Ontario Film Review Board (O.F.R.B.).

6 It is not in dispute that there has been in existence in Ontario for over 90 years a regulatory framework in which, under varying criteria over the years, no motion pictures in Ontario could be distributed without the prior approval or permission of the regulatory agency. In more recent times, a significant focus of the regulator's attention has been on adult sex films, a term of art defined in the regulation (O. Reg. 452/05) made under the *F.C.A.* in the following terms: "adult sex film" means a film that has, as its main object, the depiction of explicit sexual activity: s. 1(1).

7 There is also no issue between the parties that the video products sought to be distributed by the plaintiffs are adult sex films within the definition of the term in O. Reg. 452/05.

8 The plaintiffs seek a ruling in this motion on whether the provisions in the *F.C.A.* and regulation requiring the prior submission and approval of adult sex films in Ontario are a valid exercise of the defendant's legislative competence and whether the exercise by the defendant through the O.F.R.B. of its legislative mandate constitutes an infringement of the s. 2(b) *Charter* rights of the plaintiffs to freedom of expression.

9 A brief review of a recent decision of this court will serve to put in context the issues raised in this motion.

10 In *R. v. Glad Day Bookshops Inc.* (2004), 70 O.R. (3d) 691 (S.C.J.) (*Glad Day)* the court (Juriansz, J., as he then was) held that Ontario had jurisdiction under s. 92 of the *Constitution Act, 1867* to legislate relating to the regulation of the film industry within the province and that the *Theatres Act*, the predecessor of the *F.C.A.* was a valid exercise of that legislative authority. However, the court found that certain sections of the *Theatres Act* and the regulation enacted thereunder constituted an infringement of s. 2(b) of the *Charter of Rights* which could not be justified under s. 1 of the *Charter of Rights*. The court determined that the *Theatres Act* required all films for home viewing in Ontario had to be submitted to the regulator for prior approval and that the criteria to be exercised by the regulator in granting or refusing approval were overly broad. On this basis, the court declared that the impugned sections of the *Theatres Act* and regulations could not stand. However, the court suspended its declaration of invalidity for twelve months to permit Ontario to remedy and revise the film classification system.

11 As noted above, the response of Ontario to the decision in *Glad Day* was the *F.C.A.* and regulation thereunder which came into force on August 31st, 2005, replacing the *Theatres Act* and regulation thereunder.

12 The gist of the changes effected by the replacement of the *Theatres Act* and regulations by the *F.C.A.* and regulations are set out in an endorsement by Juriansz, J. dated April 18th, 2005, on a motion by Ontario to extend the period of suspension of the declaration of invalidity:

> The government [referred to as Ontario herein] did act promptly after the court's decision to amend the regulations under the *Theatres Act* to limit the Ontario Film Review Board's ability to refuse to approve films. Under the new regulations, the O.F.R.B. may only refuse approval to films that have as their main object the depiction of explicit sexual activity [i.e. adult sex films] ...

Analysis

13 I turn now to the relief sought by the plaintiffs in this motion.

14 In my view, the constitutional issues raised by the plaintiffs cannot properly be adjudicated in a motion for interim and interlocutory injunctive relief. These issues must be dealt with at trial on the basis of a full evidentiary record.

15 The real question for determination in this motion is whether on the record the plaintiffs can meet the test set out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 for injunctive relief suspending the operation of legislative enactments pending a challenge to the validity of such legislative enactments.

16 The test for interlocutory relief in constitutional cases where there is a challenge to the validity of a legislative enactment has three branches. The party seeking the injunctive relief must prove each of the following items:

(a) there is a serious legal issue for trial;
(b) there will be irreparable harm to the moving party before a decision disposing of the constitutional issues if the injunctive relief is denied; and
(c) the balance of convenience is in favour of the interlocutory relief being granted, having regard to the public interest.

The First Branch:

serious legal issue for trial

17 The position of the plaintiffs is that they have satisfied the onus in this regard. They contend that the defendant's implementation of the *F.C.A.* and regulation thereunder constitute a continuation of the "universal submission" regime under the now superseded *Theatres Act* and regulation and that the *F.C.A.* and regulation thereunder constitute not only defiance of the ruling in *Glad Day*, but also an exercise of legislative power outside the defendant's legislative authority under s. 92 of the *Constitution Act, 1867*.

18 The argument that the *F.C.A.* and regulation thereunder constitute a defiance of this court's ruling in *Glad Day* is more colourful than substantial.

19 The defendant's reaction to *Glad Day* resulted in the *F.C.A.* and regulation thereunder supplanting the *Theatres Act* and regulation thereunder in relation to the classification scheme. As appears from Justice Juriansz' endorsement dated April 18th, 2005 (noted above), the defendant reacted to his declaration of invalidity of the impugned sections of the *Theatres Act* and regulation thereunder and his suspension of the declaration by limiting the O.F.R.B.'s ability to refuse to approve films, i.e. limiting it only to adult sex films. Whether this limitation will survive constitutional challenge under s. 2(b) of the *Charter* will not be decided in this ruling.

20 The plaintiffs' position respecting the division of powers and *ultra vires* issues also does not raise a serious issue within the meaning of the first branch of the test. I accept the argument of the defendant that the court in *Glad Day* dismissed a similar argument based on a decision of the Supreme Court of Canada in *Nova Scotia v. McNeil*, [1978] 2

S.C.R. 662. The Supreme Court in *McNeil* held that the film censorship scheme established in Nova Scotia at the time was a valid exercise of the provincial powers under s. 92 of the *Constitution Act, 1867*. The possibility that a *Charter* right infringement arising out of a particular enactment might be found by a court of competent jurisdiction does not detract from the legislative competence of the government's exercise of its powers under the *Constitution Act, 1867*.

21 In sum, I conclude that the plaintiffs have not met the test of establishing a serious legal issue for trial in relation to its arguments of the *F.C.A.* and regulation being enacted and enforced in defiance of the ruling in *Glad Day* and that the *F.C.A.* and regulation thereunder are *ultra vires* the defendant.

The Second Branch

irreparable harm

22 At this stage in an interlocutory injunction motion, the only issue for decision is: "whether a refusal to grant the injunctive relief so adversely affect the applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": para. 58, *R.J.R.-MacDonald.*

23 Irreparable harm refers to the nature, rather than the magnitude, of the harm in question. "It is harm which either cannot be quantified in money terms or which cannot be cured, usually because one party cannot collect damages from the other": para. 59, *R.J.R.-MacDonald.*

24 Here, the assessment of irreparable harm must be done in a different context than the private law case. As indicated in *R.J.R.-MacDonald*, the primary remedy in *Charter* infringement cases is not damages; para. 60, *R.J.R.-MacDonald*.

25 However, the plaintiffs refer to a passage in *R.J.R.-MacDonald* relating to irreparable harm in *Charter* rights cases involving damages awards:

> 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 is 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: para. 61, *R.J.R.-MacDonald.*

26 In response, the defendant submits that the plaintiffs have adduced no evidence as to any financial losses since the inception of the *F.C.A.* on August 31st, 2005. The defendant contends the plaintiffs allege that the financial loss constituting irreparable harm for purposes of this motion arise out of future financial losses if the defendant, through the O.F.R.B., seized their adult sex films and thereby deprived them of the profits that would otherwise be generated from the sale and/or distribution of those films.

27 The plaintiffs describe a disparity between the laws of Ontario and Quebec relating to the regulatory schemes of both provinces respecting the sale and distribution of adult sex films. The *F.C.A.* and regulation thereunder license out-of-province distributors of adult sex films but do not require the licensees to maintain a business presence in Ontario. The Quebec law requires its licensees to maintain a business presence in Quebec. In the result, the plaintiffs allege Quebec-based distributors have the opportunity to distribute adult sex films in both Ontario and Quebec whereas Ontario-based distributors are not permitted to distribute such films in Quebec. The absence of a business presence of Quebec-based distributors in Ontario results in the O.F.R.B. being unable to carry out the same inspections of the Quebec-based distributors that they would be entitled and empowered to carry out in relation to Ontario-based distributors such as the plaintiffs.

28 The plaintiffs further allege that a substantial quantity of adult sex films sold in Ontario are the subject of internet

transactions and that there is a jurisdictional issue as to whether the defendant, through the O.F.R.B., or the federal power, through the C.R.T.C., has jurisdiction to extend control and regulate adult sex films sold to Ontario consumers by means of out-of-province or out-of-country websites.

29 The defendant counters these submissions in taking the position that there is no irreparable harm from future seizures by the O.F.R.B. of the plaintiffs' products. First, the defendant describes under the *F.C.A.* and regulation thereunder, a progressive enforcement protocol. This protocol initially consists of a warning to a distributor in the event of non-compliance, followed up by removals of between 50 and 100 non-compliant films, further followed up in a situation of continuing non-compliance, by removals of between 100 to 200 non-compliant films. The next step in the progressive enforcement protocol is for the registrar of the O.F.R.B. to seek suspension or cancellation of the distributor's licence, such action being reviewable by the Licence Appeal Tribunal. In any event, the *F.C.A.* provides for a distributor within ten days of the seizure of any film being able to compel a hearing into whether the seized film(s) should be released. The director of the O.F.R.B. is obliged to return any seized film(s) on the finding that the seized film(s) were not in contravention of the *F.C.A.* or regulation thereunder.

30 I am persuaded that the spectre of the plaintiffs' businesses being destroyed or significantly vitiated by compliance with the regulatory scheme established under the *F.C.A.* and regulation is unfounded in light of the progressive enforcement protocol under the regulatory scheme. The alleged delays encountered by the plaintiffs (as well as others in their industry) in obtaining compliance may have impact on the "shelf-life" of their product. However, these are policy issues to be addressed by the legislator and not by this court in the context of interlocutory relief.

The Third Branch

the balance of convenience

31 This branch of the test addresses which of the parties will suffer the greater harm by the granting or refusal of the interlocutory injunction being sought pending a decision on the merits of the case.

32 In cases involving constitutional issues such as the present, the public interest is a special factor that must be taken into account in determining where the balance of convenience lies: see *Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; referred to in *R.J.R.-MacDonald*, para. 64. The term "public interest" in interlocutory proceedings involving *Charter* issues has been defined as including "both the concerns of society generally and the particular interests of identifiable groups": para. 66 - *R.J.R.-MacDonald*.

33 In interlocutory relief involving *Charter* issues in legislative enactments, the courts have held that the third branch of the test creates "a very low hurdle for governments and a high one for applicants seeking an interim injunction to restrain, even briefly, the operation of a law enacted by a democratically elected legislature": see *Ontario Federation of Anglers and Hunters v. Ontario et al.* (1999) 43 O.R. (3d) 760, citing *Ferrel v. Ontario (A.G.)* unreported, December 28-29, 1995, (Gen. Div.) per MacPherson, J. (as he then was).

34 In weighing the "public interest" of the plaintiffs as representative of an identifiable group against the concerns of society in general as reflected by the legislative enactments of a democratically elected legislature, the Supreme Court has identified the approach to be taken where the interlocutory relief being sought will result in suspension of the impugned legislative enactment: ... In assessing the balance of convenience, the motions judge must proceed on the assumption that the law ... is directed to the public good and serves a valid public purpose ... The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or the Legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of law on grounds of alleged unconstitutionality succeed. (*Harper v. Canada*, [2000] 2 S.C.R. 764, para. 9) (emphasis added)

35 As indicated, the onus is on the plaintiffs and is particularly a high or difficult onus to discharge in light of the

constitutional issues herein. To grant the injunctive relief being sought here would in effect create a general stay or suspension of the operation of the legislative enactment. I accept the contention of the defendant that the plaintiff's interest in continuing with the sale and distribution of unapproved adult sex films is an economic and personal interest and not a public interest. I accept the submission of the defendant that the plaintiffs' interests cannot override the public interest in continuing the operation of the *F.C.A.* and regulation thereunder. In sum, I find that the balance of convenience branch of the test has not been satisfied by the plaintiffs.

36 In the result, the plaintiffs' motion for interim and injunctive relief is dismissed, with costs.

37 In default of agreement as to costs, the parties may make written submissions not to exceed four pages in length, exclusive of supporting materials, according to the following schedule:

(a) by the defendant, within 30 days from the date of issue of this Endorsement;
(b) by the plaintiffs, within 15 days of their receipt of the defendant's submissions re costs; and
(c) reply, if any, by the defendant, within 10 days following receipt of the plaintiffs' responding submission.

A.D.K. MacKENZIE J.

cp/e/qlrpv/qljjn/qljjn/qlesm

Case Name:

Airport Limousine Drivers Assn. v. Greater Toronto Airports Authority

Between
Airport Limousine Drivers Association and Airport Taxicab Association, plaintiffs, and
Greater Toronto Airports Authority, defendant

[2005] O.J. No. 3509

[2005] O.T.C. 730

141 A.C.W.S. (3d) 1028

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Ontario Superior Court of Justice

M.G.J. Quigley J.

Heard: July 25, 2005.
Judgment: July 29, 2005.

(163 paras.)

[Editor's note: Supplementary reasons for judgment were released August 2, 2005. See [2005] O.J. No. 3510.]

Civil procedure -- Injunctions -- Circumstances when not granted -- Considerations affecting grant -- Irreparable injury -- Balance of convenience -- Application refused for interim injunction by taxi drivers at airport to enjoin issuing of new limousine licences only to corporations -- Taxi drivers established no irreparable harm -- Balance of convenience favoured Airports Authority.

Motion for interim injunction by Taxicab Association to enjoin Airports Authority from completing Request for Proposal Process and issuing new limousine licences at Pearson Airport until completion of trial -- Airports Authority wanted to issue new limousine licences at airport only to corporations -- Association claimed right to apply for new limousine licences at airport -- Airport always had fleet of limousine vehicles dedicated exclusively for transporting passengers to and from Airport -- All airport limousine licences were held by corporations only -- Individuals held taxi permits and licences issued on basis of seniority of drivers -- Airports Authority commenced Request for Proposal Process to issue new limousine licences to corporations to deal with increased passenger flow -- Motion dismissed -- Government Airport Concession Operations Regulations no longer applied to airport, as airport under management of

Authority after airport privatization and not under management of Minister of Transport -- Authority had exclusive responsibility to manage and operate airport -- Authority had power to issue the Request for Proposal Process -- Requirements for granting injunction not met -- No irreparable ham established -- Balance of convenience favoured refusal of injunction.

Statutes, Regulations and Rules Cited:

Aeronautics Act, s. 4.2, s. 4.3(1)

Canada Corporations Act

Canadian Charter of Rights and Freedoms, 1982

Constitution Act, 1867, s. 91(1)(a)

Department of Transport Act, R.S.C. 1985, c. R-18,

Government Airport Concession Operations Regulations, SOR/ 79-373, s. 3, s. 3(a)

Ontario Rules of Civil Procedure, Rule 40.03

Ontario Municipal Act, s. 227(1)(a), s. 227(1)(b)

Statutory Powers Procedure Act

Counsel:

Jerry Levitan, for the Plaintiffs.

Mahmud Jamal and Neil Paris, for the Defendant.

REASONS FOR JUDGMENT

M.G.J. QUIGLEY J.:--

1. Introduction

1 The Airport Limousine Drivers Association and the Airport Taxicab Association (collectively the "Drivers") ask the court to grant them injunctive relief. Many of their members were present for the argument of the motion on July 25. They seek to enjoin the Greater Toronto Airport Authority ("GTAA") from completing its Request for Proposal ("RFP") process and issuing new limousine licenses at the Toronto Pearson International Airport ("Pearson") until the completion of a trial. The Drivers will seek to bring the matter on as a class proceeding, in which they will assert what they regard as their rights to be limousine licence holders and a variety of other claims, including a claim for damages against the GTAA.

2 The Drivers claim that the GTAA has no lawful authority to choose to issue new limousine licenses at Pearson only to corporations, and that rules of natural justice and procedural fairness demand that they be considered as potential licensees. Specifically, they ask for the opportunity, as individuals, to apply for the proposed new limousine licenses based on their seniority. Their aspirations have been rebuffed by the GTAA's decision to consider only incorporated applicants for new licenses under the RFP process.

3 The GTAA resists their claims, and argues that the Drivers have not satisfied the procedural or substantive requirements to obtain an interlocutory injunction. Further, the GTAA asserts that it has no duty to consider applicants who are individuals for the grant of limousine licenses. They are a private corporation, they say, and not a public body or authority to which the principles of natural justice apply. Under the terms of their Ground Lease, granted to them by the federal Crown following the privatization of Canadian airports that took place in the 1990s, they insist that they have acted entirely within their legal rights as the tenant of Pearson and the entity exclusively charged with its management and operation. Further, they assert that they have made extensive efforts to consult with the Drivers to no avail, that they have encouraged the Drivers to form themselves into co-operatives for the purposes of submitting proposals under the RFP process, that they have modified the RFP process to accede in part to the Drivers demands, and that they have also responded to the wishes of other Drivers and potential applicants who are supportive of the RFP process. They cannot, they say, be held hostage by the Drivers in their efforts to expand Pearson's fleet of dedicated limousines, and to thereby improve the airport services that they are mandated to provide at Pearson.

4 At the heart of this motion is the legal status of GTAA, following the privatization of Pearson. While certain regulatory, administrative and procedural mechanisms applied to Pearson prior to its privatization, when it was under both the management and control of the Minister of Transport, the GTAA says that that regulatory framework no longer applies to them.

5 Against this background, in considering the Drivers' motion for injunctive relief, the Court has considered the status of the GTAA, whether the prior regulatory regime respecting permits and licences continues to apply to the GTAA, and whether it is subject to the rules of natural justice and procedural fairness. As well, as is central to an injunction motion, the Court has assessed whether the Drivers present a serious issue to be tried, whether the Drivers will suffer irreparable harm if the injunction is not granted, and in favour of which of the parties, the Drivers or the GTAA, the balance of convenience lies. With respect to the last test, the Court has considered the effect on the balance of convenience of the failure of the Drivers to provide an undertaking as to damages, including whether they should benefit from an exercise of discretion by the Court to relieve them from this otherwise mandatory requirement where injunctive relief is requested.

6 In the result, while the Court well understands the emotional and perceived economic importance to the Drivers of this matter and hears their cries for a remedy, for the reasons and based on the analysis that follows the motion must fail. The Drivers seek a remedy that the Court cannot grant because they have failed to satisfy all of the tests enunciated by the Supreme Court of Canada in RJR MacDonald v. Canada (Attorney General), [1994] 1 S.C.R. 311 and in other authorities. Necessary elements must be present before injunctive relief can be granted. As such the motion for an interlocutory injunction against the GTAA is dismissed. If the Drivers are to have the remedy they claim, it will have to await a trial on the merits of their claims, or perhaps a mediated or settled solution, or as a last resort, a legislated or regulatory intervention by Parliament or the Minister of Transport.

2. Facts

The Parties

7 Pearson is the principal commercial service airport in the Greater Toronto Area. It has five operational runways and three commercial passenger terminals handling domestic, trans-border and international passengers and cargo. Over 65 airlines operate out of Pearson. Pearson is the largest and busiest airport in Canada, and it is one of the busiest in North America based on passenger and air cargo traffic. For the past five years, on a cumulative basis, Pearson has averaged over 27 million passengers per year (approximately 11.9 million domestic, 8.5 million trans-border, and 6.8 million international).

8 The evidence disclosed that on any given day, approximately 80,000 passengers pass through Pearson. When persons meeting, greeting and dropping off passengers are included, together with employees working at the airport, well over 150,000 people pass through Pearson each day. At present, Pearson has over 70,000 on-site employees

working for the airlines, in aviation support, passenger services, retail, food and beverage services, and for the federal government which maintains ultimate control over the facility, but which has contracted the management, operation and maintenance of Pearson to the GTAA.

9 As a hub airport servicing other airports across Canada and in the United States, and as many travelers will know from personal experience, delays and service issues at Pearson can affect airports throughout Canada, since much of the air traffic in Canada passes through or is connected to Pearson.

10 To complete the picture, it is important to consider the significance of Pearson and its associated activities to the economic infrastructure of the Greater Toronto Area. The evidence disclosed that in 2001, Pearson and those related and incidental activities generated some $14 billion in revenue for local businesses, $3.9 billion in personal income for those employed or engaged in Pearson related pursuits, and some $2.8 billion in tax revenue, as well as having created more than 138,000 jobs.

11 The Defendant, the GTAA, is a private corporation. It was incorporated by letters patent as a non-share capital corporation under Part II of the Canada Corporations Act, following the decision of the federal government in the early 1990s to outsource the operation and management of the major airport facilities in Canada to private service providers. It was created as a local, not-for-profit airport authority with the mandate of managing and operating Pearson pursuant to a Ground Lease with the federal government agreed to on December 2, 1996. Its board of directors includes representatives of the surrounding municipalities, the federal and provincial governments, the principal airlines, and interested community organizations. The essential mandate of the GTAA is to provide the Toronto area with a regional system of airports and aviation service that will meet current and future public and business demand for air services, on a cost-effective basis.

12 The Plaintiff, the Airport Limousine Drivers Association ("ALDA") was formed in January of 2004 to create a common voice for Pearson Airport limousine drivers. There are approximately 200 members. The Plaintiff Airport Taxicab (Pearson Airport) Association ("ATA") was formed many years ago, in 1978, to create a common voice for the Pearson airport taxi drivers. There are approximately 270 members of that organization. Nevertheless, as a petition attached as an exhibit to one of the affidavits demonstrated, while they may not be representative of all taxi and limousine drivers, they can reasonably assert to be representative of a very substantial number of the Drivers.

Historical Background and the Bartlett Committee Report

13 The roots of the current dispute between the Drivers and the GTAA go back many years. The situation is complicated by the fact that different regimes have applied to the licensing of the taxicabs and the limousines that service Pearson.

14 Sections 227(1)(a) and (b) of the Ontario Municipal Act contain provisions which generally grant to municipalities the right to regulate taxicabs, including the right to limit the number of taxicab licenses that may be issued with respect to taxicab trips taken wholly within a municipality, or to any point which is not more than five kilometers beyond the particular municipal limits. As well, "point of pickup" rules are contemplated under those provisions.[1]

15 However, the Municipal Act specifies two particular exceptions in its general legislative framework to the licencing of taxis. Despite the fact that the Pearson airport terminals are located in Mississauga, the City of Mississauga is not permitted to apply the "point of pickup" principle at Pearson where that rule would otherwise interfere with the operation at the airport of taxis, which have been licensed by other municipalities. Effectively and in practice, this leaves the regulation of the airport end of the taxicab business to the federal authorities through the Conditions of Permit, which have been established by the Government of Canada under the Government Airport Concession Operations Regulations ("GACOR")[2]. As will become apparent, the GACOR regulations figure prominently in this injunction motion. Historically, licenses for taxicabs have generally been granted to individuals, although there are taxicab licences now owned by corporate entities, as well as particular individuals who individually own substantial

numbers of licences.

16 In contrast, the present limousine service and limousine policy with respect to Pearson had its origins in a company-owned fleet of vehicles, which provided service to Pearson for many years prior to 1974. That year the business was interrupted by a strike and the company ceased operations. The successor company picked up the right to do business as well as the dispatch facilities relating to the limousine business, but it chose not to take on the Drivers or the vehicles of that former business. Instead, it then contracted directly with the vehicle owners -- some of whom were former employees who purchased former company cars -- to provide service.

17 Subsequently, a number of additional limousine companies obtained airport limousine permits, and they also operated in a similar manner. Up until 1988, the last year in which limousine licences were issued, some 236 airport limousine licences were issued. In 1990, the Report to the Ontario Minister of Municipal Affairs by the Pearson International Airport Taxi and Limousine Task Force (the "Bartlett Report") described the situation of the limousine industry at Pearson as follows:

> There are, at present, five companies, three of them in common ownership, with permits for 230 vehicles. At the municipal level, all the limousines are licensed by the City of Mississauga as "airport public transit vehicles". This unique license system permits them to carry passengers to and from Pearson International Airport only.
>
> By long-standing practice, the contracts between the companies and the vehicle owners are of indeterminate duration. The companies and the airport will validate transfers of these contracts between suitable owners, and a secondary market has accordingly developed. The street value of a limousine contract, interestingly, is about the same as the street value of the taxi's "magic package" of municipal license and airport permit: currently something over $120,000, plus any value ascribed to the car.
>
> Many of the contracts are held by individuals or small partnerships, who also drive; others may be leased by drivers, either from the prime contractor (or "broker"), or from one of the companies. The leases are short-term and non-transferable, and accordingly have no street value.
>
> Because he holds a contract from a company rather than a permit from the airport, an owner on the limousine side of the business does not have as much flexibility as his colleague on the taxicab side. Not only does he pay a monthly fee for his contract, but he is tied to one company and cannot shop around for dispatch and related services. In consequence, his monthly overhead is substantially higher. On the other hand, there is evidence that the limousine companies are on average, more effective than the taxicabs in generating business, and the zone fare schedule is 15% higher, so the gross income of a typical limo is sufficient to offset the higher operating costs.
>
> As indicated earlier, the standard of service offered by taxis and limos is essentially identical; they both use air-conditioned luxury cars of recent model years, and the street value of the taxi license package is about the same as that of the limo contract. This suggests that the net income available to owners and drivers must be about equal in both branches of the business; otherwise it would pay to sell a license package and buy a contract, or vice versa.[3]

18 As the Bartlett Report noted, the primary consequence of sections 227(1)(a) and (b) of the Municipal Act, taken together with the relevant provisions of the Conditions of Permit established under GACOR, was the creation of a fleet

of upscale limousine vehicles dedicated exclusively to the airport trade. Whatever may in principle have been permitted or forbidden by licenses and regulations, and whether it was originally intended or not, the fact of the matter is that vehicles dedicated to carrying passengers to and from the airport came to concern themselves only with that particular business, leaving other aspects of the taxicab and livery cab business in the Greater Toronto Area to other vehicle fleets.

19 Further, the source of the underlying municipal license, whether issued by Mississauga, Metro Toronto, or someplace else, became irrelevant. While taxis required a valid municipal plate as a prerequisite to obtaining the vital federal permits obtained under GACOR, any old municipal plate would do. A limousine required a Mississauga plate to pick up in Mississauga, away from the airport, but in practice there was not much business for them in Mississauga. The preponderance of the business was then and continues to be between points in Metro Toronto or beyond, and Pearson, and vice versa.

20 The Bartlett Report concluded that the public interest was much better served by the existence of such a dedicated fleet. Despite some perceptions to the contrary by those in the business, it concluded that other parts of the taxicab industry in Metro and elsewhere were not being significantly harmed over the long term by the presence of this airport-dedicated industry. In the view of the Bartlett Committee, a dedicated fleet also permitted more effective control by the airport management, provided significant economies through reduced "deadheading" (ie return journeys without passengers), permitted higher revenues to be derived, simplified airport administration and reduced costs, and perhaps most significantly from the Committee's perspective, seemed to satisfy the public.[4] It observed that the lobbying for change at that time to the existing licensing system was originating from interest groups within the Metro taxicab and limousine industry, rather than from the clientele of that industry, and that the last time the issue had been actively considered in 1986, there had been wide public support for retaining the existing limousine arrangements. Thus, with respect to the principal terms of reference of the task force, the Bartlett Report concluded that

> ... by and large, the current system of licensing as it relates to service to and from Pearson International Airport is fair, efficient and effective from the point of view of the traveling public and the taxi and limousine industries, and that consequently, it would not be in the public interest to repeal or amend Section 227, paragraph 1 (a) and (b) of the Municipal Act.

21 Nevertheless, Bartlett also observed that the limousine system appeared possibly open to abuse. It acknowledged that this had been a source of concern to some of the contractors, that is the Drivers, for many years. While expecting that airport officials could and probably would intervene at the request of a contractor if there were manifest unfairness between the contractor and the license holder, Bartlett noted that this might also have left airport officials, who were asked to adjudicate, in a difficult conflict of interest position, in light of their agreements granting licenses to the limousine companies.

22 The Bartlett Report also briefly acknowledges that there had been discussion, some years previously, about bringing the limousine drivers into a direct relationship with the airport as in the case of taxicab owners, presumably by the direct issuance of limousine licenses to drivers as individuals, while also retaining the ongoing relationships with the companies. The Report notes, however, that further pursuit of this direction fell through, apparently based on legal advice provided by federal authorities to the airport administrators during the time of full management and control by the Minister of Transport.

23 In his conclusions with respect to the limousine companies and the desirability for an appeals process under which the drivers could air their disputes, the 1990 Bartlett Report concluded that:

> It seems clear that the contractors -- and probably the other parties as well -- would be more comfortable with some sort of standby arrangement for the appeal and settlement of disputes through an objective and dispassionate process. This might never have to be activated, but the fact that an agreed procedure had been established before there was a crisis, and could be brought into play if and when required, would I think provide for natural justice and contribute to a sense

> of confidence in the industry.
>
> The specific procedure should be discussed and agreed between the parties including the airport, the companies, the operators, and the City of Mississauga. They might decide to use the Disputes Arbitration Service of the Ontario Ministry of Labour - or there are other alternatives. They should not rely on a committee of themselves, since they are all potentially in conflict of interest. This is not my area of expertise, and I make no procedural suggestion. The arrangement should in any event be agreed and understood by the parties, rather than being prescribed by an outsider.

24 On this basis, the Bartlett Report recommended:

> That the airport management, limousine companies, representatives of the owners and drivers, and the City of Mississauga, endeavour to work out an agreed, objective procedure to hear appeals and settle disputes, which may arise with respect to the administration of the Conditions of Permit for Limousines and contracts concluded thereunder.

25 It is not known, however, whether any action was ever taken by the airport authorities or the Federal regulators to implement these recommendations. No evidence on the point was presented to the Court. If no action was taken, however, one reason could have been the evident preoccupation of the Minister of Transport at that time with getting on with the privatization of Canada's principal airport facilities. It was this new policy direction, which commenced in or about 1993 and thereafter resulted in the privatization of Pearson in 1996, that is the source of the present dispute.

Privatization of Pearson

26 Prior to the privatization of Pearson in 1996, the Airport was controlled and managed by the Federal Minister of Transport under the federal government's constitutional jurisdiction. The government had reached a policy decision in the 1990's, however, to transfer the management of Canada's principal airports to the private sector. In the case of the privatization of Pearson, this objective was achieved by the incorporation of the GTAA, the granting of an aerodrome certificate to the GTAA by the federal government, pursuant to the provisions of the Aeronautics Act, and by the entering into of a ground lease with the GTAA under the Airport Transfer (Miscellaneous Matters) Act.

27 As previously noted, the GTAA was incorporated as a without share capital corporation under Part II of the Canada Corporations Act specifically for the purpose of being the entity which would operate, manage and maintain Pearson. Towards that end, its objects included the right and power

> (a) to take charge of or acquire all of, or an interest in, the Airport Properties by lease or other form of transfer

and more importantly, paragraph (b) of the GTAA's objects empower it

> (b) to undertake the management and operation of the Airport Properties in a safe, secure and efficient manner for the general benefit of the public and on a financially viable basis, enabling the necessary capital and income to be released for the optimal development of the Airport Properties and any other economic or commercial development project beneficial to the Airport Properties, whether for capital or operating purposes, and located in the Region;

28 To permit it to have all necessary corporate power to enable it to achieve its objectives, Article VIII of the GTAA objects stipulated that

> In accordance with subsection 16(3) of the Canada Corporations Act, it is provided that in

> addition to the incidental and ancillary powers given to the Corporation in accordance with subsection 16(1) of the Canada Corporations Act (save and except for the powers contained in paragraph 16(1)(s) of the Canada Corporations Act, which powers are, in accordance with subsection 16(4) of the Canada Corporations Act, expressly excluded from the Corporation) the Corporation shall, subject to these Letters Patent, have all the rights, powers and privileges of a natural person.

29 The GTAA's objects went on to stipulate that the bylaws of the Corporation shall be those filed with the application for Letters Patent until such bylaws were appealed, amended, altered or added to.

30 Once established, the GTAA took over management of Pearson in or about the end of 1996 by virtue of the Ground Lease concluded with the federal government dated December 2, 1996. The Ground Lease was entered into by the GTAA and Her Majesty the Queen in Right of Canada, as landlord, (who was represented by the Minister of Transport) pursuant to an Agreement to Transfer concluded between the federal government and the GTAA, which contemplated the parties entering into the Ground Lease. This transfer and the authorization for the Minister of Transport to execute the lease on behalf of the federal government was minuted by Order in Council No. P.C. 1996-807 dated May 30, 1996.

31 The Ground Lease is a massive document comprising well in excess of 300 pages, but most of its provisions are not relevant to this motion. The GTAA did represent as tenant, however, that it had been duly incorporated and organized under the laws of Canada, that it was a validly existing corporation, and that it had all necessary corporate power, authority and capacity to manage, operate and maintain the airport and to enter into the Ground Lease and other related instruments in order to perform its obligations as stipulated in the Ground Lease.

32 The parties agreed that the Ground Lease would be a net lease, which was intended to operate on an economic basis, that is, a lease under which the federal government as landlord would not be responsible during the term of the lease for any costs, charges, expenses and outlays of any nature or kind relating to Pearson. These would be the responsibility and liability of the GTAA who for its part was empowered to charge fees and the like and generate revenue to permit it to achieve its objectives. The lease was granted for an initial term of 60 years with one potential renewal period of 20 years.

33 Of particular relevance is Article 8 of the Ground Lease which relates to the use and operation of Pearson. Under s. 8.01.01, the GTAA is required to use the leased lands as a major international airport and for uses that are compatible with the management, operation and maintenance of Pearson as an airport, and to ensure that all occupants of Pearson use its premises for uses compatible with the management, operation and maintenance of the airport. Towards that end, the GTAA agreed that it would not permit the use of Pearson for any purposes that were incompatible with the management, operation and maintenance of the airport in accordance with the terms stipulated in the Ground Lease.

34 The obligation imposed upon the GTAA by the Ground Lease to operate the airport is stipulated in s. 8.02, in the following terms:

> The Tenant shall, alone and not in partnership with any Person, at all times throughout the Term, continuously, actively, diligently and carefully, manage, operate and maintain the Airport, on its own behalf and at its own cost and expense, in accordance with this Lease, in an up-to-date and reputable manner befitting a First Class Facility and a Major International Airport, as those standards are understood from time to time, and in a condition and at a level of service to meet the capacity demands at the Airport from time to time and the capacity demands for airport services from users within [75] kilometers from any point on the parameters of the Lands to the extent practicable under Her Majesty's policies, procedures and practices ...

The stipulated policies relate to civil air navigation services provided at the airport, services described in a

memorandum of agreement on police and security, and services described in the Canadian Inspection Services Agreement, to the extent that any of those policies might affect the GTAA's ability to meet its capacity obligations.

35 It is of note, that for the purposes of this and other provisions of the Ground Lease, where the term "Person" is used, it is defined by the Ground Lease to mean "any individual, company, corporation, partnership, limited partnership, firm, trust, sole proprietorship, government or government agency, authority or entity, however designated or constituted;" (emphasis added).

36 Further, lest it have been thought that the Ground Lease constituted some sort of joint venture or partnership arrangement between the federal government and the GTAA, the point was specifically addressed in s. 30.01. There, the federal government and the GTAA expressly disclaimed any intention to create a partnership, joint venture or joint enterprise. Nothing in the lease was to be construed as creating any relationship between the parties other than that of landlord and tenant and the GTAA agreed not to represent or hold itself out to be an agent of the federal government in the management of Pearson. Further, neither party was to have any authority to act for or assume any obligations or responsibility on behalf of the other party.

37 Notwithstanding the complete transfer by the federal government to the GTAA of the management and operation of Pearson pursuant to the terms of the Ground Lease, it is not surprising that the federal government did nevertheless reserve its right to legislate with respect to aeronautics and the Pearson airport. Section 40.01 of the Ground Lease stipulated that:

> Nothing in this Lease shall prohibit, restrict or affect the right or power of the Parliament of Canada to enact any laws whatsoever with respect to any area of law for which the Parliament of Canada has legislative jurisdiction, including aeronautics, the Airport, the operation or use of the Airport, and laws relating to any economic regulation of airports, even if the enactment of any such law affects this Lease, its interpretation or the rights of either party.

38 Finally, the GTAA extended a "good faith" undertaking under the terms of the Ground Lease in Article 49 in promising that it would exercise all of its rights under the lease at all times in a manner consistent with good business practices, as would a reasonable and prudent owner, and that it would act in good faith and in conformity with its constating documents and bylaws, and use its best efforts to generate optimum revenues and rent from the airport facility.

39 Having taken over the operation of Pearson pursuant to the terms of the Ground Lease and in furtherance of its corporate objects, the GTAA subsequently prepared a set of Rules and Regulations (the "Rules) relating to the operation of Pearson. The Rules are not "regulations" in the sense that they are statutory instruments enacted pursuant to enabling legislation. Instead as acknowledged in the Foreword to that document, the Rules are intended to express the policy of the GTAA at Pearson as duly adopted by its Board of Directors and as comprising the general rules and regulations for Pearson, intended to ensure the safe and efficient operation of Pearson as an airport. The Rules cover a wide variety of matters, governing the general conduct of the public, tenants at Pearson, employees, and commercial users of the Pearson airport facility, as their activities relate to the operation of Pearson. Interestingly, the Foreword to the Rules stipulates, in particular, that the Rules "are incorporated by reference in all leases, licences and other agreements entered into by the [GTAA]." The Rules were introduced on this motion as an exhibit, and, as in the case of the Ground Lease itself and the objects of the GTAA, most of its provisions are not relevant to this matter, but there are several that are.

40 Consistent with the provisions of the Ground Lease, the Rules specifically confirm that in the event of a conflict or inconsistency between the Rules and the Aeronautics Act, or any regulation established under the Aeronautics Act, or any other applicable federal or provincial statute or regulation, such law or regulation rule or statute will prevail over the Rules to the extent of the inconsistency or conflict.

41 Section 3.3 of the Rules stipulates that any Person who conducts any business or commercial undertaking at the

airport is required to have a permit to do so and that permit is to be issued by the Chief Executive Officer of the GTAA. Alternatively, such Person shall have entered into leases or licence agreements or other contracts with the GTAA in respect of the operation of their particular business or undertaking. Section 1.6 of the Rules confirms that permits issued by the GTAA remain the property of the GTAA and are subject to revocation or amendment by the Chief Executive Officer of the GTAA. "Person" is defined in the Rules to mean "any individual, firm, co-partnership, corporation, company, association or political body, and includes any trustee, receiver, assignee or representative thereof."

42 Part II of the Rules dealing with Commercial Vehicles is particularly relevant to this motion. Section 4.7 of the Rules stipulates that the CEO of the GTAA may specify the class or classes of commercial passenger vehicles that require that the operator be issued a permit before operating those vehicles at the airport. Subject to certain exceptions not relevant for present purposes, Section 4.10 stipulates that a vehicle operator who uses a commercial passenger vehicle to provide transportation to persons from any place at the airport to any place outside the airport must have a permit issued by the GTAA in respect of such commercial passenger vehicle and must operate that vehicle in accordance with the terms and conditions of the Permit and the Rules.

43 The Rules also govern the manner in which commercial vehicle operators are required to conduct themselves in the operation of such commercial passenger vehicle business. Section 4.13 of the Rules states that where an operator of a commercial passenger vehicle requires a permit to operate that vehicle at Pearson, the Chief Executive Officer of the GTAA "may, on written application therefor and on payment to the GTAA of the fee prescribed for that operation by the GTAA, issue a permit to that operator permitting the operation of that commercial passenger vehicle ... at the airport subject to such terms and conditions as the Chief Executive Officer deems necessary or desirable."

44 Section 4 of the Rules provides for penalties for violation of the Rules, and for the suspension and cancellation of permits. While somewhat limited in scope, the suspension and cancellation provisions of the Rules do provide some limited opportunity to a commercial vehicle operator who may be subjected to a suspension or cancellation decision to make representations as to why such suspension or cancellation should not take place[5].

The RFP Process, the Current Dispute, and the Commencement of Litigation

45 The genesis of the current dispute lies in the decision of the GTAA to commence the RFP process in anticipation of issuing a number of new limousine licenses. Notwithstanding the recommendations of the Bartlett Report in 1990, the evidence of Mr. Tolton, the Operations Manager of Pearson, established that no new limousine licenses have been issued at Pearson since 1988. No new taxi permits have been issued since 2001. Thus, the situation at present, prior to the commencement of the RFP process, was that all airport limousine licenses are held by corporations, and not by individuals. There are 236 limousine licenses that have been issued at Pearson, all of which were originally issued by Transport Canada prior to the privatization of Pearson, and under which approximately 644 limousine drivers are authorized to operate by the GTAA. All of these 236 licenses are held by five incorporated entities. No Individuals hold any of the existing limousine licenses.

46 In contrast, the GTAA has issued numerous taxi permits and licenses to individuals. Some 361 taxi permits have been issued to individuals, with up to four drivers being permitted to operate under each taxi permit. In his evidence, Mr. Dhillon, one of the deponents for the Drivers, indicated that the GTAA has issued approximately 40 new taxi licenses. These were issued exclusively to individuals, and he stated that the manner in which licenses were awarded was determined in part based on a system of seniority, whereby drivers who had worked for the longest periods of time would be next in line for a license. No distinction was made for the purposes of granting these taxicab licenses between a taxi driver and a limousine driver - either qualified to receive an individual taxicab licence. While there was no independent evidentiary support apart from the evidence of Mr. Dhillon and the oblique reference in the Bartlett report, Mr. Dhillon also asserted that the Drivers had repeatedly been promised that when limousine licenses would be issued in future, they would be issued on the same basis as the taxicab licenses had been issued. This, of course, would mean to them that such licenses would be issued to individuals, and would be issued on the basis of the seniority of the drivers.

47 In addition to the limousine licencees and drivers referred to previously, there are currently approximately 1,140 taxi drivers authorized by the GTAA to drive under taxi permits at Pearson. The GTAA says that it has been prepared to issue taxi permits to individuals because the scale of operations of taxicabs is less important for the market segment that uses taxi services for transport to and from the airport.

48 In contrast, and consistent with the dedicated fleet concept endorsed in 1990 by the Bartlett Report, the GTAA has insisted that limousine licenses be held by incorporated entities and not individuals, in order to ensure that the corporate licensees have sufficient scale of operations to ensure that the appropriate level of service is provided to the traveling public. In their view, this scale of operation is particularly important for limousine services, rather than for taxis, as limousine services tend to be used by business travelers for pre-arranged pickup and delivery to the airport. Further, since the companies that hold limousine licenses run their own central dispatch systems and are responsible for overseeing and maintaining the standards of their drivers, lower administrative costs result for the GTAA, because it need only deal with several companies as licence holders, rather than many individual drivers. In spite of this fact, the evidence of Mr. Tolton confirmed that the GTAA continues to lose money each year in the course of providing limousine and taxi services at Pearson, given the high administration costs for those systems.

49 As a result of significant increases in passenger volumes at Pearson, which Mr. Tolton advised have approached pre-September 11, 2001 levels, the GTAA determined that there was a need for new limousine licenses to be issued. The GTAA says this increased traffic has resulted in substantially increased demand from the traveling public for commercial passenger vehicle services, and in particular for limousine services. At present, with the existing number of limousine licenses, substantial delays can apparently occur, with business travellers and others being required to wait for inordinate periods for limousine service. Not surprisingly, this is alleged to be particularly problematic at peak times during the business day, and during the peak traveling seasons. Having concluded that such delays and inconveniences to the public were mounting and becoming increasingly unacceptable, the GTAA determined that it would issue additional limousine licenses.

50 It decided that it would identify potential new licensees through the RFP process. However, it concluded as well that only corporate proposals would be acceptable, consistent with the dedicated fleet concept and its dedication to the reduction of administrative costs. It is that decision and the manner in which it has been implemented over the past six months that has resulted in the dispute that is central to these proceedings.

51 The GTAA states that before deciding to issue new limousine licenses, it consulted widely with the airport taxicab and limousine industries to determine how best to meet the increased demand for commercial passenger vehicle services, and in particular for limousine services. It indicates that it invited the Drivers to participate in these industry-wide consultations, but that the Drivers specifically refused to do so.

52 The Drivers have a different version of the "consultation" that was undertaken by the GTAA. They say that in about February of 2005, they had an operational meeting set up by the GTAA, to which taxi and limousine drivers and permit holders were invited. At that time the GTAA announced that it was going to issue approximately 50 new licenses for limousines in the near future, but that such licenses would be issued only to companies, which would be identified through a competitive RFP process. Mr. Dhillon says that announcement was met with great concern and disapproval by both taxi and limousine drivers, and permit license holders, because, in their view, it would "take away the right of individuals" (emphasis added) to obtain a license, and would force many drivers to have to work or subcontract with a company.

53 For its part, the GTAA says that the fundamental premise of the RFP proposal was to ensure a high level of customer service at Pearson, by offering "uncompromising operating standards" and "high-quality services" through a "first-class limousine passenger service concession", as reflected in the introduction to the RFP itself, and which was intended to ensure that limousine licenses would be awarded to those proponents who would provide a safe and high-quality passenger service. Towards that end, the RFP contains extensive evaluation criteria and outlines a comprehensive selection process. To insure that the RFP process would be completed and suitable proponents identified

and licensed ahead of the annual increase in airport traffic which typically takes place in September of each year, the GTAA scheduled the RFP proposal to close on May 13, 2005.

54 The Drivers continued to insist, however, that any new issuance of limousine licenses could not be made solely in favour of corporate applicants, but that individuals also should be recipients of the licenses, based on their seniority as drivers. This led Mr. Dhillon to state in his affidavit that if the licenses were to be granted in the manner proposed, the GTAA "will have effectively changed the system of granting licenses, changed the class of persons, namely exclusively corporate, entitled to this property right and excluded individuals and will drive wages for drivers down. This will have irreparable harm to drivers, existing permit and license holders and potential future drivers and holders because it will harm their ability to earn income to support their families in the profession they have worked at for so long."

55 Following consultations between the parties, which were clearly not particularly productive, the GTAA agreed on two occasions to postpone the closing date of the RFP, first to June 3, 2005, and then later, as a result of further complaints and demonstrations from the Drivers, to June 30, 2005 to allow for further consultation.

56 In the meantime, commencing on April 26, the Drivers started engaging in demonstrations at Pearson. These were not merely demonstrations held on the "sidelines", but resulted in actual blockages to ingress and egress from Pearson Terminal 1, and which caused considerable public inconvenience. Further demonstrations were held on April 29, 2005. Prior to that date, the Drivers circulated a memorandum urging their members to engage in demonstrations. On that day, the Drivers blocked all traffic on the arrivals and departures levels of Terminal 1. Other incidents also took place at Pearson on that date, which were a hindrance to the travelling public and to the continuance of public safety at the Airport. Increasingly escalating demonstrations took place on May 12, 13 and 16, 2005. On each occasion, the inconvenience caused to the public and the reduced access available to Pearson created increasing situations of concern with respect to public safety.

57 On May 18, the GTAA and the Drivers met again to discuss the Drivers concerns about the RFP. On that date, the GTAA agreed to the extension of the RFP to June 30, 2005, in order to allow the Drivers to engage in further discussions with the GTAA. It is of note, however, that GTAA's decision to extend the RFP deadline as a result of pressure brought to bear by the Drivers was also raising serious concerns for other members of the airport limousine and taxi industries. There are in fact other driver associations, who are not represented by the two plaintiff associations in this motion. Complaints came from the United Airport Taxicab Drivers Association, and Aerocar Limousine Services Corp. Cooperative Ltd. Both organizations wrote to the GTAA to express their concerns about the disruption being caused by the Drivers to the RFP process. Both of these other organizations advised, essentially, that the interruption of the RFP process was not acceptable to their members. The reason for this was that a number of their members had decided to submit proposals under the RFP proposal for the issuance of new limousine licenses and had incurred considerable cost, and spent time in that regard. A number of members of these organizations followed the GTAA's recommendation that drivers could and should form themselves into cooperative corporations for the purposes of preparing proposals that they could submit under the RFP process with a view toward seeking to be issued limousine licenses.

58 The taxicab drivers continued to press their position, however, urging "a preferential award of new limousine licenses to drivers." In correspondence dated June 1, 2005, sent in advance of a meeting scheduled with the GTAA for June 3, the Drivers stated their case for the issuance of new limousine licenses on a seniority basis to individuals rather than to companies. The Drivers urged the GTAA to "retract" 35 existing limousine licenses that had been issued years before by Transport Canada, and to now reissue those licenses to the Drivers on a seniority basis. In the closing of their letter, they demanded GTAA's "complete and immediate withdrawal of its current [RFP]."

59 On June 9, 2005, following the June 3 meeting, Mr. John Kaldeway, the President and CEO of the GTAA, wrote to the Drivers to modify the terms of the limousine licence RFP to address concerns the Drivers had raised, and to accede, in part, to some of their demands. Mr. Tolton indicated that these concessions were being made as a direct result of the pressure brought to bear by the Drivers in their demonstrations, which had disrupted the operations at Pearson.

60 Under its proposed revised RFP terms, the limousine licenses would be issued using the current RFP process, but with certain points clarified. In particular, any proposals made under the RFP would explicitly have to reflect a direct relationship between the Drivers and the company to which the license would be issued (in other words with no middle person involved). Further, the fees to be charged to the Drivers by a licensee corporation would have to be fully disclosed as part of the proposal, and thereafter on an ongoing basis. The purpose of these clarifications, clearly, was to address the substance of the Drivers concerns about being mere contracting parties to the license holders. Presumably the proposal was also intended to equate the position of limousine drivers to that of the taxicab drivers.

61 Further, Mr. Kaldeway indicated in his June 9 letter that the criteria and weighting that would be used by GTAA to evaluate the proposals would be reviewed, to ensure that they fulfilled the GTAA's intent to have significant weighting in the RFP process be given to driver focused issues. Finally, he advised that the GTAA would continue in discussions with the industry, and provided peace was permitted to prevail at Pearson, would immediately commence consultation with the airport taxi industry for the issuance of up to an additional 40 taxi licenses, with taxi driver seniority being the primary criterion for award. He concluded his letter expressing his hope that these steps would go a long way to resolving the Drivers concerns regarding the proposed basis of issuance of new licenses.

62 On June 14, the Drivers responded to the GTAA. They rejected the concessions made on June 9. They took the uncompromising position that "there are absolutely no justified reasons or grounds in support of your decision to go ahead with your so-called [RFP]." The Drivers "unanimously rejected" the GTAA's concessions and insisted on "unconditional full withdrawal of your current RFP". They repeated their demand for the issuance of new licenses to be made to individual drivers on a seniority basis. The Drivers also threatened more demonstrations at Pearson on June 20, 2005, if their demands were not met.

63 On Monday, June 20, the Drivers engaged in substantial demonstrations at Pearson and substantially interfered with public safety, and the convenience of the travelling public. The activities of the Drivers were reported on in the national media, including most Toronto and national newspapers. The demonstrations undertaken by the Drivers, and the blockades which they created on the roadways into and out of Pearson, caused the Police forces to close all roads leading to Pearson. This caused inordinate delays, required passengers to essentially walk out to Dixon Road to try to compete for available municipal taxicabs, and generally caused serious inconvenience to the public.

64 In its report on the demonstration on June 21, 2005, the lead Toronto Star article, reporting on the drivers blockades the prior day, said:

> Temperatures soared and radiators overheated as thousands of travelers were gridlocked after an airport wide taxi strike closed all the roads leading in and out of Pearson Airport yesterday.
>
> A group of taxi drivers blocked entrances to all three of Pearson's terminals, backing up traffic on Airport and Dixon Roads, and on Highways 427, 401 and 409.
>
> By late yesterday afternoon, the O.P.P had closed a portion of the 427 because of the protest.
>
> Rajinder Singh, President of the Airport Taxi Cab Association, said that by 6:30 last night, none of Pearson's 596 taxis and limos was serving the airport.
>
> Singh said the protests would continue every weekday until the Greater Toronto Airport Authority satisfies his group's demands - that new limousine licenses be granted to taxi drivers on the basis of seniority.

> Under current arrangements, the GTAA will not issue limo licenses to individuals. It will only give them to companies, causing drivers to complain that they are shut out of the process.

65 As a result of these demonstrations, the GTAA and Air Canada each brought motions to the court on June 21, 2005 for interim injunctions to regulate and restrain the Driver's demonstrations at Pearson. Because of the inability of the Drivers to have their counsel present given the short notice, the Court granted an interim injunction on that day to prohibit further demonstrations by the Drivers until the matter could be further reviewed by the Court the next day.

66 On June 22, the interim injunction motion came back before the Court. At that time, WestJet Airlines Ltd. and Skyservice Airlines Inc. joined with the GTAA and Air Canada in seeking an injunction to regulate the Drivers demonstrations at Pearson. WestJet and Skyservice intervened as friends of the Court. Ultimately, the Drivers, the GTAA, Air Canada, Westjet and Skyservice agreed on terms of a consent injunction regulating the Drivers demonstrations at Pearson, so as not to interfere with public safety, the operations of the airport, or the members of the traveling public. The form of this consent injunction involved a minor modification to a demonstration Protocol that the GTAA had proposed to the Drivers' counsel on Friday, June 17, but which had been refused. Following the granting of the injunction on consent on June 22, 2005, counsel for the Drivers and the GTAA met to further discuss underlying commercial issues of concern to the Drivers, but apparently sufficient progress was not made to prevent this present litigation from commencing.

67 On Tuesday, June 28, 2005, the Drivers served a notice of motion and a notice of action for an interim injunction on the GTAA, returnable Thursday, June 30, 2005. That injunction sought to prevent the RFP from closing, came on before Justice O'Connor, and was adjourned on consent to July 25, 2005. In the meantime, the RFP was permitted to close. The GTAA agreed, however, not to issue any new limousine licenses pursuant to the RFP until after August 1, 2005. The GTAA observed that it would not have been able to do so in any event, given the timelines for evaluation and negotiation provided for under the RFP, but which had effectively been delayed by reason of the disrupting tactics of the Drivers.

68 In the Statement of Claim, which the Drivers finally served upon the GTAA only last Friday, July 22, on the eve of the hearing of this injunction, the Drivers claim the following principal remedies:

(a) Certification of the proceeding as a Class Proceeding pursuant to the Class Proceedings Act;
(b) Damages in the amount of $100 million for interference with economic interests, breach of fiduciary duty, exercise of arbitrary and discriminatory power, abuse of statutory and regulatory power, abusive monopoly power, bad faith in commercial transactions, breach of statutory duty and breach of implied public statutory duty;
(c) An interim interlocutory and permanent injunction restraining the GTAA from implementing the RFP that would have the effect of requiring applicants for taxi or limousine licenses to be corporate entities rather than individuals;
(d) A declaration that the GTAA has no authority, or has exceeded its authority by attempting to create classes of licenses, disentitling individuals from obtaining licenses and to make arbitrary decisions, without guidelines on entitlement to licenses;
(e) A declaration that the GTAA has exceeded its authority to make such enactments or regulations by being in breach of the Constitution of Canada in purporting to affect property and civil rights, a matter of exclusive provincial constitutional jurisdiction. The Government of Canada did not have the jurisdiction to affect property rights in this manner, and therefore this broad power could not have been delegated to the GTAA; and
(f) Damages for constitutional breach in the amount of $100 million.

69 As required under the Rules, counsel for the Drivers gave Notice of Constitutional Question, dated July 15, 2005 to the Attorney General of Ontario and the Attorney General of Canada. In correspondence dated July 20, 2005,

however, both Attorneys advised that they did not intend to intervene in this matter at this stage of the proceedings. The Attorney General of Canada, advised, however, that the matter is of some interest, and that the Attorney General wished to be kept informed of the matter as it progresses.

3. Statutory Framework and its application to GTAA

70 As counsel for the Drivers asserts, there is no question that "control of aeronautics" in Canada continues to abide with the federal government pursuant to the terms of the Aeronautics Act. It is pursuant to this Act, that the Minister may issue an aerodrome certificate allowing for the operation of an airport facility in Canada. The responsibilities of the Minister are set out in s. 4.2 of that Act, which stipulates that the Minister is responsible for the development and regulation of aeronautics, and the supervision of all matters connected with aeronautics. In the discharge of those responsibilities, amongst other powers, the Minister is empowered to promote aeronautics by such means as the Minister considers appropriate, to construct, maintain and operate aerodromes and establish and provide other facilities and services relating to aeronautics, and to control and manage all aircraft and equipment necessary for the conduct of any airline services of Her Majesty in Right of Canada. In addition, the Minister is permitted to undertake such other activities in relation to aeronautics as the Minister considers appropriate or as the Governor in Counsel may direct.

71 Section 4.3(1) of the Aeronautics Act provides for delegation by the Minister of the Minister's powers. It indicates that the Minister may authorize any person or class of persons to exercise or perform, subject to any restrictions or conditions that the Minister may specify, any of the powers, duties or functions of the Minister under the Aeronautics Act, other than the power to make a regulation, an order, a security measure or an emergency direction.

72 In furtherance of the Minister's power to operate airports, the Minister is permitted to issue Canadian aviation documents. It was pursuant to these powers that the Minister issued a Civil Aviation Airport Certificate to the GTAA on November 28, 1996. That aerodrome certificate was issued subject to the conditions which were specified therein. Further, that certificate can be suspended or cancelled at any time by the Minister. The Minister may take such steps pursuant to his powers under the Aeronautics Act. In deciding whether to issue or to refuse to issue or amend a Canadian aviation document, such as an aerodrome certificate, the Minister is required to take account of the public interest. Section 6.71(1) of the Aeronautics Act permits the Minister to refuse to issue or amend a Canadian aviation document if the Minister is of the opinion that the public interest, and in particular the aviation record of an applicant or of any principal of an applicant, warrants such a refusal.

73 The Drivers' counsel asserts that these provisions clearly establish that control of Pearson continues to abide in the Minister of Transport. He says that ultimate control of Pearson always remains in the hands of the federal government. This is a proposition with which the Court agrees. The principle is evident, not only from the provisions of the Aeronautics Act, but indeed, the ground lease granted by the federal government to the GTAA to manage and operate Pearson which specifically reserves to the federal Parliament its power to legislate with respect to aeronautics and Pearson in s. 40.01. However, it is not the control of Pearson that is in issue in these proceedings, but rather its management.

74 Other regulatory measures of potential application to Pearson are those relating to the issuance of taxi and limousine permits and licences. Prior to the conclusion of the Ground Lease, the authority to issue such permits flowed from GACOR under the Department of Transport Act[6], and was implemented by the Ontario Highway Transport Board pursuant to specific procedures, which were established consistent with the Statutory Powers Procedure Act.

75 On its face, GACOR provides a statutory and regulatory system for licencing and it contains typical licencing provisions and mechanisms. Sections 10 through 20 of the GACOR regulations govern a number of matters, including general conditions of operation of ground transportation services at an airport, the issuance and suspension of permits, the cancellation of permits, stipulations respecting the location of plates on ground transportation vehicles, and dealing with punishment in respect of persons who violate the GACOR regulations. These regulations continue in force. The question is whether the GACOR regulations, and the administrative and regulatory provisions they contain, continue to

apply to the issuance of permits in respect of Pearson following the privatization and the conclusion between GTAA and the federal government of the Ground Lease. The Drivers assert that the GACOR regulations, and the Conditions of Permit established under GACOR respecting the licensing of public transportation vehicles at airports, including Pearson, must continue to apply[7]. It is inconceivable, they say, that Her Majesty in Right of Canada could have meant to deprive, or permit persons to be deprived, of the type of administrative safeguards contained within the GACOR regulations following the privatization of Pearson.

76 This question, however, is one that can be determined having regarding to s. 3 of the GACOR regulations. Section 3 stipulates that the regulations apply to every airport that is "under the management and control" of the Minister, and "that belongs to or is occupied by Her Majesty in Right of Canada." There is no doubt that Pearson continues to belong to Her Majesty in Right of Canada in Her capacity as landlord and holder of the residual property interests with respect to the Ground Lease entered into with the GTAA in 1996. Further, as noted above, I agree with the assertion of Counsel for the Drivers that the general legislative framework makes clear that Pearson, and other airports in Canada, continue to be under the control of the Minister, insofar as the Minister retains residual legislative jurisdiction with respect to matters pertaining to aeronautics, not only under the provisions of the Aeronautics Act, but under the terms of s. 40.02 of the Ground Lease itself. The question, however, is whether Pearson is under the "management" of the Minister, for it is only if both management and control of Pearson abide in the Minister that the GACOR regulations would be applicable to licencing and the issuance of permits at Pearson.

77 A careful review of the terms of the Ground Lease, however, and GTAA's corporate powers pursuant to its Charter, should leave no doubt that management of Pearson does not abide in the Minister of Transport, but instead, pursuant to the privatization, is now exclusively vested in the GTAA. The whole purpose of the privatization effort undertaken by the federal government in the mid-1990's was in fact to transfer the management and operation responsibility for the principal airports in Canada to private sector participants, such as the GTAA. As such, the GTAA was given exclusive responsibility to manage and operate Pearson as its mandate.

78 As a duly incorporated private corporation, having all the powers of a natural person, the GTAA was empowered to provide the covenants it did to the federal government upon the conclusion of the Ground Lease implementing the privatization exercise with respect to Pearson. Specifically, under s. 8.02 of the Ground Lease, the GTAA covenanted to the Minister that it would diligently manage and operate Pearson. It is of note that that provision stipulates that the GTAA is not permitted to manage Pearson "with any other person". This point was made by Cameron J. in Airports Authority v. Air Canada (1999), 99 O.T.C. 81 (S.C.) in para. 122 of his reasons:

> However, the power of the Governor in Council under s. 4.4(2) is restricted to an aerodrome operated "by or on behalf of Her Majesty in Right of Canada". Pearson is operated by GTAA under s. 8.02.01 of the Ground Lease. GTAA "shall, alone and not in partnership with any other Person ... manage, operate and maintain [Pearson] on its own behalf and at its own cost and expense".

79 As such, it is clear that the GTAA alone is to undertake the management operation and maintenance of Pearson. GTAA is the tenant of Pearson pursuant to the terms of the Ground Lease and as such has the right, on its own behalf, and not on behalf of any other person, to develop, manage and operate the airport. In the Air Canada case, Cameron J. concluded that it was plain that GTAA had the power and authority to impose the rates, charges and fees which were at issue in that case and which were incorporated into the Ground Lease, and GTAA's letters patent. This was subject only to the residual legislative authority of the Crown pursuant to its aeronautic power to legislate in respect of Pearson and matters relating to it. On the basis of this analysis, Cameron J. struck out that portion of Air Canada's statement of claim dealing with GTAA's authority to impose fees and charges upon it.

80 Air Canada appealed the matter but when it came before the Ontario Court of Appeal, the Court dealt quickly with Air Canada's submissions. Air Canada argued that Cameron J. had failed to appreciate that there was an issue for trial as to whether any statutory jurisdiction existed for the delegation of the right of the Minister of Transport to impose fees

and charges for the use of the airports, as was alleged to have been done as the foundation to permit the GTAA to levy fees and charges, and further, that the trial judge had failed to appreciate that the GTAA was operating Pearson "for the benefit of the Crown." In response, the court said:

> We are of the opinion that it was not necessary for Cameron J. to resolve the two issues outlined above in order to strike the portions of the Statement of Claim that he did. The basis on which the GTAA levies fees is not pursuant to a delegation of power by the Minister of Transport. The GTAA has a lease of the airport property. The GTAA has power, as part of its corporate capacity, to charge for the use of its property. As a result of the Aeronautics Act, The Airport Transfers Miscellaneous Matters Act, and regulations passed pursuant to this legislation, the corporate power of the GTAA to set rates and charges and to act in the event of default of payment is recognized. Pearson was removed from the list of airports for which the Minister levies service charges when the Air Services Charges Regulations was amended in 1992 on the assumption that the GTAA had power and authority to set the fees. Whether or not the GTAA is operating Pearson on behalf of the Crown, it was clearly not the intention of Parliament to create a complete Code so that a designated airport authority like the GTAA has no authority to impose fees unless they are set out by Regulation. No legislative lacunae exists.

81 Counsel for the Drivers asserts that the Air Canada case should be distinguished, however, because in that case, the power to set fees and charges had specifically been included in the powers given to the GTAA under the Ground Lease. In contrast, he submits that the legislative lacunae which was found not to exist in that case, does exist in the present case, because the power of the GTAA to deal with limousine and taxicab licences and permits is not specifically addressed in the Ground Lease.

82 This Court does not agree with that submission. On the authority of the Air Canada case, and having regard to the full corporate power enjoyed by the GTAA in respect of its obligation to manage, operate and maintain Pearson, the Court concludes that there is no difference in law between the corporate capacity which the GTAA enjoyed in the Air Canada case to set the terms and conditions of and to charge fees for airplanes landing at Toronto Pearson, and the corporate capacity which it now claims to set terms and conditions for limousines servicing Toronto Pearson. It is clear that the GTAA has the corporate capacity to undertake both.

83 Further, this analysis necessarily leads the court to the conclusion that the plaintiff's assertion that the GTAA currently derives its authority to regulate limousines and taxis at Toronto Pearson pursuant to the GACOR regulations is incorrect[8]. The GACOR regulations apply only to an airport "under the management and control of the Minister" and which "belongs to or is occupied by Her Majesty in Right of Canada." The Court agrees with counsel for the GTAA that because management of Pearson clearly abides in the GTAA pursuant to the terms of its Ground Lease, one of the two requirements of s. 3(a) of the GACOR regulations is not met. Regardless, and even more compelling, is the proper legal conclusion asserted by the GTAA that the GACOR regulations ceased to apply to Pearson when the airport was leased to the GTAA in 1996 by operation of law. To the extent that it is clear that Pearson has since that time been under the exclusive management of the GTAA, having full corporate capacity under its constating documents and all the powers of a natural person, no person should be left in any doubt that full and exclusive management of the Pearson airport facility is a legal entitlement of the GTAA under the terms of its Ground Lease. As such, there is no scope for the application for the GACOR regulations. They simply do not apply.

5. Analysis:

(a) Are the tests met for a grant of injunctive relief?

84 To succeed on a motion for a pre-trial injunction, the Drivers must demonstrate first that there is a serious question to be tried, secondly that they will experience irreparable harm if the injunction is not granted, and finally, that the

balance of convenience favours the granting of the injunction. These were the principles enunciated by the Supreme Court of Canada in RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at pages 410-411 per Sopinka and Cory JJ. While that case was concerned with the availability of injunctive relief in a Charter context, certain of the judge's comments, adapted for these present non-Charter circumstances, are apposite. The Court said:

> At the first stage, an applicant for interrogatory relief in a Charter case, must demonstrate a serious question to be tried. Whether the tests has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and wheat heat consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions judge should only go beyond a preliminary investigation of the merits when the result of the interlocking Tory motion will in effect amount to a final determination of the action, or when the constitutionality of the challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, where the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.
>
> At the second stage, the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. Open quote irreparable" refers to the nature of the harm rather than its magnitude ...
>
> The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. They effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases and in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest, must demonstrate that the suspension of the legislation would itself provide a public benefit.

85 It should be emphasized, however, that a pre-trial injunction is a remedy of extraordinary character, which places a high onus on the plaintiff seeking the relief. The Divisional Court emphasized this in its reasons in Kanda Tsushin Kogyo v. Covely (1997), 96 O.A.C. 324, at paras. 3-4, citing R.J. Sharpe, Injunctions and Specific Performance:

> What we have in a pre-trial injunction is a drastic and extraordinary remedy. Thus it should be granted only in those circumstances which warrant taking such a drastic and extraordinary step. Implicit in, this is that the plaintiff must demonstrate (to a degree appropriate when granting such relief without the benefit of a trial) that such remedy is warranted.

86 Against this background, it remains to consider the application of these three tests in the context of the facts and evidence and the claims made by the Drivers in their Statement of Claim.

(i) Is there a serious issue to be tried?

87 In arguing the motion, the Drivers' claims for relief fell into two separate groupings. The first grouping was their assertion that they possess "rights" to participate in the RFP process as individuals, and to have limousine licenses

issued to them in that capacity, and according to their seniority. The second aspect to their claims has a public law aspect. They assert that even if the GTAA has full corporate power to conduct itself, and its RFP process, in the manner in which it has, the "public" orientation or nature of GTAA's undertaking requires that the Drivers be accorded the benefit of the rules of natural justice and procedural fairness in the same manner as would have been the case were Pearson still under the management of the federal government, rather than the GTAA. I have, accordingly considered the test whether there exists a serious issue to be tried separately with respect to each of these separate lines of argument.

(A) Do the Drivers possess rights capable of being enforced by injunction?

88 Fundamental to a consideration of the existence of a serious triable issue is the proposition that an injunction is "not a cause of action by itself. It is simply a remedy that is given in support of a breach of a legal, equitable or statutory right." Thus, a party seeking an injunction must have either a recognized common law cause of action, or a claim in equity, or a claim for infringement of a statutory right against the person who is subject to the injunction. Without the presence of these rights, a court can grant no injunctive relief. (Hope (District) v. L-156 Holdings Ltd., [1995] B.C.J. No. 1335, para. 18 (B.C.S.C.), per Scarth J., citing Kaiser Resources Ltd. v. Western Canada Beverage Corp. (1992), 71 B.C.L.R. (2nd) 236 at p. 244 per Bouck J.).

89 An example of the need for a clearly defined right, somewhat akin to present circumstances, can be found in the decision in Halifax Ship Yard v. Canada, [2001] O.J. No. 4943, para. 3(b) (S.C.J.), per Power J., where the court refused to grant an injunction arising out of an RFP process where the proprietary rights claimed to be infringed by the RFP were not sufficiently or specifically defined. Similarly, in Duplain v. Cameron (1960), 26 D.L.R. (2nd) 340, at p. 343, Brownridge J. of the Saskatchewan Court of Queens Bench emphasized that an applicant for an injunction must assert some right, the violation of which should be enjoined until his action in respect of that right can be tried.

90 The Drivers first assert that the GTAA lacks the authority to issue the RFP. For the reasons outlined above, relating to the status of the GTAA, in the Court's view this assertion presents no serious triable issue. The fact is that it cannot seriously be questioned that the GTAA has the authority pursuant to its Ground Lease to exclusively manage and operate the airport, including undertaking all necessary and incidental steps relating to that management and operation. This includes the issuance of RFP's relating to either the licencing of airport limousines as in the present case, or any number of other matters that might be required to be put out for proposals in the course of the GTAA fulfilling its obligation to redevelop Pearson.

91 The Drivers assert that the GTAA's RFP is in breach of the Constitution of Canada. However, it is difficult to understand how the division of legislative powers under the Constitution Act 1867 as between federal and provincial jurisdictions could have any bearing on an action undertaken by the GTAA. The division of legislative powers is a matter exclusively concerned with the legislative competence of the different levels of government in Canada. There is no action that is taken by a private individual or a private corporation, such as the GTAA, which could violate the Constitution of Canada in circumstances where the GTAA is merely fulfilling the mandate provided to it by the Government of Canada under the terms of its 1996 Ground Lease.

92 Further, as is argued by counsel for the GTAA, the Ontario Court of Appeal has already held that the "federal Crown owns all the land at Pearson Airport". As such, Pearson is "federal public property" under the exclusive legislative jurisdiction of Parliament under s. 91(1)(a) of the Constitution Act, 1867. That provision is a subject matter limitation on provincial legislative power. As such, the federal property carve out serves to eliminate provincial legislative jurisdiction over property and civil rights, or any other matter that would otherwise come within provincial jurisdiction, to the extent that it falls within federal legislative power under s. 91(1a). This proposition has been upheld by the Ontario Court of Appeal in Greater Toronto Airports Authority v. City of Mississauga (2000), 50 O.R. (3rd) 641 at para. 62-63 (C.A.) per Laskin J.A. for the Court, (leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 83).

93 The next assertion, at least in their pleadings, was the Driver's claim that they have enforceable property or other

rights arising out of the RFP process, or antecedent to that process, which should be upheld by the grant of injunctive relief.

94 Dealing first with whether the Drivers have any rights that arise out of the RFP process relating to the granting of limousine licences, the conclusion must inevitably be that they do not. No legal relationships are created between the GTAA and any proponent. Consequently, no property rights are created between the GTAA and any proponent who seeks to submit a proposal to the GTAA for consideration in response to its RFP process. The RFP process is merely an invitation to parties who may be interested, to submit proposals for evaluation by the GTAA in respect of the desire of the parties to be considered for the issuance of a limousine licence by the GTAA. The terms of the RFP process itself make clear that the GTAA will not be bound under any circumstances to accept any or all of the proposals which are submitted. It maintains a complete open hand to proceed in response to proposals that it receives in any manner it sees fit. It can accept, reject, or ignore proposals, and it is under no obligation to issue licences, or even to negotiate, with any of the proponents.

95 The Court agrees with the GTAA that the Drivers have absolutely no right to dictate to the GTAA what terms it must specify or include in its call for expressions of interest in the RFP process. This proposition is made clear in the judgment of MacFarland J., as she then was, in Butcon Ltd. v. Toronto Electric Commissioners (2003), 65 O.R. (3d) 601, at para. 30 citing P. Sandori and W.M. Pigott, Bidding and Tendering: What is the Law, 2nd Edition (Toronto) 2001, (at p. 239) where the judge said that:

> The owner that wants submissions from interested parties but does not wish to create [a contract], may choose to wish away request for proposals (RFP). Properly drawn, an RFP asks parties for expressions of interest and sets out the owners intention to consider those expressions of interest and then to undertake negotiations with one or more parties whose proposals appeal to the owner.

96 Of course an RFP is an even less formal process entailing less structure than a formal tendering process, which may give rise to a contract where a tender submitted by a party is accepted. Even in a tendering situation, however, which is not the case in the RFP proposal being undertaken by the GTAA in the limousine licencing matter, a party submitting a tender in response to a request for tenders has no right to dictate or to even negotiate the conditions of the tender. The Supreme Court of Canada has established that "tender requirements are not negotiable", and that a party calling for tenders has full and absolute discretion to set out its own specifications and requirements: see Martell Building Ltd. v. Canada, [2000] 2 S.C.R. 860, para. 17, per Iacubucci and Major JJ. See also Labrador Airways Ltd. v. Canada Post Corporation (2001), 198 Nfld. & P.E.I.R. 116, para. 5, 20 (N.S.C.) per Green C.J.T.D. where the Newfoundland Supreme Court held that in the absence of any statutory or regulatory constraint on its procurement processes, Canada Post, a public body and Crown Corporation, was governed by the law of contract and other applicable common law principles with respect to the manner in which it sought to identify and contract with potential mail carriers. The court held that it was under no statutory or regulatory duty to exercise its procurement powers in any particular way.

97 Further, the Drivers have claimed to have "economic interests" rights and that the action of the GTAA in refusing to permit them to submit proposals under the RFP process as individuals, gives rise to the tort of interference with their economic interests. There is no merit to this claim, however, for the existence of the tort would require that the Drivers demonstrate not only an intention on the part of the GTAA to injure the Drivers, and that illegal means were used by the GTAA to interfere with the Drivers method of gaining their livelihood but also that the Drivers have sustained economic loss as a result of those actions: (see Lineal Group Inc. v. Atlantis Canadian Distributors Inc. (1998), 42 O.R. (3d) 157, p. 159 (C.A.)).

98 In present circumstances, the Drivers' pleading does not assert the presence of any of the requirements noted above which would permit a claim of interference with economic interests to be proven. Further, there is simply no evidence that the GTAA has interfered in any way with the Drivers' method of gaining their livings much less that it has used "illegal means" to do so.

99 Each of the Drivers gains their livelihood from driving airport taxicabs or limousines. As the GTAA emphases, the Drivers are free to continue to drive at the airport under their existing taxi licences and limousine licences held by companies. The only issue in the RFP relates to the issuance of proposed new limousine licences. In any event, the Court observes that the Drivers have not pleaded any illegal means on the part of the GTAA and no evidence was provided of real economic loss. As such, there is no foundation for such a claim to succeed. Accordingly, it cannot constitute a serious triable issue.

100 The fact is that the Drivers have no substantive legal "right" to the new licences. They may have a hope, or a questionable expectation, but they enjoy no such legal right. They cannot claim any loss if they fail to submit a proposal under the RFP for the consideration of the GTAA, and are then not awarded a licence to which they neither had nor currently have any legal entitlement.

101 Finally, in this first part of the analysis, the Court wishes to address the assertion found in the Drivers' pleadings, and in the affidavit evidence of Mr. Dhillon, that the action of the GTAA in refusing to permit the Drivers as individuals to submit proposals with respect to the issuance of limousine licences, and to instead restrict acceptable proposals to those emanating from corporations, would "take away the right" of the drivers to obtain a licence and force many drivers to have to work or subcontract with a company.

102 I was concerned with the assertion of such a "property" based right on the argument of the motion, having reviewed carefully all of the material filed with the Court in anticipation of its argument, and having found no legal foundation or factual connection to support an assertion by the Drivers to have any sort of legal "right", enforceable as against the GTAA, to be granted limousine licences.

103 While it is true that taxicab licences at Pearson have always historically been granted to individuals, and most recently on the basis of the seniority of applicants, this has never been the procedure applicable to the issuance of limousine licences. All of the limousine licences are currently held by corporations and none has ever been issued to an individual. The source of the Drivers' claim to a right to have limousine licences issued to them as individuals, based on a seniority system, in my view results from a failure to distinguish operationally between the two processes, namely, the licencing of taxicabs at Pearson and the licensing of limousines. While there is an oblique reference in the Bartlett Report to the subject of limousine licences being issued to individuals having been discussed, perhaps in the middle to late 1980s, that report indicates the concept was not pursued, apparently on the basis of advice received by the Airport administrators from their legal advisers.

104 In my view, the Drivers fail to distinguish between the taxicab licences and the limousine licences. However, entirely different regulatory and administrative systems have been in place for almost 30 years with respect to these two different kinds of licences. In appearance, it may be difficult to distinguish between the limousines and the airport taxicabs, since both are high quality vehicles, well maintained by the drivers or owners, and equally dedicated to servicing the Pearson airport traffic requirements. Further, it may well be that a course of dealings over the years could be said to have given rise to a "right" in the Drivers to have taxicab licences issued to them as individuals. I have seen no independent evidence, however, in any of the affidavits, or in any of the documentary materials filed with the court, to support the proposition that such an arrangement has ever been seriously contemplated, much less come into existence, with respect to licences relating to limousines.

105 In any event, I need not consider this issue further. The reason is that when I raised these questions for comment during the argument of the motion, counsel for the Drivers agreed and confirmed to me that there was no "property" right being asserted or which is at issue. Rather, said counsel for the Drivers, the right being claimed by the Drivers is entirely a right, which the Drivers claim, to have the benefit of the rules of natural justice in their dealings on these issues with the GTAA.

106 In light of the foregoing the question whether the Drivers possess rights, of a legal or proprietary nature capable of being enforced by injunction does not present a triable issue in my opinion and on this first part of the first ground,

the injunction would fail.

107 It remains to be considered whether their claim to entitlement to benefit from the rules of natural justice and procedural fairness gives rise to a serious issue to be tried which would satisfy the first leg of the test in the RJR MacDonald case.

(B) Is the GTAA subject to the rules of natural justice?

108 At the commencement of his argument, counsel for the Drivers set out a very simple proposition. He asserted that the only conclusion that could be drawn from the manner in which the GTAA had treated the Drivers is that the rules of natural justice and administrative fairness did not exist at the GTAA. As a consequence of this, he asserted that the Director of Operations at Pearson can essentially do whatever he wants with respect to people's rights, or community interests and without enunciating any particular rules or regulations.

109 He asserted that this was not only against the statutory framework which he alleged governed the granting of permits at Pearson, but that it was against the Aeronautics Act, against the rules of natural justice, and against the sense of fairness that citizens believe they have in their dealings with bodies such as the GTAA. As he framed the issue, it is whether the GTAA has the authority to do what it has done with the issuance of the RFP and the authority to conduct itself in the manner it has, and can it do so with untrammeled discretion.

110 He asserted that Her Majesty the Queen could not be thought to have relinquished "control" over Pearson to a body such as the GTAA, in such a manner as to deprive persons of access and entitlement to benefit from the rules of natural justice and procedural fairness. If this was the intent of Her Majesty, he asserted, it ought to have been specifically so stated. Even if the federal government intended to exclude the GTAA from the rules of natural justice as a consequence of the privatization exercise, however, he asserted that this could not be done on the authority of the decision of the Supreme Court of Canada in Roncarelli v. Duplessis, [1959] S.C.R. 121.

111 Roncarelli was the proprietor of a restaurant in Montreal and he was the holder of a liquor licence. That licence entitled him to sell alcoholic beverages at his restaurant. He was also, however, a Jehovah's Witness. In the 1950's, certain Quebec municipalities, including Montreal, passed bylaws, which prohibited members of the Jehovah's Witness sect from distributing their religious literature (the famous "Watchtower" newsletter). Roncarelli did not himself participate in the distribution of the religious literature, contrary to the bylaw, but given his success as a business man, he offered himself up as a bailsman to provide security to obtain the bail for a number of his co-religionists.

112 As a result of this action, the Quebec Liquor Commission cancelled Roncarelli's liquor licence. The evidence established definitively that that cancellation occurred at the instigation of the defendant, the Honourable Maurice Duplessis, then Premier of Quebec. In response, Roncarelli sued Duplessis alleging that the licence had been arbitrarily cancelled at the instigation of Duplessis, who without legal powers to do so, had given orders to the Quebec Liquor Commission to cancel the licence before its expiration. Not only had the Commission cancelled Roncarelli's licence, but they had advised him as well that he need not apply for a renewal in future because it would not be granted.

113 At trial, the judge gave judgment to Roncarelli for part of the damages claimed. Duplessis appealed, and Roncarelli, seeking an increase in the amount of damages awarded, cross-appealed. The Quebec Court of Appeal dismissed the action and the cross-appeal.

114 However, the Supreme Court of Canada reversed the Quebec Court of Appeal, and held that the action should be maintained and that the amount awarded at trial to Roncarelli as damages should be increased by $25,000, not an insignificant amount in those days. It held, that by wrongfully and without legal justification causing the cancellation of Roncarelli's permit, Premier Duplessis became liable for damages under Article 1053 of the Civil Code of the Province of Quebec.

115 The most famous speech at the Supreme Court was that of Mr. Justice Rand. Counsel for the Drivers quotes from

the reasons of Rand J. in support of their position, when he said:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground for any reason that can be suggested to the mind of the administrator; no legislative act can without express language, be taken to contemplate unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. ... Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The legislature cannot be so distorted.
>
> To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to at the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only cancellation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incidents of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and a fortiori to the government or the respondent.

116 Justice Rand was harshly critical in his characterization of the actions of the Quebec Premier:

> The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the Province. Whatever may be the immunity of the Commission or its members from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec.

117 Counsel for the Drivers relies on this language and the principles of this historic case in support of his allegation that the GTAA has acted with "untrammelled discretion", as did the Quebec Liquor Commission in Roncarelli's case, and that this Court must condemn the manner in which the GTAA has operated as constituting an equivalent transgression against the "rights" of the Drivers.

118 While the principles enunciated by the Supreme Court in Roncarelli articulate a profound and cogent basis for the restraint of the untrammelled misuse by a public authority of its powers, and recognize the right of all citizens to have access to the principles of natural justice and procedural fairness when dealing with public authorities, the application of these principles in the present circumstances is substantially less clear.

119 This uncertainty, results from the character of the GTAA. The Quebec Liquor Commission in Roncarelli's case was clearly an emanation of the government of Quebec. It allowed itself to be influenced by the Premier of Quebec to reach an unreasonable and unsubstantiated decision respecting the continuing entitlement of Roncarelli to hold a liquor licence. The Court in this case, however, is confronted with a fundamentally different set of circumstances. Unlike the Quebec Liquor Commission in Roncarelli's case, which was a statutory creation and instrumentality of the Quebec government, and sadly susceptible to influence by a powerful political figure of the day, such as Duplessis, the GTAA is a private corporation which owes no part of its existence or power to any governmental authority, other than its letters patent of incorporation which provide to it all the powers of a natural person and its Ground Lease.

120 There is no question that Canadian law recognizes the general existence of a set of rules of natural justice and an

obligation of procedural fairness, but the application of those principles has typically been in the context of the decisions and actions of a public authority. A strong articulation of this principle can be found in the reasons of Le Dain J., in Cardinal v. Kent Institution, [1985] 2 S.C.R. 643. At page 653, Le Dain J. defines the scope of the duty of fairness as follows:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. (emphasis added)

121 The importance of this particular statement, as Brown and Evans recognize in their definitive work, Judicial Review of Administrative Action in Canada[9] lies in its simple capturing of the three principal elements that lie behind the duty of fairness. First, the duty of fairness is meant to apply to a "public authority". Second it operates in respect of "an administrative decision which is not of a legislative nature", but which, thirdly, affects the rights, privileges or interests of an individual. It is in the first element of this test that serious question arises whether the GTAA is properly subject to the duty of procedural fairness and the rules of natural justice which counsel for the Drivers asserts.

122 The Court recognizes that the duty of procedural fairness may apply to a broad range of decision makers ranging from actual members of government such as Ministers, Cabinets, Municipalities and their officials, to statutory bodies that operate at arm's-length from government, but which owe their existence to legislation, such as universities and bodies statutorily responsible for the regulation of self-governing professions. However, the application of these principles has been extended to non-governmental bodies in only exceedingly limited circumstances.

123 As Brown and Evans[10] state, the negative implication of this element of the definition of the duty of fairness is that it does not apply to private bodies. The authors suggest that that conclusion may not be completely correct, however, since there are examples in the jurisprudence examples of private circumstance cases, such as 19th century English cases concerned with natural justice respecting membership in clubs, and more modern cases concerning a duty of fairness held to apply to churches and other religious organizations in terms of their membership, as well as to trade unions in the discipline of their members, and certain trade and other voluntary organizations. It is substantially less clear that there is any scope for the application of natural justice principles in the context of non-statutory or non-governmental bodies. In those circumstances, it may be that only principles of private law will provide a remedy by way of an award of damages, or possibly, suggest the authors, an injunction to prevent further breaches of the alleged administrative right.

124 Further, the extent to which a duty of fairness applies to the "commercial" decisions of even a public authority is unclear. Even this, however, is one step removed from the circumstances of the GTAA. The GTAA is not a public body within any ordinary meaning of the expression although it is acknowledged that the operation, maintenance and management of Pearson would at first blush seem to constitute a function that is at least exercisable in the public interest and that consequently has a "public" dimension.

125 The case law draws a distinction between public bodies acting in a public and in a private contractual capacity. Thus, for example, Brown and Evans observe that the traditional view has been that the process of awarding a government contract for the procurement of goods is solely a matter of contract and is neither reviewable, nor does it give rise to a duty of fairness.[11] On the other hand, the authors note that some courts have recognized that there can be a public element to the awarding of a government procurement contract and have held such decisions to be reviewable for breach of a duty of fairness. Similarly, in the context of a tendering process, courts have implied a term of fairness owed by the public body to all persons tendering to the proposed contract. In these instances, however, no public law remedy has generally been available. Rather, courts have held the matter to be one of contract so as to permit the aggrieved party to attain a remedy only by way of the granting of an award of damages.

126 In the present case, the Court is confronted with actions by a body which is not public, but clearly private in

character. The GTAA is a private corporation and it is empowered by its Charter and the terms of its Ground Lease with the Government of Canada to take such action as it sees fit relative to the operation, maintenance, and management of the airport facilities at Pearson. This includes the granting of licences relative to passenger transportation to and from Pearson, either by taxicabs, or by limousines.

127 Thus, the initial legal analysis suggests, contrary to the assertions of counsel for the Drivers, that the GTAA as a private body with all the powers of a natural person is not subject to the rules of natural justice or any particular code of procedural fairness relative to the manner in which it conducts and undertakes the management, operation and maintenance of the Pearson facilities. Nevertheless, a question remains whether the "public" nature, or the "public" orientation of the GTAA's undertaking is such that it would be appropriate to import into the conduct of the GTAA, and burden its operating freedom, with some obligation to operate by rules of procedural fairness in recognition of the rules of natural justice consistent with some of the more unusual cases found in the jurisprudence. This question arises here, notwithstanding the private character of the GTAA, having regard to the "public" oriented function, which it ultimately serves.

128 Were such a standard to be imposed upon the GTAA, having regard to its obligations to manage, maintain and operate Pearson in the interests of the public, it may well be that a court could regard the GTAA as being subject to an implied duty of procedural fairness. Such an implied obligation to operate by the same or similar kinds of principles relating to natural justice would be applicable to a public authority or body in the discharge of its public or statutorily mandated obligations[12]. In raising this question, the court acknowledges that it is far from clear, even if such a standard were to be imposed upon the GTAA, that its imposition would necessarily result in an entitlement to the public remedy of injunction for alleged failure of the GTAA to comply. It might instead be appropriate that the Drivers would have a simpler remedy in damages for breach of contract, or for an alleged tort of interference with economic relations, were the factual elements necessary to establish that tort present in this case, of which as noted, there is no evidence.

129 Nevertheless, in considering whether a triable issue exists for the purposes of the first test required to be satisfied on an application for injunctive relief, and without anticipating or suggesting where the outcome of that debate might lie, it seems clear to the court that the low level threshold of existence of a "triable issue" may be present in the instant case with respect to this line of argument. Thus, without deciding the issue, and solely for the purposes of these reasons, the Court is prepared to assume that there may be a triable issue which would satisfy the first of the three tests established by the Supreme Court in the RJR MacDonald decision as a pre-condition to entitlement to injunctive relief.

130 It may well be that a court called upon to consider the question at trial would conclude that it was inappropriate or technically impossible to impose principles of natural justice or a public law standard of procedural fairness on the actions of a private corporation having no statutorily mandated public law duty. This, however, is not a question for this Court to decide today. The low threshold of "triable issue" mandated by the Supreme Court of Canada's decision in RJR MacDonald, and my assumption made solely for these purposes that a triable issue is present, does not require that the issue be resolved but does permit the Court to proceed to consider the remaining tests established in the jurisprudence.

(ii) Will the Drivers suffer irreparable harm if the injunction is not granted?

131 In the R.J.R. MacDonald case, supra, the Supreme Court ruled that "the applicant must convince the Court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude". The Supreme Court went on to say that irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

132 The key element of this test requires that the party claiming injunctive relief not merely argue that harm may result, but that it must convince the Court that it will result. Expressed another way by the Divisional Court in the Kanda decision, supra, the Court said that evidence of irreparable harm must be "clear and not speculative".

133 In the present case, the nature of the irreparable harm, which it is alleged will be sustained by the Drivers if this

injunctive relief is not granted, is stated succinctly in para. 20 of the Drivers' factum:

> If the GTAA proceeds in this arbitrary manner, apart from a statutory, administrative regime, rights of individuals and licencing, appeals, fairness, the ability for an individual to obtain a licence, will be trampled on. The rights of some 1500 drivers, some of whom have been working at the airport for more than two decades will be eliminated and seniority will be subverted. Further, the incomes and livelihoods of the drivers and owners would be adversely affected once corporations are designated, in a downloaded system, as the only entity entitled to a limousine licence.

134 This statement purports to be a distillation of the affidavit evidence of Mr. Dhillon in his two affidavits, the first sworn June 29, 2005 in paras. 2, 9, 10 and 13, and the second sworn July 8, 2005 in paras. 5, 7, 8, 13, 17, 20, 27 and 31. Clearly, not all of the alleged harms enumerated in that paragraph involve purely monetary loss. However, there are reassertions in that paragraph of the existence of "rights" which, for the reasons outlined above, I have concluded do not achieve the level of being legally enforceable rights in respect of which a remedy could be provided.

135 The most direct statement, and the only evidence in the Drivers' Motion Record of alleged injury that will result to the Drivers if the injunction is not granted is contained in para. 15 of the June 29, 2005 Dhillon affidavit.

> If this happens, the GTAA will have effectively changed the system of granting licences, changed to the class of persons, namely exclusively corporate, entitled to this property right and excluded individuals and will drive wages for drivers down. This will have irreparable harm to drivers, existing permit and licence holders and potential future drivers and holders because it will harm their ability to earn income and to support their families in the profession they have worked at for so long.

The Court agrees with counsel for the GTAA that this is not evidence of a sufficiently clear and convincing character to permit the Court to conclude that the Drivers will in fact suffer "irreparable harm" as that concept has been defined in the jurisprudence. The decision of Anderson J. in North Bay Trappers Hockey Team Ltd. v. Reg Quinn Ltd., [1983] O.J. No. 211, para. 7 (H.C.J.), establishes that a mere allegation of irreparable harm does not make it so. An affiant "cannot establish irreparable harm by saying that it exists or will be suffered. It is only in the allegations of fact which are put forward as supporting that contention that foundation can be found for a conclusion that such harm is to be anticipated."

136 On the basis of this principle, the assertion of Mr. Dhillon needs to be analyzed and tested.

137 First, Mr. Dhillion asserts that through its RFP process, the GTAA will have effectively "changed" the system of granting licences, changed the class of persons, namely exclusively corporate, entitled to that property right, and have excluded individuals. This is demonstrably incorrect. As the facts outlined above demonstrate, there have never been limousine licences issued to any persons other than corporations.

138 The existing system at Pearson is that taxicab licences are issued to individuals on the basis of seniority, but for the numerous reasons previously noted, limousine licences have historically been issued only to corporations. This appears always to have been the case. There are no limousine licences which have been issued at any time over the past 30 years to individuals. As such, it seems clear that rather than "effectively changing" the system of granting licences, the decision of the GTAA to grant limousine licences under its RFP process only to corporate applicants in fact results in the continuance of the existing system. As in the past, the GTAA now continues to assert that only corporate applicants will be entitled to obtain limousine licences. This cannot result in a new "exclusion" of individuals, because no individuals have previously received such licences, nor have they been considered for limousine licences. This is so regardless of the fact that the Conditions of Permit relative to Pearson, at least contemplate the possibility in the language of s. 14 that a limousine licence could potentially be issued either to a company or to "the person ... registered

as owner of that limousine under the Ontario Highway Traffic Act."

139 The fact is that even with that permissive language, Transport Canada never issued limousine licences to individuals during the period of its stewardship of the airport. No further limousine licences have been issued since that time and the Bartlett Report acknowledged that there were good and valid reasons for the existence of a dedicated fleet and the existence of the streamlined administrative system relative to limousines. The current RFP process being undertaken by the GTA merely perpetuates that existing system.

140 The real economic detriment alleged by the Drivers in paragraph 15 of Mr. Dhillon's affidavit is that the issuance of the limousine licences will "drive wages for drivers down". However if that were so, it would merely give rise to a claim for a lost wages or profits that is measurable and compensable in damages. One measure of damages would be the difference between the current wages earned by the Drivers and wages earned by the Drivers after the new licences are issued. Courts have consistently ruled that claims for lost wages or lost contracts do not constitute irreparable harm: see Semiconductor Insights Inc. v. Kurjanowicz (1995), 63 C.P.R. (3d) 532, p. 545 (Ont. Gen. Div.), per Cunningham J. ("Irreparable harm does not occur when there are lost contracts. Irreparable harm may occur when it is determined that customers have forever departed. There may be a temporary loss of business which, for all intents and purposes, would equate to a temporary loss of revenue. But that is clearly something which can be compensated for in damages.")

141 Further, in Telus Integrated Communications v. Canada (Attorney General), [2000] F.C.J. No. 1429, paras. 20-31 (T.D.), Heneghan J. of the Federal Court Trial Division refused to grant an injunction to restrain a contract awarded pursuant to an RFP. She concluded that loss of projected market share could not constitute an irreparable harm.

142 In any event the assertion that the ability of existing Drivers to earn a living will be injured if the GTAA issues limousine licences only to corporate proponents is simply not borne out on the facts. There will be no rescission of existing taxi and limousine licences. Drivers who currently earn a living pursuant to these licences will continue to be able to do so.

143 This situation is virtually identical to that considered by the Federal Court in Airport Taxicab (Malton) Association v. Minister of Transport, [1985] 2 F.C. 392. In that case, the ATA at Toronto Pearson, the same organization that is a participant and plaintiff in this litigation, endeavoured to obtain an injunction against the Minister of Transport to prevent the Minister from issuing a call for tenders for a new common dispatch system. The Minister had sought to replace the prior system, under which limousine and taxi companies each had their own dispatch systems operated by them. That arrangement had led to serious abuses, harassments of passengers by the taxi and limousine companies, and complaints from members of the public. The ATA claimed that the Minister had no lawful authority to tender the dispatch system, and that the practice of having separate queues for taxis and limousines was discriminatory.

144 The Federal Court refused to grant an injunction, however, finding that any injury claimed to be suffered by the ATA was purely monetary, involving only claims for lost profits. Further, the Court found that the claim for lost profits would arise from an activity that the ATA had no right to, namely, the entitlement to operate the dispatch system. The Court also found that the travelling public would be substantially inconvenienced and harmed if an injunction were granted, since they would have to continue to tolerate harassment on the curbs by the taxi and limousine companies. In her ruling, at pages 400 to 401 of the report, Madam Justice Reid said the following:

> In this case what is the harm the plaintiff alleges it will suffer? As I understand, it is the loss of business which will occur as a result of dispatchers employed by it not being able to solicit customers. It is a loss of profits claim and as such one that is usually seen as adequately compensated by a monetary award in damages. In this case the calculation of, and eventual allocation of any reimbursement of that profit might be difficult given the numbers of taxi cab operators involved and the loose form of organization. However it would not be impossible. In addition, the crucial factor in this case is the fact that from the evidence set out above, it is clear that the damage which the plaintiff will suffer will arise from it not being able to engage in

> activities, or encourage others to engage in activities which it has no right to do ...
>
> What then is the harm that the defendant will suffer if the injunction is granted? ... It is clear that the defendant will suffer damage in the sense of having to tolerate "chaos on the platform" as it was put on the cross-examination of Mr. Mann. The damage which will occur will be the hassling of the travelling public and consequent complaints by members thereof to the airport management. The defendant is responsible for the orderly administration of the airport. Its ability to fulfil that responsibility will be diminished if an injunction is granted. It is clear, this is not an injury which can be compensated by a monetary award in damages.

145 Here, the Court agrees with the GTAA that the Drivers will not be "harmed" within the legal meaning of that term if the GTAA is permitted to exercise its right to issue new limousine licences pursuant to the RFP. The Drivers simply have no "right" to receive new limousine licences, far less any right to licences on commercial terms which may be dictated by them. On the other hand, as is discussed below with respect to the balance of convenience test, the GTAA and the third parties members of the public who make use of the facilities at Pearson would be substantially harmed if the GTAA is not permitted to manage and operate Toronto Pearson in accordance with its mandate to do so.

146 For these reasons, I conclude that the Drivers have failed to establish the element of irreparable harm necessary if the injunction motion is to succeed. The injunction would fail on this ground alone, but I will proceed in the interest of the parties, and having regard to the importance of the matter, to the last element, namely balance of convenience and assess the extent to which the balance of convenience on this motion favours the Drivers as compared to the GTAA.

(iii) Which of the parties, the GTAA or the Drivers, will suffer the greater harm from granting or refusing the injunction pending a decision on the merits?

147 The third test enunciated in RJR MacDonald is the balance of convenience. As the court said in that case, this involves "a determination of which of the two parties will suffer the greater harm from the granting or refusing of an interlocutory injunction, pending a decision on the merits." A related question, which may affect the determination of the balance of convenience or inconvenience relates to the giving of an undertaking with respect to damages.

148 Rule 40.03 of the Rules of Practice stipulates that on a motion for an interlocutory injunction or a mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

149 In the present case, the Drivers have not provided an undertaking with respect to damages either in the names of ALDA or ATA, or in the names of individual members of those organizations. Their counsel acknowledges that such an undertaking is normally given on an injunction motion unless the court, in its discretion, decides not to require it. He asserts that this is a case of ATA and ALDA being representatives of a much broader group of individuals who are the Drivers. It is the individuals, he says, who are seeking redress. These are not persons of great wealth, he argues, and thus he suggests to the Court that it would be appropriate in this circumstance for the Court to grant an indulgence and not require the undertaking with respect to damages, especially having regard to the intention of the Drivers to seek to proceed with the litigation as a class proceeding.

150 The Court concludes that the balance of convenience on this motion strongly favours a refusal to grant the injunction. The Drivers claim that they will be harmed if new limousine licences are not awarded to them in accordance with the conditions and terms which they have endeavoured to dictate to the GTAA, but the Court is not persuaded that such an assertion is correct. The Drivers have no contractual or other proprietary right to an award of a licence on any basis, not only because they have no legal right that results from a legal relationship with the GTAA with respect to the prospective issuing of limousine licences, but also because the RFP process itself does not create legal rights. As such, it

is difficult for the Court to conclude that there is harm that will be suffered by the Drivers that cannot await consideration at a subsequent trial of the matter if the GTAA is permitted to exercise its right to issue new limousine licences pursuant to the RFP without being enjoined by the Drivers from doing so.

151 In contrast, the GTAA asserted and provided evidence to support its position that substantial harm would result to it, as well as to third parties including the travelling public, if it is not permitted to exercise its right, to issue new limousine licences pursuant to the RFP, a right it insists it has under its corporate charter and the terms of its Ground Lease entitlement to the exclusive management and operation of Pearson.

152 These harms include a potential direct financial loss of annual concession revenue from the proposed new limousine licences that is estimated to total approximately $720,000 per year, and direct financial harm that would result to any of the successful proponents submitting proposals under the RFP process. They would suffer harm since the Drivers injunction would prevent that process from continuing and those proponents from being awarded limousines licences as successful applicants. Operational harm and inconvenience would also result to the GTAA.

153 The fact is, and the GTAA has advanced persuasive evidence in support of its position on this point, that new limousine services are currently needed at Pearson to service increasing volumes of passengers. These passengers are presently encountering substantial delays on the arrivals curb at Pearson while waiting for vehicles to take them to their destinations in the Greater Toronto Area. Further, such increased passenger congestion poses operational harm to the GTAA insofar as it must devote additional resources to the more burdensome task of managing this larger number of persons at the Pearson Airport facility, rather than being able to process passengers quickly into and out of the airport, consistent with its operational mandate.

154 Further, if the injunction is granted, the shortfall of new limousines which will result will necessarily cause inconvenience to the travelling public, the intended third party beneficiaries of the GTAA management and operational mandate. In addition, and perhaps most important having regard to the mammoth redevelopment of Pearson currently being undertaken by the GTAA, failure to permit the RFP process to continue to completion will compromise the reliability and credibility of the GTAA to other prospective suppliers of services. It will potentially compromise the willingness of such persons to participate in other competitive RFP processes which must necessarily be conducted to permit the redevelopment of Pearson to be completed over the next few years.

155 Even had the Court not reached the conclusion on the basis of the points outlined above that the balance of convenience favours the GTAA, the failure of the Drivers to provide an undertaking with respect to damages would have tipped the balance in favour of the GTAA.

156 The providing of the undertaking with respect to damages is not a mere trifle. In a case such as the present where a party seeks to restrain conduct of the other party by way of an injunction on an interlocutory basis prior to trial, effectively the restrained party is being prevented from undertaking some kind of conduct without having had the opportunity to have its case considered on a full trial of the matter. Thus, the requirement of the undertaking has been appropriately regarded as being "an essential condition in the granting of an injunction but for exception circumstances" (Fulham v. Manitoba Hydro (1995), 29 M.P.L.R. (2d) 243, para. 13, Man. C.A.), per Scott J.A.M.). It has been described as "the price" or "condition" of granting an interlocutory injunction, with a failure to give such an undertaking tilting the balance of convenience against the moving party who seeks the injunctive relief.

157 An excellent expression of the proposition can be found in the decision of the Alberta Court of Appeal in Lac La Biche (Town) v. Alberta (1993), 17 C.P.C. (3d) 230 page 236 (Alta. C.A.), per Cote J.A. as follows:

> Nor is the undertaking as to damages a frill or a side issue. Nor is it merely an expression of the old equitable principle that one who seeks equity must do equity. It is an integral part of the balance of convenience. The balance of convenience test asks who is likely to be more injured, the plaintiff who does not get an interlocutory injunction despite his good cause of action, or the

> defendant who is subjected to such an injunction though he has a good defence. The parties here in effect agree that the balance of convenience (and its policy aspects) is the whole issue here. Usually plaintiffs offer the undertaking as to damages, and courts exact them, in order to minimize the risk to the defendant from wrongly granting an interlocutory injunction. By declining to give the undertaking as to the damages, a plaintiff tilts the balance of convenience against himself. He comes to court for interlocutory relief because he does not want to run the risk that the court will move too slowly but he wants to put all the risk on to the defendant and will shoulder none of it.

158 The Drivers asserted, however, based on two decisions to which the Court was referred, that it was appropriate in a case such as this for the Court to exercise its discretion to waive the requirement that they provide the undertaking as to damages. The two cases were Imadul Islamic Jama'at of Toronto v. Rahman, [2000] O.J. No. 541 (S.C.J.), and Knott v. University of Saskatchewan [1999] S.J. No. 849 (Q.B.).

159 In the former case, an injunction was granted to restrain an Islamic religious group from removing certain individuals from membership in the group. Nordheimer J. granted the injunction without an undertaking as to damages, finding that "[G]iven the nature of the dispute and the very narrow effect of the injunction, I have serious doubts that the plaintiff could suffer any damage arising from the injunction". As such, with no likely expectation of any damage arising from the dispute, and the granting of the injunction, the need for an undertaking as to damages was less serious. In this case, however, at stake is a purely commercial dispute where evidence before the Court establishes reliably that the GTAA would incur substantial financial harm if the injunction were to be issued. This, in itself, provides an additional reason why the Court should not dispense with the damages undertaking in a case such as this, which is a case of a purely commercial character.

160 Similarly, in the Knott decision, an undertaking as to damages was not required from a group of trustees, who were representative of a group of retiree members of a pension plan, in their efforts to enjoin the University of Saskatchewan and several pension plan administrators from winding up the plan. Effectively, the court said that the plaintiffs were representative of a larger group, but indeed that the monies claimed were essentially acknowledged to be theirs, so that it was difficult to conceive of how damage could result to the enjoined party. As such, it would have been inappropriate in such a circumstance to require the undertaking to be given. In reaching this conclusion, the court noted that each case must be guided by the "justice of the situation." This seems to accord with common sense.

161 In this matter, the Drivers have asserted a number of propositions, some of which the Court has found in these reasons to simply be incorrect, and others which seem to betray a failure to recognize the legal status of the management situation at Pearson, or the historical basis upon which limousine and taxi licences for operation at Pearson have been granted. This is a purely commercial licencing dispute.

162 Other authorities have held that the failure to provide an undertaking with respect to damages in the context of a purely commercial dispute will typically be fatal.[13] In this case, I am not satisfied that it would be appropriate for the Court to dispense with the undertaking, but I need not decide the issue with finality. Even if that undertaking were to be dispensed with, however, that fact would necessarily add further weight to the tilting of the balance of convenience in favour of the GTAA. As such, whether the undertaking on damages were to be required of the Drivers, or dispensed with in the Court's discretion, it would have no impact on the conclusion I have reached for the reasons set out above, that the balance of convenience in this application clearly favours the GTAA. As such, the Drivers' motion fails as well on the third test in R.J.R. v. MacDonald.

6. Conclusions

163 For all of the foregoing reasons, the motion by the Drivers for an interlocutory injunction against the GTAA to prevent it from completing its RFP process is dismissed. However, having regard to the serious issues raised by the Drivers, and the representative capacity in which ALDA and ATA brought the motion, costs awarded to the GTAA

shall be on a partial indemnity basis payable within 30 days following assessment.

M.G.J. QUIGLEY J.

cp/e/qw/qltlc/qlkjg/qlaxw

1 The history and regulatory background to the Pearson Airport taxicab and limousine industries can be found in D.W. Bartlett (Chairman), Report to the Ontario Minister of Municipal Affairs by the Pearson International Airport Taxi and Limousine Task Force, December 14, 1990 filed as an exhibit in the GTAA's motion materials. Much of this description is taken from that report.

2 SOR/79-373, Consolidated Regulations of Canada, 1978, as amended.

3 The Bartlett Report, at p. 7-8.

4 The Bartlett Report, p. 9-10.

5 Mr. Tolton described the limited nature of these appeal processes on his cross-examination on his affidavit at Q 165-169. See also Q 221-268 at page 54 and following. Sadly, as noted elsewhere in these reasons, the atmosphere on this examination was quite hostile from both sides, and frankly surprising to the Court. This effectively rendered any utility of that transcript to be minimal. The cross examination was ultimately abandoned by Counsel for the Drivers on the basis that Counsel for the GTAA allowed too little latitude to the witness to answer the questions asked.

6 The Department of Transport Act, R.S.C. 1985, c. R-18 empowers the Minister to make regulations for the management, maintenance, proper use and protection of the various transport related works that are under the management, charge and direction or control of the Minister.

7 The court was invited by Counsel for the Drivers to review the transcript of the cross examination of Mr. Tolton, the Manager of Operations at Pearson, who testified that the Conditions of Permit established pursuant to GACOR continued in operation even after the GTAA took over the management of Pearson in 1996. Mr Tolton essentially agreed with that proposition. The court notes that it reviewed that entire transcript, but regrettably, the demeanour of both counsel interfered with that cross examination so extensively as to cause the transcript to be largely useless in contributing in any useful way to a deeper understanding of the facts relating to the matter.

8 For further discussion of the GACOR regulatory regime, and the interaction of these regulatory provisions with the rules of freedom of contract of the Crown, and by extension the GTAA, in the context of airport management, see Canada (Attorney General) v. 121571 Canada Inc., [2001] O.J. No. 948, per Ratushny J. (O.S.C.J.).

9 D.Brown and J.Evans, Judicial Review of Administrative Action In Canada, (Canvassback: Toronto, 1998). See also D.P. Jones and A. de Villars, Principles of Administrative Law, (4th)(Thompson-Carswell: Toronto, 2004) at pages 217-245.

10 Brown and Evans, supra, at para. 7: 2200

11 See for example Raney v. The Queen (1974), 47 D.L.R. (3d) 533 (Ont. C.A.); Ainsworth Electric Co. v. Exhibition Place (1987), 58 O.R. (2nd) 432 (Ont. Div. Ct.) and numerous other cases cited at Brown and Evans, supra, para. 7: 2322, at footnote 80.

12 It is of note in present circumstances, that even if such an obligation were imposed upon the GTAA, the persons who would be entitled to benefit from it are only those who could demonstrate an "interest" with respect to the matter in issue. Apropos of the subject at issue here, licensed competitors have been held to have an "interest" which may entitle them to object to the grant of additional or more comprehensive licences to others (see for example: All Ontario Transport Ltd. v. Ontario (Highway Transport Board)(1979, 26 O.R. (2d) 202 (Ont. Div. Ct.); Richmond Cabs Ltd. v. British Columbia (Motor Carrier Commn.)(1992), 11 Admin. L.R. (2d) 183 (B.C.S.C.); Abbottsford Taxi Ltd. v. British Columbia (Motor Carrier Commn.)(1985), 23 D.L.R. (4th) 365 (B.C.S.C.)), but on the other hand, a driver of a taxi was held not to have sufficient interest to entitle him to be heard before the taxi owner's licence was revoked: see Ghuman v. Canada (Minister of Transport)(1983), 2 Admin L.R. 1 (F.C.T.D.). Further, "qualifying interests" may include benefits to which there is no legal entitlement, but which are nevertheless important, which are essentially in the nature of "privileges." Caselaw has left uncertain the question whether a first time applicant for a discretionary benefit is entitled to procedural fairness before their application is refused. For dicta distinguishing between the refusal and the revocation of a benefit, see Ghuman, supra, and Brown and Evans, supra, para. 7:2640, fn. 220 and cases there cited.

13 See: Equitas Investment Corp. v. Goodman (1987), 57 O.R. (2d) 795 (H.C.J.); Vapormatic Co. Ltd. v. Sparex Ltd., [1976] 1 W.L.R. 939 (ch.); Lintaman v. Goodman (1982), 54 N.S.R. (2d) 320 (S.C.).

Indexed as:

Carbert v. Farm Credit Corp.

Between
Ronald Joseph Carbert and Laureena Carbert, Plaintiffs,
and Farm Credit Corporation, Defendant

[1992] S.J. No. 585

[1993] 3 W.W.R. 198

106 Sask.R. 123

37 A.C.W.S. (3d) 245

Q.B. No. 3411 of A.D. 1992 J.C.S.

Saskatchewan Court of Queen's Bench
Judicial Centre of Saskatoon

Baynton J.

November 18, 1992

(24 pp.)

Crown Liability -- Injunctions -- Constitutional Law.

Summary: A farm couple applied for an interim mandatory injunction requiring Farm Credit Corporation, an agent of the federal Crown, to comply with the new "lease-back" provisions of The Saskatchewan Farm Security Act. Farm Credit filed an undertaking not to sell or lease the subject land to anyone except the applicants until the matter had been determined at trial.

I refused to grant the injunction on the basis that the applicants had not established in the circumstances that it was just and equitable to do so. In particular I held that: (1) due to the serious constitutional challenges to the provincial legislation they did not have a strong case but did have a prima facie case; (2) in view of the undertaking they would not suffer irreparable harm; (3) the balance of convenience favoured the refusal of the injunction. In view of the Manitoba (A.G.) v. Metropolitan Stores Supreme Court decision in 1987, I took into account the public interest factor in considering the balance of convenience test.

Although I did not have to decide the issue, it will be of interest to the court that two unreported Federal Court cases this fall appear to interpret s. 22, (proclaimed in force February 1, 1992), of the federal Crown Liability Act as a bar to an

injunction against the federal Crown, servants, ministers. Section 22 is practically identical to s. 17(2) of our Proceedings Against the Crown Act that has been interpreted by our Court of Appeal in Tetzlaff as no bar to an injunction against an agent of the provincial Crown.

Cases Considered:

A.G. of Canada and Tetzlaff et al v. Saskatchewan Water Corporation and Souris Basin Development Authority, [1992] 4 W.W.R. 712, (Sask. C.A.).

Agricultural Credit Corp. of Saskatchewan et al v. Kozak et al (1991), 91 Sask. R. 277.

Olynick et al v. Kelvington Credit Union Ltd., [1991] Sask. D. 1892-01 (Sask. C.A.).

Mid West Television Ltd. v. S.E.D. Systems Inc. et al, [1981] 3 W.W.R. 560 (Sask. Q.B.).

Loblaw Co. v. Canada Safeway Ltd. (Sask. Q.B.), unreported, August 8, 1986, S.J. No. 586, Q.B. No. 3529 of 1985.

Ollinger et al v. Saskatchewan Crop Insurance Corporation, [1992] Sask. D. 1895-01.

Rules and Regulations Considered:

The Saskatchewan Farm Security Act, S.S. 1988-89, c. 17.1, as amended.

Farm Credit Act, R.S.C. 1985, c. F-2, ss. 10, 11, 27.

Crown Liability Act, R.S.C. 1985, c. C-50, s. 22.

The Proceedings Against the Crown Act, R.S.S. 1978, c. P-27, s. 17(2).

Andrew Mason, for the Applicants.

Patrick N. McDonald, for the Respondent.

D. McKillop, Q.C., for the Attorney General for Saskatchewan, (intervenor).

BAYNTON J.:-- This is an application for an interlocutory mandatory injunction to compel Farm Credit Corporation "to comply with The Saskatchewan Farm Security Act, S.S. 1988-89, c. 17.1, as amended, ..." The circumstances of this case raise numerous issues on which there are few definitive precedents.

Background Facts

Mr. and Mrs. Carbert are husband and wife who farm in the district of Meadow Lake, Saskatchewan. Thirteen of their quarter sections were mortgaged to Farm Credit Corporation. Farm Credit Corporation is an agent of Her Majesty in right of Canada pursuant to s. 10 of the Farm Credit Act, R.S.C. 1985, c. F-2. On February 3, 1992 the Carberts entered into a settlement agreement with Farm Credit Corporation and consented to a final order of foreclosure on seven quarter sections of the mortgaged land. Farm Credit Corporation became registered owner of the seven quarter sections on March 18, 1992. At the request of Mr. Carbert, Farm Credit Corporation leased back to Mrs. Carbert six of the quarter sections of land. The lease terminated on October 31, 1992. Farm Credit Corporation previously advertised the land for sale, subject to the terms of the lease, with a closing date of October 23, 1992.

On September 20, 1992, the "lease-back" provisions contained in The Saskatchewan Farm Security Amendment Act, 1992, S.S. 1992, c. 74, were proclaimed in force. In brief, they require a lender who acquires title to farm land by voluntary transfer or foreclosure, to lease it back to the farmer from whom it was acquired. The mandatory lease-back period in most instances is a minimum of six years. The legislation is made applicable specifically to Farm Credit Corporation, as well as to other financial institutions, but Farm Credit Corporation is in effect excluded by s. 6 of the Regulations from the financial assistance provisions available to other lending institutions. Contravention of the legislation constitutes an offence that is punishable by a fine and an additional fine for each day that the offence continues.

On September 27, 1992, the Carberts requested that Farm Credit Corporation offer to re-lease to them six quarter sections of the foreclosed lands. On October 5, 1992 Farm Credit Corporation advised the Carberts that new leases would not be offered. The Carberts brought an action on October 15, 1992 claiming inter alia:

> A declaration that the Defendant Farm Credit Corporation is bound by The Saskatchewan Farm Security Act.

An interlocutory mandatory injunction was also claimed and sought by notice of motion filed on the same date. Farm Credit Corporation filed its defence and an undertaking on October 27, 1992. The application was heard in Chambers on October 29, 1992.

The undertaking given to the applicants by Farm Credit Corporation is very broad and will remain in effect until this action has finally been resolved at trial. It reads as follows:

> The Defendant, Farm Credit Corporation, hereby undertakes that it will not sell, lease or otherwise dispose of the land that is the subject of the within action to any third person until the action is heard and determined by this Honourable Court in accordance with The Queen's Bench Rules.

Positions of the Parties

The Carberts contend that they will suffer irreparable harm if Farm Credit Corporation is not prevented from selling the farm land and is not required to lease the land back to them. They claim they are financially unable at this time to exercise their rights of first refusal of the sale of the foreclosed lands. They maintain as well that they require a lease of these lands for their livelihood. They also ask for solicitor and client costs and to be relieved from giving the usual undertaking as to damages. These positions of course were taken by the applicants before Farm Credit Corporation filed its undertaking.

Farm Credit Corporation contends that the lease-back provisions in the new legislation are ultra vires the Legislature of the Province of Saskatchewan, but only insofar as they pertain to the Corporation. They rely on three grounds. First, the legislation purports to apply to land owned by a federal Crown corporation. Second, the legislation and regulations are discriminatory against a federal Crown corporation. Third, the legislation is in conflict with provisions in the Farm Credit Act, supra, and under the principle of paramountcy of legislation of the Parliament of Canada, is inoperative against the corporation. Farm Credit Corporation also takes the position that the undertaking it has given protects the applicant farmers from suffering any irreparable harm. In the event the applicants are successful at trial, the land will still be available to them for lease and purchase. Any other residual harm that may be suffered by them can be adequately compensated for in damages. The corporation also contends that to grant the interlocutory mandatory relief as sought will determine the very action itself and will give the applicants now the very relief that they ultimately seek at trial.

Counsel for the Attorney General for Saskatchewan has not intervened by applying to become a party to the litigation under Rule 39A, but appears in response to a notice filed by the plaintiffs under The Constitutional Questions Act, R.S.S. 1978, c. C-29. Counsel on behalf of the Attorney General contends that the provincial legislation is valid

and that it is binding on Farm Credit Corporation. He also contends that it is in the public interest that the interlocutory mandatory injunction be granted as sought by the applicants. His position is in effect that even if the undertaking will protect the applicants, it will not protect other farmers in similar circumstances. He submits that in view of the stated intention of the parties to pursue this matter to the Supreme Court of Canada in any event, it will take months before the ultimate issue is determined and irreparable harm to the applicants and other farmers will inevitably follow. He submits that public interest considerations tilt the balance of convenience heavily to the side of granting the interlocutory mandatory injunction.

He also maintains that Farm Credit Corporation has chosen not to bring its own action to challenge the law and that in so doing it has put the onus on the private litigants to commence an action to enforce the law. He submits that if the application is denied, this decision will "send a message" to the public that Farm Credit Corporation is above the law.

Unique Circumstances of this Case

Many of the circumstances of this case, including the nature of the injunction sought, are unique. There are three significant aspects in particular that must be borne in mind. The first is that a mandatory injunction is sought in this case (not a prohibitory or restraining type of injunction as was granted in the two recent Saskatchewan decisions referred to later). The second is that the injunction sought in this case is quite different than those sought in the two previous cases. It is tantamount to an interim declaration rather than an injunction. The third is that there is a federal-provincial constitutional issue at stake in this case. Previous Saskatchewan cases have restricted a provincial Crown agency from doing something contrary to its own undertakings, agreements, or legislation. Here the injunction sought is to force a federal Crown agency to comply not with federal law, but with a provincial law, the constitutionality of which is challenged by the federal Crown agency.

Counsel were not able to refer me to any case on point, nor in the short time available to me have I been able to find a definitive precedent. The numerous cases cited to me and those referred to in this decision, can all be distinguished on their facts. None of the cases cited involved the issue of an injunction against a federal Crown agent requiring it to comply with a law that it submitted was ultra vires as being contrary to the division of powers as set out in the Constitution of Canada. None of the cases cited involved the consideration of the public interest in the manner in which it has been raised in this private litigation. Finally, none of the cases cited involved an undertaking that was granted voluntarily by the respondent in an attempt to alleviate the irreparable harm that the applicant would otherwise suffer if an injunction were not granted. In contrast, the cases cited as authority for the granting of the injunctive relief sought all involved prohibitive rather than mandatory injunctions. No case was cited to me in which an injunction was granted that was worded in such general and broad terms as the injunction sought in this case. Nor was any case cited which granted an injunction that simply directed compliance with a statute. The injunctions granted in any of the cases I have considered were much more specific and narrowly crafted.

As there appears to be no definitive precedent, I must consider the facts of this application in the light of the general principles laid down in previous cases, bearing in mind the significant distinctions of the case before me.

Requirements for the Issue of an Interlocutory Injunction

It is trite law that an interlocutory injunction will be granted only if three requirements are met by the applicant. First he must establish a prima facie case entitling him to the relief sought. Second he must establish that he will suffer irreparable harm (i.e. harm that cannot be readily compensated in damages) if the injunction is not granted. Third he must establish that the balance of convenience favours the granting of the injunction, (i.e. that the harm to the applicant if the injunction is not granted will be greater than the harm to the respondent if it is granted). Numerous English and Canadian cases at all levels deal in depth with these requirements and no useful purpose would be served in reviewing these principles in this decision.

It is evident from many of the recent authorities that a rigid step-by-step analysis of these three requirements is not the most appropriate manner in which to determine whether or not interim injunctive relief should be granted. The requirements tend to meld into one another and accordingly should be considered more in the nature of guidelines to assist the court in exercising its discretion. The ultimate question to be determined is whether it is just and equitable in the circumstances of the particular case to grant the injunction. As well, the strengths and weaknesses of the applicant's position respecting each of the three requirements should be considered together and not as a series of independent hurdles (e.g. if the applicant has a strong case the court will have less regard to the other tests and vice versa). Robert J. Sharpe, Injunctions and Specific Performance, (Toronto, Canada Law Book, 1983), paras. 187-189; Manitoba (A.G.) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110 at pp. 127-9; A.G. of Canada and Tetzlaff et al v. Saskatchewan Water Corporation and Souris Basin Development Authority, [1992] 4 W.W.R. 712, (Sask. C.A.), at p. 730.

In cases involving constitutional issues, (even in private litigation), the public interest must be taken into consideration as a special factor in assessing the balance of convenience. This is a particular consideration in applications for an injunction that suspends the impugned legislation or exempts the applicant from compliance with it if the public is deprived of the protection of the legislation. Manitoba (A.G.) v. Metropolitan Stores Ltd., supra, at pp. 134-144.

Finally, there are several general principles that must be considered by the court in the exercise of its discretion as to whether or not to grant an injunction. These are referred to later in this judgment.

1. Have the Plaintiffs Established a Prima Facie Case?

As the first step in coming to my decision, I must assess the strength of the plaintiffs' case. This in turn primarily involves a consideration of the constitutional issues raised by this application. If the new legislation is binding on Farm Credit Corporation, the plaintiffs have a strong case. If it is not, then the plaintiffs have no case. These constitutional issues were not argued in depth by counsel due to time constraints and the fact that this is an interlocutory application. It would accordingly be inappropriate for me to attempt to determine these constitutional issues on their merits. But I must to some degree at least assess the strengths of the respective constitutional positions of the parties in order to determine if the plaintiffs have a prima facie case.

The respondent has raised serious challenges to the validity of the impugned legislation insofar as it pertains to Farm Credit Corporation, a federal Crown agency. The Attorney General for Saskatchewan maintains that the legislation is valid under s. 92(13) while Farm Credit Corporation relies on the paramountcy doctrine and on s. 91(1A) of the Constitution Act, 1867, 30-31 Vict., ch. 3 (Eng.) and to various provisions in the Farm Credit Act, supra. In particular it appears that the legislation may not be binding on Farm Credit Corporation for the following reasons:

1. It infringes upon the ownership of land held by a federal Crown corporation, (e.g. ss. 11(c) and 27 of the Farm Credit Act, and Spooner Oils Ltd. et al v. The Turner Valley Gas Conservation Board et al, [1933] S.C.R. 629 at pp. 643-4).
2. It specifically and directly discriminates against a federal Crown corporation, (e.g. ss. 2(1)(o)(i)(B) and 2(1)(w)(v) of the Saskatchewan Farm Land Security Act, supra, and s. 6 of the Regulations).
3. It interferes with and prevents a federal Crown corporation from complying with the statutory law under which it was constituted and under which it is required to function, namely the Farm Credit Act (e.g. s. 11(1)) setting out its purpose to make and administer and supervise farm loans, s. 11(1)(c) requiring it to dispose of land acquired through foreclosure within 5 years, and s. 11(1)(e) giving it the mandate to negotiate with borrowers).
4. It fails to recognize the constitutionality of the historical involvement of the federal government in agriculture and farm debt issues in the province, (e.g. the Farm Debt Review Act, R.S.C. 1985 (2nd Supp.) c. 25, and the special status and mandate of Farm Credit Corporation that has been previously recognized in statutory exemptions, (e.g. s. 43(b)(ii) of The Saskatchewan Farm

Security Act).

5. It infringes the principles set out in Reference as to the Validity of Section 6 of The Farm Security Act, 1944, of the Province of Saskatchewan, [1946] S.C.R. 394. Upheld on appeal to Privy Council [1949] A.C. 110. The impugned legislation does not restrict itself to foreclosure or debt enforcement, but purports to deal with the property owned by a federal Crown agency long after foreclosure or enforcement proceedings have been completed. Accordingly the Alberta cases cited by the applicant, namely Farm Credit Corp. v. Holowach, [1988] 5 W.W.R. 87, (Alta. C.A.), and Farm Credit Corp. v. Enns, [1990] 4 W.W.R. 598 (Alta. C.A.), are not applicable to this case.

Both Alberta cases in effect confirmed that Farm Credit Corporation, a Crown agent, was on the same footing as any other lender insofar as it relied on provincial law to enforce its rights. The two cases approached the issue from the perspective of Crown prerogative. It is not necessary for the purposes of this judgment to get into the complex area of Crown prerogative. Agricultural Credit Corp. of Saskatchewan et al v. Kozak et al (1991), 91 Sask. R. 277, is instructive on that issue. The essence of the Holowach case, which was followed by the Enns case, is that the relevant provisions of The Law of Property Act, R.S.A. 1980, c. L-8, (similar in content to The Limitation of Civil Rights Act, R.S.S. 1978, c. L-16), do not in effect "bind" the federal Crown in the sense of imposing a liability upon it or of derogating from existing Crown prerogatives, privileges or rights. The impugned Saskatchewan lease-back provisions are completely different. They in effect place a federal Crown agent in an inferior position to other lenders, and impose a liability on existing Crown property. This is much more intrusive than legislation that restricts enforcement remedies of litigants who rely on the legislation to enforce their rights or to obtain title.

I accordingly conclude that there is a serious constitutional challenge to the new legislation insofar as it applies to the respondent and that the challenge has considerable merit. This weakens the plaintiffs' case considerably and in my view it is not a particularly strong one. But I hold that the plaintiffs have a prima facie case, as to hold otherwise would be tantamount to deciding at this time the constitutional issues that are to be determined at trial. Having come to this conclusion as to the strength of their case, I must carefully consider the remaining two tests.

Irreparable Harm

I agree with the position taken by the applicants that damages cannot adequately compensate them for the loss of their land. If they are successful at trial but in the interim the land has been disposed of and is no longer available to them for lease, they will suffer irreparable harm. But in my view the broad undertaking filed by Farm Credit Corporation substantially addresses this issue. It in effect preserves the availability of the land to the applicants until the merits of the action have been determined. If the applicants are successful at trial the land will still be available to them. By the terms of the undertaking the land will not be sold or leased to any persons other than the applicants.

Although the applicants concede that the undertaking addresses their main concern, they contend that it does not guarantee them a lease for the 1993 crop year. But if this matter has not been resolved in the interim, practical considerations will provide the respondent with a strong motivation to lease the land in 1993 to the applicants. The respondent is prevented by its undertaking from leasing it to anyone else. If the land is not leased to the applicants the respondent will derive no revenue from it but rather will incur the expense of owning and maintaining it. Land taxes and weed control are but two such expenses. The advantage of the undertaking in contrast to the injunction, is that the respondent will be able to make its own arrangements with the applicants without submitting to the very legislation that it challenges.

Even if the respondent denies the applicants the opportunity to obtain a lease in 1993 and they are successful at trial, their financial losses can be compensated for in damages, including if applicable their temporary loss of livelihood and the economic consequences that flow from it. The affidavit evidence of Mr. Carbert however is not that he will lose his livelihood if he does not acquire the lease, but that it will be more difficult for him to earn a livelihood. His affidavit implies that he still has at least six quarter sections of land that he can farm.

As indicated previously, interlocutory mandatory injunctions are an extraordinary remedy and are not granted as a matter of course. They will be granted only if necessary to prevent irreparable harm to the applicant. In most cases they are granted to preserve unique rights or property pending the determination of the merits of the claim. In this case, the applicants have not established that notwithstanding the undertaking, they will suffer irreparable harm that cannot be reasonably compensated for in damages if the injunction is not granted prior to trial.

Balance of Convenience

Although I have decided that the plaintiffs will suffer no irreparable harm if the interlocutory injunction is not granted, I will also deal with the third consideration, namely the balance of convenience. I do so in the circumstances of this case for three reasons. First, as I indicated previously, there is judicial authority to the effect that the three tests should be considered as a whole and not necessarily in a stepby-step fashion. Second, when constitutional issues are involved, even in private litigation, the public interest must be taken into consideration in assessing balance of convenience. Manitoba (A.G.) v. Metropolitan Stores Ltd., supra. Third, if I am found to be in error in my findings on irreparable harm, my determination of this third test should be available for review by the Court of Appeal.

In determining the balance of convenience issue, the court usually determines which of the two parties will suffer the greater harm from the granting or refusal of an injunction pending a decision on the merits. Even in cases where the plaintiff will suffer irreparable harm, the relief will usually be refused if the harm that will be suffered by the defendant from the granting of the injunction will be greater.

In this case, if Farm Credit Corporation is directed to comply with the impugned provincial legislation pending the decision on the merits, it will be required to:

(1) grant a property interest in the form of a lease to the applicants;
(2) submit itself to the jurisdiction of a provincial arbitration board; and

(3) participate in an involved regulatory scheme.

If it is successful at trial, it cannot then return to the same position as it was prior to this application. In the meantime it will have been forced to bind itself in law to the applicants under a contract that has a mandatory term, even if that term is only one year in duration.

But this is not the full extent of the impact of such an injunction. Farm Credit Corporation will be required to participate in the regulatory scheme not only with respect to the applicants but also with respect to each farmer who qualifies under the legislation. Presumably notices will have to be forwarded even to those farmers who have no intention of acquiring a lease. This will undoubtedly require Farm Credit Corporation to significantly reorganize its procedural, administrative, and staffing policies at substantial additional expense. This expense is estimated by Farm Credit Corporation to be in excess of $16,000,000. The most significant impact however will be the difficulty with which Farm Credit Corporation will be faced in attempting to withdraw to its former position if the applicants are unsuccessful at trial. In my view the respondent will suffer greater harm if the interlocutory injunction is granted than will the applicants if it is refused.

But as indicated previously, when the constitutionality of legislation is involved, the public interest is a special factor that must be considered in the determination of the balance of convenience. It is on the public interest issue that counsel for the Attorney General for Saskatchewan takes a strong position in "standing with" the plaintiffs in their application for the interlocutory mandatory injunction. He relies on the comments of Beetz J. in Manitoba (A.G.) v. Metropolitan Stores Ltd., supra, at pp. 129-150. Although I agree with and acknowledge the public interest considerations enunciated in that decision, their application to this case, which is completely different in many significant respects, does not shift the balance of convenience in favour of granting the injunction.

The case of Manitoba (A.G.) v. Metropolitan Stores Ltd., supra, involved a Charter application by a private litigant employer for a stay of proceedings by the Manitoba Labour Board until the constitutionality of the legislation had been determined. A stay granted by the Manitoba Court of Appeal was set aside by the Supreme Court of Canada even though the court concluded that irreparable harm might well be suffered by the applicant if the stay were not granted. One of the primary factors considered by the court in setting aside the stay was that the public would be deprived from the protection and advantages of the impugned legislation. Legislation is generally deemed to be enacted for the common good by a democratically-elected legislature.

But the facts in this case are very different. First, the applicants are not seeking to challenge the legislation, but to enforce it by an interlocutory mandatory injunction. Second, the entity challenging the application of the impugned legislation to it, is not a private litigant but a federal Crown corporation with its own statutory agricultural lending mandate to farmers. The challenge, if successful, will likely not result in the striking down of the new legislation, but rather in a declaration that it does not apply to Farm Credit Corporation. Third, the issues in this case do not merely involve impugned provincial legislation, but involve the effect and validity of federal legislation as well. They involve a determination of the apparent conflict between provincial and federal law. Fourth, the court in Manitoba (A.G.) v. Metropolitan Stores Ltd. supra, made a finding that irreparable harm would be suffered by the applicant. Presumably if the irreparable harm finding had not been made in Metropolitan Stores, the public interest considerations would not have even been entertained. Fifth, no undertaking was given in that case, while in this case the undertaking is a significant factor.

Another unique feature of this case is that it is not clear what is in the public interest. Undoubtedly, it is in the public interest that farmers know with some certainty whether they have the right under the new legislation to lease from Farm Credit Corporation the land it acquired from them. But it is also in the public interest that the court not enjoin Farm Credit Corporation in such a manner as will restrict or prevent it from carrying out its statutory mandate to continue to provide and administer loans to other farmers in Canada. To put it another way, does the interest of farmers who have lost their land supersede the interest of those who are still able to service existing loans or acquire new loans? This issue cannot be adequately addressed in an interim application of this nature. No material has been presented by the parties on this issue and it would be inappropriate for me to attempt to decide the matter on the basis of conjecture.

There are several other factors raised by the parties on the balance of convenience issue that in my view are not issues in this case. First, neither the granting nor refusal of an interlocutory mandatory injunction will maintain the status quo in the traditional sense. From one perspective, granting the injunction will maintain the status quo between the parties in that the new legislation was enacted just prior to the application. But from a different perspective, refusing the injunction will maintain the status quo that existed between the parties immediately before the enactment of the new legislation, the validity of which is the very substance of the lawsuit. Sharpe, supra, at para. 181 has this to say about status quo:

> This phrase is frequently used to describe the purpose of an interlocutory injunction although it adds little or nothing to the analysis, and in fact, may produce a possible source of confusion. Properly understood, the phrase merely restates the basic premise of granting an interlocutory injunction, namely, that the plaintiff must demonstrate that unless an injunction is granted, his rights will be nullified or impaired by the time of trial. . . .

Second, the presumption of validity of legislation alleged by counsel for the Attorney General is inapplicable to the circumstances of this particular case. To which statute does the presumption apply, federal or provincial? Surely it would not be of any assistance if it applied to both federal and provincial legislation. In any event, Beetz J. in Manitoba (A.G.) v. Metropolitan Stores Ltd., supra, at p. 122, makes it clear that his decision is not based on this so-called principle. He indicates that such a principle is not helpful and is positively misleading. He goes on to distinguish and comment on the "presumption of constitutionality", and he states at p. 125 that it only arises when the merits are being considered.

Third, the inherent delay in getting to trial in an action brought by the applicant cannot of itself be weighed against the respondent in deciding the balance of convenience issue. Counsel for the Attorney General for Saskatchewan stressed the significance of the fact that Farm Credit Corporation chose not to take its own action to challenge the legislation but in effect forced a private litigant to bring this action. He also stressed the fact that by its very nature an action requiring a trial cannot provide a speedy remedy. This may be so, but it should be noted that neither has the Province of Saskatchewan chosen to take advantage of a speedy remedy available to it. Under s. 2 of The Constitutional Questions Act, the Lieutenant Governor in Council may refer any matter to the court for a ruling. It would appear that such a reference would be a far quicker and more suitable manner in which to determine these issues than by means of private litigation. References have certainly been utilized on previous like occasions with obvious advantages. However, neither government has seen fit to do so, and the matter must accordingly be determined within the confines of a private lawsuit.

On a consideration of all of the circumstances pertaining to the third test, I have concluded that the balance of convenience favours refusing the grant of the injunction.

General Considerations

As I indicated previously, there are several general guidelines or principles that must be kept in mind by the court in the exercise of its discretion.

First, injunctions are not granted as a matter of course but only when necessary to prevent irreparable harm. They are extraordinary remedies. At para. 127, Sharpe, supra, refers to an injunction as a "drastic" remedy. Although the distinction between prohibitive and mandatory injunctions is diminishing, the courts tend to grant mandatory injunctions less readily than prohibitive injunctions. Sharpe, supra, para. 191. Olynick et al v. Kelvington Credit Union Ltd., [1991] Sask. D. 1892-01 (Sask. C.A.).

Second, the law is clear that the court should not attempt to decide the merits of the case at the interlocutory stage. The following passage appears at p. 130 in Manitoba (A.G.) v. Metropolitan Stores Ltd., supra:

> The limited role of a court at the interlocutory stage was well described by Lord Diplock in the American Cyanamid case, supra, at p. 510:
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.
>
> The American Cyanamid case was a complicated civil case but Lord Diplock's dictum, just quoted, should a fortiori be followed for several reasons in a Charter case and in other constitutional cases when the validity of a law is challenged.
>
> [emphasis added]

and at p. 132:

> In addition, to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise. . . .

and at p. 133:

> Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not only in Charter cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor R. J. Sharpe wrote in Injunctions and Specific Performance at p. 177, in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case". At this stage, even in cases where the plaintiff has a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

Third, the law is also clear that the court should not at the interlocutory stage grant the very relief that is being requested at trial. I again refer to Manitoba (A.G.) v. Metropolitan Stores Ltd., supra, at p. 144:

And, as we have already seen above, Mahoney J. went on to hold that the interlocutory injunction should be refused for the additional reason that it decided the merits, a matter that should not be resolved at the interlocutory stage.

Sharpe has this to say at para. 182:

> It is often said that an interlocutory injunction should not be granted where it would have the effect of granting the whole relief claimed in the action. . . .

Fourth, an injunction will not usually be granted if it is sought to enforce a statute that provides penalties for non-compliance, especially if the respondent is an agent of the Crown. Sharpe, supra, paras. 274-285 and 305; Mid West Television Ltd. v. S.E.D. Systems Inc. et al, [1981] 3 W.W.R. 560 (Sask. Q.B.); Manitoba Naturalists Society Inc. v. Ducks Unlimited Canada, [1992] 2 W.W.R. 377, (Man. Q.B.), at pp. 383-4. As indicated previously, The Saskatchewan Farm Security Act provides for substantial penalties for non-compliance. Some nice questions arise as to how the court would enforce the injunction against a federal Crown agent if it took the position that an order to comply with an ultra vires statute was itself of no effect. As well, if a private litigant attempts to enjoin a Crown agency, there is often the question of whether the applicant has sufficient standing to obtain an injunction. Sharpe, supra, paras. 299-322.

Fifth, except in the clearest of cases, injunctive relief should not be readily granted against a government and its agencies. Beetz J. in Manitoba (A.G.) v. Metropolitan Stores Ltd., supra, at p. 150 quotes from Sharpe with approval:

> On the whole, I thus find myself in agreement with the following excerpt from Sharpe, op. cit. at pp. 176-77:
>
> Indeed, in many situations, problems will arise if no account is taken of the general public interest where interlocutory relief is sought. In assessing the risk of harm to the defendant from an interlocutory injunction which might later be dissolved at trial, the courts may be expected to be conscious of the public interest. Too ready availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government.

Although this principle involves the public interest factor discussed under the balance of convenience test, it has a somewhat broader application.

What is really in issue in this case is the respective constitutional rights and powers of the federal and provincial governments in the shared area of agriculture and farm debt. This issue can properly be determined only on its merits. If the court grants the interim relief sought in this case, it will in effect be ordering one government through its agent to comply with the legislation of another government even though the constitutional validity of that legislation is the very essence of the issue.

Faced with this consequence, I am reluctant to grant the injunction unless the applicants clearly establish their entitlement to such interim relief. Although not strictly applicable to this case, the words of Middleton J.A. as quoted in Sharpe, supra, para. 250, bear consideration:

> . . . The civil rights injunction amounts, in effect, to a detailed legislative enactment. English and Canadian judges have deliberately avoided such an active role. Lord Diplock has recently spoken of the need to remember "the difference between private law and public law" when injunctions are applied for, and the sentiment expressed by an Ontario judge in 1924 reflects accurately the traditional Anglo-Canadian judicial attitude: "Government by injunction is a thing abhorrent to the law of England and of this Province."

Matters Presumed

I have not determined, for the purposes of this application, three matters that although not conceded, were not strongly contested by counsel for the respondent. The first is whether the lease-back provisions of the legislation, (provided they of course are intra vires and apply to Farm Credit Corporation), apply to the six quarter sections of land formerly owned by the Carberts and now owned by Farm Credit Corporation. I have made my decision on the basis that if the legislation is valid it does apply to the six quarter sections.

The second is whether the applicant should be required to provide an undertaking as to damages. On the authority of Loblaw Co. v. Canada Safeway Ltd., (Sask. Q.B., unreported, August 8, 1986, S.J. No. 586, Q.B. No. 3529 of 1985) and Ollinger et al v. Saskatchewan Crop Insurance Corporation, [1992] Sask. D. 1895-01, I considered the application without requiring the applicants to provide such an undertaking.

The third is whether the court has the power to grant an interlocutory mandatory injunction against a federal Crown agency. In A.G. of Canada and Tetzlaff et al v. Saskatchewan Water Corporation and Souris Basin Development Authority, supra, an interlocutory injunction restraining an agent of the provincial Crown was granted. Reasons have not as yet been given by the Court of Appeal for its interpretation of s. 17(2) of The Proceedings Against the Crown Act, R.S.S. 1978, c. P-27 on this point. At the time of the Saskatchewan decision, s. 22 of the Crown Liability Act, R.S.C. 1985, c. C-50 had not yet been proclaimed in force. The proclamation was made on February 1, 1992, by S/I 92-6. Section 22 (1) of the federal Act is almost identical to s. 17(2) of the provincial Act.

Two recent unreported decisions of the Federal Court considered specifically the new provisions of the Crown Liability Act, supra. MacKay J. in Saugeen Band of Indians v. Canada, (Federal Court Trial Division, unreported September 10, 1992), refused to issue a prohibitory injunction against the federal Crown or the federal Minister on the basis of the common law and the new s. 22. Rouleau J. in Benoanie v. Canada (Minister of Indian and Northern Affairs), (Federal Court Trial Division, unreported October 16, 1992), also refused to issue a prohibitory injunction apparently on the same basis. In each case the only recognized exception to this general principle was the issue of an injunction against a federal Minister or servant who exceeded his jurisdiction.

These two cases are distinguishable on their facts from the case before me. On the basis of the principles set out in A.G. of Canada and Tetzlaff et al v. Saskatchewan Water Corporation and Souris Basin Development Authority, supra, and Ollinger et al v. Saskatchewan Crop Insurance Corporation, supra, (which held that s. 17(2) is not a bar to injunctive relief against a provincial Crown agent), and as well because of the position taken by counsel, I considered the application in this case as if I had the authority to issue the injunction against a federal Crown agent despite s. 22. In view of my ultimate conclusion however, I was not required to decide this issue.

Conclusion

In determining whether it is just and equitable to grant the interim mandatory injunction that is sought, I have considered all the circumstances of this case including the guidelines and principles I have discussed. For the reasons given, the applicants have not established that they are entitled to the injunctive relief that they seek pending trial. The

costs of this application will be left to be determined by the trial judge.

BAYNTON J.

Case Name:

Doyle v. Newfoundland and Labrador

Between
Sharon Joanne Doyle, first plaintiff, and Eileen Howell, second plaintiff, and Quinlan Brothers Limited, third plaintiff, and Quin-Sea Fisheries Limited, fourth plaintiff, and Labrador Sea Products Incorporated, fifth plaintiff, and
Her Majesty in Right of Newfoundland and Labrador, defendant

[2005] N.J. No. 222

2005 NLTD 113

250 Nfld. & P.E.I.R. 82

12 C.P.C. (6th) 203

140 A.C.W.S. (3d) 463

2005 CarswellNfld 188

Docket: 200501T5822

Newfoundland and Labrador Supreme Court - Trial Division
St. John's, Newfoundland and Labrador

D.B. Orsborn J.

Oral judgment: June 30, 2005.

(65 paras.)

Civil procedure -- Injunctions -- Considerations affecting grant -- Balance of convenience -- Interlocutory or interim injunctions.

Application by the plaintiffs, Doyle, for an interim declaration seeking relief from a licence condition issued by the province that restricted the amount of crab that could be processed by the plaintiff crab processors, Quinlan Brothers and Quin-Sea Fisheries. The amount was limited by the defendant, Newfoundland and Labrador, to a percentage of the

total crab landed in the province during the season. If the processor purchased too much crab than was permitted to be processed, the excess had to be transferred to another processor at a price established by the province. Doyle argued that the condition was beyond the legislative competence and authority of the province and that there was procedural unfairness. The individual plaintiffs were employees who complained that if this process were upheld, their employment hours would be affected, leading to financial hardship. The province maintained that the program was necessary due to the instability in the crab market which was in danger of collapse. Quinlan and Quin-Sea argued that they had worked hard to procure relationships with raw material providers that now meant nothing because other processors would have raw material handed to them, which was against free market principles. They also argued that the transfer pricing depressed the price of processed crab.

HELD: Application dismissed. For pre-trial relief such as the one sought, the court had to be persuaded that it was just and equitable that Quinlan and Quin-Sea be treated as if the province's licence condition was contrary to law. Applying the test for an injunction, there were serious issues to be tried. As for irreparable harm, Quinlans' asserted the anticipated loss of the valuable relationship with their family of harvesters. The individual plaintiffs argued financial hardship which would cause them to seek employment elsewhere. The case involved constitutionality of legislation and if found unconstitutional, it did not follow that damages would be awarded to the companies or the individuals. There was irreparable harm. The balance of inconvenience favoured the government or public. The case was weak, the concept of sharing crab among processors was not a foreign one, Quinlan's themselves had a crab sharing agreement previously and the crab harvesters changed relationships often. As such it was not just and equitable to set aside the licence condition before trial.

Statutes, Regulations and Rules Cited:

Fish Inspection Act

Counsel:

Frederick J. Constantine and M. John Maite for the plaintiffs.

Jacqueline Brazil and Chantelle MacDonald Newhook for the defendant.

APPLICATION FOR INTERIM DECLARATORY RELIEF

D.B. ORSBORN J. (orally):--

INTRODUCTION

1 The plaintiffs have applied for an interim declaration seeking relief from a Licence Condition and Directive issued by the Provincial Minister of Fisheries and Aquaculture. The Condition restricts the amount of crab that may be processed by the corporate plaintiff processors. The amount that may be processed for the 2005 crab fishing season has been limited by the Minister to a percentage of the total crab landed in the province during the season.

2 The Condition does not limit the amount of crab that a processor can purchase from fish harvesters. However, if and to the extent that a processor chooses to purchase more crab than is permitted to be processed, the processor must transfer that crab to another processor through Northwind - an intermediary established by the government. The transfer price is fixed by the government, with the base for the fixed price being by reference to the price negotiated by the processors and the harvesters' union as a result of collective bargaining.

3 The plaintiffs assert that:

1. The Condition is beyond the legislative competence of the government of the province in that it is, in pith and substance, regulation of trade and commerce or alternatively regulation of fisheries, both of which subject matters fall within the exclusive legislative competence of the federal government.
2. The Condition is beyond the legislative authority given to the Minister pursuant to the Fish Inspection Act, the provincial legislation asserted to support the imposition of the Condition.
3. In establishing the production limit based on a percentage of landings, the Minister failed in his duty of procedural fairness to the plaintiffs - or at least the corporate plaintiffs - by establishing a preliminary participatory process whereby recommendations were developed but then proceeding to establish a production limit on a basis different from that underpinning the participatory process.

4 The parties need this decision quickly because the crab season will end by the end of July. According to the plaintiffs, the harmful effects of the Condition - or Raw Material Sharing (RMS) - will be felt in full force within the next week. The time is quickly approaching, said the plaintiffs, where decisions will have to be taken, likely to stop buying crab from harvesters. In turn this will lead to plant shutdowns and loss of employment, and will call into question the continuation of long-term relationships that the processors have developed - at considerable expense - with certain crab harvesters.

5 Because of these time constraints, these reasons do not contain as comprehensive an analysis as would otherwise be the case. Neither will I recite the facts at length. A number of comprehensive affidavits were filed, and detailed cross-examination was conducted of two of the plaintiffs' deponents and of the defendant's deponent. The facts are well known to the parties; generally there is little dispute. Where the parties differ is on their characterization of the facts and their constitutional or other legal significance.

6 I have referred to the three corporate plaintiffs. As a group, - and in particular Quinlan Brothers and Quin-Sea Fisheries - they represent the largest crab processing operation in the province. The two individual plaintiffs are employees of the corporate plaintiffs. They assert that if the RMS program is maintained, and Quinlan's (as a group) ability to process crab is thereby curtailed, they may not have enough hours of work to qualify for Employment Insurance benefits, which in turn will lead to financial hardship and potential family disruption.

BACKGROUND

7 The Raw Material Sharing program was announced by the Minister on March 2, 2005. Initially established as a two-year pilot program, the evidence is that it is now to last one year only; that is, it will last only until the end of the present season. The program is to be reviewed by Mr. Richard Cashin after the season and recommendations made to government as to its continuation, cessation, modification or otherwise.

8 The crab fishery is of significant economic benefit to the province. The quota - the amount permitted to be caught by the harvesters - is established by the Federal Government through the Department of Fisheries and Oceans. The province has no legislative ability to affect this quota. Although the processed product is essentially all sold on the international export market - predominantly to the United States and Japan - the province derives economic benefit from the employment of those harvesters who are resident in the province and from the employment and other economic benefits resulting from onshore processing and packaging of the crab. It is in the best interest of the province that the industry function efficiently and effectively, and on as stable a footing as possible.

9 Said the Minister when he announced the RMS program:

> ... the government is very concerned about the situation in the crab sector. Each year, we face

> bickering between harvesters and processors as they attempt to negotiate prices. At best, this results in a delayed opening to the fishery and leaves many fish plant workers in a precarious position. At worst, it results in industry shutdowns, with plant workers (and government) caught in the middle. These industry-made situations have destroyed untold millions of pounds of crab due to the season getting delayed into the soft shell period. This instability is damaging our fishery, and it must stop. ...
>
> Should the worst case scenario play out, the impact of a collapse in the crab fishery would be immediate, intensely painful, and far-reaching. While we believe rationalization is necessary, we believe it is essential to rural and regional stability that rationalization be properly managed, not uncontrolled.

10 He continued:

> As a government, we are limited in what we can do. We cannot force crab harvesters to fish. We cannot force seafood producers to process. And the province does not control the quantity of fish that is available to catch in our waters. However, we do exercise jurisdiction over the processing sector. ...
>
> Having reviewed the alternatives, and after assessing the implications of failing to act, we have decided that the best way to proceed is with a 2-year pilot project for Raw Material Sharing in crab. This concept is highly controversial among some harvesters, as Eric Dunne recorded in his Report. However, the Dunne Commission advised that this is the only viable way to solve some of the operational instability in the industry. We agree.

11 And in a backgrounder of the same date:

> The concept of allocating individual raw material or input shares to processing facilities is relatively new. It means processing licence holders would be authorized to acquire up to a specified amount of available raw material for processing. The Dunne Commission report had envisioned that the allocation or share would be a raw material purchasing entitlement, expressed as a percent of all available quotas of a given species, or of each separate quota of each species.
>
> Raw material shares are not catch quotas or allocations of fish in the water; these are granted only to licensed harvesters by the federal, not the provincial, government. The provincial allocation is only a cap on the amount of fish that can be purchased for each plant. It can be interpreted as a share that would be reserved or protected for each processing facility to the exclusion of others. In essence, this system would limit races to acquire raw material that some feel are as detrimental to processing operations as competitive fisheries are to harvesters.

12 Fundamentally, the RMS program significantly reduced the amount of crab that the Quinlan group could process in 2005. For the years 2002 to 2004, each of the two Quinlan companies processed over 9 million lbs of crab annually. In 2005, despite the significant DFO quota cuts reducing the amount of crab that may be harvested, Quinlan's say that, without RMS, they would nonetheless be able to purchase and process and sell over 9 million lbs each (referring to Quinlan Brothers and Quin-Sea). This would be possible, they say, because of the time and money they have invested in securing relationships with harvesters who will in turn ensure that their catch is sold to Quinlans. I accept this evidence.

13 Under the RMS program, Quinlan's production of crab for the two major companies - will be limited to approximately 6.5 million lbs each. The evidence is that it is not in Quinlan's economic interest to purchase more than

they can process since the excess product must be transferred to other processors at a price that does not reflect Quinlan's actual cost of acquisition of the product. Although it is not particularly relevant, I would note that I found the plaintiff's evidence in respect of its uncompensated average costs somewhat vague and unconvincing.

14 Quinlan's concern is that by eliminating the free market between processors and harvesters, the RMS will cause them to lose the benefit of and not be able to recoup the significant investment - in the many millions of dollars - incurred in order to assure a significant source of supply. They argue that other processors who have not acted to secure a source of raw material - i.e., who have not invested in relationships with harvesters - will now be able to sit back and have their crab handed to them "on a platter", so to speak. This view is to some extent supported by the government's backgrounder which refers to an RMS share "as a share that would be reserved or protected for each processing facility to the exclusion of others".

15 Quinlan's say that the stated purpose of the Minister is to regulate the crab industry as a whole, including the harvesting aspect and including setting the price on the international market. They say that harvesters are, because of RMS, told where and to whom to sell their catch; they say that because the transfer price of excess raw material crab - crab sold between processors through Northwind Inc., the government intermediary - is based on the minimum negotiated price, the province is thereby effectively regulating and depressing the price paid for processed product by international buyers. There is some suggestion to this effect in the June 10, 2005 pricing report of John Sackton, a recognized expert fishing pricing consultant. I note however that Mr. Sackton mentions the RMS program as only one factor affecting price, along with problems of over supply, lacklustre demand, quality problems and short weight problems. Further, I note that as of June 10, only about 10% of the crab landed had actually been transferred subject to the transfer pricing mechanism. 90% of the crab had been purchased by the processors for processing in their own plants. It is also interesting to note that, in respect of the crab purchased by Quin-Sea, 100% of it to date has been purchased from harvesters at the negotiated minimum price; the issue of any bonuses or other compensation to harvesters will be looked at in the fall, said Derrick Philpott. This evidence is not supportive of the argument that the effect of the RMS program as a whole is to regulate the international market price for crab.

16 I should take a moment to briefly set out the process by which the plaintiffs' share of crab production was determined.

17 Once the program was announced, the Minister wrote to each processor setting out how their relative shares were to be determined. Said the Minister:

> The process for the development of the shares for each company will be open, fair and equitable.

18 The Minister indicated that regional considerations would be important. Using a three-year average of purchases for production (as opposed to all purchases, some of which would be transferred to other processors), a preliminary share of 90% would be assigned. An arbitrator with the power not to decide, but to recommend a share between 90 and 105%, would listen to presentations from interested processors and make recommendations to the Minister on whether a particular processor's share should be increased from 90%. The final decision would be made by the Minister.

19 The terms of reference for the arbitrator - again really only an advisor - included the following:

> 2. No license holder can end up with less than 90 percent of their three-year average of raw material purchased for processing;
> 3. No licence holder should receive an allocation of more than 105 percent of their three-year average;

20 These terms of reference were provided to the processors at the outset of the process.

21 The Quinlan group made submissions to the arbitrator, who subsequently recommended a 95.5% share for each of Quinlan Brothers and Quin-Sea and 98.5% for Labrador Sea Products, a small company in which the Quinlan

companies hold a two-thirds interest.

22 Based on the terms of reference of the arbitrator, one would reasonably expect that this would result in a percentage share measured against that particular processor's three-year average production, some 8.6 million pounds for Quin-Sea and slightly more for Quinlan Brothers. The initial 90%, reasoned Quinlan's, reflected the decrease in the DFO quota from 2004 to 2005, while the arbitrator's ability to recommend increases above 90% reflected the ability to persuade the arbitrator of that particular processor's relative position in the industry and the need to protect relationships with harvesters.

23 The Department of Fisheries and Aquaculture asserts that it accepted the arbitrator's recommendation. But instead of supplying the 95.5% figures to a three year average of production, it was applied to Quinlan's percentage share of a derived total of three year averages for all processors in the province. I say derived because the province made five adjustments for plants that were considered to be anomalies in that they did not produce crab for the three years in question. It is not necessary for present purposes to go into more detail. Suffice it to say that the government calculated Quinlan Brothers as having produced 7.129% of this artificial total, with Quin-Sea calculated at 6.889%. The government then applied the arbitrator's 95.9% to these percentages to come up with the final percentages of 6.808% and 6.579% respectively.

24 These latter percentages were in turn applied to the anticipated landings for 2005, based on the set DFO quota. The anticipated share for Quinlan Brothers, assuming that the entire quota was landed in the province, was 7.463 million pounds and for Quin-Sea 7.212 million pounds. These anticipated shares were later recalculated to reflect a reduction in anticipated landings due to additional DFO quota cuts, although these cuts were not in the fishing area from which, traditionally, most of Quinlan's crab came from.

25 I express no opinion on the merits of the government's methodology of calculating these RMS shares. I would observe however that this methodology - unknown to Quinlan's until the hearing of this application - seems to be a considerable distance removed from the assurance that no processor would end up with less than 90% of its average three-year production.

26 The foregoing is a very brief condensation of the factual circumstances of this application. I will mention other facts as may be relevant in my consideration of the legal issues. Again, the discussion of those issues will be somewhat curtailed.

ANALYSIS

27 A request for relief before trial is an extraordinary use of the court's authority. It is not a request for a remedy as such since no wrong nor infringement of a legal right has yet to be established. Rather, a party seeks to persuade the court that its circumstances are such as to warrant the court's protection before it has established a legal right to the relief it seeks.

28 Here, the plaintiffs are asking to be exempted from the operation of the Licence Condition before it has been determined by a court that the Condition is somehow defective or contrary to law and should therefore be set aside.

29 The overriding principle is that a court must be persuaded that it is just and equitable that an applicant be treated, at least temporarily, as if the defendant's act were contrary to law. To assist in apply this undefined parameter the courts have developed an analytical framework. This framework - in particular as reflected in decisions of the Supreme Court of Canada - asks three questions:

1. Is there a serious issue to be tried in respect of the act - or in this case, Licence Condition - that the applicant is seeking to challenge?
2. If relief is not given before a full determination on the merits at trial, would the applicant suffer in the interim what is now referred to as "irreparable harm"? - i.e., harm which

cannot readily be compensated by an award of damages.

3. In any event, which of the parties would suffer the greater harm if relief were or were not granted? That is, where is the balance of inconvenience between the parties?

30 This analysis will assist the court in determining whether it is just and equitable to exercise its discretion to provide a party with "pre-adjudication" relief or protection.

31 Using this analysis - and bearing in mind the principles applicable to constitutional cases - what can be said of the circumstances of this case?

Serious Issue

32 Here the court must make a preliminary assessment of the substantive case to determine, in essence, that the case is neither frivolous nor vexatious. This is a very low threshold. At this stage - and in particular in constitutional cases - the applications judge is directed not to engage in an extensive review of the merits of the case. There are two exceptions to this low threshold, one of which arises - in the words of RJR-Macdonald[1] at para. 51:

> ... when the right the applicant seeks to protect can only be exercised immediately or not at all ....

33 There is an argument to be made in this case that Quinlan's claimed right to process as much crab as it can purchase will be lost if immediate relief is not given. By the time the matter is determined at trial, both the one year pilot project and the crab season will be over. It may be argued that in such circumstances, a more extensive examination of the merits of the case is warranted. However, recognizing the very limited nature of this exception, and bearing in mind the very clear comments in the authorities that constitutional cases such as this do not lend themselves to preliminary determination, I prefer to leave any further consideration of the merits of the case until considering the issue of balance of inconvenience.

34 I cannot say that the issues pertaining to lack of legislative competence (the constitutional argument), lack of statutory authority in the Fish Inspection Act, and a breach of a duty of procedural fairness are frivolous and vexatious. Accordingly, I conclude that, for the purposes of this application, the plaintiffs have raised one or more serious questions to be tried.

Irreparable Harm

35 Turning now to the question of irreparable harm.

36 The applicant must satisfy the court that if relief is not granted now, it will suffer damages and losses that, should the applicant succeed at trial, will not be readily recoverable as monetary damages. Irreparable harm refers to the nature or type of expected damage, and not to its magnitude.

37 Here the primary damage asserted by the corporate plaintiffs is an anticipated loss of the valuable relationships with their "family" of harvesters should - as is expected - application of the RMS program forces Quinlan's to avoid losses by refusing, perhaps as early as next week, to purchase more crab from these harvesters. Quinlan's say that they will lose much of the value of investments already made to secure their supply of crab, and that they will lose the security brought by harvester relationships that have been fostered and nurtured over the years.

38 Quinlan's also say that the Lab-Sea plant at Black Tickle, Labrador is already a marginal proposition and that the inability to process further crab at that plant may mean its demise.

39 The individual plaintiffs Doyle and Howell say that if RMS continues, they are uncertain if they will be able to work enough hours to qualify for EI benefits. This in turn will create financial hardship for their families and may - at least in Doyle's case - lead her to look for employment opportunities outside the region in which she and her family now

live.

40 It could be argued that Quinlan's losses - and in particular its relationships with crab harvesters - are all tied in the final analysis to the amount of crab processed by Quinlan's. That is, if Quinlan's assertions are to be made out, it should be able to establish that the refusal of a particular harvester to sell crab to Quinlan's because of RMS-related issues did or did not affect the amount of crab actually processed by Quinlan's. From there, a dollar quantification of loss may be made.

41 Likewise, the loss of EI benefits may be considered as a straightforward loss of income claim.

42 But such an argument does not need to be considered in a case such as this. The litigation involves - at least in one of its primary aspects - a request to set aside the License Condition as unconstitutional. But if the plaintiffs actually succeed in striking down the License Condition on constitutional grounds, it does not follow that damages would be awarded against the government for imposing a condition or passing legislation later found to be unconstitutional.

43 In RJR-MacDonald the irreparable harm asserted by the tobacco companies was the expenditure of very large sums of money to accommodate the challenged packaging regulations. This loss was of a type that could easily be recovered as monetary damages. But the Supreme Court of Canada recognized that monetary redress is usually not readily available in cases involving the constitutionality of legislation. Referring to these particular expenditures, the court said at para. 84:

> Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

44 Here, as already noted, the plaintiffs' claim is in part constitutional. Recovery of loss incurred because of a regulatory scheme subsequently found to be unconstitutional or lack statutory authority would face significant and perhaps insurmountable legal hurdles.

45 Following the guidance of RJR-MacDonald, the losses asserted by the plaintiffs to flow from the continuation of the RMS program may be characterized for present purposes as irreparable harm.

Balance of Inconvenience

46 I turn now to the balance of inconvenience. It is at this stage of the analysis that the focus shifts to both parties. The determination of whether it is just and equitable to grant relief resolves into an assessment of the relative harms that may be suffered by the parties if relief is or is not given before trial.

47 The factors that may be considered at this stage are numerous and will vary in each case. They include, where appropriate, the public interest, and may also include some consideration of the strength of the plaintiffs' substantive case.

48 It is my conclusion that in the circumstances of this case, the balance of inconvenience favours the government, or public. Accordingly, I have not been persuaded that it is just and equitable to exercise my discretion to set aside the License Condition before trial.

49 My reasons on this point are as follows.

50 The case law - again with particular reference to decisions of the Supreme Court of Canada - is clear that a claim for injunctive relief in a case involving a challenge to the constitutionality of legislation stands on a different footing

than the ordinary private law case. The difference is that before validly enacted legislation (or a License Condition) may be set aside in advance of a determination on the merits, consideration must be given to the effect of such setting aside on the public interest as represented by government.

51 The case law, including decisions by which I am bound - direct applications judges to assume that irreparable harm will be suffered by the public interest if the court sets aside legislation declared - as here - to be in the public interest. In order to overcome this assumption, the applicants - here Quinlan's - must demonstrate that suspending the License Condition would itself provide a public benefit. That has not been established in the present case and indeed probably could not be established. The situation is that, in essence, the quantity of crab processed in the province and the employment thereby created is a "zero sum" proposition. It has not been proven, if the RMS program were suspended, and looking at the processing industry on a province-wide basis, that any additional crab could be processed or hours worked beyond what would otherwise be the case. The evidence is that the quantity of crab that will, in fact, be processed in the province between now and the end of the fishing season will be the same whether RMS is in force or not. Thus, should Quinlan's and their employees avoid the restrictions of RMS, any additional crab processed by Quinlan's over and above its present quota and any extra hours worked by Quinlan plant workers will be reflected as a mirror image in processing and employment reductions in other plants.

52 The situation would be similar if the whole RMS program were suspended. Additional crab acquired by some processors would be lost to the other processors and their employees.

53 The court should not become engaged in the debate over whether regulation of the free market by the RMS program is good or bad public policy. The fact is that government has considered and declared the RMS program to be for the greater good of the province-wide industry and has stated as one of the objectives of the program the encouragement of economic activity on more balanced basis across the different regions of the province. One may well appreciate the argument put forward by Quinlan's that such a program will be to the detriment of processors such as Quinlan's who have done much to protect and ensure a steady source of supply of raw material. But I reiterate that arguments for and against the policy are not proper considerations for the court in the context of this application. Government's introduction of the program is of itself sufficient to allow - and perhaps indeed require - the court to conclude that suspending the program would not be in the public interest.

54 It is true that Quinlan's have asked - as one claim for relief, that the RMS program simply not be applied to Quinlan's, as distinct from suspending it totally. For present purposes, that is a distinction without a difference. It is clear from the 1987 Supreme Court of Canada decision in Metropolitan Stores[2] that because of the precedential value and exemplary effect of exemption cases, the public interest should be considered and weighed as if it were a suspension case - as i.e., as if the case involved a blanket suspension of the legislation in question. I refer in particular to paras. 79 and 80 of that decision.

> ... suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.
>
> The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

55 I note that in Metropolitan Stores, the court appears to agree with the proposition that in suspension cases, injunctive relief should only be given in exceptional or rare circumstances. Mr. Justice Beetz indicated that he was

aware of only two cases in which injunctive relief had in fact been given to suspend the operation of legislation.

56 A similar reluctance was noted by Justice Allan of the British Columbia Supreme Court in the 2001 decision Law Society British Columbia v Canada[3]. Justice Allan said, at para. 85:

> Determining the balance of convenience in a constitutional case is far more complex than in private disputes. Because it is assumed that laws enacted by democratically elected legislatures are directed to the common good and serve a valid public purpose, interlocutory injunctions are rarely granted in constitutional cases. The applicants in Harper, [2000] 2 S.C.R. 764, Metropolitan Stores, supra, and RJR-MacDonald, supra, all failed to establish that the balance of convenience entitled them to the relief they sought.

57 The assumed public good weighs heavily against suspending the operation of legislation without a determination of invalidity. The same considerations apply to the License Condition now challenged.

58 Further, after considering all of the evidence before me, there are a number of other factors which tend to tip the inconvenience scales in favour of the government, generally by suggesting to me that the inconvenience to Quinlan's may not be as great as asserted. In no particular order these factors are, in summary form:

1. In my view, the plaintiffs' challenges based on a lack of legislative competence or a lack of legislative authority are weak. It is difficult to assess the primary purpose and effect of the License Condition as anything other than the regulation of crab processing in the province, and in particular the regulation of where in the province crab actually landed in the province would be processed. The suggestion that the RMS program is primarily intended to regulate the international market price - i.e. trade and commerce - is far-fetched. The argument that the RMS program somehow affects the international market price rests on a dubious evidentiary foundation and would in any event be of incidental effect only. The License Condition is light-years removed from the provincial marketing and price-fixing scheme struck down by the Supreme Court of Canada in Central Canada Potash[4], a decision relied on here by Quinlan's. Likewise, the suggestion that the License Condition is aimed at regulating the fishery has little merit. On its face, the condition applies only to crab landed in the province. There is no regulation at all affecting the harvesters decision to land crab in the province or elsewhere.

   Courts in this province have consistently held that fish processing in the province is a matter within provincial legislative competence. Likewise, provincial courts have upheld the statutory authority of the Minister of Fisheries and Aquaculture to impose License Conditions directed at regulating where in the province processing activity should occur.

2. The RMS program - in its broad objectives - is not dissimilar to a quota previously suggested by crab processors. The evidence clearly indicates marked differences in the two approaches, but nonetheless, the concept of sharing crab among processors is not a foreign one. This suggests that at least some of the consequences that may flow from the RMS sharing program are not as "dire" or "irreparable" as suggested.
3. Quinlan's themselves were signatories to a crab sharing agreement among certain processors in 2004. Under that agreement Quin-Sea was to receive 7.28% of the total of "competitive inshore crab quota landed from all areas except 2J", while Quinlan Brothers was to receive 7.25%. This, at least on its face, resembles the moving production target in

the RMS program which so offends the plaintiffs. Further, under this agreement, additional crab over a processor's percentage share had to be distributed to other processors "on a timely and equitable basis", which process was to be "implemented by processors on a transparent basis, and subject to effective sanctions". The sharing program was not to result in "unreasonable gains or losses". The similarities to the present RMS program again tend to weaken the plaintiffs' arguments based on irreparable harm.

4. Quinlan's placed much emphasis on the RMS program leading to a potential loss of relationships with the crab harvesters. However, the evidence is that harvesters in fact "move around a lot" from processor to processor. I note the evidence of Derrick Philpott concerning the 2004 crab sharing and transfer agreement between processors. He explained that the objective of the agreement was to avoid a repeat of problems experienced in the 2003 seasons, problems compounded by a harvester strike that year. The processors wished to ensure that the 2004 fishing season got started on a timely basis, and thereby avoid a glut of crab due to increased pressure of fishing after a late start. But when asked about the reaction of harvesters to the processors agreement, Philpott replied - "A lot of them knew about it - I don't think the harvesters were very happy - they can move around - we're always picking up boats". This willingness to manage or put up with any movement of harvesters due to unhappiness with the processors own sharing agreement tends to render less "irreparable" or inconvenient any harm that may be suffered if "boats move around" because a processor stops purchasing after it has reached its RMS production quota.

This 2004 processors agreement fell apart since not all processors adhered to the agreement. It was after the collapse of the agreement that Quinlan's, although knowing that a sharing or quota program was under consideration by government, nonetheless decided to expend considerable further sums on the acquisition of harvesting capacity. It is difficult to argue that the potential difficulty of realizing the benefit of expenditures made in these circumstances should support the granting of pre-trial relief from the government's crab sharing program.

5. In April 2005, after government had announced its intention to implement a Raw Material Sharing program, the Quinlan group provided to government written comprehensive recommendations on how such a plan could be implemented. The introductory paragraph of Quinlan's letter:

> Further to our conversation of yesterday the following is an outline of an implementation plan for raw material sharing for now crab taking into account the need to achieve the public policy objectives of the Government that is consistent with the fundamental principle of maintaining an independent and transparent system that will be practical and effective for harvesters and processors:

Part of Quinlan's recommendations included a mechanism for transferring excess crab between processors. This transfer would require immediate cash payment to the selling processor:

> The processor that transfers a quantity of raw material will be paid immediately

> upon the transfer of the crab at dockside following completion of discharge and grading. It will be the sole responsibility of the processor acquiring the raw material to transport the raw material and arrange and pay for transport unless otherwise agreed between the shipper and the receiving processor. If the designated processor to whom the raw material is to be transferred fails to arrive and take delivery of the raw material within a reasonable time e.g. one hour of the completion of discharge and grading, or fails to pay immediately for the crab at the prescribed cost, then the administrator will deem that the transfer has occurred and the processor who paid the harvesters and discharged the catch will have the right to process the crab without penalty.

The government obviously did not fully accept Quinlan's recommendations and went on to establish its own implementation process for the Raw Material Sharing program. But nevertheless the Quinlan's participated actively in the arbitration process established by the province and made individual presentations to the arbitrator, leading to the arbitrator's recommendations referenced previously.

Two points may be made. The first is that the Quinlan group argues that the RMS transfer of excess crab through an intermediary requires the receiving processor to pay cash immediately for the raw material, rather than delay payment for a few days as would be the case if the crab were purchased directly from harvesters. This requirement for immediate payment, says Quinlan's, creates a cash shortage for the paying processor, who then will "dump" the processed product in the international market at a depressed price in order to get cash. This conclusion is arguably supported by a very short reference in John Sackton's June 10 pricing report.

But it seems to me that the Quinlans cannot now complain about the consequences of the RMS cash transfer system - assuming, which may be doubtful, that an effect on the international market price because of the immediate cash requirement can be proven - when Quinlans themselves clearly recommended a transfer of access crab based on payment immediately following the transfer at dockside.

Secondly, Quinlan's participation in the Raw Material Sharing implementation process - both by way of making recommendations concerning its implementation and eventually through presentations to the arbitrator - suggest that Quinlans is now more aggrieved by the mechanism of the process and its result rather than by any lack of legislative competence or authority. While, as I have already noted, there may be a legitimate procedural fairness issue raised, and Quinlan's participation in the arbitration process may indeed have been a result of their expectation of receiving a share based on a three-year average of their production, their complaint of harm based on a lack of legislative competence seems to be driven by their dissatisfaction with the result.

59 To summarize on the balance of inconvenience. The RMS program is intended by government to allocate any crab to be processed in the province among the processors presently licensed by the province. The program is intended to try and achieve some regional balance in the distribution of economic benefits from the crab industry by sharing the available resource among the various regions of the province. It is intended to bring some assurance of a supply of raw material to the various processors.

60 This is the announced policy of government; the License Condition effects that policy. The questions of whether the policy is good or bad or whether it is or will be effective or not, are not questions for the court. The court must assume that, unless otherwise demonstrated, the public interest will suffer irreparable harm if the RMS program is set aside before a determination of the merits of its legal validity. It has not been otherwise demonstrated.

61 There is a fixed quantity of crab to go around. To ensure some degree of processing and employment in the various regions of the province, government has taken from some and given to others. If the court were to now suspend the RMS program, it would result in a reversal of this process; the more crab processed by Quinlan's, the less by others. It is not completely speculative to expect that considerable confusion and unrest would follow if the program were now suspended two-thirds of the way through the fishing season.

62 The concept of sharing crab among processors is not new. The processors themselves have tried it, although such attempts were perhaps not motivated by the same considerations that influenced government in its decision to implement the RMS program. But the past willingness of processors to consider and implement such an arrangement - admittedly on different terms - suggests that the sky will not fall if pre-trial relief is not granted.

63 In the circumstances of this case, I am satisfied that if the application were granted, the inconvenience of suspending the RMS program would be far heavier for the public interest represented by government than the inconvenience that might be suffered by the plaintiffs if the application were not granted.

64 A final point, going to the discretion of the court to refuse interim relief even where the various preconditions for the granting of such relief have been met. By its terms, the License Condition refers to the imposition of sanctions if a processor overruns its share allocation or otherwise fails to comply with the product transfer protocols. But the Condition refers to such infractions that occur "without my prior written approval ..." - that is, without the prior written approval of the Minister. This approval to let a processor "out from under" the terms of the Condition was referred to throughout the proceeding as "flexibility". The evidence is that the Quinlans have made no request of the Minister that either Quinlan Brothers or Quin-Sea Fisheries be permitted to exceed its production quota. In the absence of evidence that such a request for approval - an alternative remedy - had been made and refused, I would be less inclined to grant interim declaratory relief in the circumstances of this case, even if it were otherwise just and equitable to do so.

CONCLUSION

65 The application for interim declaratory relief is dismissed. The respondent government is entitled to its costs on a party and party basis with fees for two counsel, the applicant also having been represented throughout by two counsel.

cp/e/qw/qlmxd/qlbrl/qlsxs

1 RJR-MacDonald Inc. v. Canada, [1994] 1 S.C.R. 311.

2 Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, [1987] 1 S.C.R. 110.

3 Law Society (British Columbia) v. Canada (Attorney General), [2001] B.C.J. No. 2420, 2001 BCSC 1593.

4 Central Canada Potash v. Saskatchewan, [1979] 1 S.C.R. 42.

Indexed as:

Sauvé v. Canada (Chief Electoral Officer)

Between
Richard Sauvé, respondent (plaintiff), and
The Chief Electoral Officer of Canada, the Solicitor General of Canada and the Attorney General of Canada, applicants (defendants)
And between
Sheldon McCorrister, Chairman, Lloyd Knezacek, Vice Chairman on their own behalf and on behalf of the Stony Mountain Institution Inmate Welfare Committee, and Clair Woodhouse, Chairman, Aaron Spence, Vice Chairman on their own behalf and on behalf of the Native Brotherhood Organization of Stony Mountain Institution, and Serge Belanger, Emile A. Bear and Randy Opoonechaw, respondents (plaintiffs), and
The Attorney General of Canada, applicant (defendant)

[1997] F.C.J. No. 594

[1997] A.C.F. no 594

[1997] 3 F.C. 628

[1997] 3 C.F. 628

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Court File Nos. T-2257-93, T-1084-94

Federal Court of Canada - Trial Division
Ottawa, Ontario

Wetston J.

Heard: May 15, 1997
Judgment: May 16, 1997

(10 pp.)

Elections -- Voters -- Disqualifications -- Prisoners -- Practice -- Judgments and orders -- Enforcement of judgments - - Stay of.

Application for a stay pending appeal. Section 51(e) of the Canada Elections Act prohibited prisoners serving more than two years from voting in Federal elections. Canada moved for a stay of a 1995 decision of the Federal Court Trial Division declaring section 51(e) unconstitutional. HELD: Motion dismissed. There was a serious issue to be tried since the stay would essentially grant Canada the remedy sought in the appeal by denying prisoners the right to vote in the upcoming Federal election. The Court weighed the public interest concerns between the parties in determining that the short term fact that prisoners might vote in the election pending appeal of the trial decision did not amount to irreparable harm to the public interest. Consideration of the public interest included the protection of rights guaranteed under the Canadian Charter of Rights and Freedoms as well as the pressing and substantial objectives of the government in passing the legislation. The prisoners could not be compensated for the denial of their right to vote in the election. There was no evidence of negative effects caused by prisoners participating in elections. The balance of inconvenience did not favour Canada.

Statutes, Regulations and Rules Cited:

Canada Elections Act, R.S.C. 1985, c. E-2, s. 51(e). Canadian Charter of Rights and Freedoms, 1982, ss. 3, 15.

Counsel:

Fergus J. O'Connor, for the respondent (plaintiff), Richard Sauvé.
Arne Peltz, for the respondents (plaintiffs), Sheldon McCorrister et al.
Gérald L. Chartier and Glenn D. Joyal, for the applicants (defendants).

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1 **WETSTON J.** (Reasons for Order):-- This is a motion to stay a decision of this court which declared section 51(e) of the Canada Elections Act, R.S.C., 1985, c. E-2, (as am. by S.C. 1993, c.19, s.23), to be in violation of section 3 of the Charter. At the request of the parties, this motion was heard by myself on an urgent basis.

2 Section 51(e) of the Canada Elections Act prohibits prisoners serving more than two years from voting in a Federal election. The decision that 51(e) was unconstitutional was made after a lengthy trial in this Court. On January 19, 1996, the Crown appealed the decision of December 27, 1995, to the Federal Court of Appeal. The Crown took no steps after the appeal was filed to stay the effect of this Court's earlier decision. As a result, prisoners were entitled to vote in 7 by-elections which occurred on March 25, 1996, and June 17, 1996, after the application for appeal was filed. The applicants have not expedited the hearing of the appeal before the Federal Court of Appeal and it is unlikely that it will be heard before the Federal election (June 2, 1997).

3 On April 23, 1997, the Crown filed this motion, in anticipation of a Federal election call, to stay the effect of the decision of this Court pending the outcome of the appeal. On April 27, 1997, the Federal government announced a Federal election to be held on June 2, 1997. Steps were then taken to prepare for Prisoners' voting day, pursuant to Special Voting Rules, set for May 23, 1997.

4 Rule 341A grants this Court the discretionary authority to suspend the operation of any judgment of the Court pending an appeal. The principles to be considered in deciding whether or not a stay is to be granted in such a case have been determined by the Supreme Court of Canada in RJR - MacDonald Inc. v. Canada (Attorney General), [1994] 1

S.C.R. 311. In that case, the applicants, RJR - MacDonald, applied to the Supreme Court of Canada for a suspension of the legal effects of regulations pending the ultimate hearing before the Supreme Court regarding the constitutionality of the enabling legislation. The Supreme Court of Canada indicated, at page 333, that in such a case a careful balancing process must be undertaken:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

I am guided by these introductory remarks in my consideration of whether a stay should be granted in this case.

5 In RJR - MacDonald, supra, at page 347, the Supreme Court reviewed the factors to be considered on an application for a stay in a Charter case. The Court adopted the three-part American Cyanamid test to be applied for stays in both private law and Charter cases. This tripartite test is well-known. At the first stage, an applicant must demonstrate a serious question to be tried. At the second stage, the applicant must convince the Court that it will suffer irreparable harm if the relief is not granted. At the third stage, the applicant is required to demonstrate that the balance of inconvenience is in its favour. In this regard, the Supreme Court was careful to note that the requirement to assess the balance of inconvenience will often determine the result in applications involving Charter rights.

Serious Question to be Tried

6 In considering the tripartite test as set out in RJR - MacDonald, supra, I am of the opinion that there is a serious issue in this matter. The Supreme Court has stated that it is not the role of the motions judge to consider the merits of the case to be heard and that, particularly in Charter cases, it is a low threshold to meet at this stage: RJR - MacDonald, supra, at page 337. It is also important to note that the Court outlined two exceptions to this principle. The first exception applies where the interlocutory motion will in effect amount to a final determination of the action. The second applies where the question of constitutionality is one which is a simple question of law alone and the motions judge may be able to dispose of the case.

7 In the case at bar, granting the stay would essentially grant the applicants the remedy sought in the appeal; that is, it would deny prisoners the right to vote in the Federal election. While I do not believe that this would justify a consideration of the merits of the case under the exceptions set out above, I do believe that it is an issue which should be considered under the weighing of balance of inconvenience.

Irreparable Harm

8 The second stage of the tripartite test requires that the applicant establish that irreparable harm would occur if the stay was not granted. The test for irreparable harm has been described as follows in RJR - MacDonald, supra, at page 341:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

9 The applicants in this case are public authorities and, as such, it should be noted that the type of harm claimed will

necessarily be different from that of a private applicant. In RJR - MacDonald, supra, it was stated, at page 346:

> In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

10 In RJR - MacDonald, supra, the public authority was the respondent and not the applicant, as in this case. The Court defined the test for a public authority acting as an applicant as follows, at page 349:

> We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

11 It is clear from the above that as an applicant the Crown bears the burden of establishing irreparable harm at stage two of the test. I do not accept the Crown's submission that the two stages are collapsed into one consideration under balance of inconvenience. I interpret this passage to mean that where the Crown is the applicant, and by implication the legislation has already been found to be unconstitutional, they do not benefit from an assumption of irreparable harm at stage two. However, public interest, as an aspect of irreparable harm, may be demonstrated at a lower standard. It is, nonetheless, in the discretion of the Court, to determine at this stage whether the alleged harm to the public interest, as an aspect of irreparable harm, is sufficient in the context of the case to satisfy stage two.

12 This interpretation is supported by the comments of the majority of Supreme Court of Canada in 143471 Canada Inc. v. Quebec (A.G.), [1994] 2 S.C.R. 339 at page 385:

> In RJR - MacDonald, supra, it was held that the onus of demonstrating harm to the public interest is a relatively low one for government authority opposing interlocutory orders.

[emphasis added]

The Supreme Court relied on the passage from RJR - MacDonald, supra, at page 346, with added emphasis on the phrase "nearly always" and "in most cases". In other words, the benefit of the assumption of irreparable harm to public interest, in satisfying stage two, does not arise in all cases.

13 To interpret this test otherwise would effectively mean that the applicants would obtain the full extent of the relief sought despite the fact that this Court has declared section 51(e) of the Canada Elections Act to be unconstitutional. This is contrary to the principle discussed earlier that a party should not be allowed to achieve the ultimate remedy by means of an interlocutory motion. In this regard, I have considered the decision of Attorney General of Canada v. Gould, [1984] 1 F.C. 1133, aff'd [1984] 2 S.C.R. 124. To grant the relief requested by the applicants, in this case, would effectively mean that, despite the declaration of invalidity of section 51(e) by this Court after a full trial of the action and prior to the Court of Appeal having considered this matter, that prisoners would have their right to vote suspended in the upcoming election. In my opinion, this runs contrary to the principles outlined in Gould, supra.

14 Finally, with respect to the matter of irreparable harm, it may be worthwhile to consider one further passage from

the Supreme Court of Canada in 143471 Canada Inc. v. Quebec (A.G.), [1994] 2 S.C.R. 339, wherein LaForest J. (in dissent) stated, at page 359:

> However, a monetary remedy is not always contemplated in cases where the Charter is invoked. This results from the nature of the rights it guarantees and of the parties. That is why the Court held that in most situations the existence of irreparable harm must be presumed. But when the alleged harm itself takes the form of a breach of a right protected by the Charter, as it does here, the judge who has the responsibility for ruling on the merits of the interlocutory motion is in the best position to determine its nature and extent and whether it is irreparable.

15 The Crown filed no evidence in support of this application for a stay. The only affidavit that was filed was that of Mr. Henderson who stated that the objectives of section 51(e) of the Canada Elections Act were found to be pressing and substantial at the trial of this action and were as follows:

> a) the enhancement of civic responsibility and respect for the rule of law; and b) the enhancement of the general purposes of the criminal sanction.

The Crown relies upon this finding for its submission that there would be irreparable harm to the public interest if the stay is not granted.

16 The Crown argued that if they do not have the benefit of the assumption as described in RJR - MacDonald, supra, then it would be virtually impossible for the Crown to ever obtain a stay. I do not believe that this is the case. Even if the Crown does not have the benefit of the assumption of irreparable harm in satisfying the second stage in all cases, it is still open to the Crown to lead evidence of harm. That was the case in both Schreiber v. A.G. (Canada), [1996] 118 F.T.R. 231 (T.D.) and 143471 Canada Inc. v. Quebec (A.G.), supra, in which the Crown led evidence regarding the public harm that would be suffered in the period pending the appeal if the stay was not granted. Furthermore, the Crown may also establish that, on balance, the public interest outweighs any harm to the respondents at the third stage.

17 The Crown submitted that stages two and three ought to be considered together and did not argue irreparable harm as a separate issue under stage two. For the above reasons, and the fact that the Crown provided no other evidence as to irreparable harm, in the context of the denial of a democratic right, I conclude that the Crown has not met its onus at this stage. In the event that I am wrong, I will, nonetheless, consider the issue of harm to the public interest, as submitted by the Crown, under stage three, balance of inconvenience.

Balance of Inconvenience

18 In weighing the balance of inconvenience between the parties, the factors to be considered are as follows, RJR - MacDonald, supra, at p. 350:

> Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

In addition, the Crown submits that once the minimal requirements are met regarding irreparable harm to the public interest (which in their opinion is deemed to exist), in the absence of strong evidence of a sufficiently weighty public benefit arising from the refusal of the stay, the balance of convenience favours the public authority.

19 The relief sought in this case is the application of a legislative provision which has been found to be unconstitutional. The respondents argue that, while the consequences of the loss of the right to vote are considerable, the specific harm to the respondents is the denial of a democratic right. They submit that, should the respondents not be able to vote in the upcoming election, that harm is irreparable. They argue that the harm in this case is even more

serious because the respondents were excluded from the last general election in 1993 under section 51(e) of the Act. They were also denied the right to vote in 1988 under the previous provisions even though that disqualification was subsequently struck down by the Supreme Court of Canada.

20 With respect to the issue of public interest, the government alone does not have a monopoly. It was stated in RJR - MacDonald, supra, at page 344:

> It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

21 In the case at bar, I have no doubt that the Federal Government is charged with the duty of promoting and protecting the public interest. The question is what is the public interest in this case? The applicants argue that the public interest should be found in the two pressing and substantial objectives that this legislation was found to have at trial; namely, the enhancement of civic responsibility and respect for the rule of law and the enhancement of the general purposes of criminal sanctions.

22 In my opinion, the public interest in this type of case must be considered more broadly than in the manner advocated by the applicants. I accept the applicants' submission regarding the pressing and substantial objectives of the government in passing the legislation: however, the public interest must also include the protection of democratic rights enshrined in the Charter. What could be more fundamental than the right to vote in a free and democratic society? In defining public interest, therefore, consideration must be given not only to the pressing and substantial objectives noted above, but also to the protection of rights guaranteed under the Charter.

23 In this case, can it be said that the denial of the franchise which has been declared unconstitutional by this Court is consistent with the government's role in protecting Charter rights? There may be circumstances in which a court would delay or stay the effects of an unconstitutional ruling and on several occasions the Supreme Court of Canada has done just that. For example, the Crown referred to the case of Thibaudeau v. The Queen, [1994] 2 F.C. 189 (F.C.A.), aff'd (1995), 95 D.T.C. 5273, as authority for the proposition that a declaration of unconstitutionality could be stayed pending an appeal. I would note that Thibaudeau is different from this case in several ways. In the first place, while the law had been found to violate section 15 of the Charter, the harm which would be suffered if the legislation was enforced was monetary and could be compensated in damages if the finding was upheld on appeal. In this case, the respondents cannot be compensated for the denial of their right to vote in the upcoming Federal election. Furthermore, no reasons were given by the Supreme Court of Canada in allowing the stay in Thibaudeau.

24 As part of the argument in this case, the respondents referred the Court to the decision of Schreiber v. A.G. (Canada), supra, at page 235, wherein Gibson J., on a motion for a stay of a constitutional decision of this Court, noted that the "short-term context of a period, pending disposition of an appeal "was the relevant period to address in a motion for a stay. In Schreiber there was affidavit evidence before Gibson J. upon which he determined that the short-term interference with international criminal investigations was sufficient harm to justify a stay.

25 I am of the opinion that a consideration of the short-term impact of a stay pending an appeal is an important consideration when the Court is faced with the decision to stay an order in which a law has been declared to be contrary to the Charter. This is particularly the case on a motion for a stay where the longer term implications of declaring a provision invalid rests with the judge who has the responsibility during the trial. Similarly, that responsibility should rest with the Federal Court of Appeal and ultimately with the Supreme Court of Canada in considering the appeals on the merits.

26 In this case, the respondents argue that at best the Crown's case is one in which, over the long term, prisoner voting may erode the respect for the rule of law and undermine the criminal law sanction. Counsel for the respondents noted that evidence during the trial by one of the experts called by the Crown was to the effect that the more general development of the loss of responsibilities and duties attendant upon rights, of which prisoner voting is merely one example, would take place only after the passage of several decades and maybe even generations.

27 In weighing the balance of inconvenience, I note that the Crown only argued that irreparable harm, in this case, would be harm to the public interest. While this is of significance, the Crown did not argue that there was any administrative burden that could not be met to allow prisoners to vote, nor did they seriously argue that the vote of 14,000 prisoners disseminated throughout various ridings in Canada could affect the overall outcome of the election. In fact, everything is in place at this time for prisoners to vote. Posters have been placed in prisons advising them of the upcoming voting and steps have been taken to put the machinery for voting in place.

28 During 1996, after the filing of the Crown's Notice of Appeal in this matter, there were seven by-elections held under the Canada Elections Act. No motion for a stay of the Order declaring the law to be unconstitutional was made by the Crown prior to the holding of either the March 25th or the June 17th, 1996, federal by-elections. As such, prisoners voted in those by-elections. The Crown distinguished voting in a by-election from voting in a federal election because, in the latter, citizens are voting for their government. In a by-election they are voting for individual members of parliament. For the purposes of determining harm to the public interest, I am not persuaded by this distinction submitted by the Crown.

29 Counsel for the respondents further argued that all inmates were allowed to vote in the 1992 Constitutional referendum and prisoner voting is allowed in four provinces, yet no evidence was led to prove that any negative effects have been shown to arise from the participation of the inmates in those elections. There was no evidence presented, therefore, that any harm occurred to the public interest or that public confidence in the rule of law was in any way affected by those occasions in which prisoners voted.

30 Based on the evidence before me, and in weighing the public interest concerns as between the parties, I am not satisfied that in the short-term the fact that prisoners might vote in the upcoming election, pending the decision in the Federal Court of Appeal, would amount to irreparable harm to the public interest. In considering the nature of the relief sought, the harm which the parties contend they would suffer and the denial of a democratic right under the Charter, I am not persuaded that, in this case, the balance of inconvenience favours the applicants.

31 Accordingly, the motion for a stay shall be dismissed and the respondents shall have their costs.

WETSTON J.

qp/d/ln/hbb/mjb/DRS/DRS

Case Name:

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] S.C.J. No. 25

[1978] A.C.S. no 25

[1978] 2 S.C.R. 662

[1978] 2 R.C.S. 662

84 D.L.R. (3d) 1

19 N.R. 570

25 N.S.R. (2d) 128

44 C.C.C. (2d) 316

[1978] 1 A.C.W.S. 210

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.

KIMBERLY CLARK - and - MINISTER OF NATURAL RESOURCES

Court File No. 95-CU-84779

February 26, 1996

The limited protective remedy that the plaintiff seeks is an order in the nature of an interlocutory injunction, and as such, comes within the 3 principles discussed in the *RJR v. MacDonald* case. It is trite law, that the remedy requested is an extraordinary remedy, and that, in the exercise of its discretion, the court must take care not to grant such remedy lightly.

For the purpose of this motion, I am prepared to assume that there is a serious issue to be tried with respect to whether the charges, in issue, constitute indirect taxation that is *ultra vires* the Province. However, the plaintiff has failed to satisfy the remaining two principles. Although I am not without sympathy in regard to the plaintiff's dilemma, created in large part by the *Air Canada* case, I do not see how the plaintiff will suffer irreparable harm prior to trial if the remedy is not granted. The legislation requires that the plaintiff pay the charges. It is only after the trial that the plaintiff may sustain harm, if it succeeds in the action and the trial judge fails to order that the money be repaid. Even if the plaintiff were to be permitted to pay the money into an interim bearing escrow account, or into court, it will still be for the trial judge to decide who gets the money.

This leads to the balance of convenience, where, in cases like this, the government has a low hurdle to overcome. I agree with Ms. Lee's submissions on this principle. Because this court cannot make the ultimate order sought by the plaintiff, the plaintiff has little to gain, but the Crown would be severely prejudiced by the order if granted.

Not only would the order tend to destabilize the pricing arrangement for the forest industry, the Crown would also lose the revenue.

Therefore, the motion is dismissed. Costs in the cause.

S. Borins J.

SERVICE OF A COPY
ADMITTED THIS 16 DAY OF Feb 19 96
Crown Law Office (Civil Law)
MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO
Per [illegible] Time 3:40 pm
720 BAY STREET
TORONTO, ONTARIO
M5G 2K1

ONTARIO COURT
(GENERAL DIVISION)

Proceeding Commenced at
TORONTO

ENTERED AS EXHIBIT A
ON MOTION
MOTION RECORD

FEB [illegible]

Feb. 16/96.

The limited protective remedy that the pet. seeks is an order, ~~that~~ in the nature of an interlocutory injunction, & as such, comes within the RJR principles discussed in the RJR-MacDonald case. It is quite clear, that the remedy granted is an extraordinary remedy & that, in the exercise of its discretion, the court must take care not to grant such remedy lightly.

For the purpose of this motion, I am prepared to assume that there is a serious issue to be tried with respect to whether the charges, in pith, Constitute indirect taxation & are ultra vires the province. However, the plaintiff

PERSONAL

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Solicitors for the Plaintiff

[illegible] to satisfy the remaining two principles.
Although I am not without sympathy in regard to
the plaintiff's dilemma, created in larger part by the
Ali [illegible] case, I do not see how the pl. might differ
in a parallel home [illegible] if the remedy is not [illegible]
The classification requires that the pl. pay the charges. It is
only after the trial that the pl. may [illegible] that
if it succeeds in the action & the trial judge [illegible] Fails, to
the money be repaid. Even if the pl. were to be permitted
to pay the money into an interest bearing escrow account, it
into court, it will still be for the trial judge to decide
who get the money.

This leads to the balance of convenience, which
in cases like this, the government [illegible] can handle [illegible]
[illegible]. I agree with Ms. Lee's submission on this principle
Because this [illegible] cannot make the ultimate order
sought by the pl., the pl. has little to gain, but the
[illegible] would be severely prejudiced by the order [illegible]
if [illegible]

Not only would he [illegible] to
an [illegible] for the [illegible] industry, the Crown would
also lose the revenue.

Therefore, the motion is Dismissed. Costs
in the cause.

S. Bracci J.

BETWEEN:

KIMBERLY CLARK and MINISTER OF NATURAL RESOURCES

Court File No. 95-CU-84779

Leave to appeal is refused,
cost to the respondent in the cause.
[illegible] April 16/96.

ONTARIO COURT
(GENERAL DIVISION)

Proceeding Commenced at
TORONTO

MOTION RECORD

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Indexed as:

Ontario Home Builders' Assn. v. York Region Board of Education

Ontario Home Builders' Association et al. v. York Region Board of Education et al.

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13 O.R. (3d) 493 at 496

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62 O.A.C. 321

15 M.P.L.R. (2d) 1

40 A.C.W.S. (3d) 788

Action No. 666/91

Ontario Court (General Division), Divisional Court,

O'driscoll, White and Mckeown JJ.

May 20, 1993

Counsel:

Neil Finkelstein and George Vegh, for applicants.

Janet E. Minor and Michel Hélie, for respondent, Attorney General of Ontario.

Peter D. Lauwers, for respondent, York Region Roman Catholic Separate School Board.

Martha MacKinnon, for respondent, York Region Board of Education.

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1 MCKEOWN J.:--This is an application pursuant to s. 2 of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1, for an order quashing by-laws passed by the York Region Board of Education (the "Public Board") and the York Region

Roman Catholic Separate School Board (the "Separate Board") (collectively the "School Boards") on November 18, 1991, which imposed education development charges pursuant to Part III of the Development Charges Act, R.S.O. 1990, c. D.9 (hereinafter the Act or the Development Charges Act). The issues are:

(a) whether the education development charge constitutes a breach of s. 93 of the Constitution Act, 1867;
(b) whether the charge is indirect taxation contrary to s. 92(2) of the Constitution Act, 1867; and,
(c) whether the education development charges are contrary to ss. 2(a) and 15 of the Canadian Charter of Rights and Freedoms and can be justified under s. 1.

Standing

2 Although the question of standing of the Ontario Home Builders' Association was raised, this matter was not seriously pursued. This organization clearly has a sufficient public interest to meet the test set out in Borowski v. Canada (Minister of Justice) , [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588, for public interest standing.

3 The Attorney General of Ontario submits that Humber Green Estates Ltd. and Butternut Grove Homes Inc. are corporate persons without religious beliefs or educational rights and as such, they have no standing to raise the constitutional questions. In my view, these corporate bodies have a sufficient "personal stake in the outcome of this litigation" to come within the Supreme Court's decision in Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321.

Facts

4 Historically, education funding came from two sources: provincial grants and local assessments or property taxes. Prior to the passage of the Development Charges Act, 1989 , S.O. 1989, c. 58, 75 per cent of a school board's recognized capital expenditure were financed by provincial capital grants, while the remaining 25 per cent were made up through local assessment or property taxes.

5 The enactment of the Development Charges Act, 1989 introduced the education development charge, a new method of raising funds that is unique to Ontario. Currently, the local share of growth-related capital expenditures for new schools may be raised by local assessment charges or, with the approval of the Minister of Education, through education development charges, or a combination of both.

6 In 1989, subsequent to the passage of the Development Charges Act, 1989, the province reduced its funding commitment to growth-related capital expenditures to 60 per cent. As a result of this provincial action, the local share of these expenses increased from 25 per cent to 40 per cent. The capital grants for non-growth-related capital expenditures remained the same.

7 Part III of the Development Charges Act gives school boards the authority to pass by-laws that impose education development charges. Section 30 is the operative section and provides that an education development charge is imposed "against land undergoing residential and commercial development" (emphasis added) where that development will give rise to the need for new schools directly attributable to it. Section 29 of the Development Charges Act defines an education development charge as:

> "education development charge" means a development charge imposed under a by-law passed under section 30 respecting growth-related net education capital costs incurred or proposed to be incurred by a board;

8 Where residential and commercial development gives rise to a need for new schools directly attributable to land development, this is known in s. 29, Part III of the Development Charges Act as a "growth-related net education capital

cost". "Growth- related net education capital cost" is calculated pursuant to a statutory and regulatory formula whereby the public or separate school board that wishes to impose an education development charge shall:

(1) estimate what new school facilities will be needed as a consequence of the development and the cost of these facilities;
(2) calculate the amount chargeable to each new home so that it can be expressed and levied on a per-unit basis at the time each building permit is issued; and,
(3) submit a proposal for anticipated capital needs and an estimate of the education development charge to the Minister of Education for review and approval.

9 Once the education development charge is approved by the Minister of Education, the board may pass the by-law pursuant to Part III of the Act. The municipality then becomes the collector of the charge pursuant to the Development Charges Act and the charge is payable on a per-unit basis when a building permit is issued (s. 35(3)). If two or more boards in the same area pass by-laws, then both charges must be paid when the permit is issued. An account is then established, or a joint account if two or more boards levied the charges and the money is deposited into that account. No money can be withdrawn from this account unless the actual project (as opposed to the estimate made in contemplation of the by-laws described above) is given final approval by the Minister of Education.

10 Ontario Regulation 722/89 sets out the methodology that school boards must follow to ascertain their eligibility for education development charges and to calculate them. When a school board calculates a proposed education development charge, it cannot include the capital costs associated with renovating schools for existing pupils, or building schools for existing pupils currently accommodated in portables or bussed to distant schools. The projected capital costs must be based on the board's projection of the number of new pupils that it anticipates will be entitled to education within its jurisdiction as a result of the new development.

11 Where two or more coterminous boards pass by-laws, the proceeds raised are deposited and commingled in two joint bank accounts. One bank account is for charges raised on account of residential development, and the other is for charges raised on account of non-residential development.

12 It is important to note that the Minister of Education's preliminary approval of capital projects is based on growth predictions. On the other hand, final approval depends on the actual need shown by school boards. Consequently, projects given preliminary approval may not necessarily be given a final approval. Also, the funds raised under the by-law of one board may be allocated for building schools needed by another board, something which might occur if the predictions differed from a determination of actual need.

13 Money can only be withdrawn from these accounts for capital projects that have been given final approval by the Minister of Education and only with the signatures of the treasurers of both School Boards. The York Region School Boards have adopted a protocol for withdrawals from the education development charges accounts. Funds have been withdrawn from the accounts pursuant to the protocol.

14 In October of 1991, the School Boards of York Region received preliminary approval for the imposition of an education development charge.

15 On November 18, 1991, the School Boards of York Region passed by-laws pursuant to Part III of the Development Charges Act, imposing education development charges in York Region. The total charge for each residential unit imposed by the two by- laws is $3,623. Of this, $2,451 represents the charge imposed by the Public Board and $1,172 represents the charge imposed by the Separate Board. The funds collected are placed in a joint account in both boards' names but neither one can withdraw any money without the Minister of Education's approval of particular construction projects.

16 On November 26, 1991, and December 2, 1991, Butternut Grove Homes Inc. and Humber Green Estates Limited applied for building permits in York Region. Both were advised that building permits would not be issued unless and

until they paid the education development charges pursuant to the impugned by- laws. This application was subsequently commenced.

17 It should be pointed out that there is no requirement anywhere in this statutory scheme that the funds raised be shared proportionately between public and separate schools. Furthermore, the decision of a board as to whether it should impose education development charges does not affect its eligibility for provincial grants or the amount of those grants.

18 When property is assessed for tax purposes under the Assessment Act, R.S.O. 1990, c. A.31, ratepayers are entitled, pursuant to the Education Act, R.S.O. 1990, c. E.2 (which is the cross-reference to the Assessment Act), to designate their support for either public or separate schools. Every school board, following a scheme laid out in the Education Act and regulations, determines the rate at which property is assessed for school purposes. The municipality in which the school board is situated includes the rate calculated by the school board in its total annual rate on a ratepayer's assessable property pursuant to the Municipal Act, R.S.O. 1990, c. M.45.

19 Separate school supporters are entitled to designate where their portion of the local assessment that is allotted to school purposes is to be applied. They are permitted to designate this portion to separate school purposes. "[A] fundamental part of the confederation compromise", as enshrined in s. 93(1) of the Constitution Act, 1867, was that separate school supporters be able to designate that their municipal rates related to school financing be applied to the separate school system. Public schools are thus not constitutionally or statutorily entitled to the local assessments from separate school supporters for separate school purposes, and vice versa.

20 In addition, s. 14 of the Separate Schools Act (Scott Act), 26 Vict., c. 5, which became part of the Constitution by virtue of s. 93 of the Constitution Act, 1867, provided that Roman Catholics who were supporters of the separate school situate in the municipality or the municipality contiguous thereto "shall be exempted from the payments of all rates imposed for the support of common schools, and of common school libraries, or for the purchase of land or erection of buildings for common school purposes" within the city, town, or village in which he resides. Accordingly, separate school supporters, as a matter of constitutional law, are exempt from paying any public school rates.

21 It was submitted by the applicant that by contrast with local assessment imposed directly on public and separate school supporters by the respective boards, s. 93(3) of the Constitution Act, 1867 requires that separate school supporters be given a proportionate share, on a per-pupil basis, of all of the public monies spent on education. Put another way, separate schools must receive at least the same amount of public monies, excluding local assessments, on a per-pupil basis, as public schools. Anglin C.J.C. in Tiny Roman Catholic Separate School Board v. R., [1927] S.C.R. 637 at p. 677, [1927] 4 D.L.R. 857, referred to the pre-Confederation distinction between the sources of funds as follows:

> All three statutes pointedly distinguish legislative and municipal grants of public moneys (which belonged to the supporters of common schools and separate schools alike) from moneys raised for common school purposes by local assessments, to which separate school supporters did not contribute because they were exempt. In the former only were separate school supporters given the right to share. The policy of the Legislature up to Confederation plainly was to put both kinds of schools on an equal footing in regard to sharing in the appropriation of public money.
>
> The language of s. 20 of the Act of 1863 is most comprehensive in describing the public grants in which the right to share was assured to the separate schools. Formerly restricted to a right to share in "The Common School Fund" (a well-defined annual grant of long standing, which had been the subject of much legislation, and as to the distribution of which no complaint is made by the appellant), separate school supporters were in 1863 given the added right to "share in all other public grants", etc. There is no allusion to "general grants" or "special grants" -- "grants for urban

> schools" or "grants for rural schools" -- "conditional grants" or "unconditional grants." All such "grants" are "public grants," i.e., grants of public moneys, in which common and separate school supporters have identical interests.

22 Assuming there is a constitutional right to a proportionate share of all public monies, it is a right with respect to legislative grants only and not monies raised for school purposes by local assessment. Provincial grants are allocated and distributed to separate and public school boards pursuant to the Education Act , which has designed a complex scheme for calculating the allocation and distribution of such grants.

23 Prior to the enactment of the Development Charges Act, 1989, municipalities financed local land development and related capital expenditures through charges referred to as "lot levies". These levies were not applicable to education financing. In fact, the only way in which a school board, public or separate, could influence municipal planning of new land development was to resort to the Planning Act, 1983, S.O. 1983, c. 1. Under s. 2(e) of this Act, the applicable Minister was obligated to have regard to "the equitable distribution of educational . . . facilities" in considering the official subdivision plan, including draft subdivision plans as well. A municipality was only able to impose a condition in the draft plan that the owner of the land agree to reserve adequate school sites.

24 With the passage of the Development Charges Act, it was expected that new development would pay for capital expenditures in relation to the construction of new schools through the imposition of education development charges.

Who pays education development charges?

25 The evidence of economists and home builders is that, in the long run, education development charges will be passed on and ultimately borne by home purchasers. There is no economic recoupment of the tax. The charges are a cost which is factored into the new house price. As Mr. Stephen Kaiser of the Ontario Home Builders Association (O.H.B.A.) stated:

> In most cases the builder will not commence construction unless he/she is reasonably sure the house can be sold for a profit after calculating all costs of construction, desired profit margin, and the state of the market. . . . . .
>
> The imposition of lot levies such as the education development charges passed by the York Region Board of Education and the York Region Roman Catholic Separate School Board on November 18, 1991, increases the cost of building homes, and will be taken into account by builders as part of the cost involved in their business. In order to remain profitable and efficient, builders will attempt to pass on this charge to others so that they do not bear the cost of the charge.

26 Since education development charges are not payable until a building permit is applied for, home builders are in a position to determine whether the charge can be passed on before building a house. Generally speaking, if it cannot be passed on, the house will not be built. Mr. David Keenan, an officer of a developer, put it as follows:

> Most builders are in business for the long term, and have offices and administrative overhead. They purchase serviced lots with a view to having a sufficient inventory to carry out their operations over time, and to amortize the overhead costs over a larger number of units. The builder will buy lots in order to establish a satisfactory base of operations, but not necessarily to bring them into the housing market immediately. He will hold the lots and not invest the input costs until he is confident that these costs, plus a profit margin, can be recouped through the price paid for the house by the home buyer.

> Put another way, a builder will usually only take out a building permit, and pay the EDC, when an agreement of purchase and sale has been reached with a buyer. In practical terms, the builder is like a general contractor: he holds the lot until he can sell a house to a buyer at a price which includes all the input costs of construction, including labour, materials, building permits (including the EDC), etc.

27 Similarly, as stated by Mr. Frank Giannone, an officer of a developer and builder:

> In the future all land purchases, development and home building conducted by Fram will take into account the cost of paying education development charges in its calculations of the cost of doing business to ensure, as best as it is able, that Fram does not bear the cost of the education development charge.

28 In the short run, since many projects are already in progress and the education development charge was not anticipated during the planning of some projects or when the sale with the ultimate buyer was negotiated, Fram may in some cases absorb some of the cost of the education development charge. In addition, the additional cost imposed by these charges may cause some home construction to be delayed or cancelled, causing lost profits and business harm which may never be recovered. In the long run, I believe the market will adjust to take into account, as builders will take into account the cost of paying the charge and the charge will be passed on to new home buyers.

29 Professor George Fallis, Chair of the Department of Economics at York University, describes the education development charge as "a tax on the production of new housing units".

30 He concludes that the education development charge will be shifted to home purchasers:

> . . . the price elasticity of both demand and supply imply that the education development charge will tend to be shifted forward into the price of new homes. Most of the education development charge on new houses will be paid by purchasers of new homes in the long run.

31 Professor Fallis formed this conclusion by reference to demand and supply price elasticities. He stated:

> All of the literature of which I am aware which analyses the incidence of development charges emphasizes the importance of demand and supply price elasticities. If demand is relatively insensitive to price increases (price inelastic), consumers will tend to accept such increases and not reduce their purchases significantly. If supply is relatively sensitive to price (price elastic), suppliers will tend not to absorb increased costs. Rather, they will reduce their production. Where a combination exists of relatively inelastic demand and highly elastic supply, such that purchasers will accept higher prices and suppliers will not absorb cost increases themselves, most of the EDC will be passed forward to home purchasers.
>
> The strong consensus in the economics literature is that the long-run demand for houses is price inelastic, likely in the range - 0.4 to -0.9. Similarly, the strong consensus is that the long-run supply of houses is highly price elastic, likely above 4.0. Therefore the evidence on both the demand and supply elasticities points in the same direction: most of the EDC will tend to be shifted forward into house prices.
>
> Applying the foregoing at its most conservative, if the demand elasticity is - 0.9 and the supply elasticity is 4.0, then over 80% of the EDC will be passed forward to the home buyer. Other elasticities in the range set out in paragraph 7 [i.e., the previous paragraph] will yield even higher percentages of forward shifting.

32 Mr. David P. Amborski, a municipal planner and economist who submitted material on behalf of the respondent, confirmed that if demand is inelastic and supply is elastic, home buyers would bear most of the charge.

33 The foregoing is consistent with the views of those responsible for implementing education development charges. The Public Board's information officer described the charges as reflecting a "user pay philosophy. New people coming in will pay for the new school in their area." Similarly, Premier Bob Rae, while Leader of the Opposition, advised the O.H.B.A. that using development charges to finance, inter alia, school construction, "dumps the cost on to new home buyers. Clearly this increases the price of new homes as well."

Are education development charges a charge or a tax?

34 The respondents submitted that the education development charges are regulatory charges, not taxes. It was submitted that the charges do not contain the strictures of taxation and are permissible under provincial regulatory authority under various provisions of the Constitution Act, 1867. They argued that the Development Charges Act is just one piece of legislation, albeit significant, in the context of a complex and comprehensive scheme of municipal financing infrastructure.

35 Prior to the enactment of the Development Charges Act, municipalities financed municipal infrastructure through charges commonly known as "lot levies".

36 Mr. S.B. Stein, barrister and solicitor, in a lecture to the Canadian Bar Association Ontario Institute, in 1990, stated (The Development Charges Act, 1989 -- The Developer Perspective (February 9, 1990), pp. 1, 2 and 6):

> The new Act institutionalizes and codifies the collection of lot levies for new subdivisions, and goes far beyond the existing jurisdiction. In many municipalities levies already form a substantial portion of revenues. Prior to the new Act, the statutory authority to impose levies was indirect through conditions on subdivision approvals under section 50(5) of the Planning Act 1983. Under the new Development Charges Act, municipalities may now enact by-laws which enable the collection of levies in a much
> wider range of development situations. . . . . .
>
> Historically, lot levies have been founded on the philosophy that new development should pay its own way; it should not impose tax burdens on existing residents. The traditional language in the cases is that the amount of the levy should bear a reasonable and relevant relationship to the proposed development. (See e.g. Steel Company of Canada Ltd. v. City of Nanticoke (1976), 6 O.M.B.R. 278 at 282; Re Mills et al. v. Land Division Committee of the Regional Municipality of York et al. (1976), 9 O.R. (2d) 349 at 352 (Div. Crt.) . . . . .
>
> Levies are not a new tax. They have been around long enough for them to be accepted in principle by the development industry. Some aspects of the new Act should even be welcomed because it finally provides some ground rules for certainty and accountability.

37 It is interesting to note that Mr. Stein considers that the levies are not a new tax. I propose to deal with the difference between education development charges and lot levies later.

38 It is well understood that not every levy imposed by a province is "taxation" within the meaning of s. 92(2). The distinction between "taxation" and "charge" is that the latter is money collected to defray the cost of specific services rather than to raise revenue for general purposes. As Peter Hogg concluded, in his book Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985), at p. 613:

> These charges too are not necessarily taxes, and if they are not they need not be direct. They are not taxes if they can be supported as regulatory charges imposed under one of the province's regulatory powers . . . These can be supported as regulatory charges if they are taken in payment for a specific governmental service, and if they bear a reasonable relation to the cost of providing the service, -- whether it be the issue of a license . . . the provision of a bridge, or the supply of water. These charges are not taxes because their purpose is to defray expenses, not to raise revenue.

39 It is not doubted that if this levy is found to be a charge imposed to defray specific capital education expenditures rather than a tax within the meaning of s. 92(2), then a school board possesses the power within its jurisdiction to pass by- laws imposing such charges: see Shannon v. British Columbia (Lower Mainland Dairy Products Board), [1938] A.C. 780, [1938] 4 D.L.R. 81 (P.C.).

40 The respondents claim that an education development charge is imposed on those engaged in land-use development for the purpose of defraying costs associated with capital expenditures in education. The respondents further submit that these charges are related directly to land development and therefore are exclusively within provincial power pursuant to its jurisdiction over property and civil rights, s. 92(13); local works and undertakings, s. 92(10); and matters of a merely local or private nature, s. 92(16). Alternatively, they say that s. 93 of the Constitution Act, 1867 provides the province with jurisdiction to impose charges to defray educational costs.

41 Under the Planning Act, 1983, the power of a school board to affect development and the planning process was very limited. In considering an official plan, the Minister must have regard to "the equitable distribution of educational . . . facilities". In considering a draft plan of subdivision, regard must be had to "the adequacy of school sites". While it was possible to impose a condition in the draft plan that the owner of the land enter into an agreement with the municipality to reserve adequate school sites, school boards could not compel owners to sell the sites at a price below market value or to contribute funds for their acquisition.

42 Land development creates a need for a broad range of services. The Development Charges Act seeks for the first time to implement the philosophy that new development should pay its own way for schools, just as it pays for other necessary aspects of municipal infrastructure, including sidewalks and sewers. The respondent submits it is a charge because it is directly related to costs of providing services. It is a one-time imposition. There is no suggestion that education development charges are for general revenue.

43 However, we should point out that, while everyone taking up residence in the new land development will use sewers and sidewalks, not everyone will use the schools. It is not enough to say that every homeowner benefits indirectly through potential capital appreciation: Howay v. Caradoc (Township) (1991), 6 M.P.L.R. (2d) 70 (Ont. Gen. Div.) at p. 73. Furthermore, a review of Parts I and II of the Development Charges Act shows that the municipality is regulating the development industry, whereas in Part III of the Act, the municipality through its local school boards is levying a charge or tax and is making no attempt to regulate the schools. There is nothing in Part III, or the regulations passed pursuant thereto, regulating schools. The Act and regulations set out how to levy and calculate a charge, when the charge expires, and how to collect it.

44 The respondent relied on Cariboo College v. Kamloops (City) (1982), 18 M.P.L.R. 85, 36 B.C.L.R. 133 (S.C.). In that case, the city refused to grant the college a building permit until it paid the development cost charge imposed on it pursuant to a municipal by-law under the applicable legislation. The college challenged the charge on the basis that it was a tax and, as such, it was exempt from paying it. The court observed that most charges are compulsory if a person wants to engage in the particular activity. It was submitted that the provisions at issue in Cariboo are similar to the provision regarding the education development charges which are payable on the granting of a permit. However, in International Aviation Terminals (Vancouver) Ltd. v. Richmond (Township) (1992), 9 M.P.L.R. (2d) 1, 65 B.C.L.R. (2d) 145 (C.A.), it was pointed out that the fact that a levy is characterized as a charge in a non-constitutional case is not dispositive in a constitutional case. At p. 10 Taylor J.A. stated:

> In Cariboo College v. Kamloops (City) (1982), 18 M.P.L.R. 85, . . . a case involving the status of development cost charges in the context of a provincial Crown entity, Mr. Justice Legg, as a trial judge, held . . . that development cost charges do "not purport to regulate the use or development of land."
>
> Such charges, when levied on the developer in person in order to defray capital costs imposed on the municipality as a result of development of a parcel of federal Crown land, while they do not constitute taxes as such, cannot in my view be distinguished for constitutional purposes from the annual municipal levy imposed on lessees . . .
>
> While some of these decisions strongly support the view, with which the appellant agrees, that the respondent could not have been prevented from constructing the buildings in question without obtaining building permits, none in my view supports the contention that imposition of development cost charges on the respondent could, for constitutional purposes, be distinguished in the present context from imposition on it of annual municipal property taxes, or of business taxes on its subtenants.

45 Furthermore, the Divisional Court in Ontario treated lot levies as taxation in Sorokolit v. Peel (Regional Municipality) (1977), 16 O.R. (2d) 607 at pp. 613-14, 2 M.P.L.R. 249 at pp. 258-59 sub nom. Sorokolit v. Mississauga (City). In that case the court held that there must be clear legislative authority to impose taxation or levies in the nature of taxation.

46 In Cariboo, supra, it was also found that the charge was not a tax because the taking out of a building permit is voluntary. Using this approach, it could be said that every customs tax or manufacturers sales tax is voluntary since it is not necessary to import or produce goods. Voluntariness is an illusion.

47 While schools are an integral part of community life, they are no more services akin to sewers and waterlines than are courts and post offices. It is not useful to compare the construction of schools to the provision of direct municipal services that the community requires in order to function on a daily basis. Schools are not like street lights that perform one function, a physical function. We no more view our schools in such a way than we do our criminal courts, hospitals or the town hall. Revenue raised under the scheme of the Development Charges Act for the construction of schools is closer in nature to money raised to build other essential municipal buildings. While this charge may not be imposed to "raise revenue for general purposes" as conventionally understood, it is much closer in nature to a tax for raising revenue than it is to a charge to defray costs. Neither the municipality nor the school boards have any discretion over the use of these funds. These monies can only be used for capital expenditures approved by the Minister of Education pursuant to his authority under the Education Act . Although the charge is attached to the cost of purchasing a building permit, that appears to be for administrative convenience rather than any real connection to the construction of a house.

48 Accordingly, we find that an education development charge is a tax for the purpose of s. 92(2) of the Constitution Act, 1867.

Direct and indirect taxation and s. 92(2) of the Constitution Act, 1867

49 As it was found earlier, the economic evidence demonstrates that the education development charges would be passed on to home buyers. Accordingly, it is necessary to determine whether this tax is direct or indirect as understood in s. 92(2) of the Constitution Act, 1867. Section 92(2) reads as follows:

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

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

50 A provincial legislature is restricted by s. 92(2) of the Constitution Act, 1867 to enacting direct taxes. Only Parliament may enact indirect taxes pursuant to s. 91 of the Constitution. The classic definition of direct and indirect taxation, propounded by John Stuart Mill, accepted in Bank of Toronto v. Lambe (1887), 12 App. Cas. 575 at p. 582, 4 Cart. B.N.A. 7 (P.C.) (per Lord Hobhouse) and succeeding cases, is as follows:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.
>
> The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.

51 In Bank of Toronto v. Lambe, at p. 583, the Quebec capital tax at issue was upheld because, in practical terms, it would be very difficult to pass on other than in an "obscure and circuitous manner". Lord Hobhouse contrasted that situation with a commodity tax, which would be indirect: "It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers."

52 By 1914, Mill's definition had become entrenched as the exclusive test used by the Privy Council to determine the constitutional attributes of a tax. Lord Moulton stated for the court in Cotton v. R., [1914] A.C. 176 at p. 193, 15 D.L.R. 283:

> Their Lordships are of the opinion that these decisions have established that the meaning to be attributed to the phrase "direct taxation" in s. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion.

53 After 1927 the test was not strictly applied. The highwater mark of the movement away from Mill's test was Halifax (City) v. Fairbanks Estate, [1928] A.C. 117, [1927] 4 D.L.R. 945 (P.C.). In Fairbanks, the Halifax City Charter imposed a "business tax" on every person who occupied real property for the purposes of any trade, business or calling, the tax to be assessed in accordance with the capital value of the premises. Viscount Cave L.C. stated at pp. 124-25:

> The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories -- namely, those that are direct and those which cannot be so described . . . From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes . . . When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the

conclusion reached should afterwards be held to be wrong.

> What then is the effect to be given to Mill's formula above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of the old and well known species of taxation, and making it necessary to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation . . .; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation.

54 Viscount Cave refused to apply Mill's definition to those taxes that were already identified in 1867 as falling within one category of taxation or another. He held that property taxes and income taxes were known in 1867 to be direct taxes and always within the competence of the provinces. Even if Fairbanks is the law, which we do not accept, we must decide whether the education development charges fall within the category of a property tax.

55 In order to determine whether it is a property tax, we must look at the indicia developed by the courts in the leading property tax cases which considered a s. 92(2) problem. First, the tax must be based on the value of the property. Second, the property must be assessed without regard to exploration, production or any transactions.

56 In the case before us, the value of the land is not a relevant consideration in the calculation of the education development charge. The land can sit forever without attracting tax if no development is undertaken. It was submitted with respect to the second indicia, that there were cases where the tax applied to some land owners and not others and yet the tax was still held to be direct. However, in those cases, all owners of the same type of land paid the same tax; with the Development Charges Act not all owners of the same type of land pay the same tax.

57 The form of the words used in s. 30 of the Development Charges Act, "land undergoing development", cannot change the real purpose of the tax which is a tax directed at the ultimate purchaser of a building or edifice. It cannot be a property tax just because the municipality has the same collection rights against the property when the education development charge is not paid as it has against arrears in property taxes. Thus this is not a property tax. I must now determine into what new category the tax falls based on the circumstances before me.

58 In the present application, the education development charge is an indirect tax on a product, i.e., the building of homes or offices or factories. It is a tax for the purpose of building schools. The tax on the product will be passed on. It falls within the category of a tax on the producer.

59 The Privy Council returned to reliance on the approach expounded by Lord Hobhouse in Bank of Toronto v. Lambe, supra, in R. v. Caledonian Collieries Ltd. , [1928] A.C. 358, [1928] 3 D.L.R. 657. At p. 361 Lord Warrington of Clyffe stated:

> The question whether a tax is direct or indirect has on many occasions been the subject of decision by this Board, but it is unnecessary to refer to any of these decisions except that of Bank of Toronto v. Lambe . . . in which Lord Hobhouse, in delivering the judgment of the Board, made some useful observations as to the mode in which the question should be approached.

The Privy Council looked to "the real nature" of the tax and if its general tendency was to be passed on and did not refer to its previous decision in Fairbanks , supra.

60 The Privy Council reinforced the Mill test in Atlantic Smoke Shops Ltd. v. Conlon , [1943] A.C. 550, [1943] 4 D.L.R. 81. In this case, New Brunswick imposed a tax on tobacco purchased for personal consumption from a retail vendor in the province. It was argued that this was an indirect tax and therefore ultra vires of the province. Viscount Simon stated at pp. 563-64:

> It has been long and firmly established that, in interpreting the phrase "direct taxation" in head 2 of s. 92 of the Act of 1867, the guide to be followed is that provided by the distinction between direct and indirect taxes which is to be found in the treatise of John Stuart Mill. . . . It is a tax which is to be paid by the last purchaser of the article, and since there is no question of further re-sale, the tax cannot be passed on to any other person by subsequent dealing. The money for the tax is found by the individual who finally bears the burden of it. It is unnecessary to consider the refinement which might arise if the taxpayer who has purchased the tobacco for his own consumption subsequently changes his mind and in fact re-sells it. If so, he would, for one thing, require a retail vendor's licence. But the instance is exceptional and far-fetched, while for the purpose of classifying the tax, it is the general tendency of the impost which has to be considered.

61 In Esquimalt & Nanaimo Railway Co. v. British Columbia (Attorney General) , [1950] A.C. 87, [1950] 1 D.L.R. 305 (P.C.), Lord Greene emphasized that the courts should be careful not to interpret Lord Cave's words in Fairbanks as laying down any rigid classification. He stressed the need for courts to examine "the real nature and effect of the particular tax".

62 When the Supreme Court of Canada first faced this issue in the early 1950s in Canadian Pacific Railway Co. v. Saskatchewan (Attorney General), [1952] 2 S.C.R. 231, [1952] 4 D.L.R. 11, it did not deal in a definitive manner with the Mill test.

63 In that case, the provincial legislature sought to tax the value of land by reference to the minerals situated on the land. The tax was an annual one, payable whether or not there was any exploitation of the minerals. As stated by Kerwin J. (as he then was): "This is not a tax on production." If it had been, it would have been ultra vires. As it was, it was upheld.

64 In the application before us, the landowner is not subject to paying education development charges merely by virtue of the fact that he or she is the owner of the lands. The tax is only exigible when the developer decides to build and seeks a building permit. It is a tax on production, which is an indirect tax.

65 For constitutional purposes, the difference between a direct and an indirect tax is whether it has a general tendency to be passed on as part of a commodity moving in trade or will be borne by the person charged with paying it. The test is whether the general tendency of the tax is that it will be passed on. Where the tax is relatable to a commodity moving through the production process, it is indirect. Rand J. put it as follows in Canadian Pacific Railway Co. v. Saskatchewan (Attorney General), at pp. 251-52:

> If the tax is related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in the course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market. . . .
>
> In the case, on the other hand, of any large public undertaking, the taxes on its fixed assets might wipe out any operating profit and its revenue have to be increased to avoid such a result; but that, obviously, would not convert them into direct taxes.
>
> Here we have an intermediate case: a capital asset which, in the course of its business exploitation, becomes used up. The tax is not in any way related to the course of that exploitation.

> It is an annual levy on the total quantity then existing; and that capital tax could not, in the sense of a general tendency, be taken to be intended and expected to be passed on to the consumer as an element of the price: it might be paid for years before a ton of mineral was removed. There might be the "economic tendency" to transfer some of it to price, but that is as irrelevant here as in Esquimalt.
>
> The tax, at the moment of imposition, is in fact against land; it is an annual impost; the charge securing it is limited to land; and it is not an item related to or recognized as reflected in the cluster of charges intended and expected to be recouped in the price of the marketed commodity. It is of the nature of a fixed asset tax rather than a transaction tax; and it is therefore direct. That being so in the case of the tax based on an annual assessment of value, it is much more clearly so in the cases of the flat acreage rates.

66 This passage was approved by Laskin C.J.C. for a unanimous Supreme Court of Canada in New Brunswick (Minister of Finance) v. Simpsons-Sears Ltd., [1982] 1 S.C.R. 144 at p. 162, 130 D.L.R. (3d) 385.

67 In this application, the tax is on a per-unit basis on land undergoing development. It is only paid when the building permit is taken out. On the other hand, the lot levies under Parts I and II of the Development Charges Act fall within the definition of a direct tax as outlined by Rand J.

68 In Charlottetown (City) v. Foundation Maritime Ltd., [1932] S.C.R. 589, [1932] 3 D.L.R. 353, the city enacted a by-law imposing a tax on non-resident building contractors equal to a percentage of the revenues on each of their contracts within the municipality. The Supreme Court of Canada struck down the by-law as imposing an indirect tax. As stated by Rinfret J. (as he then was), at p. 595, for a unanimous Supreme Court:

> The tax is not a direct lump sum imposed yearly as a result of the non-resident engaging in the business of contractor within the city of Charlottetown, it is a tax on every contract or agreement, on each single transaction, graduated on a sliding scale according to the amount of the contract. . . . . .
>
> Such a tax would invariably be an element in the fixing of the price of the contract and, in its normal and general tendency, must be reasonably assumed to pass to the owner, in the ordinary course of the transaction, as enhancement of the cost. That would seem to be, in the end, the natural consequence -- in fact, the inevitable result -- of the taxation now in question.

69 The time of levying the tax is important. In this application we must distinguish between the land market and the housing market. Although the form of the tax indicates it is a tax on land, in substance the tax is on new housing. This is further confirmed when one looks at what it is replacing. The education development charges fill the void left by provincial grants now reduced from 75 per cent to 60 per cent. The charges are also a substitute for local assessment because a board may reduce local assessment to the extent that it imposes education development charges.

70 In Cairns Construction Ltd. v. Saskatchewan, [1960] S.C.R. 619, 24 D.L.R. (2d) 1, a provincial statute imposed a tax on the sale of "tangible personal property". A builder who purchased construction materials sought to escape the tax on the basis that it was indirect because he would pass the cost on to the ultimate purchaser in the price of the finished houses. Martland J., speaking for the court, upheld the tax as being direct "when considering the general tendency of the tax as a whole". A critical consideration was the fact that the tax was on tangible personal property. In the usual case, the tax would be paid by the ultimate consumer and not passed on. Martland J., at pp. 629-30, stated:

> I would agree that the intention of the Act is to impose the tax upon the final consumer or user of the personal property purchased. . . . But it also appears to me that a person who purchases

> personal property and incorporates it into something else, in the process of which it loses its own identity as personal property, is the final user of
> that personal property so incorporated. . . . . .
>
> The appellant would undoubtedly seek, when selling the house which he constructed, to recoup himself for municipal land taxes which he had been required to pay on the land on which the house is situated, yet, clearly, a tax of this general character does not cease to be direct because cases may occur in which the taxpayer may be able to pass it on, as was established in City of Halifax v. Fairbanks Estate . If the general tendency of the tax imposed is such that it may be classified as direct tax, the authorities establish that its nature is not changed because, in some instances, it may be passed on.

(Footnotes omitted)

71 Martland J. applied the "general tendency" test in Canadian Industrial Gas & Oil Ltd. v. Saskatchewan , [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449. Dickson J. dissented and relied on Viscount Cave in Fairbanks, supra, where he described the categories approach. However, Dickson J., in Ellett v. British Columbia (Attorney General), [1980] 2 S.C.R. 466, 112 D.L.R. (3d) 592, just three years later ignored his approach in Canadian Industrial Gas & Oil Ltd. At pp. 477-78, Dickson J. stated:

> First, the Fairbanks notion of fixed categories of taxes was substantially cut back in Attorney General for British Columbia v. Kingcome Navigation Co., [1934] A.C. 45, where the Privy Council held, in effect, that there is but one test to determine whether a tax is direct or not and the test is that of John Stuart Mill. Professor Frank Scott noted in (1934), 12 Can. Bar. Rev. 303, at p. 305, that this restating of the ratio decidendi in the Fairbanks case amounted to a virtual overruling and commented: "Henceforth it appears that the question of what the tax was universally considered to be in 1867 is irrelevant." In Atlantic Smoke Shops Ltd. v. Conlon , [1943] A.C. 550, Viscount Simon L.C. stated, at p. 565, that Lord Cave's reference in Fairbanks to "two separate and distinct categories" of taxes should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance.

And at p. 479:

> If the Canadian Constitution is to be regarded as a "living tree" and legislative competence as "essentially dynamic" (per Beetz J. in Martin Service Station Ltd. v. M.N.R., [1977] 2 S.C.R. 996 at p. 1006), then the determination of categories existing in 1867 becomes of little, other than historic, concern.

72 The cases decided after Ellett v. British Columbia (Attorney General) have applied an evolved version of Mill's "general tendency" test. In Newfoundland & Labrador Corp. v. Newfoundland (Attorney General), [1982] 2 S.C.R. 260 at p. 270, 138 D.L.R. (3d) 577, Martland J. quoted with approval from Dickson J.'s judgment in Canadian Industrial Gas & Oil Ltd. v. Saskatchewan, supra, at p. 582:

> The dividing line between a direct and an indirect tax is referable to and ascertainable by the "general tendencies of the tax and the common understanding of men as to those tendencies": Lambe's case.
>
> The general tendency of a tax is the relevant criterion. This must be distinguished from the ultimate incidence of the tax in the circumstances of the particular case.

This is also true in New Brunswick (Minister of Finance) v. Simpsons-Sears , supra, at p. 161, where the Chief Justice pointed out:

> Although the tests of direct and indirect taxation have, almost from the beginning of Canadian federalism been based on Mill's Political Economy, they have necessarily been placed in a legal setting and have been applied as providing a legal definition and not an economic one.

In reviewing the case law, the Chief Justice approved of Rand J.'s expanded application of the Mill test in Canadian Pacific Railway Co. v. Saskatchewan (Attorney General), supra , when he stated at p. 162:

> Moreover, to borrow a phrase from the reasons of Rand J. . . . the tax in the present case is not "related or relateable" to any unit of a commodity or its price: indeed no commodity is involved.

73 Finally, the most recent case on this point, Air Canada v. British Columbia , [1989] 1 S.C.R. 1161, 41 C.R.R. 308, continues this trend of applying Bank of Toronto v. Lambe, supra. In Air Canada v. British Columbia , the Supreme Court of Canada held that the categories approach was irrelevant. The issue raised in that appeal was whether a British Columbia gasoline tax violated s. 92(2) as an indirect tax. At pp. 1186-87, La Forest J. stated:

> Since at least Bank of Toronto v. Lambe (1887), 12 A.C. 575 (P.C.), the generally accepted test of what constitutes a direct tax has been that of John Stuart Mill: "A direct tax is one which is demanded from the very persons who it is intended or desired should pay it." . . . However important it may be to distinguish between taxes on persons, property or transactions for the purpose of determining whether a tax is imposed in the province, the relevant inquiry in determining whether the tax is direct or indirect is generally whether it conforms to the test just quoted (see Kennedy and Wells, The Law of the Taxing Power in Canada , at p. 61). In some cases, it is true, the courts have decided the latter question on the basis of a "categories" test, but that is irrelevant here .

(Emphasis added)

74 I agree with Professor Hogg's description of Mill's test when he states (at p. 605):

> The distinction between a direct and indirect tax has been held to lie in "the general tendencies of the tax and the common understandings of men as to those tendencies" (Lambe, supra, at 582). If the general tendency is for the tax to be paid by the very person taxed, then the tax is direct; if the general tendency is for the tax to be paid by someone else, then the tax is indirect. The courts have said that they are not concerned with whether the tax is in fact recouped by the taxpayer in a particular case.

75 In summary, the following tests are approved by the cases and are applicable to the case before me:

1. The general tendency of the tax must be determined.
2. An indirect tax is one where the tax is related to the transaction and the tax clings to the product in subsequent trans-[ljactions.
3. The legislation must purport to tax the final consumer.

76 I now summarize my findings with respect to each of the foregoing three tests.

77 When one looks at the general tendency of the education development charges, in my view, the fact that in exceptional cases the tax may not be passed on does not matter. As Professor Fallis said, in 80 to 90 per cent of the cases, the education development charges will be passed on. This tax is not recouped by the taxpayer by more or less circuitous operation of economic forces. The education development charge clings to the product going to market in

much the same way as a manufacturer's sales tax does. The key is whether it relates to trading transactions. The education development charge is a tax on land undergoing development, not on the land underlying the development. The Development Charges Act does not purport to tax the final consumer. Accordingly, this is not direct taxation within the province.

78 As I am of the view that the education development charge is indirect taxation contrary to s. 92(2) of the Constitution Act, 1867, it is not necessary to determine the other issues relating to s. 93 of the Constitution Act, 1867 or ss. 2(a) and 15 of the Charter of Rights and Freedoms .

79 In the result, an order shall go quashing the by-laws passed on November 18, 1991, by the School Boards. Costs are awarded to the applicants and to be paid by the respondent School Boards. If counsel cannot agree on the quantum of costs, written submissions may be filed within ten days of the release of these reasons.

Application allowed.

COURT OF APPEAL -- ENDORSEMENT

130 THE COURT:--On motion of the York Region Board of Education, the York Region Roman Catholic Separate School Board, and the Attorney General of Ontario, we granted leave to appeal a decision of the Divisional Court quashing by-laws passed by the respondent school boards for the payment of education development charges pursuant to the Development Charges Act, R.S.O. 1990, c. D.9, the imposition of which charges the court held to be unconstitutional. The applicants also seek an order staying the order of the Divisional Court pending appeal. Such an order would have the effect of permitting the school boards to continue to collect education development charges pending the decision of this court. They have already collected in excess of $15,600,000 pursuant to the by-laws. The respondents seek an order for the return of those monies, which the school boards undertook to repay if the by-laws were quashed. The undertaking was given to Carruthers J., sitting as a single judge of the Divisional Court, and by its terms repayment was to be made following any decision of that court to quash the by-law. Mr. Finkelstein, counsel for the respondents, very fairly acknowledged that it may well have been the intention of counsel for the boards to have the undertaking take effect on final disposition of the constitutional issue, including all appeals.

131 What is requested by the boards is not a stay within the ordinary meaning of rule 63.02 of the Rules of Civil Procedure. It would not have the normal effect of preventing the successful party from executing judgment pending appeal but, rather, would permit the unsuccessful party to continue to act as if the decision had never been rendered. This court in Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d) 161, 44 C.P.C. (2d) 109 (C.A.), in an analogous situation, quoted (at p. 162) the words of Catzman J.A. who had heard the same matter as a single judge of this court,

> [t]he steps which the appellant apprehends that the respondents will take and which furnish the impetus for this motion are not steps, referred to in rule 63.03(1), taken under the order or for its enforcement.

The full panel agreed with Catzman J.A. that a stay should not be granted. In doing so Morden A.C.J.O. stated that the parties' contentions could be addressed appropriately under s. 144(2) (now s. 134(2), R.S.O. 1990, c. C.43) of the Courts of Justice Act, 1984 , S.O. 1984, c. 11. He also stated that in such circumstances the court must balance the hardships to the respective parties of making the order requested, and must weigh the consideration that "if the appeal is unsuccessful, those whose constitutional rights have been infringed by the legislation will have been deprived of the benefit of a judgment so declaring".

132 In this case we acknowledge that the boards are acting in the public interest in imposing the education

development charges; however, if their method of doing so is unconstitutional (and at this stage in the proceedings that is prima facie so), then we see no reason why these boards should continue to collect charges pending appeal. They have other methods of raising funds for educational purposes. Having considered the possible detrimental effects to all parties, we are of the view that no further collection of education development charges should be effected under the impugned by-laws. The motion for a stay is dismissed.

133 With respect to the charges already collected, we consider that the respondents are sufficiently protected by the undertaking of the two boards, with the assurance of counsel that the undertaking will continue until final disposition of this matter through all appeals, and that if the decision of the Divisional Court is finally upheld, the funds will be returned, with interest, without the necessity of further action being taken by the respondents.

134 The motion of the respondents for return of payments already made is dismissed.

135 There will be no order as to costs.

Counsel:

[para136] Peter D. Lauwers, Martha MacKinnon, Janet E.
Minor and Michel Hélie, for appellants.

[para137] Neil Finkelstein and George Vegh, for respondents.

Indexed as:

Rogers v. Greater Sudbury (City) Administrator, Ontario Works

Between
Kimberly Rogers, (applicant), and
The Administrator of Ontario Works for the city of Greater Sudbury and Attorney General of Ontario, (respondents)

[2001] O.J. No. 2167

Court File No. 01-CV-210868

Also reported at: 57 O.R. (3d) 460

Ontario Superior Court of Justice

Epstein J.

Heard: May 25, 2001.
Judgment: May 31, 2001.

(22 paras.)

[Quicklaw note: Supplementary reasons for judgment were released August 21, 2001. See [2001] O.J. No. 3346.]

Counsel:

Sean Dewart and Charlene Wiseman, for the applicant.
Richard Stewart and Lisa Sand, for the respondent, Attorney General of Ontario.
No one appearing, for the Administrator of Ontario Works.

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1 EPSTEIN J. (endorsement):-- The applicant, Ms. Rogers moves for interim relief reinstating her as a recipient of Ontario Works' benefits (the "benefits") pending the determination of her constitutional challenge to the Regulations pursuant to which her benefits were recently suspended. The motion raises the usual issues relevant to the test for an interlocutory injunction established in RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.) in the context of relief sought that would have the effect of suspending the operation of a law or at least exempting Ms. Rogers from its operation.

The Background

2 There is really no dispute concerning the facts. Ms. Rogers received benefits from the respondent, the Administrator of Ontario Works for the City of Greater Sudbury, until April 30, 2001. Her benefits were then automatically cancelled pursuant to Regulations promulgated under the Ontario Works Act, S.O. 1997 c. 25, Schedule B, as amended, (the "Regulations") because she pled guilty to welfare fraud on April 25, 2001. The plea and ultimate conviction arose as a result of the applicant's failure to report a portion of certain student loan proceeds she received while she attended college between 1996 and 1999.

3 Ms. Rogers is 39 years old and about 22 weeks pregnant. The evidence is clear that she is destitute and has no clear means of support. She has no savings. She is unable to obtain assistance from her family or from the father of her unborn child. A counsellor and social worker have been trying to help Ms. Rogers obtain basic necessities. However, although they have been able to provide some assistance, most charitable organizations have been unable or unwilling to help. As a result, Ms. Rogers faces the imminent loss of her shelter and has no ready access to food.

4 When Ms. Rogers benefits were automatically cancelled for three months she commenced this proceeding challenging the provisions of the relevant Regulations that provide as follows:

> (1) An administrator shall refuse to provide assistance to an applicant or cancel or reduce the assistance provided to a recipient if a member of the benefit unit has been convicted of a crime or an offence in relation to the receipt of,
>
> (a) assistance under the Ontario Works Act, 1997;
>
> (a.1) income support under the Ontario Disability Support Program Act, 1997;
>
> (b) benefits under the Family Benefits Act; or
> (c) assistance under the General Welfare Assistance Act.
>
> (2) If the recipient is a single person, the assistance shall be cancelled; if the recipient's benefit unit includes a dependant, the assistance shall be reduced by an amount equal to the budgetary requirements and benefits for the convicted person.
>
> (3) Assistance shall be refused, cancelled or reduced under this section,
>
> (a) for three months if it is a first conviction;
> (b) for six months with respect to any subsequent conviction for that person.

5 As of April 1, 2000, this provision was repealed. As amended, the regulation provides that in the event of conviction of an offence in relation to the receipt of assistance under one of the Acts named above, the person is permanently ineligible for social assistance. Section 36 as it read prior to repeal continues to apply to convictions for offenses that were committed in whole before April 1, 2000.

6 Ms. Rogers, in her application, takes the position that the Regulations violate sections 7, 12 and 15 of the Canadian Charter of Rights and Freedoms and are ultra vires the Lieutenant-Governor in Council of the Province of Ontario.

The Argument

7 Counsel for the applicant contends that the impugned Regulations should be suspended or at least the applicant ought to be exempt from their effect pending the results of the constitutional challenge. There is a serious issue to be tried in regards to each of the four distinct challenges to the constitutional validity of the Regulations. Further, given Ms. Roger's medical condition and financial circumstances, she will suffer irreparable harm if her benefits are suspended for another two months and the balance of inconvenience lies in favour of suspending the Regulations or at least exempting the applicant from their operation.

8 The administrator of Ontario Works for the City of Greater Sudbury took no position on the motion. Counsel for the Attorney General for Ontario, however, asks that the motion be dismissed. He submits that the various arguments raised by the applicant concerning the constitutional validity of the Regulations are without merit. He also argues that Ms. Rogers has, to date, been able to find ways of addressing her basic needs and therefore has failed to establish irreparable harm. Further, given the strong public interest in preserving the integrity of validly enacted laws that are presumed to promote the welfare of the public, the balance of inconvenience lies strongly in favour of dismissing the motion.

Analysis

9 The test for granting an interim order such as the one requested by the applicant is as follows:

(a) There must be a serious Charter case to be tried that is not frivolous and vexatious.
(b) The applicant must show that she will suffer irreparable harm if the relief is not granted prior to the hearing.
(c) The balance of convenience, taking into account the public interest must favour the granting of the relief.

See: Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832, [1987] 1 S.C.R. 110 and RJR-MacDonald, supra.

10 Generally, in Charter cases the motions judge does not have to engage in an extensive review of the merits of the constitutional arguments and need only be satisfied that the application is not frivolous or vexatious. The Attorney General argued that this case may fall within one or both of the exceptions to that general rule in that the question of constitutionality presents itself as a simple question of law alone or that the result of the motion would amount to a final determination of the application. I should proceed, therefore, with an in-depth analysis of the merits of the case. I do not agree. The determination of this motion in no way can be said to resolve the application. Further, some, if not all, of the aspects of the applicant's constitutional challenge require a contextual analysis. Accordingly, the threshold for demonstrating there is a serious case to be tried is low.

11 Notwithstanding this low threshold I did hear and consider extensive submissions concerning the various arguments upon which the applicant relies in her challenge to the Regulations. While I cannot say that I accept all of them, some of them clearly have merit. The matter is anything but frivolous and vexatious. I find there is a serious case to be tried. I therefore must turn to consider the second and third stages of the test.

12 RJR-MacDonald makes it clear that irreparable harm refers to the nature of the harm rather than its magnitude. It is harm that cannot be quantified in monetary terms or that cannot be cured. It is only the harm to the applicant that is to be considered at this stage of the test. And the applicant has easily persuaded me that she will suffer, or at the very least is seriously threatened with, irreparable harm if the relief sought is not granted.

13 Ms. Rogers has no reliable alternative source of income. She is at the brink of being homeless. She is at this moment unable to feed herself adequately. The medical evidence in the record is clear that as a pregnant woman in the last trimester of her pregnancy the applicant is exposed to serious and perhaps permanent health problems unless, at the

very least, she has access to proper nutrition if not shelter. The irreparable harm is clear and obvious.

14 In constitutional cases assessing the balance of inconvenience is often very difficult. The public interest must be considered along with the interests of the litigants. In fashioning a remedy the court should weigh the severity of the present and potential harm to the individual against any possible short-term harm to the public interest.

15 There are two types of interlocutory orders that may be sought in a Charter proceeding. An applicant may seek an order suspending the operation of the impugned law pending determination of the case on the merits or may only seek to be exempted personally from the operation of the law. The Supreme Court has indicated that public interest considerations will weigh more heavily where the applicant seeks suspension of the impugned law, than in an exemption situation where she seeks personal exemption. Obviously, that is because the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the law in question.

16 According to RJR- MacDonald I must assume that the operation of a properly enacted but challenged law serves a valid public purpose. Further, according to the Supreme Court of Canada decision in Attorney General of Canada v. Harper, [2000] 2 S.C.R. 764, courts "will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged constitutionality succeed."

17 While the test has been described as creating "a very low hurdle for governments and a high one for applicants seeking an interim injunction to restrain, even briefly, the operation of a law enacted by a democratically elected legislature" it cannot be said that the public interest in the application of its laws always trumps any inconvenience demonstrated by the record resulting from the failure to enjoin, in some fashion, the operation of a law. See: Ferrel v. Ontario (Attorney General), unreported decision, December 28-29, 1995, Ontario Court (General Division), Al Yamani v. Canada (Solicitor General), [1994] F.C.J. No. 966 p. 1 (F.C.A.) and Smith v. Canada (Minister of Employment and Immigration), [1993] O.J. No. 395 at p. 1.

18 In my view this is one of the "clear cases" where the applicant has demonstrated that the balance of inconvenience favours the granting of an order exempting the applicant from the operation of the Regulations pending the final determination of the application.

19 In the unique circumstances of this case, if the applicant is exposed to the full three month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus thereby adversely affecting not only mother and child but also the public - its dignity, its human rights commitments and its health care resources. For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.

20 While the integrity of our social assistance programs must be respected and maintained it simply has to be that the inconvenience' of a pregnant woman living on the streets is far greater than is the inconvenience' of any threat, perceived or real, that the order exempting Ms. Rogers from the operation of the Regulations may seriously jeopardize that integrity. I have considered the argument that an exemption may be a slippery slope' leading to a suspension of the operation of the Regulations but there is no convincing evidence in the record before me of the real likelihood of such a consequence. More importantly, the order is being granted in light of the particular facts in this case that centre on Ms. Rogers' medical condition.

21 In the result I order an interlocutory declaration that Ms. Rogers is constitutionally exempted from the application of the Regulations (as well as section 36.1 of the regulations as amended effective April 1, 2001). I also grant a mandatory order directing the Administrator to reinstate Ms. Rogers' benefits retroactive to April 30, 2001.

22 I regret that the obvious need for me to provide the parties with my decision on an urgent basis precluded me from

doing justice to the comprehensive and thorough arguments presented by counsel in their factums and oral submissions. But the matter is urgent and should be resolved as quickly as possible. It is common ground that the application should proceed by way of judicial review pursuant to sections 2(1) and 6(1) of the Judicial Review Procedure Act, R.S.O. 1990, c. J. The application is therefore transferred to be heard in the Divisional Court at the very earliest date that the parties are able to arrange with the Registrar.

EPSTEIN J.

cp/d/qlrme/qldah/qlmjb

Case Name:

Broomer v. Ontario (Attorney General)

Between
Dale Broomer, on his own behalf and as Litigation Guardian for Kyla Broomer, Emily Broomer and Travis Broomer, Paulette Duke, on her own behalf and as Litigation Guardian for Keenan Hughes, Madison Hughes and Ethan Duke and Robert Beauparlant, applicants, and
Attorney General of Ontario, the Director of the Ontario Disability Support Program, the Administrator of the Nipissing Social Services Administration Board and the Administrator of the Kawartha Lakes/Haliburton Social Services Alliance, respondents

[2002] O.J. No. 2196

Court File No. 02-CV-229203CM3

Ontario Superior Court of Justice

Nordheimer J.

Heard: May 31, 2002.
Judgment: June 5, 2002.

(59 paras.)

Social assistance -- Claims -- Benefits -- Offences -- Receiving unentitled assistance -- Benefits, cancellation of -- Appeal to courts -- Remedies -- Interlocutory or interim injunctions -- Balance of convenience.

Application by Broomer and Beauparlant for an interlocutory declaration to challenge the validity of legislation and to suspend its application. The legislation imposed a lifetime ban on any person convicted of an offence in relation to the receipt of social assistance. Broomer received benefits from Ontario Works. He did not report all of the payments that he received from the Workers' Compensation Board. He was convicted of fraud over $5,000 because of this failure and was ordered to make restitution. He was subject to a lifetime ban. Consequently, his monthly income was reduced from $2,300 to $1,350. His monthly family budget was $1,515. Beauparlant was convicted and was subject to the ban because he failed to fully report his income. Beauparlant suffered from manic depression and obsessive compulsive disorder. His drug card was suspended when he became subject to the ban, and he was unable to purchase his medication. Without the benefits he was left with $77 per month to feed and support himself.

HELD: Application allowed in part. An interlocutory injunction was granted restraining the Province of Ontario from making deductions regarding the repayments that were ordered. The deductions were to be returned to the applicants. The applicants suffered irreparable harm from the bans. This included the non-quantifiable emotional and physical harm that Broomer's children suffered from the reduced income. Public interest considerations were more important when a suspension of legislation was involved. The balance of convenience favoured the Province, as the public good from the legislation outweighed the harm suffered by the applicants. However, Broomer's children were innocent parties who suffered from the suspension. The imposition of the penalty on them had to be restrained. It also violated their equality rights under the Charter. The public interest also did not outweigh Beauparlant's need to have his medication. It was not in the public interest to leave a person untreated who suffered from a mental illness. He would become violent and would pose a risk to society. The drug card was to be reinstated retroactively from the date it was withdrawn.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 12, 15.

Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25.

Ontario Disability Support Program Act Regulation, O. Reg. 134/98, s. 36.

Ontario Disability Support Program Act Regulation, O. Reg. 222/98, s. 25.

Ontario Works Act, 1997, S.O. 1997, c. 25.

Counsel:

Sean Dewart and Charlene Wiseman, for the applicants.
Richard J.K. Stewart and Daniel Guttman, for the respondents, Attorney General of Ontario and the Director of the Ontario Disability Support Program.

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1 **NORDHEIMER J.**:-- The applicants move, on an urgent basis, for interim relief pending their challenge to the constitutional validity of certain provincial legislation. In particular, they seek an interlocutory declaration that certain regulations are of no force and effect with respect to the applicants, an interlocutory declaration that the applicants are constitutionally exempt from the application of those regulations and a mandatory order directing the respondents administrators to reinstate the applicants' social assistance payments retroactive to the date on which a lifetime ban was imposed together, as well as certain other related relief.

2 I should note that the respondents, The Administrator of the Kawartha Lakes/Haliburton Social Services Alliance and The Administrator of the Nipissing Social Services Administration Board, did not appear on this motion and did not take any position with respect to it.

Background

3 In this proceeding, the applicants challenge a lifetime ban imposed on any person convicted of an offence in relation to the receipt of social assistance. The ban is imposed pursuant to the Ontario Works Act, 1997, S.O. 1997, c. 25, Schedule A and section 36 of Ontario Regulation 134/98 made thereunder and the Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Schedule B and section 25 of Ontario Regulation 222/98 made thereunder. The applicants contend that a lifetime ban violates the rights guaranteed by sections 7, 12 and 15 of the Canadian Charter of Rights and Freedoms and that the lifetime ban is, therefore, ultra vires the Legislature and Lieutenant Governor in

Council of Ontario.

4 I will now provide a brief description of each of the applicants.

The Broomers

5 The Broomer family lives near Janetville, Ontario. Dale Broomer, who is 37, lives with his wife and the couple's three children, Kayla (age 7), Emily (age 3), and Travis (age 18 months). Mr. Broomer was born with a visual impairment. Although he has some sight, he is what is known as "legally" blind. Mr. Broomer has had two workplace accidents, the first of which resulted in a back injury and the second of which resulted in a head injury and an exacerbation of the back injury. Due to the pain associated with the back injury, he continues to be unable to stand up or sit down for extended periods of time. As a result of the head injury, he continues to experience periodic episodes of sharp, debilitating head pain. These episodes occur about four times per week, tend to last half an hour, and leave him weakened for about two hours afterwards. In addition to these episodes, he suffer from chronic headaches, diminished memory, and poor concentration.

6 In the past, Mr. Broomer was receiving a worker's compensation benefit of $63.93 per month for his back injury, and an additional WSIB payment of $82.72 per month for his head injury. When he ceased to qualify for total WCB benefits, he applied for benefits under the General Welfare Assistance Plan (now known as Ontario Works). He collected welfare benefits for himself and, commencing in 1995, his family, until early 2001.

7 In early 2001, Mr. Broomer was recognized as disabled by the Ontario Disability Support Program. This entitled the family to a higher level of support and he began collecting ODSP benefits instead of OW benefits.

8 Social assistance (first General Welfare, then Ontario Works and finally Ontario Disability Support Program) was the primary source of support for the Broomer Family. Mrs. Broomer is unable to work outside of the home because it is necessary for her to look after the children on a full-time basis. While Mr. Broomer is able to assist with childcare, his visual impairment and the continuing disability from his back and head injuries make it impossible and unsafe for him to care for three small children on his own.

9 At some point during the process of applying for Ontario Works benefits, Mr. Broomer declared that he was receiving a monthly WCB payment of $63.93, however he did not declare the second monthly WCB benefit of $82.72. This was discovered by the Ontario Works administrator in April, 2000, and it began deducting the $82.72 benefit from his welfare benefits, in addition to the $63.93 for the WSIB benefit that was already being deducted.

10 In August 2001, Mr. Broomer was charged under the Criminal Code with fraud over $5,000. The charge arose from his failure to report the second monthly WSIB benefit to Ontario Works as income from May 4, 1993 to April 30, 2000. Mr. Broomer was convicted on October 5, 2001 and sentenced to serve a three month conditional sentence, during which time he was prohibited from leaving his property (except for appointments with his doctor or his probation officer). This was followed by six months of probation, which he is currently serving. He was also ordered to make restitution to Ontario Works of the sum of $6,476.92, to be deducted from future social assistance payments.

11 Following his conviction, Mr. Broomer was banned for life from receiving social assistance benefits, including both ODSP and Ontario Works, pursuant to the legislation and regulations to which I earlier made reference.

12 After the lifetime ban was imposed on Mr. Broomer, Mrs. Broomer applied for and received Ontario Works benefits on behalf of herself, Kayla, Emily, and Travis. She receives a total amount of $607.44, broken down as follows:

Basic needs for Kimberly, Kayla, Emily, and Travis:	$ 481.00

Shelter allowance for Kimberly, Kayla, Emily, and Travis	$ 602.00
Less - National Child Benefit Supplement	($ 274.16)
Less - Mr. Broomer's WSIB benefits	($ 147.25)
Less - Set-off re: Mr. Broomer's overpayment	($ 54.15)
TOTAL	$ 607.40

13 In addition to the Ontario Works payment of $607.44, the Broomer family's other source of income is Mr. Broomer's WSIB benefits totalling $147.25 per month, and a Child Tax Benefit of $596.72 per month. Thus, the Broomer family's total monthly income is $1,351.41. Without the lifetime ban from ODSP, the Broomer family's total monthly income would be around $2,279.56 (after all deductions and including the Child Tax Benefit). The Broomer family's fixed basic household expenses total approximately $1,320.

14 In addition to Mr. Broomer's medical problems, two of the children also suffer from medical problems. As a result of these medical problems, the Broomer family spends about $40 per month on prescriptions. Because Mr. Boomer is no longer entitled to OW benefits, he also no longer qualifies for a drug card to cover the costs of prescription drugs.

15 The Broomer family makes efforts to obtain clothes for the children from the Salvation Army but it does not always have clothes that fit them. Consequently, some clothes must be purchased. On average, the Broomer family spends about $60.00 per month to clothe the children and spends about $15.00 per month on school supplies for the two school age children. The Broomers are currently in arrears of their rent.

16 Without taking into account debt or unforeseen expenses, the Broomers' basic living expenses total approximately $1,515, which is about $165.00 short of their monthly income of $1,351.41.

17 Mr. Broomer deposes in his affidavit to the fact that the family cannot afford to adequately feed themselves. They go to a soup kitchen and they also obtain some food staples from two local food banks. Mr. Broomer also deposes to the fact that their children no longer receive any gifts, toys, books, or entertainment, that he and his wife no longer take their children to movies, restaurants, fairs, or museums and that when there are school field trips, the children have to stay home, all because there are no funds available to pay for any of these items.

The Dukes

18 Paulette Duke is 22 years old. She lives in Lindsay, Ontario, with her three children Keenan (age 3), Madison (age 2), and Ethan (age 2 months).

19 In July 2000, Ms. Duke was convicted on a charge of fraud under $5,000 and of two related offenses under the

Criminal Code, as a result of having submitted a false rent receipt to Ontario Works. Ms. Duke's sentence for this crime was two years probation, 100 hours of community service, and a restitution order requiring her to pay $1,022 to the Ontario Works office. As a result of the conviction, Ms. Duke was banned for life from receiving any form of social assistance.

20 Around October 2001, Ms. Duke reapplied for Ontario Works benefits. She was granted an allowance for her children, but was denied assistance for herself because of the lifetime ban. Ms. Duke and her three children currently live on $1,213.58 per month ($415.00 per month from the Child Tax Credit and $798.58 in Ontario Works benefits for Keenan, Madison, and Ethan). If Ms. Duke had not been subject to the lifetime ban, it is likely that her family's monthly income would be $1,456.50. The Duke family's expenses for basic necessities total at least $1,490 each month. This amount does not take into account any unexpected needs or emergencies, or any of Ms. Duke's personal needs such as clothing, dental work or prescription drugs.

21 Ms. Duke deposes in her affidavit that it is impossible for her to provide adequate nutrition for Keenan and Madison with the $200 per month which is the amount allocated to groceries in the above number regarding the family's basic necessities. Therefore, Ms. Duke visits the local food bank as much as she can. The food bank supplies Ms. Duke with canned goods and bread, but not with milk, meat, or fresh food. Since Christmas, 2001, Ms. Duke has been able to obtain food vouchers from a local church in the amount of $40 per month without which, Ms. Duke deposes, the family would have had to go without food.

22 Ms. Duke also deposes to the fact that she usually runs out of diapers during the month with the result that she has to obtain diapers and wipes from a local charity. Ms. Duke says that she is able to obtain some clothes for Keenan, Madison, and Ethan at a used clothing depot but they do not always have what the children need. Ms. Duke also says that she is unable to cover the costs of various medications and other medical expenses related to illnesses or injuries from which she and one of her children suffer.

Robert Beauparlant

23 Mr. Beauparlant is forty-six years old. He lives by himself in the City of North Bay. Mr. Beauparlant suffers from manic depression and obsessive compulsive disorder. His psychiatrist has prescribed several psychotropic drugs to manage his symptoms. According to the evidence, prior to taking these drugs, Mr. Beauparlant experienced depression, agitation, and anger which occasionally lead to violence. Since taking the drugs, his symptoms have improved dramatically.

24 Mr. Beauparlant also suffers from Crohn's Disease, a disorder of the small intestine. His symptoms include wrenching pain every time he eats and chronic diarrhea. While no medication has been successful at managing Mr. Beauparlant's symptoms, Mr. Beauparlant deposes in his affidavit that he has noticed that nutrition plays a role in determining the severity of his symptoms and consequently he tries to eat a well-balanced diet. About one month ago, Mr. Beauparlant was diagnosed with angina (blockage in his arteries). He is scheduled to undergo further testing over the next few weeks.

25 In early 2000, Mr. Beauparlant got laid off from his job and was unable to find new work. Consequently, he applied for and received Ontario Works benefits. At the time Mr. Beauparlant applied for Ontario Works, he was collecting WSIB benefits in the amount of $242.56 per month. However Mr. Beauparlant did not declare this amount to Ontario Works as income.

26 In the summer of 2001, Mr. Beauparlant enrolled in an employment skills course sponsored by the WSIB. The course lasted from July until December, 2001. Throughout this period, the WSIB upgraded Mr. Beauparlant's benefits from $242.56 per month to $1,000 per month to cover the costs associated with the course. Throughout this period, Mr. Beauparlant continued to collect Ontario Works benefits.

27 In around December 2001, Mr. Beauparlant was charged with fraud over $5,000 under the Criminal Code with

respect to the failure to report all of his income.

28 Mr. Beauparlant deposes to the fact that throughout the next few months, while waiting for his criminal charges to be dealt with, his anxiety and distress grew until February 2002, when he became suicidal and was hospitalized for two weeks as a result. The evidence is that Mr. Beauparlant's doctors increased his dosage of Lithium which appears to have alleviated some of his distress and prevented further suicidal behaviour.

29 On February 12, 2002, Mr. Beauparlant was convicted of social assistance-related fraud. He was ordered to serve a six month conditional sentence, during which he was prohibited from leaving his home (except for appointments with his doctor or his probation officer) and from purchasing or consuming any drugs or alcohol. He was also ordered to make restitution to Ontario Works in the sum of $12,138.87, to be deducted from future Ontario Works benefit payments. On March 1, 2002, Mr. Beauparlant was cut off from receiving any form of social assistance for the rest of his life. Mr. Beauparlant's current income is his WSIB pension of $242.56 per month.

30 Following the lifetime ban, Mr. Beauparlant was accepted into the "Phase II Program" at the Canadian Mental Health Association. This program provides him with various support services, including subsidized housing. Thus, his rent is $85 per month.

31 As part of the lifetime ban, Mr. Beauparlant's drug card was taken away from him. The various medications which he needs to take in order to manage his mental and physical illnesses cost a total of $190 per month. He has applied for a Trillium grant to cover the costs of his medications but, as yet, no decision has been made with respect to his application.

32 This past month, Mr. Beauparlant paid his rent ($80), bought a bus pass ($60), and put $20 toward the cost of his medications. He is therefore left with about $77 to feed and support himself for the month. Mr. Beauparlant says that while he has started obtaining as much food as possible from local community services, it still costs him $100 per month for food. Mr. Beauparlant also says that when he does not eat properly, the symptoms of his Crohn's disease worsen.

33 Finally, while Mr. Beauparlant is scheduled to have knee surgery this summer in Toronto, he says that he cannot afford the bus fare to get there and back. Mr. Beauparlant also says that he will not be able to afford the costs of any drugs or knee braces that he may be required to wear as a result of the surgery, or any other incidental costs associated with the procedure.

Analysis

34 At the outset of my analysis of the issues raised, I wish to make it clear that I am not called upon on this motion to decide the merits of the underlying constitutional challenge to the legislation and regulations. I make that point because, perhaps inevitably, the submissions of counsel tended to stray into the merits of the challenge as opposed to being confined to the narrower issue of whether the interim relief sought by the applicants ought to be granted.

35 There is no dispute between the parties as to the test to be applied in determining the outcome of this motion. The test is set out in various decisions of the Supreme Court of Canada including RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 and Harper v. Canada (A.G.), [2000] 2 S.C.R. 764. The test involves three stages as follows: (i) there must be a serious issue to be tried; (ii) there must be irreparable harm occasioned to the applicants, and (iii) the balance of convenience (or inconvenience as it may more aptly be described) must favour the applicants.

36 Given the low threshold for establishing that there is a serious issue to be tried, the Attorney General of Ontario fairly concedes that there is a serious issue (that is, that the challenge is neither frivolous nor vexatious) and therefore the first stage of the test is met. Consequently, I need say no more with respect to that matter.

37 The second stage involves a consideration as to whether the applicants will suffer irreparable harm between now

and the time when the application challenging the legislation can be heard and determined. In RJR-Macdonald Inc. v. Canada (Attorney General), supra, the Supreme Court defined irreparable harm in the following terms, at p. 341 (per Sopinka and Cory JJ.):

> " Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

38 I also refer to the following observation from Sharpe, Injunctions and Specific Performance, (loose-leaf edition) at Paragraph 2.600:

> "The terms irreparable harm', status quo' and balance of convenience' do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case."

39 The facts of this case, and the circumstances of these applicants, in my view are sufficient to satisfy the requirement that irreparable harm is being occasioned to the applicants through the impact of their lifetime bans. The harm that is being caused to these individuals, a number of whom are children, is harm that cannot be quantified in monetary terms nor is it harm which can be cured by a subsequent award of damages or by the payment of benefits retroactively. I do not believe that one can properly quantify in monetary terms, for example, the potential health consequences of meals that are not eaten or that are nutritionally inadequate, the pain or discomfort suffered because needed medications cannot be purchased, the impact on the development of children arising from the loss of school trips or family social events that cannot afford to be taken and so on. Further, the emotional and psychological impact on the individuals and on the family unit from living in such circumstances is equally incapable of being monetarily quantified in any meaningful way.

40 I am satisfied therefore that the applicants have met the requirement of demonstrating that irreparable harm is being occasioned to them.

41 I now turn to the third stage, which is clearly the most difficult to resolve in these circumstances, namely, the balance of inconvenience. It has been said that the balance of inconvenience involves a determination of "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits" - see Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), 38 D.L.R. (4th) 321 (S.C.C.) at p. 334.

42 A principal consideration when dealing with injunctive relief in the context of a constitutional challenge, and central to the issue of the balance of inconvenience, is the issue of the public interest. It is open to either side to invoke the public interest in support of its position. As Sopinka and Cory JJ. said in RJR-Macdonald Inc. v. Canada (Attorney General), supra, at p. 344:

> "In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. Public interest' includes both the concerns of society generally and the particular interests of identifiable groups."

43 It appears, however, that while both sides may rely on the issue of public interest, the ability of the parties to "tip the scales" through that consideration is very much different. I again quote Sopinka and Cory JJ. in RJR-Macdonald Inc. v. Canada (Attorney General), supra, at p. 346:

> "In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and

> partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."

44 The Government of Ontario is clearly an authority charged with the duty of promoting or protecting the public interest. The Attorney General says that the regulations which are challenged in this application were clearly undertaken pursuant to that duty. Therefore, the Attorney General submits that the court must assume that, if the interlocutory relief sought by the applicants is granted, irreparable harm will result to the public interest. The applicants, however, contend that the application of the regulation is itself resulting in harm to the public interest not only because of the deleterious effects which have clearly been, and will continue to be, occasioned to the applicants but also because of the real potential for further and greater harmful effects. The applicants say that the public interest is negatively effected when any of its citizens are forced to endure the harsh realities which these applicants have suffered, as more fully described above.

45 In response to that assertion, the Attorney General says that focusing on the applicants ignores the benefits of the regulation including the effective management of public funds and the restoration of public confidence in the welfare system. While the applicants contend that the evidence that the regulation in fact accomplishes those goals is suspect, the Attorney General points to the fact that the impugned regulation must, at this stage of the proceeding, be assumed to be producing a public good. In Harper v. Canada (A.G.), [2000] 2 S.C.R. 764, McLachlin, C.J.C. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ. said, at p. 770:

> "Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed."

and further, at p. 771:

> "The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."

46 Is this such a clear case? The applicants rely heavily on the decision in Rogers v. Sudbury (Administrator of Ontario Works) (2001), 57 O.R. (3d) 460 (S.C.J.) where Madam Justice Epstein granted an interlocutory declaration that Ms. Rogers was constitutionally exempted from the application of certain regulations which would have terminated the payment of social assistance benefits to her. The facts of that case are, however, different from the ones before me. In Rogers, the applicant was going to be denied payments with the result that she would have no income to support herself at a time when she was pregnant. Madam Justice Epstein very carefully limited her conclusion and made it clear that it was the specific facts of the case before her that lead her to grant the relief that she did. Madam Justice Epstein said, at p. 466:

> "More importantly, the order is being granted in light of the particular facts in this case that centre on Ms. Rogers' medical condition."

47 There is a difference between the complete cessation of benefits and the reduction of benefits. In that regard, I do not accept the applicants' submission that it is a distinction without a difference. The fact is that most of these applicants

continue to receive social assistance notwithstanding that a lifetime ban has been imposed on a few within their midst. It is also true that, as a consequence of that fact, they are able to met their most basic of needs, albeit barely. Having said that, I am not unsympathetic to the applicants' point that there are on a knife-edge between meeting those needs and not. The problem posed by that reality, however, is that I assume that most, if not all, recipients of social assistance would be similarly situated in any case where someone within the family unit became subject to a lifetime ban. I draw this assumption from the reality that the level at which social assistance is paid provides only a minimal level of subsistence and, consequently, places all recipients in a position where any negative impact on the payments being received can have very serious effects. If I am correct in that assumption, then the resolution of this motion has the potential for significant repercussions throughout the programme. As a consequence of that analysis, I tend to the view that the challenge which the applicants make to the regulations, and the interlocutory relief which they seek in this motion, is very much more akin to that of a suspension of the regulations than it is to a mere exemption for a particularly hard hit group of individuals.

48 It is recognized that public interest considerations weigh more heavily in a case where a suspension of legislation is sought as opposed to an exemption. In RJR-Macdonald Inc. v. Canada (Attorney General), supra, Cory and Sopinka JJ. said, at p. 346:

> "Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a suspension' case than in an exemption' case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely."

49 I have a very real concern that we are not, in actual terms, dealing here with a discrete and limited number of applicants. I am concerned that we are, in fact, dealing with all social assistance recipients who are subject to lifetime bans and their family members, for the reasons I have expressed. I do not believe that it takes too great a degree of prognostication to foresee that a favourable result to the applicants on this motion will be followed by numerous further applications and motions by others who are similarly effected. Consequently, I am of the view that the public interest in this case must be given its proper consideration as if it were a suspension case, as opposed to the exemption case it is portrayed to be.

50 As all but one of the justices of the Supreme Court of Canada said in Harper v. Canada (A.G.), supra, courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review. It is with this principle in mind, and not without some considerable reluctance, that I have concluded that, with two exceptions to which I will now turn, the motion for interlocutory relief sought by the applicants must be dismissed. I cannot conclude on the facts before me that the circumstances of the applicants, viewed against the backdrop of the principles established by the Supreme Court of Canada, amount to such a clear case that the extraordinary relief sought by them ought to be granted. In other words, based on the principles I have mentioned, the balance of inconvenience favours the Government.

51 The two exceptions which I make are as follows. It appears that it is a common practice for individuals who are convicted of defrauding the system to be ordered to repay the amounts which they improperly received. However, by imposing a lifetime ban, the Government of Ontario eliminates the only source of income from which these individuals could make good these repayment obligations. The solution which the Government has then adopted is to deduct the repayments obligations from the amount of social assistance or child benefits which are paid to the defaulting individual's spouse and children. I am unable to see any logical basis or legitimate rationale upon which this action is taken. I must assume that the amounts which are paid to individuals, especially children, are based on what the Government concludes these individuals need to survive. To then reduce the amounts which those individuals receive as a consequence of actions for which they are not responsible is to inflict a punishment or penalty against innocent parties. Once again I turn to RJR-Macdonald Inc. v. Canada (Attorney General), supra, in order to quote Justices Cory

and Sopinka who said, at p. 346:

> "The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights."

52 In my view, the imposition of a penalty on entirely innocent individuals, especially children, in these circumstances with the consequent irreparable harm to these individuals, encroaches on their fundamental rights and must be restrained. I would note in this regard that the Court of Appeal for Ontario has recently concluded that receipt of social assistance is an analogous ground of discrimination under s. 15(1) of the Charter - see Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch), [2002] O.J. No. 1771 (C.A.). The Government of Ontario would have no ability to transfer the liability for the benefits ordered by a court to be repaid by the individual who improperly received them onto the backs of other individuals who are innocent of any offence but for the terms of the regulation. It seems to me that such a course of action is prima facie discriminatory because it imposes a burden on recipients of social assistance which could not be imposed on any other citizen. Such a result would appear to constitute a violation of the non-offending applicants' fundamental rights to be treated equally under section 15(1) of the Charter and thereby invokes the exception referred to by Justices Cory and Sopinka above. I therefore grant an interlocutory injunction restraining the Government of Ontario and the respondent administrators from making any such deductions regarding the repayments that were ordered and further order that all amounts so deducted to date be repaid to those from whom the monies were taken.

53 The other exception involves Mr. Beauparlant. I earlier set out that Mr. Beauparlant suffers from manic depression and obsessive compulsive disorder which causes Mr. Beauparlant to experience depression, agitation, and anger which occasionally lead to violence. The uncontradicted evidence is that the medication prescribed by his doctors results in a dramatic improvement in Mr. Beauparlant's symptoms. Nevertheless, as part of the lifetime ban, Mr. Beauparlant's drug card was taken away from him. While I was not advised how much the medications for his mental illness alone would cost, the various medications for all of his illnesses cost a total of $190 per month. Mr. Beauparlant simply cannot afford to purchase the necessary medications and the loss of his drug card, as a direct result of the lifetime ban, will mean that he will not receive these medications notwithstanding their obvious benefits to him.

54 While the earlier quotations I set out from the Supreme Court of Canada's decisions say that the public good from impugned legislation is, at this stage, to be presumed, I do not believe that that presumption can displace a contrary conclusion that is self-evident. There can be no public interest in creating a situation where a person who suffers from a mental illness will be left untreated with the very real prospect that the individual may become violent and consequently pose a risk not only to himself but to other members of the public. There are too many known instances of tragic consequences that have arisen in other contexts where people suffering from such illnesses have gone untreated to purposely allow such a situation to occur.

55 I therefore grant an interim declaration that Mr. Beauparlant is exempt from the regulation insofar as that regulation operates to deny him his entitlement to a drug card. To put it more plainly, the Government of Ontario is to reinstate Mr. Beauparlant's drug card immediately and retroactively to the date it was withdrawn.

56 Before concluding, I should say that I was concerned as to the court's jurisdiction to craft these two exceptions from the relief that the applicants sought in light of the principles set down by the Supreme Court of Canada to which I have referred. I conclude that the jurisdiction exists, however, as is made evident by the following statement of Justices Cory and Sopinka in RJR-Macdonald Inc. v. Canada (Attorney General), supra, at p. 347:

> "Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected."

57 In my view, the exceptions which I have granted are limited in scope and do not negatively impact the presumed

general public interest in the continued application of the regulation in question. Indeed, for the reasons I have given, I believe the public interest is furthered by the small exceptions made.

Summary

58 An interlocutory injunction is granted restraining the Government of Ontario and the respondent administrators from making any deductions regarding the repayments that were ordered. I further order that all amounts so deducted to date be repaid to those from whom the monies were taken. An interim declaration is also granted that Mr. Beauparlant is exempt from the regulation insofar as that regulation operates to deny him his entitlement to a drug card and his drug card is to be immediately reinstated retroactive the date it was withdrawn. The applicants' motion is otherwise dismissed.

59 I am inclined to leave the costs of this motion to the judge ultimately disposing of the underlying application. However, since the parties did not have the opportunity to address that issue, if there are matters which they wish to bring to my attention which they believe might alter my view in that regard, they may do so by written submissions. The respondent's submissions are to be delivered within ten days of the date of these reasons and the applicants' submissions are to be delivered within ten days thereafter. No reply submissions are to be filed without leave.

NORDHEIMER J.

cp/e/nc/qlrme

Case Name:

Burrows (Litigation guardian of) v. Ontario

Between
Lucas Burrows by his litigation guardian et al., and
Her Majesty the Queen

[2003] O.J. No. 5858

Court File No. 03-CV-253464CM3

Ontario Superior Court of Justice

Backhouse J.

Heard: October 17, 2003.
Judgment: October 20, 2003.

(35 paras.)

Civil procedure -- Injunctions--Interlocutory or interim injunctions -- Mandatory injuctions -- Serious issue to be tried or a strong prima facie case -- Considerations affecting grant -- Irreparable injury -- Balance of convenience -- Health law -- Health insurance, government -- Entitlement -- Pensions and benefits law -- Government benefit programs -- Health and social services -- Handicapped children, funding for therapy.

Motion for injunction reinstating provincial funding for treatment. The minor plaintiffs suffered from autism. Each had participated in Intensive Behavioural treatment funded by the province which had led to significant improvement and gains for all the plaintiffs. However, pursuant to provincial legislation, the funding was terminated for each child at age six. The plaintiffs brought an action claiming that the termination of funding was a breach of sections seven and 15 of the Charter. They brought an interlocutory motion for reinstatement of the funding pending resolution of the issue. The motion could not be heard on the day in question, therefore they sought interim interim relief until their motion could be heard.

HELD: Motion allowed. Funding for treatment reinstated pending a decision on the motion. There was a serious question to be tried. Other judges had engaged in a trial on the merits on the very same issues raised in the case. The minor plaintiffs would have suffered irreparable harm if the injunction was not granted. A short break in treatment would have resulted in immediate regression and loss of gains. The balance of convenience favoured the plaintiffs. Although money was an important consideration it was not nearly as important a concern as the welfare of the autistic children.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 15.

Counsel:

Marvin Kurz and Steven Klein, for the plaintiffs.

Robert Chamey and Sarah Kraicer, for the defendant.

BACKHOUSE J. (endorsement):--

Background

1 The minor plaintiffs all suffer from a serious neurobehavioural disorder called autism which, if left untreated, will almost certainly lead to their being institutionalized. Appropriate treatment has led to the return to the range of normal functioning for a substantial number of autistic children.

2 The minor plaintiffs seek an injunction reinstating provincial government funding for their treatment which was terminated at the age of six which they claim is a breach of ss.15 and 7 of the Canadian Charter of Rights and Freedoms.

3 The motion for an interlocutory injunction could not be heard today because of the defendant's wish to cross-examine and is scheduled for the week of January 5, 2004. The plaintiffs seek interim interim relief to cover the period from now until the motion can be heard in January.

4 It is accepted that if children with autism receive early intensive behavioural treatment ("IBI") along the lines of the methodology developed by Dr. Ivan Lovaas, of the University of California, their ability to learn and develop improves markedly and they stand a greater chance of keeping pace with their non-developmentally disabled peers.

5 In the year 2000, the government introduced the Intensive Early Intervention Program ("IEIP") to provide IBI for children under the age of six years. As a transitional provision, children who are otherwise eligible but have not received 12 months of treatment by the time they are "aged out" of the program, may receive up to 12 months of service.

6 The government submits that focusing the IEIP on pre-school aged children allocates the limited available resources where there is a clearly identified special service gap and in a manner that optimizes the program's benefits. The parties are in agreement that IBI is most effective (ie. best outcomes are achieved) if initiated at an early age. It is submitted by the government that scientific research and professional opinion has concluded that there is a narrow "window of opportunity" when these services may be effective.

7 Each of the minor plaintiffs has received ongoing IBI treatment funded through the IEIP. All have had their funding terminated on the day prior to their sixth birthday. (The plaintiff, Cameron Borgstadt, will have his funding cut off at the end of this month.)

8 Since the commencement of the IBI therapy, each of the minor plaintiffs has shown significant improvement and gains. All of the plaintiffs have supervising psychologists and therapists who - have recommended continued treatment and who warn of the inevitable regression and ultimate life of isolation and eventual institutionalization that will occur if treatment is discontinued. The parents and professionals involved in treating each of the children speak of the immediate regression in gains of the children where there is even a short break in treatment. The professionals all depose to the lack of appropriate treatment available in the public school system. A recurrent theme in the cases is of parents who have attempted to continue their child's treatment through their own resources and have exhausted their

savings and borrowing capacities.

9 A more detailed review of the facts in the cases of 4 of the minor plaintiffs, chosen at random, serves to illustrate the common circumstances of each of the minor plaintiffs and their families.

Cameron Borgstadt

10 Cameron was assessed as having autism when he was 3 1/2 years old. His language was severely delayed, he had echolalia, he had problems with social interaction, he was severely delayed in his preacademics and he had trouble attending to any sort of directions. He could not cope with change or perform the simplest task because his motor planning was very delayed. He displayed frequent aggression and non-compliance.

11 Cameron was refused admission into the public school system to start junior kindergarten because he was not toilet trained. Prior to starting IBI therapy, Cameron was assessed as functioning 2.5 years below his peers. The school board's individual assessment plan for Cameron was to enrol him in a regular class with parent volunteers to help him. At the parents' insistence and after a further assessment, Cameron was allotted an educational assistant, untrained in IBI, for 40 minutes a day for 4 days per week. Not surprisingly, Cameron did not benefit from that setting and was removed from the public school system in February, 2003.

12 Cameron was approved for 12 months of IBI therapy which began in November, 2002. By all accounts he has made great improvement. However, according to both Cameron's supervising clinical psychologist, Dr. Hundert, and his IBI therapist, Cameron is not ready for the regular classroom with the support of an educational assistant. Dr. Hundert states that Cameron's needs cannot be met in the more general programs of a school setting at this time because the intensive one on one treatment is not available in school, schools do not have trained and supervised therapists and the environment would be distracting and frustrating for Cameron. Dr. Hundert is of the opinion that Cameron needs one more year of IBI treatment because of the continuation of significant delays in language, attention and behaviour. With the benefit of this treatment, Dr. Hundert predicts that Cameron would reach a point where he will be able to function successfully in regular school with minimal assistance. Without this treatment, Cameron is likely to regress in his adjustment and will likely fail to gain in academic or communication development.

13 Cameron's mother deposes to the regression in gains made by Cameron over even a short break in his therapy. It took Cameron over a week to get back to the general level of functioning he achieved before the Christmas break. However, he still lost some of the skills he had learned.

14 Cameron's mother is on long term disability. His father is a municipal worker. They have spent approximately $20,000 to pay for their son's treatment for the 12 months that they were funded, being the shortfall between the guidelines and the cost. They have no ability to continue Cameron's treatment when the provincial funding is terminated.

Adam Brady

15 Adam was diagnosed as autistic in 1999. Adam's parents were advised that early therapy intervention was critical yet Adam was put on a waiting list for the next two years, Adam began receiving IBI in October, 2001. Funding ceased July 4, 2003.

16 Adam's clinical psychologist, Dr. Jeffrey Sherman, recommends that Adam continue to receive the IBI therapy, failing which Adam's future is in jeopardy. Adam's clinical director, Sandee-Lee Parker, deposes that if therapy is discontinued for Adam, the gains he has made will be lost over a period of time. There is a clear and positive correlation between the amount of time Adam is out of therapy and an increase in maladaptive, repetitive and stereotypic behaviours. Adam is not yet able to learn in a group format including a self-contained special education classroom. Both Dr. Sherman and Ms. Parker depose to the lack of programs suitable for Adam's treatment in the public education system.

17 Privately funding Adam's treatment has exhausted all the financial resources of Adam's family, including their savings and ability to borrow. Second jobs have been tried but the time away from Adam was damaging and it was also difficult to find someone to babysit him while working in the evenings.

Lucas Burrows

18 Lucas was first diagnosed as having Pervasive Development Disorder (a mild form of autism) at an early stage which was subsequently revised to a diagnosis of autism. He was approved for funding under the IEIP in April, 2001. His funding ended March 31, 2002.

19 By all accounts, Lucas is a dramatically different child than he was prior to receiving IBI therapy. It is recommended that Lucas would benefit from spending part of his day in an elementary classroom but only with the assistance of a trained IBI therapist which is not available in the public school system.

20 Lucas' mother has raised $16,400 in 2001 and $35,000 in 2002 to keep Lucas in therapy. She is at the end of her resources and is struggling to keep food on the table. She is extremely tearful that she is weeks away from the end of her son's highly effective autism treatment.

Andrew Cesario

21 Andrew was diagnosed as autistic at age 2. He also suffers from apraxia. His mother was diagnosed with metasticized cancer and has been undergoing chemotherapy treatment. Andrew began to receive funding for JBI therapy in July, 2000. Funding terminated June, 2003.

22 Andrew's mother has extensively and comprehensively investigated what schooling options were available for Andrew. She visited a multiexceptionality classroom within the Toronto Catholic District and was advised that no IBI was available to children with autism within the segregated classroom. She was advised by Dave Rowan, executive superintendent of special education at the Toronto District School Board in response to her request that they consider a pilot IBI classroom for students with autism between the ages of 6 to 9 as follows:

> "It is not the role of school boards to provide therapeutic treatment programs to individual students on an ongoing and daily basis. Therapeutic treatment programs are the responsibility of community agencies supported by the Ministry of Health and/or Ministry of Community and Social Services."

23 Like the parents of the other minor plaintiffs, Andrew's parents have depleted their savings and have little left. They have tried to refinance the equity in their home but were rejected by the bank. Andrew's supervising psychologist, Dr. Mary Knostantareas, recommends that Andrew's IBI therapy continue and that discontinuing it is certainly going to be detrimental to him. It is her opinion that the most likely scenario for Andrew if therapy is discontinued is that Andrew may end up being completely dependent with self-abusive and self-stimulatory behaviours.

Analysis

24 There are two prior decisions of our Court considering the same Charter issues, reaching opposite conclusions based on their own facts, as to whether or not interim relief is appropriate. The government sought leave to appeal the decision of Justice Gans in Lowrey v. Ontario (2003), 64 O.R. (3d) 222 (S.C.J.) which had awarded interim relief. Leave was denied by Justice Lane who points out that the decision of Justice Campbell in Clough v. Ontario; Nieberg v. Ontario, [2003] O.J. No. 1074 (Ont. Div. Ct.) is clearly distinguishable from the decision of Justice Gans on the basis that whereas Justice Gans found irreparable harm if an injunction was not granted on the facts before him, Justice Campbell had found, on the facts of his case, no irreparable harm.

25 In my view, it is important that there be consistent results where the facts are essentially the same. In other words,

if the facts of this case fall within the factual matrix identified in the Lowrey decision, supra, it would not be appropriate for me to substitute my own opinion, were it to differ, on an interim interim basis. Equally, if the case before me is similar to the Cloug decision, supra, it would not be appropriate for me to substitute my opinion in another case.

26 I appreciate that if I were of the view that either case was clearly wrongly decided, that the value of consistency would not be controlling. However, I am not persuaded that either decision was wrongly decided.

27 The tests for granting a mandatory order in circumstances such as this on an interim interim basis are well-known. There must be a serious question to be tried. There must be irreparable harm shown if an order is not made and the balance of convenience must favour the applicant.

28 It seems clear that there is a serious question to be tried and even if a stronger showing is required for a mandatory order, I am satisfied that such an enhanced test is met in this case. After all, Justice Gans found that this criteria was satisfied in Lowrey, supra, and Madam Justice Kitely is engaged in a trial on the merits on the very same issues that are raised in this case.

Irreparable Harm

29 The evidence satisfies me that each of the minor plaintiffs will suffer irreparable harm if the injunction were not granted. Even a delay of 2 1/2 months is critical to these children. The evidence establishes that a short break in treatment results in immediate regression and loss in gains. There is a narrow "window of opportunity" during which this therapy will be effective. There is ample evidence to support that it is required in the specific cases of these children and that it is not available through the public school system or any longer through the parents' private resources.

30 It was submitted on behalf of the government that, unlike the case before Justice Gans in Lowrey, supra, there is evidence in this case that the school boards for these children have appropriate special education programs and services available for autistic children. However, it is clear that what is not available is the one on one IBI therapy which is what is required for each of these children.

Balance of Convenience

31 In my opinion, the balance of convenience favours the plaintiffs. At stake for the government is scarce resources. Although money is an important concern, it is not anywhere near as an important concern as the welfare of these autistic children. A 2 1/2 month interruption in their therapy could prove disastrous.

32 These children have already gone through the assessment process and have their therapists and supervising psychologists in place.

33 The slippery slope argument was not accepted in Lowrey, supra. If it has any merit, it is as an argument ultimately on the merits of the application but I do not understand it to have anything to do with interim interim relief

34 In the result, on an interim interim basis, the provincial government finding for the IEIP shall be reinstated (and in the case of Cameron Borgstadt shall be continued) pending the hearing of the interlocutory injunction.

35 Costs are reserved to the return of the motion.

BACKHOUSE J.

cp/s/qw/qlhbb

drs/e/qlsjl/qlsez/qljal

Case Name:

Burrows v. (Litigation guardian of) v. Ontario

Between
Lucas Burrows, by his litigation guardian,
Norrah Whitney et al. (responding parties), and
Her Majesty the Queen In Right of Ontario,
defendant, (moving party)

[2004] O.J. No. 3217

Court File No. 03-CV-253464CM3

Divisional Court File No. 684/03

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

Epstein J.

Heard: December 16, 2003.
Judgment: January 5, 2004.

(30 paras.)

Civil procedure -- Appeals -- Leave to appeal -- Injunctions -- Interlocutory or interim injunctions -- Continuation or variation of interim injunction -- Considerations affecting grant -- Public interest -- Health law -- Health insurance, government -- Entitlement -- Pensions and benefits law -- Government benefit programs -- Health and social services -- Handicapped children, funding for therapy.

Motion by the Crown for leave to appeal an interim interim mandato order requiring the Crown to reinstate funding for the plaintiffs' therapy. The ten minor plaintiffs suffered from autism and were eligible for government funding for a therapy program that ceased when the child reached the age of six. The children claimed that the age limit violated their rights under sections 7 and 15 of the Canadian Charter of Rights and Freedoms. The motions judge dispensed with the age eligibility rules with the effect that the families involved had their funding reinstated pending the hearing of their interlocutory injunction.

HELD: Application allowed. The test for leave to appeal was met. The motions judge failed to consider the individual facts of many of the plaintiffs which prevented her from making the appropriate findings that would distinguish these children from other autistic children. This approach had the potential of amounting to a global finding on the entitlement for funding on an interim basis, with the ultimate potential for the equivalent of suspending the legislation. Accordingly, the public interest element had to be given careful consideration. However, it was not a factor in the

analysis by the motions judge. In addition, the motions judge failed to evaluate irreparable harm to the plaintiffs on an individual basis. The decision involved a judicial allocation of scarce public resources for private benefit based on conclusions drawn from an interim interim partial record and therefore required consideration by a full panel of the court.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, ss. 7, 15.

Ontario Rules of Civil Procedure, Rule 62.02(4)(a), 62.02(4)(b).

Counsel:

Robin Basu, for the defendant, moving party.

Marvin Kurz and Steven Klein, for the plaintiffs, responding parties.

ENDORSEMENT

1 EPSTEIN J. :-- This is a motion for leave to appeal to the Divisional Court from the interlocutory order of Backhouse J. dated October 20, 2003 whereby she granted an interim interim mandato order requiring the Crown to reinstate funding for certain therapy for the moving minor plaintiffs pending the hearing of the interlocutory injunction currently scheduled for January 5, 2004.

Background

2 The 10 moving minor plaintiffs suffer from autism and have been involved in Intensive Behavioural Intervention ("IBI") therapy under the Intensive Early Intervention Program ("Program") of Ontario's Ministry of Community, Family and Children's Services. The Program provides, among other things, IBI services for eligible children with autism and direct funding to purchase IBI services from private providers to those families of eligible children who wish to do so. The Program is designed for pre-school age children with autism, on the basis that the IBI services have proven to be most needed and most effective for young children. Eligibility in the Program ceases when the child turns six. This age limit has given rise to numerous complaints by parents to the Ontario Human Rights Commission and also to a growing number of actions, including this one, challenging the constitutional validity of such an age limit. Two of those actions are presently at trial together before Kiteley J. of this court. The trials are lengthy and will not likely finish until some time during the spring of 2004.

3 In this proceeding, each minor plaintiff seeks an injunction reinstating provincial government funding because their IBI treatment terminated at the age of six. They claim this termination, based on age, violates their rights under ss. 15 and 7 of the Canadian Charter of Rights and Freedoms.

4 In the record before the motions judge, the Crown cited much evidence that the impugned age limit was not arrived at arbitrarily, but was the product of considerable study and research in the field of autism. That research developed the view that early treatment was the key to success and that the best results were achieved when the patient was pre-school age. Beyond the age of six the results were less hopeful. Thus the Program focuses on younger children.

5 The record also contains evidence in support of the Crown's position that ongoing treatment beyond six years of age is the responsibility of the various local School Boards, which have funding for special needs pupils. There is extensive evidence about the opportunities for autistic children to be assisted with their instability within the public school system.

However, any such program will be in a classroom setting, albeit with some degree of personal attention.

6 It would appear that none of the moving minor plaintiffs have been taken to their respective Boards for the necessary testing to determine what program should be developed for him or her. Their parents believe that a continuation of the IBI therapy, which is a one-on-one approach, is essential. For financial reasons it is not feasible without funding under the Program.

7 The order of Backhouse J. dispensed with the age eligibility rules for the moving plaintiffs, who now are all school age. As a result, the families involved have had their funding for the Program reinstated pending the interlocutory injunction hearing.

Analysis

8 The first issue to be resolved involves the nature of the order from which leave is sought. The Crown takes the position that Backhouse J. granted an interim interim injunction pending the hearing of the interlocutory injunction. The moving parties contend that the motions judge did nothing more than grant an adjournment, on terms.

9 The resolution of this issue is important because of the test to be met for leave to appeal to the Divisional Court.

10 Pursuant to rule 62.02(4)(a) or (b), leave to appeal is granted where there is good reason to doubt the correctness of the order made and the matter is of importance beyond the interests of the parties alone; or where there are conflicting cases on the point and the leave judge finds it to be desirable that leave be granted. In each case there is an element of public interest required.

11 If the matter under consideration were merely the terms of an adjournment, then it would be more difficult to justify its being referred to a full panel of this court. Adjournment terms are highly discretionary and rarely, if ever, precedent setting. It would be next to impossible to satisfy the first part of the test set out in rule 62.02(4)(a) or (b). The granting of an interim interim order, however, should be treated as any other interlocutory decision in terms of the test to be applied for leave to be granted.

12 There is some debate as to how the matter actually got before the motions judge. Without actual evidence on this point, it is impossible for me to decide whether the parties came before Backhouse J. for the purposes of resolving the terms of an adjournment or to secure an interim interim order. However, regardless of how it came before her, it is what transpired before the motions judge that governs the nature of the order from which leave is sought.

13 While paragraph 3 of the reasons suggest an adjournment request by the Crown, the rest of the decision clearly treats the matter as the moving parties' motion for interim interim relief Without specifically citing RJR.- MacDonald Inc. v. Canada (Attorney General)[1], the motions judge based her analysis upon the tests set out in that decision and on the reasoning of Gans J. in Lowrey v. Ontario[2] a case in which the applicant, James Lowrey, an autistic child, moved for a mandatory interlocutory injunction requiring the government to maintain the necessary funding for the Program for a period of time.

14 Furthermore, the preamble to the order from which leave is being sought describes the matter before Backhouse J. as a "motion for interim-interim relief" and then establishes that the motions judge considered the full record before her in granting the order she did.

15 It is clear to me that Backhouse J. granted an interim interim injunction. Accordingly, the tests set out above for the granting of leave, apply.[3]

16 Justice Backhouse approached the motion in the following manner. She chose four of the moving minor plaintiffs to illustrate the common circumstances of each of the moving parties and their families. The motions judge then considered two recent decisions in which the court responded to interlocutory requests for funding pending a resolution

of the Crown's right to disentitle autistic children from participating in the Program by reason of their age. In Lowrey Gans J. awarded interim relief, whereas C. Campbell J. in Clough v. Ontario; Nieberg v. Ontario[4], declined to grant the injunction, in part due to the plaintiffs' failure to demonstrate irreparable harm.

17 Against the background of the detailed facts of the four selected children and their families, Backhouse J. considered the well-established tests for an injunction. She determined that there was a serious issue to be tried, that the moving minor plaintiffs would suffer irreparable harm if the injunction were not granted and that the balance of convenience favoured the plaintiffs.

18 With respect, there is good reason to doubt the correctness of this approach.

19 First, she failed to address the issue of the public interest, an issue that is essential to the analysis of injunction applications that involve an exemption from or the suspension of legislation.

20 RJR-MacDonald was a case in which the major members of the Canadian tobacco industry sought a blanket exemption from the provisions of new regulations governing, among other things, the contents of the packaging of their products. The Supreme Court of Canada premised its analysis on the fact that the Crown is charged with the duty to promote the public interest and that the impugned legislation was undertaken pursuant to that responsibility.[5] Justices Sopinka and Cory then went on to say that "in order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit."[6]

21 It is of note that in each of the closely related cases, namely, Lowrey, Clough and Neiberg and the recent decision of Sachs J. in Juravsky et al. v. Ontario, [2003] O.J. No. 5857[7] the court specifically considered the public interest element in the exercise of discretion as to whether to grant the injunction.[8]

22 While the Supreme Court discussed the lesser impact of exemption cases than suspension cases on the public interest, the public interest is an essential consideration in either instance.[9]

23 In my view, the motions judge's approach in the instant matter amounts to a suspension of the legislation rather than an exemption as the decision potentially opens the door to every autistic child to obtain the same relief on an interim interim basis. By not considering the facts pertinent to each individual plaintiff, the decision potentially creates the "slippery slope" that Gans J. specifically avoided in Lowrey. As Lane J. observed in his decision to dismiss the leave application in Lowrey, Gans J. was alive to the "slippery slope" issue and dealt with it by emphasizing that each case would be determined on its own facts. Accordingly, it was proper to treat the matter as an exemption case. C. Campbell in Clough similarly analyzed the facts in considerable detail but, unlike in Lowrey, found that there was nothing in the record before him to distinguish the applicants from many other autistic children who receive limited funding. As a result, he treated the matter as a suspension case.

24 Backhouse J.'s failure to consider the individual facts of many of the minor moving plaintiffs prevented her from making the appropriate findings that would distinguish the children whose factual background she did not analyze from other autistic children. This approach has the potential of being relied upon as a global finding as to the entitlement for funding for the Program on an interim basis. This paves the way for many more children who are similarly affected by the age restrictions of the Program to obtain the same relief. The net result of this would be the equivalent of suspending the legislation.[10]

25 Accordingly the public interest element had to be given careful consideration. Unfortunately, it did not appear to factor into the motions judge's analysis.

26 Moreover, in my view it is incorrect to take a "sampling" in order to determine whether an applicant's irreparable harm transcends a personal catastrophe. The court must look at the matter on an individual basis and then apply the appropriate tests set out in RJR-MacDonald, including the public interest element.

27 For these reasons I find that the first part of the test set out in rule 62.02(4)(b) has been met.

28 I now turn to the second part of the test and that is whether this interim interim order raises an issue of public importance.

29 In my view it does. What is in issue here is a private claim to increased benefits. The appropriate expenditure of scarce government resources is an important public issue.[11] It follows that the expenditure of these resources by judicial fiat rather than by legislative authority is also an important issue. What makes this case additionally significant from a policy perspective is that it results in a judicial allocation of scarce resources based on conclusions drawn from a partial record such as exists at the interim interim stage of a proceeding. In my view, this is a matter that should be considered by a full panel of this court.

Disposition

30 The test for leave to appeal to the Divisional Court set out in rule 62.02(4)(b) has been met. Leave to appeal to the Divisional Court is granted. In the circumstances, the appeal to the Divisional Court should be expedited. The costs of this application are reserved to the panel hearing the appeal.

EPSTEIN J.

cp/s/qw/qldjv/qlkjg/qlbdp/qlmjb

drs/e/qljzb/qlsez/qlmll

1 [1994] 1 S.C.R. 311, 334.

2 (2003), 64 O.R. (3d) 222 (S.C.J.) Leave to appeal to the Divisional Court was denied by Lane J., [2003] O.J. No. 2009, on May 27, 2003.

3 See: Kanado Tsushin Kogyo Co. et al. v. Coveley et al. (1997) 96 O.A.C. 324 [1997] O.J. No. 56 (Div. Ct.)

4 [2003] O.J. No. 1074 (Ont. Div. Ct.)

5 RJR-MocDonald, supra, at p. 346.

6 RJR-MacDonald, para. 349.

7 Released December 1, 2003.

8 See also Rogers v. Sudbury (Administrator of Ontario Works) (2001), 57 O.R. (3d) 460 (S.C.J.).

9 See pages 346 and 347 in the judgment of Sopinka and Cory JJ.

10 See Bromer v. Ontario [2002] O.J. No. 2196 (leave to appeal dismissed, June 28,2002) at para. 49 and Re A.G. of Manitoba and Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110 at 146.

11 See Egon v. Canada, [1995] 2 S.C.R 513 (S.C.C.) at paras. 104-105.

Lowrey, by his Litigation Guardian, Lowrey v. Her Majesty the Queen in right of Ontario [Indexed as: Lowrey (Litigation Guardian of) v. Ontario]

64 O.R. (3d) 222

[2003] O.J. No. 1197

Docket No. 03-85523

Ontario Superior Court of Justice

Gans J.

April 11, 2003

Injunctions -- Mandatory injunctions -- Autistic child ceasing to qualify for government funding for treatment program when he turned six -- Child and his parents bringing action challenging age eligibility requirements of program based on ss. 7 and 15 of Charter -- Plaintiffs seeking mandatory interlocutory injunction requiring government to maintain funding until matter determined -- Injunction granted -- Canadian Charter of Rights and Freedoms, ss. 7, 15.

AL suffered from autism. Recent research indicates that if children with autism receive early extensive behavioural treatment ("IBI"), their ability to learn and develop improves markedly. AL was enrolled in an IBI program partially funded by the Ontario government, but ceased to qualify for funding when he turned six. He and his parents brought an action challenging the age eligibility requirements of the IBI program based on ss. 7 and 15 of the Canadian Charter of Rights and Freedoms. They brought an application for a mandatory interlocutory injunction requiring the government to maintain the necessary payments for the duration of the treatment program or until the matter was finally determined.

Held, the application should be granted.

There was a serious issue to be tried. If the injunction were not granted, the action would be academic by the time it came to trial, as AL was reaching a critical point in the program, and the window of opportunity to develop and learn would have closed on him if his treatment were not continued for the next year or so. Assuming that the plaintiffs were able to sell the family farm and home in a timely manner, the resulting personal dislocation was not something that could be compensated in damages if the plaintiffs were ultimately successful. In order to overcome the assumed benefit to the public interest arising from the continued application of impugned legislation, an applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit. There was a public benefit in ensuring that AL continued with the prescribed treatment for the time period specified by his therapist. The balance of convenience was in AL's favour.

Auton (Guardian ad litem of) v. British Columbia (Attorney General) (2002), 220 D.L.R. (4th) 411, [2003] 1 W.W.R. 42, 99 C.R.R. (2d) 139, 2002 BCCA 538, 6 B.C.L.R. (4th) 201, [2002] B.C.J. No. 2258 (Quicklaw) (C.A.), affg (2001),

78 B.C.L.R. (3d) 55, [2000] 8 W.W.R. 227, 77 C.R.R. (2d) 293, 2000 BCSC 1142 (S.C.), supp. reasons (2000), 84 B.C.L.R. (3d) 259, 197 D.L.R. (4th) 165, [2001] 3 W.W.R. 447, 80 C.R.R. (2d) 233, 2001 BCSC 220 (S.C.); Clough (Litigation guardian of) v. Ontario, [2003] O.J. No. 1074 (Quicklaw) (S.C.J.); Rogers v. Sudbury (Administrator of Ontario Works) (2001), 57 O.R. (3d) 460, [2001] O.J. No. 2167 (Quicklaw) (S.C.J.), supp. reasons (2001), 57 O.R. (3d) 467 (S.C.J.), consd

Other cases referred to

Broomer v. Ontario (Attorney General), [2002] O.J. No. 2196 (Quicklaw) (S.C.J.); Gosselin v. Quebec (Attorney General), 2002 SCC 84, (2002), 221 D.L.R. (4th) 257, 100 C.R.R. (2d) 1, [2002] S.C.J. No. 85 (Quicklaw); Harper v. Canada (Attorney General), 2000 SCC 57, [2000] 2 S.C.R. 764, 92 Alta. L.R. (3d) 1, 193 D.L.R. (4th) 38, 262 N.R. 201; [page223] 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; 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

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 15

Treaties and conventions referred to

Convention on the Rights of the Child, GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989)

APPLICATION for a mandatory interlocutory injunction.

Donald R. Good and Lisa Lemieux, for plaintiff, Andrew Lowrey.
Robert Charney and Rochelle Fox, for defendant.

GANS J.: --

Introduction

[1] Andrew Lowrey suffers from the effects of a serious disabling affliction. He has been diagnosed with an autism spectrum disorder ("ASD") or autism, a neurobehavioural syndrome, which if left untreated will almost certainly lead him to a "life of 'physical, emotional, social and intellectual isolation and eventual institutionalization'".[1] at end of document]

[2] Research of recent vintage indicates that if children with autism receive early intensive behavioural treatment ("IBI"), along the lines of the methodology developed by Dr. Ivan Lovaas of the University of California, their ability to learn and develop improves markedly. In the final analysis, they stand a greater chance of keeping pace with their non-developmentally disabled peers. Indeed, this notion formed the underpinning for the IBI initiative that was introduced by the Ministry of Community, Family and Children's Service (as it now is) in 1999, which, to its credit, was then in the governmental vanguard of change.

[3] Andrew was not formally diagnosed with his condition until the summer of 2001, when he was approaching his fourth birthday. As a result of this diagnosis, the Lowreys were able to enroll him in an IBI program partially funded by

the Ministry. Unfortunately, Andrew no longer qualifies for funding since he no longer meets the age eligibility requirements for the Program or as [page224] counsel for the Attorney General stated, he has "aged out" of the Program, having attained the exalted age of six. His parents are presently funding the treatment he is currently receiving. There is, however, some uncertainty as to how long they will be able to continue making the necessary payments in light of their own financial circumstances, with or without a sale of the family farm and homestead.

Position of the Parties

[4] Putting the matter at its simplest, the Lowreys have mounted a challenge of the age eligibility requirements of the IBI Program based, inter alia, upon ss. 15 and 7 of the Canadian Charter of Rights and Freedoms. They also raise a parens patriae argument tied to the United Nations Convention on the Rights of the Child. For reasons expressed below, I need not amplify upon the elements of the plaintiffs' case any further.

[5] As a result of this claim, they seek a mandatory interlocutory injunction requiring the Ministry to maintain the necessary payments previously received for the duration of the treatment plan first designed some 16 months ago or to the date this matter is finally determined, whichever is the earlier. Putting the matter otherwise, Andrew is now entering a critical phase of his IBI program, which is anticipated to last another 12 to 18 months, depending upon his progress. As I understand it, this phase is aimed at integrating him into a "regular" school curriculum, without which, I was told, he will undoubtedly regress and lose any chance of maintaining the skill sets he has learned and mastered in the last year and a half. Taking this argument to its logical and devastating conclusion, it is the Lowreys' position that if Andrew does not continue to receive the prescribed IBI therapy, he, his family and, ultimately, society will be beset with the standard basket of problems that are vividly described in the affidavit material and a recent decision of the B.C.C.A. See Auton, supra, note 1.

[6] The Attorney General on behalf of the Ministry argues that the age requirements established for the IBI Program were not arbitrarily or capriciously set. It is their position, based upon scientific and clinical research, that pre-school children between the ages of two and five benefit most from early behavioural intervention treatment. Furthermore, to suspend the upper limit of the age requirement to accommodate the Lowreys, and others in their position, would tax an already beleaguered program which is supported by limited human and financial resources and would result in an increase in the size of [page225] the waiting list. Such would, by definition, defeat the public purpose of the Program.

Analysis and Law

[7] There is no dispute between the parties that in order to obtain a stay of or an exemption from the operation of the legislation pending the determination of a constitutional challenge the moving party must establish each of the following:

(a) there is a serious legal issue to be determined;

(b) the moving party will suffer irreparable harm prior to trial if the interlocutory relief is not granted;

(c) the balance of convenience, taking into account the public interest, favours a departure from the status quo.

See Harper v. Canada (Attorney General), [2000] 2 S.C.R. 764, 193 D.L.R. (4th) 38 at para. 4 and RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 at p. 334 S.C.R.

[8] I also accept as a given that injunctive relief in respect of the operation of legislation for which there is a public benefit has been granted in the rarest of circumstances. Indeed, it would appear that injunctive relief has only been granted when the facts of a particular case clearly mandate the same and there is actually a public benefit associated with the request of the moving party. See Rogers v. Sudbury (Administrator of Ontario Works) (2001), 57 O.R. (3d)

460, [2001] O.J. No. 2167 (Quicklaw) (S.C.J.), Clough (Litigation guardian of) v. Ontario, [2003] O.J. No. 1074 (Quicklaw) (S.C.J.) and Broomer v. Ontario (Attorney General), [2002] O.J. No. 2196 (Quicklaw) (S.C.J.).

[9] However, the Canadian human landscape is dotted with individuals of varying disabilities. The legal principles of the past, even the recent past, must be interpreted in light of the realities of the day.

Serious Issue to be Tried/Strong Prima Facie Case

[10] Counsel for the Attorney General has all but conceded there is a serious issue to be tried based upon, as a minimum, s. 15 of the Charter. In this respect, he has candidly acknowledged that the instant case meets the low threshold of this test. He also acknowledges that there is presently a 15-week trial involving some 35 plaintiffs that is poised to start this month where the same issues, with much the same evidence, will be canvassed. As [page226] if that were not enough, the decision of the B.C.C.A. in Auton, supra, involving a successful s. 15 Charter challenge, albeit in circumstances where there is a complete absence of an IBI program, is presently before the S.C.C. on an application for leave to appeal.

[11] Although he did not argue this strenuously, counsel for the Attorney General suggested that because the Lowreys were now seeking a mandatory injunction, they were obliged to satisfy the court they had a strong prima facie case. In this respect, he argued that they failed to meet this threshold based upon the notion that their challenge is, in reality, to the age barrier the Ministry established on the basis of sound clinical evidence. That having been said, he argued that it was not now a function of this court to second guess the reasonable limits imposed by the Ministry unless there was evidence to suggest that such were established for an improper or unauthorized purpose. See Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, at pp. 989-90 S.C.R., per Dickson C.J. and Gosselin v. Quebec (Attorney General), 2002 SCC 84, [2002] S.C.J. No. 85 (Quicklaw) at paras. 55, 57.

[12] In my respectful opinion, having regard to the precedential value of the Court of Appeal decision in Auton, supra, albeit where the age limit is not directly in issue, and the fact that this matter and others will be canvassed more fully before Kiteley J. in the weeks and months ahead, I am not persuaded that the cases to which my attention was directed cannot, in fact, be distinguished. In any event, I am not satisfied that the age limit proposition expressed in the above-cited cases would reduce the strength of the plaintiff's case for purposes, only, of this motion.

[13] Moreover, I would have been inclined to relieve the plaintiffs of the obligation to establish a strong prima facie case if such had become necessary. In the first place, they sought the assistance of their local M.P.P. in the fall of 2002, well before Andrew's sixth birthday. Mr. Dunlop, the M.P.P., wrote the Minister at the end of September, to which letter she did not respond until the 10th of February. Further, the Regional Director to whom a copy of the above correspondence was sent, did not provide his input until the 10th of March, some two months after the payments ceased, thereby necessitating the instant application for a mandatory instead of a prohibitory injunction.

Irreparable Harm and Balance of Convenience

[14] Although contained in his factum, counsel for the Attorney General did not stress the argument that the plaintiffs' had not [page227] demonstrated that they or Andrew, alone, would suffer irreparable harm if the injunction were not granted. As will be indicated below, if the injunction is not now granted, the action of the plaintiffs will truly be rendered academic by the time this matter comes to trial or the result in the other actions before Kiteley J. are made known.

[15] The "window of opportunity" to develop and learn will have closed on Andrew if his treatment is not continued for the next year or so, never to be opened again. Furthermore, the sale of the family farm and home, assuming it can be done in a timely fashion, and the resulting personal dislocation is not something that can be compensated in damages if the plaintiffs prove successful in the final analysis.

[16] What was emphasized by counsel for the Attorney General, although located in his factum in the balance of

convenience section, was the notion that the Government, itself, will suffer irreparable harm if the injunction is granted. This proposition, with which I agree intellectually, is premised on the fact that the Ministry ". . . is charged with the duty of promoting or protecting the public interest and . . . that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility". See RJR-MacDonald, supra, at p. 346 S.C.R.

[17] As I said, I accept this proposition, generally, but, do not agree it leads to the irrefutable conclusion, as counsel at first argued, that the balance of convenience is automatically tipped in favour of the Government. That proposition belies the notion that a citizen is always entitled to challenge the Government in respect of its actions and legislation that on their face are designed for the public good.

[18] Counsel for the Attorney General also argued, with some force, that in the instant case, actual harm will befall the public if the limitations are "suspended" since those already in the queue for IBI therapy and those waiting to be assessed will be compelled to wait that much longer.

[19] I do not doubt there is some truth to this argument. However, if the Lowreys determine personally to continue with Andrew's treatment, which they are perfectly entitled to do, the Instructor-therapist with whom they are working will not necessarily be available to others in the "waiting-line". The harm that the Ministry seeks now to minimize will not be avoided. This event would regrettably pit Andrew against an unidentified younger child, a fray into which I am reluctant to venture.

[20] It seems to me that it is more appropriate to gauge the competing interests attendant to the matters in issue in light of [page228] the test described by Justices Sopinka and Cory in RJR-MacDonald, supra, where they made the following observation at p. 349 S.C.R.:

> In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

[21] In my respectful opinion, there is a public benefit in insuring that Andrew continues with the prescribed treatment for the time period specified by his instructor-therapist. I am satisfied on the evidence that he has benefited from the therapy provided to date and has achieved more than a modicum of success in this regard. While there is no guarantee, I am persuaded that he will continue to benefit from the continuation of the treatment to the point that he should, as is hoped, be able to cope with the regular and supplemental school program to which he will be exposed next year. The alternative to this course of action is too extreme to contemplate, but will of necessity involve the public purse in an amount well beyond that which is required in the short term.

[22] Furthermore, I am not persuaded there are the special education alternatives now in place, which the Ministry's Regional Director "promised" in his letter to the Lowreys of March 10th last. If there were, I am sure I would have seen evidence to that effect. Respectfully, a general description of what is available province-wide and how much money is or will be made available for such activities, laudable as this may be, does not answer the specific issues at hand.

[23] Finally, counsel for the Attorney General suggested that any decision, which results in a suspension of the current program, would open up the floodgates in respect of those who presently qualify for IBI therapy. In the first place, I am not persuaded this argument should or, indeed, does carry the day. In my respectful opinion, this decision, much like the judgment of Epstein J. in Rogers, supra, is intended to act only as an exemption to the operation of the Program specific to the Lowreys and in relation to the evidence they have adduced. It is not intended to send the Ministry down the "slippery slope" to a suspension of the operation of the Program guidelines until such time as another court passes on their constitutionality or otherwise.

[24] That having been said, it is nevertheless necessary for me to comment upon the decision of my brother C. Campbell J. in Clough, supra. In my respectful opinion, the case at bar is [page229] distinguishable from the case that was before Campbell J. As was argued by Mr. Charney, who was counsel both before me and Justice Campbell, the

Clough decision did not involve a denial or withdrawal of assistance, as is the situation in the instant action. It was concerned with an increase of entitlement of assistance, a factor, which apparently was of some moment to my colleague. Furthermore, there was no evidence of irreparable harm that would then be suffered by the moving parties particularly since the request for additional funding that was before Campbell J. was to be revisited a scant few months after the argument of the motion. In addition, I do not believe Campbell J. was faced with the same sense of urgency as am I in the instant case or at least there does not appear to be any evidence to suggest that from the reasons for judgment. Finally, I am of the opinion that the continuation of the IBI therapy for Andrew for the remainder of the treatment plan will not offend the objects of the Program, which are aimed in part to insure that an autistic child can be integrated into the school system.

[25] An order for a mandatory injunction requiring the Ministry to continue to fund Andrew's IBI therapy will therefore issue. It shall remain in effect until the earlier of the decision of Kiteley J. in the Wynberg and Deskin cases that are about to start, or the completion of the therapy set by his instructor-therapist and psychologist or further order of this court. I have tied the injunction to the decision of Kiteley J. since both counsel agree that the outcome of that case should govern for a variety of reasons, including the fact that it will be decided well before the Lowrey matter could possibly be reached for trial.

[26] If the parties are not able to come to a resolution in respect of the costs of this motion, I may be contacted.

Application granted.

Notes

Note 1: Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2002] B.C.J. No. 2258 (Quicklaw), 220 D.L.R. (4th) 411 (C.A.) at para. 12.

Indexed as:

Westbank First Nation v. British Columbia Hydro and Power Authority

Westbank First Nation, appellant;
v.
British Columbia Hydro and Power Authority, respondent, and The Attorney General of Quebec, the Attorney General of Manitoba and the Attorney General of British Columbia, interveners.

[1999] 3 S.C.R. 134

[1999] S.C.J. No. 38

File No.: 26450.

Supreme Court of Canada

Hearing and judgment: June 21, 1999.
Reasons delivered: September 10, 1999.

Present: Lamer C.J. and Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (46 paras.)

Constitutional law -- Crown -- Immunity -- Taxation -- Exemption of public lands -- Indian band passing assessment and taxation by-laws pursuant to the Indian Act -- Whether by-laws impose taxes -- Whether by-laws constitutionally inapplicable to provincial utility -- Constitution Act, 1867, s. 125.

Indians -- Taxation -- Money by-laws -- Indian band passing assessment and taxation by-laws pursuant to Indian Act -- Whether by-laws constitutionally inapplicable to provincial utility -- Constitution Act, 1867, s. 125 -- Indian Act, R.S.C., 1985, c. I-5, s. 83(1)(a).

Between 1951 and 1978, the respondent hydroelectric utility was granted from Her Majesty the Queen in Right of Canada eight permits to use and occupy various lands located on two Indian reserves in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the reserves. In 1990, the appellant passed the Westbank Indian Band Assessment [page135] By-law and the Westbank Indian Band Taxation By-law, pursuant to its authority under s. 83(1)(a) of the Indian Act. The appellant passed additional by-laws from 1991 to 1995, under which the respondent was assessed $124,527.25 in taxes, penalties, and interest. The respondent refused

to pay the assessed taxes, and did not appeal the assessment notices. The appellant brought an action to recover the unpaid amount. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal. The issue in this appeal is whether s. 125 of the Constitution Act, 1867 prevents the appellant from applying its assessment and taxation by-laws to the respondent, an agent of the provincial Crown.

Held: The appeal should be dismissed.

Section 125 of the Constitution Act, 1867 renders the impugned by-laws constitutionally inapplicable to the respondent. The by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(a) of the Indian Act, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes".

Section 125 of the Constitution Act, 1867 is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It advances the goals of federalism and democracy by according a degree of operational space to each level of government, free from interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several [page136] key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

The levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the Constitution Act, 1867. They are enforceable by law, imposed under the authority of the legislature, and levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between the respondent and any regulation to which these charges adhere. Although the Indian Act is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

As these taxes are imposed on the respondent, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. The taxation and assessment by-laws are accordingly inapplicable to the respondent.

Cases Cited

Applied: Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004; Attorney-General of British Columbia v. Attorney-General of Canada (1922), 64 S.C.R. 377, aff'd [1924] A.C. 222; referred to: M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641; Eurig Estate (Re), [1998] 2 S.C.R. 565; Attorney General of Canada v. City of Toronto (1892), 23 S.C.R. 514; Attorney- General of Canada v. Registrar of Titles, [1934] 4 D.L.R. 764; Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357; Allard Contractors Ltd. v. Coquitlam

(District), [1993] 4 S.C.R. 371 [page137]; Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929; Re Ottawa-Carleton (Regional Municipality) By-law 234-1992, [1996] O.M.B.D. No. 553 (QL); Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General) (1997), 144 D.L.R. (4th) 536, aff'd (1997), 151 D.L.R. (4th) 575, leave to appeal refused, [1997] 3 S.C.R. vii; Minister of Justice v. City of Levis, [1919] A.C. 505; Urban Outdoor Trans Ad v. Scarborough (City) (1999), 43 O.R. (3d) 673; Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 53, 91(3), (24), 92(2), (9), (13), 125.
Indian Act, R.S.C., 1985, c. I-5, ss. 28(2), 83(1)(a) [rep. & sub. c. 17 (4th Supp.), s. 10(1)].
Interpretation Act, R.S.C., 1985, c. I-21, s. 17.
Westbank Indian Band Assessment By-law (1990), s. 36(1).
Westbank Indian Band Property Taxation Bylaw (1994), ss. 2(1), 8(1), 28, 30, 35, 36.
Westbank Indian Band Taxation By-law (1990), ss. 2(1), 8(1), 41(1), 45, 46(1), 49.

Authors Cited

Browne, Gerald P. Documents on the Confederation of British North America. Toronto: McClelland and Stewart, 1969.
Hogg, Peter W. Constitutional Law of Canada, vol. 1, 3rd ed. Toronto: Carswell, 1992 (loose-leaf updated 1997, release 2).
La Forest, Gérard V. The Allocation of Taxing Power Under the Canadian Constitution, 2nd ed. Toronto: Canadian Tax Foundation, 1981.
Lordon, Paul. Crown Law. Toronto: Butterworths, 1991.
Magnet, Joseph E. Constitutional Law of Canada, vol. 1, 7th ed. Edmonton: Juriliber Limited, 1998.

APPEAL from a judgment of the British Columbia Court of Appeal (1997), 45 B.C.L.R. (3d) 98, 154 D.L.R. (4th) 93, 100 B.C.A.C. 92, [1998] 2 C.N.L.R. 284, affirming a decision of the British Columbia Supreme Court (1996), 138 D.L.R. (4th) 362, [1997] 2 C.N.L.R. 229, granting summary judgment to the respondent. Appeal dismissed.

[page138]

Jack Woodward, Robert J. M. Janes and Patricia Hutchings, for the appellant.
Peter D. Feldberg, Anne Dobson-Mack and Cydney J. Elofson, for the respondent.
Monique Rousseau, for the intervener the Attorney General of Quebec.
Heather J. Leonoff, Q.C., for the intervener the Attorney General of Manitoba.
George H. Copley, Q.C., and Jeffrey M. Loenen, for the intervener the Attorney General of British Columbia.

Solicitors for the appellant: Woodward & Company, Victoria.
Solicitors for the respondent: Lawson, Lundell, Lawson & McIntosh, Vancouver.
Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.
Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.
Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

The judgment of the Court was delivered by

GONTHIER J.:--

I - Introduction

1 The issue in this appeal is whether s. 125 of the Constitution Act, 1867 prevents Westbank First Nation from applying its assessment and taxation by-laws to B.C. Hydro, an agent of the provincial Crown. The answer to that question depends upon whether the by-laws enact a system of taxation, which is subject to s. 125, or some other form of regulation which is not subject to the application of s. 125. If the by-laws impose taxes, then they are constitutionally inapplicable to the provincial Crown or its agents. For the reasons that follow, it is my opinion that these by-laws are properly described as taxes, and as such, cannot be imposed on B.C. Hydro.

2 The proper approach to characterizing a governmental levy has been considered on numerous occasions by this Court in various contexts. The characterization is relevant when determining the constitutionality of a provincial levy that has indirect tendencies, for if it is a regulatory charge, or otherwise is a component of a regulatory scheme, then the provinces are constitutionally competent to impose such a charge. It is equally relevant [page139] when considering s. 53 of the Constitution Act, 1867, because if the levy is a tax, then it must be imposed by the legislature. And, as I discuss below, if the levy is characterized as a tax, then it is constitutionally inapplicable to the other level of government.

3 The impugned by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes". There are no restrictions to the expenditure of these revenues; they are simply revenues for the discretionary spending of the Westbank First Nation.

4 The impugned charges bear all of the traditional hallmarks of a "tax". They are enforceable by law, imposed pursuant to the authority of Parliament, levied by a public body, and are imposed for a public purpose. There is no "nexus" between the revenues raised and the cost of any services provided. As such, they do not resemble a user fee, nor any other form of a regulatory charge. I disagree with the submissions of the appellant that they are attached to a regulatory scheme, as none of the indicia of a "regulatory scheme" recognized by this Court in constitutional law are present in this case. As such, these charges are properly characterized as being in pith and substance "taxation" levied under s. 91(3) of the Constitution Act, 1867, and as such, are rendered inapplicable to the provincial government by s. 125 of the Constitution Act, 1867. As it is my opinion that s. 125 prevents the application of the by-laws to the respondent, it is unnecessary to address the additional arguments [page140] raised concerning s. 17 of the Interpretation Act, R.S.C., 1985, c. I-21.

II - Facts

5 The relevant facts of this appeal are not in dispute. Between 1951 and 1978, the respondent acquired eight permits from Her Majesty the Queen in Right of Canada to use and occupy various lands on the Tsinstikeptum Indian Reserves No. 9 and No. 10 in British Columbia. The permits were granted pursuant to s. 28(2) of the Indian Act with the consent of the appellant. The respondent held the permits in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the Reserves. In 1990, the appellant passed the Westbank Indian Band Assessment By-law ("1990 Assessment By-law") and the Westbank Indian Band Taxation By-law ("1990 Taxation By-law"), pursuant to its authority under s. 83(1)(a) of the Indian Act. These by-laws were amended in subsequent years, but the relevant provisions remained the same. The appellant passed additional by-laws from 1991 to 1995, and under these by-laws the respondent was assessed $124,527.25 in taxes, penalties, and interest. The respondent refused to pay the assessed taxes, and did not appeal the assessment notices.

6 The appellant brought an action against the respondent to recover the unpaid amount. The respondent

counterclaimed for declaratory relief stating that it was not subject to taxation under the by-laws. Both parties brought applications to the Supreme Court of British Columbia for summary judgment under Rule 18A of the British Columbia Rules of Court. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal.

[page141]

III - Relevant Constitutional and Statutory Provisions

7 A. Constitution Act, 1867

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, ___
>
> ...
>
> 3. The raising of Money by any Mode or System of Taxation.
>
> ...
>
> 24. Indians, and Lands reserved for the Indians.
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, ___
>
> ...
>
> 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
>
> ...
>
> 9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
>
> ...
>
> 13. Property and Civil Rights in the Province.
>
> 125. No Lands or Property belonging to Canada or any Province shall be liable to

Taxation.

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

28. ...

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

C. Westbank Indian Band Taxation By-law (1990)

2. (1) As provided in this by-law, and for raising revenue for local purposes,

(a) land and interests in land are subject to taxation;
(b) subject to any exemption contained in this by-law, every interest holder of land shall be assessed and taxed on his interest in such land...

D. Westbank Indian Band Assessment By-law (1990)

36. (1) Land held or occupied by a municipality or the Crown in Right of the Province of British Columbia, held or occupied by, or on behalf of, a municipality or the Crown in Right of the Province of British Columbia, is, with the improvements on it, liable to assessment under this section, subject to the Constitution Act, S.C.

IV - Judgments Below

A. Supreme Court of British Columbia (1996), 138 D.L.R. (4th) 362

8 Downs J. held that s. 125 of the Constitution Act, 1867, exempted B.C. Hydro from taxation imposed by the

appellant. At trial, the parties agreed that the respondent is an agent of the provincial Crown and that s. 125 applies to agents of [page143] the Crown. The appellant argued that s. 125 only confers immunity from taxation imposed under s. 91(3) of the Constitution Act, 1867, and the tax imposed in this case was founded on s. 91(24) of the Constitution Act, 1867. This argument was also rejected by Downs J., who held that the legislation in pith and substance fell under s. 91(3) of the Constitution Act, 1867. Downs J. distinguished this type of tax from regulatory charges, which would not attract the scrutiny of s. 125.

9 Downs J. further rejected the appellant's alternative argument that the Westbank by-laws bound the Crown because of s. 17 of the Interpretation Act. After reviewing s. 17 of the Interpretation Act, Downs J. held that s. 83(1)(a) of the Indian Act did not expressly bind the Crown, nor would the Band's taxation regime be "wholly frustrated" if the Crown were not bound. Therefore, she held that s. 83(1)(a) and the Westbank by-laws were not binding on the provincial Crown by implication.

10 Related to this issue was the argument that the respondent was bound to accept the burden of the assessment by-law because it accepted the benefit of the permits for the rights of way. Here, Downs J. held that there was no nexus between the permits and the taxes, given that the respondent held the permits long before s. 83 of the Indian Act was enacted. Further, the by-law itself expressly stated that it was subject to the Constitution Act, and as such, the "benefit/burden" principle did not apply.

11 Downs J. also rejected numerous other arguments advanced by the appellant, which either have not been appealed or have been conceded by the appellant before this Court. As such, Downs J. granted the respondent's application for summary judgment.

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B. British Columbia Court of Appeal (1997), 154 D.L.R. (4th) 93

12 Writing for the Court, Goldie J.A. found that B.C. Hydro was clearly an agent of the Crown, and held that it "at no time acted in these proceedings other than as an agent of the Crown in right of the Province" (p. 101). As B.C. Hydro was an agent of the provincial Crown, Goldie J.A. then considered the application of s. 125 of the Constitution Act, 1867. Having regard to the by-laws' preambles and effects, Goldie J.A. agreed with the trial judge that the by-laws were properly characterized as by-laws to "raise revenue for local purposes". As such, the charges were imposed pursuant to s. 91(3) of the Constitution Act, 1867, not s. 91(24). Section 91(24) could not allow the federal government "to do indirectly what it could not do directly, namely, tax the Province through its agent for the purpose of raising a revenue" (p. 103). He accordingly dismissed the appeal.

V - Issues

13 On December 1, 1998, the Chief Justice stated the following constitutional questions:

1. Is the Province constitutionally competent to constitute the Respondent, British Columbia Hydro and Power Authority ("B.C. Hydro"), an agent of the Province for the purpose of acquiring and holding interests within exclusive federal jurisdiction, namely an interest in land on an Indian Reserve?
2. If the answer to question 1 is yes, is the interest of B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia, in land and improvements located on the reserves ("Reserves") of the Appellant, Westbank First Nation ("Westbank") immune, as a result of the application of s. 125 of the Constitution Act, 1867, from taxation imposed by Westbank pursuant

to assessment and taxation by-laws ("By-law") promulgated pursuant to the authority of s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5? If so, are such By-laws purporting to impose such taxation ultra vires, or inapplicable to B.C. Hydro?

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3. If the answer to question 2 is no, does the Indian Act, R.S.C., 1985, c. I-5, authorize the passing of by-laws imposing taxation on the interests of the Provincial Crown or its agents on Indian reserves? If not, are the By-laws ultra vires or inapplicable to the extent that they purport to impose taxation on the interests of B.C. Hydro on the Westbank Reserves?

14 At the outset of the hearing before this Court, counsel for the appellant stated that he was "abandoning" his arguments concerning the first constitutional question, and arguments relating to a "commercial activity" exception to s. 125. Although this Court is not bound by these concessions, in my view, it was quite proper for counsel to have abandoned these arguments, which were either not raised in the courts below, or are not necessary to be decided on this appeal. I therefore find it unnecessary to consider these arguments any further.

VI - Analysis

15 The only issue to be determined in this appeal is whether s. 125 of the Constitution Act, 1867, precludes the Westbank First Nation from imposing its taxation and assessment by-laws on B.C. Hydro, an agent of the provincial Crown. To answer this question, it is useful to first understand the underlying purpose of s. 125. It is these constitutional values that inform the constitutional distinction between "taxes" and "regulatory charges", and which explain why s. 125 applies to the former but not the latter. As I explain in this section, the impugned charges are best characterized as taxation by-laws, which are constitutionally inapplicable to the respondent.

A. Section 125 of the Constitution Act, 1867

16 Section 125 of the Constitution Act, 1867 was not originally considered at the Charlottetown Conference in September 1864. It was first tabled by the then Attorney General, Sir John A. Macdonald on October 26, 1864, at the Quebec [page146] Conference (G. P. Browne, Documents on the Confederation of British North America (1969), at p. 88). The motion read: "That no lands or property belonging to the General or Local Governments shall be liable to taxation". Macdonald proposed the section along with a series of other miscellaneous clauses that dealt with the Crown prerogatives, and rights of Crown representatives. The motion was approved without any notable debate, and inserted into the "Miscellaneous" section of the Quebec resolutions, labelled as clause 47. The resolution attracted no scrutiny during the Confederation debates, although it was relocated several times before receiving its final designation of s. 125. The final text of s. 125 read: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

17 The section is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It grants to each level of government sufficient operational space to govern without interference. It is founded upon the concept that imposing a tax on a level of government may significantly harm the ability of that government to exercise its constitutionally mandated governmental functions. In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), at p. 431, Marshall C.J. explained this concept as follows:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are

propositions not to be denied.

In Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004, the majority of this Court referred to these statements at p. 1056, explaining at p. 1065 that "s. 125 is plainly intended to prevent inroads, by way of taxation, upon the property of one level of government, by another level of government".

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18 While Canadian federalism requires some separation between each level of government, this rule is not absolute. Canada's federal system is a flexible one, and the Constitution does not create "enclaves" around federal or provincial actors. As Dickson C.J. explained in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 18, "[t]he history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers" (see also Dickson C.J.'s comments in General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, at p. 669). Flexible federalism demands protection from taxation, but not from all forms of charges, when the charges are levied in support of other regulatory objectives within the competence of the taxing authority.

19 While the primary constitutional value served by s. 125 is federalism, it also secondarily advances the constitutional value of democracy. As this Court recently explained in Eurig Estate (Re), [1998] 2 S.C.R. 565, at para. 30, the Canadian Constitution (through the operation of s. 53 of the Constitution Act, 1867) demands that there should be no taxation without representation. In other words, individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated, and determine how it should be spent. Intergovernmental taxation is prohibited, in part, because one group of elected representatives should not be allowed to decide how taxes levied under and within the authority of another group of elected representatives should be spent. At the same time, governments are not immune from paying user fees, such as water rates, in part because the government can choose whether to use the service, and the money charged is spent solely on providing that service: Attorney General of Canada v. City of Toronto (1892), 23 S.C.R. 514; Attorney-General of Canada v. Registrar of Titles, [1934] 4 D.L.R. 764 (B.C.C.A.), at pp. 771-72. In this way, imposing a user fee is more like charging a fee for [page148] a merchantable commodity than imposing any form of taxation.

20 These principles, and the guiding structure of the Constitution, are as applicable to Indian Band Councils exercising the right of taxation authorized by s. 83 of the Indian Act as they are to the federal and provincial levels of government. The exercise of governmental powers in Canada, by any level of government, must be done in accordance with the constitutional framework of the country. This constitutional framework includes the prohibition contained in s. 125 against taxing another level of government.

B. Regulatory Charges Distinguished from Taxes

21 The natural starting point for characterizing a governmental levy is this Court's decision in Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357, at pp. 362-63. In that case, Duff J., as he then was, explained that the impugned charges in that case were taxes because they were: (1) enforceable by law, (2) imposed under the authority of the legislature, (3) imposed by a public body, and (4) intended for a public purpose. Duff J. also noted that the charges there were compulsory, and affected a large number of people.

22 These indicia of "taxation" were recently adopted by this Court in Eurig Estate, supra, at para. 15. Major J., writing for the majority of this Court, added another possible factor to consider when characterizing a governmental levy, stating at para. 21 that "[a]nother factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided". This was a useful development, as it helps to distinguish between taxes and user fees, a subset of "regulatory charges".

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23 A distinction is made between simple "taxation" and "regulation", or what has elsewhere been described as "regulatory charges": P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), vol. 1, at p. 30-28; J. E. Magnet, Constitutional Law of Canada (7th ed. 1998), vol. 1, at p. 481; G. V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981). The distinction between taxes, on the one hand, and regulatory charges, on the other, was highlighted by the majority of this Court in Re Exported Natural Gas Tax, supra, at pp. 1055, 1070, 1072 and 1075. In that case, the majority explained at p. 1070 that a tax is to be distinguished from a "levy [imposed] primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme".

24 It goes without saying that in order for charges to be imposed for regulatory purposes, or to otherwise be "necessarily incidental to a broader regulatory scheme", one must first identify a "regulatory scheme". Certain indicia have been present when this Court has found a "regulatory scheme". The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

25 The first factor to consider is the nature of the purported regulation itself. Regulatory schemes are usually characterized by their complexity and detail. In Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371, at p. 409, the regulatory scheme there was described as a "complete and detailed code for the regulation of the gravel [page150] and soil extraction and removal trade". In Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 S.C.R. 929, at para. 28, the charge was described as part of a "complex regulatory framework governing land development". And, in General Motors of Canada Ltd. v. City National Leasing, supra, at p. 676, the Combines Investigation Act was described as "a complex scheme of economic regulation".

26 A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard. Professor Magnet, supra, at p. 459, correctly explains that a regulatory scheme usually "delineates certain required or prohibited conduct". For example, in Re Exported Natural Gas Tax, supra, at p. 1075, the levy there was held to not be a regulatory charge because "the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur". In sum, a regulatory scheme must "regulate" in some specific way and for some specific purpose.

27 Regulatory schemes usually involve expenditures of funds on costs which are either known, or properly estimated. In the indirect tax cases, evidence was provided demonstrating how the revenues would be used and how the regulatory costs of the scheme were estimated. In Ontario Home Builders', supra, at para. 55, the charge levied was "meticulous in its detail" and "clearly operate[d] so as to limit recoupment to the actual costs". In Allard, supra, evidence was led by city officials demonstrating the actual costs of annual road repair, based on estimates from similar repairs in the municipality. In both cases, there was a fairly [page151] close "nexus" between the estimated costs and the revenues raised through the regulatory scheme.

28 Finally, the individual subject to the regulatory charge will usually either benefit from the regulation, or cause the need for the regulation: Magnet, supra, at p. 459. In Allard, supra, the gravel trucks caused the need for the repair to the roads; in Ontario Home Builders', supra, the developers and the new home-owners caused the need for the new schools. In both cases the individuals being charged also benefited from the regulation.

29 A regulatory charge may exist to defray the expenses of the regulatory scheme, as was the case in Allard or

Ontario Home Builders', or the regulatory charges themselves may be the means of advancing a regulatory purpose. In Attorney-General of British Columbia v. Attorney-General of Canada (1922), 64 S.C.R. 377 ("Johnnie Walker" case) (aff'd [1924] A.C. 222), this Court explained that customs duties were the method of advancing the regulatory purpose of encouraging the importation of certain products, and discouraging the importation of others. Anglin J., at p. 387, explained that customs duties "are, it seems to me, something more" than simple taxation. As with customs duties, other types of charges may proscribe, prohibit, or lend preferences to certain conduct with the view of changing individual behaviour. A per-tonne charge on landfill waste may be levied to discourage the production of waste: Re Ottawa-Carleton (Regional Municipality) By-law 234-1992, [1996] O.M.B.D. No. 553 (QL). A deposit-refund charge on bottles may encourage recycling of glass or plastic bottles: Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General) (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) (aff'd (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), leave to appeal refused, [1997] 3 S.C.R. vii).

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30 In all cases, a court should identify the primary aspect of the impugned levy. This was the underlying current of the earlier cases on s. 125, which focussed on the "pith and substance" of the charge: "Johnnie Walker" case, supra; Re Exported Natural Gas Tax, supra. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.

C. Section 125 Treatment of Taxes, User Fees, and Regulatory Charges

31 Section 125 applies only to taxes properly enacted under s. 91(3) or 92(2) of the Constitution Act, 1867. As this Court explained in Re Exported Natural Gas Tax, at p. 1068, s. 125 does not purport to affect activities of government other than taxation. Consequently, the section will not usually apply to user fees, for they cannot be considered to be "taxation" in the constitutional meaning of the word, as developed above: City of Toronto, supra; Minister of Justice v. City of Levis, [1919] A.C. 505; Registrar of Titles, supra. In particular, it is difficult to say that payment of charges for such merchantable commodities are "compulsory" or are used for a "public purpose": Registrar of Titles, supra, at pp. 771-72; Urban Outdoor Trans Ad v. Scarborough (City) (1999), 43 O.R. (3d) 673 (Sup. Ct.), at p. 683. However, some services may be so essential that although in theory it is not compulsory to pay for the services, in reality it is: City of Levis, supra, at p. 513; Eurig Estate, supra, at para. 17.

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32 Nor does s. 125 apply to other types of regulatory charges, as I have described them above. Where a charge itself is the mechanism for advancing a regulatory purpose, such as a charge that encourages or discourages certain types of behaviour, or where a charge is "ancillary or adhesive to a regulatory scheme" which may be used to defray the costs of that scheme, then they will usually be applicable to the other order of government. As the majority of the Court explained in Re Exported Natural Gas Tax, supra, at p. 1070:

> If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the "adjustment levies" considered in Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, s. A-7 et al., [1978] 2 S.C.R. 1198 or the

unemployment insurance premiums in Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 355, then the levy is not in pith and substance "taxation" and s. 125 does not apply.

33 By protecting each level of government from taxation, but not from other types of regulatory charges, the Constitution accords a degree of operational space to the governments in a manner which best advances the goals of Canada's flexible federalism. It is with these concepts in mind that I now turn to the governmental levy at issue in this case.

D. Characterization of the Westbank First Nation Taxation By-laws

34 There is no question that these levies apply to the "Lands or Property" of the Crown agent. However, the parties disagree as to whether the Court of Appeal was correct in describing these by-laws as "taxation", founded upon s. 91(3) of the Constitution Act, 1867. In my view, the Court of Appeal and the trial court below were both correct in [page154] describing these by-laws as imposing "taxation" within the meaning of s. 125.

35 The charges imposed by Westbank bear all of the hallmarks of "taxation". The charges here are enforceable by law. Failure to comply with the by-law can result in all services provided by the Band being cancelled (1990 Taxation By-law, s. 8(1); Westbank Indian Band Property Taxation Bylaw (1994) ("1994 Property Taxation By-law"), s. 8(1)). The taxes form a lien on the property (1990 Taxation By-law, s. 41(1); 1994 Property Taxation By-law, s. 28). The Band can recover the taxes by distress (1990 Taxation By-law, s. 46(1); 1994 Property Taxation By-law, s. 30), forfeiture (1990 Taxation By-law, s. 49; 1994 Property Taxation By-law, s. 35), or by court action (1990 Taxation By-law, s. 45; 1994 Property Taxation By-law, s. 36). The taxes are as compulsory as any municipal tax on land or interests in land.

36 The impugned charges are imposed under the authority of the legislature and levied by a public body. The by-laws are imposed pursuant to the power conferred by s. 83 of the Indian Act. The taxes are levied by the Band Council, under its conferred authority, and are approved by the Minister of Indian Affairs and Northern Development.

37 The charges are levied for a public purpose. In this case, the public purpose is for general Band governance. Section 2(1) of the 1990 Taxation By-law and the 1994 Property Taxation By-law state that the levies are "for raising a revenue for local purposes". As Lamer C.J. explained in Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, at para. 43, the purposes of these taxes are "to promote the interests of Aboriginal peoples and to further the aims of self-government". Thus, as the Chief Justice pointed out (at para. 43), the taxes here are "more ambitious" than simple taxation. However, the existence of this secondary purpose does not remove these taxes from the head of [page155] power under which s. 83 is founded __ s. 91(3). Indeed, while the intention of Parliament in enacting s. 83 may have been to advance self-government, that does not mean that this is the specific purpose of the taxes themselves. Here, the specific purpose of these taxes is to simply raise revenue, to be brought into the discretionary spending accounts of the Band. No evidence has been brought demonstrating that these charges have a secondary purpose of discouraging or encouraging any behaviour of the respondent, nor have any other regulatory purposes been demonstrated.

38 The appellant has also not demonstrated that these charges form a nexus with any regulatory costs such as to bring it into the type of charge contemplated by Allard, supra, and Ontario Home Builders', supra. The charge forms no part of a regulatory scheme. Although the Indian Act is legislation in relation to Indian land, this is insufficient to meet the requirements for a "regulatory scheme" in the constitutional sense. There is insufficient evidence demonstrating that the charge is attached to any "complete and detailed code"; nor can it be said that this forms part of a "complex regulatory framework". There are no costs of a regulatory scheme identified. Westbank does not seek to alter B.C. Hydro's behaviour in any way. B.C. Hydro has not caused the need for any regulation, to which the charges adhere. Nor does it benefit from any regulation provided. In summary, these charges do not "regulate" in any sense of the word, and they are not attached to any scheme which does.

39 I am also not convinced that there is any significance that can be attached to the fact that the charges are levied "for local purposes", as opposed to charges which raise revenue for the federal Consolidated Revenue Fund. In Eurig Estate, supra, para. 20, the charge was directed to the "court administration in general", as opposed to the general expenses of the province, and yet this was still [page156] held to be a tax. As in Eurig Estate, supra, at paras. 18-23, here there is only a loose, if any, relationship between the charge and any costs. I agree with the Attorney General of British Columbia's submissions that the Constitution demands more precision in order to oust the operation of s. 125.

40 None of the foregoing suggests that Westbank is constitutionally incapable of levying properly authorized regulatory charges or user fees on B.C. Hydro. In this regard, I note that the authorizing by-laws and the agreements entered into between B.C. Hydro and Westbank allow for the payment of regulatory charges in a manner which complies with the Constitution. Section 36(1) of the 1990 Assessment By-law states that land held on behalf of the Crown shall be "liable to assessment under this section, subject to the Constitution Act, S.C." (emphasis added). Section 125 was thus contemplated. In addition, clause 2 of the July 22, 1960 agreement between B.C. Hydro and the Crown, for example, states that B.C. Hydro "shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the said lands". Although this clause refers to "taxes", these must be interpreted to refer to those taxes authorized under the Constitution, as explicitly provided by the by-law, such as provincial taxes, which the province can levy on one of its agents: La Forest, supra, at pp. 182-83; P. Lordon, Crown Law (1991), at pp. 487-88. The remainder of this clause provides for the payment of all charges and levies constitutionally applicable to B.C. Hydro. The impugned tax simply is not one of those types of charges. For these reasons, the appeal must fail.

41 As it is my opinion that s. 125 renders these taxation by-laws inapplicable to the respondent, it is [page157] unnecessary to answer the third question framed by the Chief Justice.

VII - Summary

42 Section 125 of the Constitution Act, 1867, advances the goals of federalism and democracy by according a degree of operational space to each level of government, free from interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

43 In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

44 As is evident from the fifth inquiry described above, the Court must identify the presence of a regulatory scheme in order to find a "regulatory charge". To find a regulatory scheme, a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. This list is not exhaustive. In order for a charge to be "connected" or "adhesive" to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This will exist when the revenues are tied to the costs of the regulatory scheme, or where the [page158] charges themselves have a regulatory purpose, such as the regulation of certain behaviour.

45 In the case at bar, the levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the Constitution Act, 1867. They are enforceable by law, imposed under the authority of the legislature, and are levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed

code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between B.C. Hydro and any regulation to which these charges adhere. Although the Indian Act is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

46 As these taxes are imposed on B.C. Hydro, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. As such, the taxation and assessment by-laws are inapplicable to the respondent. As this appeal can be dismissed on the second constitutional question, I find it unnecessary to consider the third constitutional question. The respondent does not seek costs in this appeal. Accordingly, it is my opinion that the appeal must be dismissed, without costs. I would therefore answer the constitutional questions as follows:

1. Is the Province constitutionally competent to constitute the Respondent, British Columbia Hydro and Power Authority ("B.C. Hydro"), an agent of the Province for the purpose of acquiring and holding interests within exclusive federal jurisdiction, namely an interest in land on an Indian Reserve?

Answer:

Conceded by the appellant.

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2. If the answer to question 1 is yes, is the interest of B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia, in land and improvements located on the reserves ("Reserves") of the Appellant, Westbank First Nation ("Westbank") immune, as a result of the application of s. 125 of the Constitution Act, 1867, from taxation imposed by Westbank pursuant to assessment and taxation by-laws ("By-law") promulgated pursuant to the authority of s. 83(1)(a) of the Indian Act, R.S.C., 1985, c. I-5? If so, are such By-laws purporting to impose such taxation ultra vires, or inapplicable to B.C. Hydro?

Answer:

Yes. The By-laws are constitutionally inapplicable to B.C. Hydro, an agent of Her Majesty the Queen in Right of British Columbia.

3. If the answer to question 2 is no, does the Indian Act, R.S.C., 1985, c. I-5, authorize the passing of by-laws imposing taxation on the interests of the Provincial Crown or its agents on Indian reserves? If not, are the By-laws ultra vires or inapplicable to the extent that they purport to impose taxation on the interests of B.C. Hydro on the Westbank Reserves?

Answer:

Given the answer to question 2, it is unnecessary to answer this question.

cp/d/qlhbb

Indexed as:

620 Connaught Ltd. v. Canada (Attorney General)

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

v.

Attorney General of Canada, Minister of Environment, Superintendent of

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Jasper National Park and Parks Canada Agency, Respondents, and

Attorney General of Ontario, Intervener.

[2008] 1 S.C.R. 131

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

2008 SCC 7

File No.: 31661.

Supreme Court of Canada

Heard: November 16, 2007;
Judgment: February 29, 2008.

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

(50 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

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

Summary:

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

Held: The appeal should be dismissed.

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

To determine if the governmental levy is connected to a regulatory scheme, the first step is to identify the existence of a relevant regulatory scheme and, if there is such a scheme, the second step is to find a relationship between the charge and the scheme itself. Here, the regulation of Jasper National Park qualifies as a relevant regulatory scheme: (1) the *Canada National Parks Act* and the *Parks Canada Agency Act* together with the accompanying regulations form a complete, complex and detailed code governing how Jasper National Park should operate; (2) the scheme is aimed at

affecting individuals' behaviour; (3) it provides for a proper estimation of the costs of the operation of the park; and (4) the appellants benefit from the regulation in that a well-maintained National Park attracts more visitors and therefore the greater the potential volume of their businesses. Also, regulations limiting development and thus the number of businesses within the Park allow the appellants to participate in a restricted market in which they are not subject to unlimited competition. With respect to the second step, the necessary relevant relationship between the fees paid by the persons being regulated and the regulatory scheme exists because the fees are tied to the costs of the regulatory scheme. While the fee revenue should not exceed the regulatory costs in order to avoid rendering s. 53 of the *Constitution Act, 1867* meaningless, the government should be given some reasonable leeway. In this case, given the evidence, it can be inferred that the fee revenues generated in Jasper National Park likely did not exceed, and certainly did not significantly exceed, the cost of the regulatory scheme for the Park. Accordingly, [page134] the business licence fees are connected to the regulatory scheme governing the Park. [paras. 25-27] [paras. 30-34] [paras. 37-40] [paras. 44-45]

Cases Cited

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

Statutes and Regulations Cited

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

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

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

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

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

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

Authors Cited

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

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

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

History and Disposition:

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

[page135]

Counsel:

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

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

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

The judgment of the Court was delivered by

ROTHSTEIN J.:--

I. Introduction

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

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

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

[page136]

II. The Power to Tax

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

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

> The provision codifies the principle of no taxation without representation, by requiring any bill

> that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.
>
> In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, "[t]he Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."
>
> The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 *Ottawa L. Rev.* 25, at p. 41:
>
> > Through the centuries, the principle was maintained that taxation required representation and consent. [page137] The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.

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

III. Facts

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

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

IV. Overview of Statutes and Regulations Governing National Parks

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

10 The obligation to obtain a licence to sell alcoholic beverages in national parks and pay the applicable licence fees arises from a combination of the relevant statutes and regulations. Sections 16(1)(*n*) and 16(1)(*r*) of the *National Parks*

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

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

[page139]

V. Appellants' Position

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

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

VI. Respondent's Position

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

[page140]

VII. Selecting the Appropriate Regulatory Scheme

15 The narrow scheme proposed by the appellants focuses exclusively on the regulation of the sale of alcoholic

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

VIII. Analysis

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

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

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

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

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

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

2. *Regulatory Charges Distinguished From User Fees*

19 It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig*, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged cannot exceed the cost to the government of providing the services or facilities.

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

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

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

3. *The Characteristics of a Tax*

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

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

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

4. *Distinguishing a Regulatory Charge From a Tax*

24 The distinction between a tax and a regulatory charge was not the way in which the Court in *Lawson* dealt with the matter before it. To address that issue, Gonthier J. in *Westbank* added a fifth consideration to those articulated by Duff J. in *Lawson*: that the government levy would be in pith and substance a tax if it was "unconnected to any form of a regulatory scheme" (para. 43). This fifth consideration provides that even if the levy has all [page144] the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme.

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

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

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

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

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

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

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

> This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.
>
> (*Westbank*, at para. 44)

[page145]

28 In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank.*

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

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

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

Step 1:

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

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

prohibited within the parks and to whom authority is delegated. Together, these statutes and the regulations form a complete and detailed scheme of how Jasper National Park should operate. Therefore, the first of the regulatory scheme criteria is satisfied.

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

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

The operation of Jasper National Park must be in accordance with this principle. The object of operating the park for the benefit, education and enjoyment of the people of Canada is intended to encourage the use of the park by Canadians, while preserving the integrity of the park for the future. Regulation of the behaviour of current visitors to and businesses in the park so that they do not use the park in a manner which would impair enjoyment of the park by present and future generations helps to achieve these goals. The second criterion is satisfied.

[page147]

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

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

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

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

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

customer base.

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

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

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

Step 2:

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

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

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

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

In this case, it is equally necessary that the fee revenue not exceed the regulatory costs in order to avoid rendering s. 53 of the *Constitution Act, 1867* meaningless.

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

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

regulating Jasper National Park.

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

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

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

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

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

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

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

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

6. *Proprietary Charges*

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

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

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

IX. Conclusion

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

* * * * *

APPENDIX

Constitution Act, 1867

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

[page154]

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

...

1A. The Public Debt and Property.

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

...

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

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

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

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

...

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

...

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

...

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

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

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

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

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

20. ...

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

...

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

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

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

24. The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix the fees or the manner of calculating [page156] fees in respect of products, rights or privileges provided by the Agency.

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

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

4. ...

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

National Parks General Regulations, SOR/78-213

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

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

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

Solicitors:

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

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

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

cp/e/qllls

Indexed as:

Confédération des syndicats nationaux v. Canada (Attorney General)

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.

[page513]

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.

Statutes and Regulations Cited

Act to amend the Employment Insurance Act and the Employment Insurance (Fishing) Regulations, S.C. 2001, c. 5, s. 9.

Budget Implementation Act, 1994, S.C. 1994, c. 18, s. 26.

Budget Implementation Act, 2003, S.C. 2003, c. 15, s. 21.

Budget Implementation Act, 2004, S.C. 2004, c. 22, s. 25.

Constitution Act, 1867, ss. 53, 91(2A), (3).

Employment and Immigration Reorganization Act, S.C. 1977, c. 54.

Employment and Social Insurance Act, S.C. 1935, c. 38.

Employment Insurance Act, S.C. 1996, c. 23, ss. 22(1), 23(1), 24, 25, 56 to 65.2, 66 to 66.3, 71, 72, 73, 75, 77, 109(*c*), 135(2), Schedule II, s. 12.

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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Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 39, 62, 63.

Authors Cited

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 5e éd. Cowansville, Qué.: Yvon Blais, 2008.

Canada. House of Commons. *House of Commons Debates*, vol. 136, 2nd Sess., 36th Parl., November 1, 1999.

Canada. House of Commons. *House of Commons Debates*, vol. 137, 1st Sess., 37th Parl., March 2, 2001.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., vol. 1. Scarborough, Ont.: Thomson/Carswell, 2007 (updated 2007, release 2).

Issalys, Pierre, et Denis Lemieux. *L'action gouvernementale: Précis de droit des institutions administratives*, 2e éd. rev. et augm. Cowansville, Qué.: Yvon Blais, 2002.

Magnet, Joseph Eliot. *Constitutional Law of Canada*, vol. 1, *Federalism / Aboriginal Peoples*, 9th ed. Edmonton: Juriliber, 2007.

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)

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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.

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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]

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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.

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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*.

[page548]

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;
>
> [page550]
>
> (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:

[page551]

> 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.

[page552]

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.

[page553]

* * * * *

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.

Indexed as:

Kingstreet Investments Ltd. v. New Brunswick (Finance)

Kingstreet Investments Ltd. and 501638 NB Ltd., Appellants/Respondents on cross-appeal;
v.
Province of New Brunswick as represented by the Department of Finance and New Brunswick Liquor Corporation, Respondents/Appellants on cross-appeal, and Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Alberta, Canadian Constitution Foundation and Consumers' Association of Canada, Interveners.

[2007] 1 S.C.R. 3

[2007] S.C.J. No. 1

2007 SCC 1

File No.: 31057.

Supreme Court of Canada

Heard: June 20, 2006;
Judgment: January 11, 2007.

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

(62 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Catchwords:

Constitutional law -- Remedy -- Restitution -- Ultra vires taxes -- Taxpayers seeking reimbursement of user charges paid pursuant to ultra vires legislation -- Whether Crown immune from claims for recovery of ultra vires taxes -- Whether such claims must be analysed on basis of constitutional principles rather than unjust enrichment.

Restitution -- Unjust enrichment -- Ultra vires taxes -- Taxpayers seeking reimbursement of user charges paid pursuant to ultra vires legislation -- Whether taxpayers' claims for recovery of ultra vires taxes must be [page4] analysed on basis of constitutional principles rather than unjust enrichment.

Restitution -- Defences -- Passing-on defence -- Protest and compulsion exception -- Taxpayers seeking reimbursement of user charges paid pursuant to ultra vires legislation -- Whether passing-on defence applicable to deny recovery -- Whether taxpayers' payments made under protest and compulsion recoverable.

Summary:

Since 1988, the corporate taxpayers have been operating a number of night clubs in New Brunswick that are licensed to sell alcoholic beverages. They purchase their alcohol from the provincial liquor corporation's retail stores and, in addition to the retail price, pay a user charge, as prescribed by regulation. The taxpayers challenged the constitutional validity of the user charge and seek by way of relief reimbursement of all amounts paid over the years with compound interest. The Court of Queen's Bench declared the user charge to constitute an unconstitutional indirect tax but denied recovery. The court found that the taxpayers had passed on the tax burden to their customers in the form of increased prices and applied the passing-on defence to the taxpayers' claim for unjust enrichment. The court also applied the general rule against recovery of *ultra vires* taxes. The majority of the Court of Appeal allowed the restitutionary claim with respect to all monies paid from the time the taxpayers protested by commencing legal proceedings against the Province. For monies paid prior to the commencement of legal proceedings, which were held not to have been paid under protest, the majority denied the claim on the basis of the passing-on defence.

Held: The appeal is allowed in part. The cross-appeal is dismissed.

This case should be decided on the basis of constitutional principles rather than unjust enrichment as an unjust enrichment analysis is ill-suited to deal with the issues raised by *ultra vires* taxes. The taxpayers in this case have recourse to a remedy as a matter of constitutional right. This remedy is the only appropriate one because it raises important constitutional principles [page5] which would be ignored by treating the claim under another category of restitution. [para. 12] [para. 34]

Restitution is generally available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*. Such restitution is warranted to guarantee respect for constitutional principles, in particular, in this case, the principle that the Crown may not levy a tax except with authority of the Parliament or the Legislature. This principle of "no taxation without representation" is central to our conception of democracy and the rule of law. When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would thus condone a breach of this most fundamental constitutional principle. As a result, a taxpayer who has made a payment pursuant to *ultra vires* legislation has a right to restitution. In a public law context, a rule which would, for policy considerations, immunize public authorities from restitutionary claims with respect to monies paid under invalid legislation must be rejected. To privilege policy considerations in the case of *ultra vires* taxes threatens to undermine the rule of law. Moreover, the availability of suspended declarations of invalidity and the possibility for Parliament or a legislature to enact valid taxes and apply them retroactively, so as to limit or deny recovery of *ultra vires* taxes, are sufficient to guard against the possibility of fiscal chaos. [para. 12] [paras. 14-15] [paras. 20-21] [paras. 25]

The passing-on defence is not available to the Crown in the context of a claim for the recovery of taxes paid pursuant to *ultra vires* legislation. The defence is inconsistent with the basic premise of restitution law. Restitutionary principles provide for restoration of what has been taken or received from the plaintiff without justification. Restitution law is not concerned by the possibility of the plaintiff obtaining a windfall because it is not founded on the concept of compensation for loss. The defence is also economically misconceived and creates serious difficulties of proof as there are inherent difficulties in a commercial marketplace of proving that the loss was not passed onto consumers. [para. 42] [para. 44] [paras. 47-48]

[page6]

Since the passing-on defence is generally inapplicable in the context of *ultra vires* taxes, it is unnecessary to deal with the doctrine of protest and compulsion which functions as an exception to the passing-on defence. However, as a general rule, this doctrine should be discarded insofar as it applies to payments made to public authorities, whether pursuant to unconstitutional legislation or as the result of a misapplication of otherwise valid legislation. [para. 52] [para. 57]

Claims for the recovery of *ultra vires* taxes may be subject to an applicable limitation period. Here, the six-year limitation period set out in s. 9 of the New Brunswick *Limitation of Actions Act* applies. The taxpayers can therefore only recover, with interest, the user charges paid during the six years preceding the filing date of their notice of application. However, this is not an appropriate case for the awarding of compound interest as the taxpayers did not allege any wrongful conduct on behalf of the Province that might warrant moral sanction. [para. 59] [paras. 61-62]

Cases Cited

Discussed: *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; **referred to:** *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581; *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, [1993] A.C. 70; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *United States v. Butler*, 297 U.S. 1 (1936); *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575, 2004 SCC 75; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25; *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; *Ross v. The King* (1902), 32 S.C.R. 532; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403; *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210; *Ville de Sept-Îles v. Lussier*, [1993] R.J.Q. 2717; *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51; *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, 2004 SCC 38; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Law Society of Upper Canada v. Ernst & Young* (2002), 59 O.R. (3d) 214; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Miron v. [page7] Trudel*, [1995] 2 S.C.R. 418; *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, 2002 SCC 43.

Statutes and Regulations Cited

Civil Code of Lower Canada, arts. 1047, 1048.

Civil Code of Québec, S.Q. 1991, c. 64, art. 1491.

Constitution Act, 1867, ss. 53, 90, 92(9).

Fees Regulation -- Liquor Control Act, N.B. Reg. 89-167, s. 5.

Limitation of Actions Act, R.S.N.B. 1973, c. L-8, s. 9.

Liquor Control Act, R.S.N.B. 1973, c. L-10, s. 200(3).

Authors Cited

Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 6e éd. Cowansville, Qué.: Yvon Blais, 2005.

Birks, Peter. "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", in P. D. Finn, ed., *Essays on Restitution*. Sydney, Australia: Law Book Co., 1990, 164.

Goff of Chieveley, Robert Goff, Baron, and Gareth Jones. *The Law of Restitution*, 4th ed. London: Sweet & Maxwell,

1993.

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

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

Maddaugh, Peter D., and John D. McCamus. *The Law of Restitution*. Aurora, Ont.: Canada Law Book, 2004 (loose-leaf updated September 2005).

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the New Brunswick Court of Appeal (Ryan, Robertson and Richard JJ.A.) (2005), 254 D.L.R. (4th) 715, 285 N.B.R. (2d) 201, 744 A.P.R. 201, 8 B.L.R. (4th) 182, 2005 G.T.C. 1510, [2005] N.B.J. No. 205 (QL), 2005 NBCA 56, reversing in part a decision of Russell J. (2004), 236 D.L.R. (4th) 733, 273 N.B.R. (2d) 6, 717 A.P.R. 6, [2004] N.B.J. No. 75 (QL), 2004 NBQB 84. Appeal allowed in part and cross-appeal dismissed.

[page8]

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Joseph J. Arvay, Q.C., and *Brent B. Olthuis*, for the intervener the Consumers' Association of Canada.

The judgment of the Court was delivered by

BASTARACHE J.:--

1. Facts

1 Since 1988, the corporate appellants have been operating a number of night clubs in the cities of Fredericton and Moncton, New Brunswick, that are licensed to sell alcoholic beverages. They purchase their alcohol from the New Brunswick Liquor Corporation's retail stores and, in addition to the retail price, pay a user charge, as prescribed by regulation adopted pursuant to the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, s. 200(3). That user charge has varied over the years from 11 percent of the retail price to the current 5 percent: see *Fees Regulation -- Liquor Control Act*,

N.B. Reg. 89-167, s. 5. The trial judge found, and the parties agree, that the appellants have paid over $1 million in such charges. The appellants have challenged the constitutional validity of the user charge and seek by way of relief reimbursement of all amounts paid over the years with compound interest.

2 The appellants' initial argument was that the user charge constituted an indirect tax, which is *ultra vires* the Province of New Brunswick's [page9] constitutional taxing power. However, the day before the trial began, appellants' counsel forwarded a letter to the Clerk's office informing the court that he would argue in the alternative that the user charge constituted a direct tax that was illegally imposed by regulation rather than originating in the legislature. The appellants may have realized that their submission that the charge constituted an indirect tax weighed in favour of the Province's argument that the club owners had in fact passed on the cost of the charge to their customers by increasing their prices.

3 The appellants also attempted to argue that the user charge, if held to constitute a tax, was *ultra vires* in the administrative law sense. It was argued that, as a matter of statutory interpretation, the legislature authorized the imposition of a user charge and not a tax. Robertson J.A., on behalf of a majority of the Court of Appeal, concluded that this was a last-minute attempt to characterize the user charge as a misapplication of an otherwise valid statutory provision, in order to avoid the application of the general rule against the recovery of *ultra vires* taxes proposed by La Forest J. in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 ("*Air Canada*").

4 The trial judge held that the user charge constituted an indirect tax which, since it was not tailored to the cost of regulating the licensees, could not constitute a "[l]icenc[e] in order to [*sic*] the raising of a Revenue for Provincial, Local, or Municipal Purposes" in accordance with s. 92(9) of the *Constitution Act, 1867* ((2004), 273 N.B.R. (2d) 6, 2004 NBQB 84, at para. 4). As a matter of fact, he held that the user charge had been passed on and that it therefore qualified as an indirect tax. Accordingly, the trial judge declared the impugned regulation to be *ultra vires* the Province of New Brunswick. The Province did not appeal from this judgment. Before the Court of Appeal, the parties agreed that the user charge constitutes an unlawful [page10] tax ((2005), 285 N.B.R. (2d) 201 , 2005 NBCA 56, at para. 1). Robertson J.A. rejected the appellants' attempts to recharacterize the user charge as either a direct tax which could not be imposed by way of regulation, or as *ultra vires* in the administrative law sense. I agree: the trial judge's decision that the user charge constitutes an unconstitutional indirect tax must stand.

5 As a result, this Court is only concerned with the appellants' claim for relief. The principal issue is whether money paid to a public authority pursuant to *ultra vires* legislation is recoverable. The case is argued on the basis of a claim for unjust enrichment. The Province relies on the common law bar to recovery of unconstitutional taxes articulated by La Forest J. in *Air Canada*. The Province further relies on La Forest J.'s judgment in *Air Canada*, at p. 1202, for the proposition that "[t]he law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss." It submits that where the burden of an *ultra vires* tax has been passed on, the requirement for a corresponding deprivation has not been met.

6 By contrast, the appellants submit that La Forest J.'s common law bar to recovery for *ultra vires* taxes was *obiter* and did not win a majority of votes in *Air Canada*. They rely on Wilson J.'s dissenting opinion in that case and on this Court's unanimous decision in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581 ("*Ontario (Liquor Control Board)*"), for the proposition that the responsibility of ensuring the applicability and the constitutionality of a law lies with the governmental agency in charge of administering that law, not the taxpayer. Turning to the passing-on defence, the appellants argue that it is inconsistent with basic restitutionary principles, that it is economically misconceived, and that it is fraught with practical difficulties related to proof. In their submission, the trial judge's finding that the cost of [page11] the tax was passed on to bar patrons is irrelevant to their unjust enrichment claim.

2. Judicial History

2.1

New Brunswick Court of Queen's Bench (2004), 273 N.B.R. (2d) 6, 2004 NBQB 84

7 Russell J. dismissed the appellants' claim for relief. The trial judge found as a matter of fact that the appellants had passed on the tax burden to their customers in the form of increased prices. On this basis, he applied the passing-on defence to the appellants' claim for unjust enrichment and denied recovery. Moreover, the trial judge applied the general rule against recovery of *ultra vires* taxes enunciated by La Forest J. in *Air Canada*, at pp. 1206-7. As in *Air Canada*, he found the regulation to be deficient only in form, insofar as it resulted from the Province's failure to tailor the charge to the cost of regulating the licensees. Finally, the trial judge emphasized that fiscal turmoil could result if restitution were allowed, and that government would be driven to the inefficient course of re-imposing the tax.

2.2

New Brunswick Court of Appeal (2005), 285 N.B.R. (2d) 201, 2005 NBCA 56

8 Robertson J.A., writing on behalf of the majority, noted that the distinction between monies paid under mistake of fact and monies paid under mistake of law has been abolished and that the issue must therefore be decided on the basis of restitutionary principles. He considered this Court's decision in *Air Canada* but was not prepared to immunize public authorities from restitutionary claims resulting from invalid legislation.

[page12]

9 However, he was prepared to recognize the validity of the passing-on defence, relying on La Forest J.'s statement in *Air Canada* to the effect that the law of restitution is not intended to provide windfalls to plaintiffs. He concluded that the equities lie with the Province because, when a benefit accrues to the government, it accrues to the public interest, and because to hold otherwise would cause bar patrons to pay the tax twice. Robertson J.A. acknowledged that the defence has been much criticized for being contrary to restitutionary principles, economically misconceived and fraught with practical difficulties. However, he rejected the economic argument because there is nothing preventing the plaintiffs from proving that they are still out of pocket despite having passed on a portion of the tax -- as a result of reduced sales, for example. Turning to the practicality of the defence, Robertson J.A. considered the evidentiary difficulties and costs associated with discerning whether the tax has effectively been passed on. He resolved these concerns by placing the initial burden of proof on the Province, with the caveat that there is a rebuttable presumption of passing on in the case of an illegal indirect tax, and the further caveat that the defence would have no application in cases where monies were paid under compulsion and protest. Robertson J.A. emphasized that the plaintiffs should not be entitled to a windfall and expressed concern that the government be able to defend claims for unjust enrichment to avoid potential fiscal disruption.

10 Accordingly, the majority allowed the restitutionary claim with respect to all monies paid from the time the claimants protested by commencing legal proceedings against the Province (May 25, 2001). For monies paid prior to the commencement of legal proceedings, which were held not to have been paid under protest, the majority denied the claim on the basis of the passing-on defence. In the [page13] alternative, Robertson J.A. concluded that if he was wrong with respect to the existence of the passing-on defence in Canadian restitutionary law, then the claimants would be entitled to all monies paid subject to the six-year limitation period set down in the *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8.

11 Ryan J.A. dissented and held that the appellants' claim should fail because they had recouped the cost from their customers. Ryan J.A. was of the view that the passing-on defence goes to the existence of one of the three elements of a claim for unjust enrichment, namely a corresponding deprivation. Thus, regardless of whether payments were made under protest and compulsion, if the costs were passed on, then there was no deprivation and no unjust enrichment. In his opinion, payment under protest could not alter the fact that one of the three elements of an unjust enrichment claim

had not been established.

3. Introduction

12 This appeal concerns whether restitution is available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*. For the reasons given below, I find that restitution is generally available. I agree with Robertson J.A. that there is no general immunity affecting recovery of an illegal tax. I would, however, decide the case on the basis of constitutional principles rather than unjust enrichment. An unjust enrichment analysis is ill-suited to deal with the issues raised by *ultra vires* taxes. The Court's central concern must be to ensure the constitutionality of fiscal legislation. Moreover, the availability of suspended declarations of invalidity as ordered in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, and the possibility of retroactive ameliorating legislation are sufficient to guard against the possibility of fiscal chaos. I would also reject the passing-on defence [page14] raised by the Crown in this case. Accordingly, I would allow the appeal in part.

4. Restitution for *Ultra Vires* Taxes

4.1 *Constitutional Remedy*

13 This case is about the consequences of the injustice created where a government attempts to retain unconstitutionally collected taxes. Because of the constitutional rule at play, the claim can be dealt with more simply than one for unjust enrichment in the private domain. Taxes were illegally collected. Taxes must be returned subject to limitation periods and remedial legislation, when such a measure is deemed appropriate. As will later be discussed, no passing-on defence should be entertained.

14 The Court's central concern must be to guarantee respect for constitutional principles. One such principle is that the Crown may not levy a tax except with authority of the Parliament or the legislature: *Constitution Act, 1867*, ss. 53 and 90. This principle of "no taxation without representation" is central to our conception of democracy and the rule of law. As Hogg and Monahan explain, this principle "ensures not merely that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes" (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 246. See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at pp. 55-16 and 55-17; *Eurig*, at para. 31, *per* Major J.).

15 When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle. As a result, [page15] a citizen who has made a payment pursuant to *ultra vires* legislation has a right to restitution: P. Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", in P. D. Finn, ed., *Essays on Restitution* (1990), c. 6, at p. 168.

16 This Court has previously recognized this right. In *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576 , the Court struck down a provision that purported to bar recovery of *ultra vires* taxes. At p. 590, Dickson J. (as he then was) based his holding on constitutional principles:

> Section 5(7) of *The Proceedings against the Crown Act*, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under *The British North America Act, 1867*. It also brings into question the right of a Province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal Parliament or a provincial Legislature can tax beyond the limit of its powers, and by prior or *ex post facto* legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits. To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert

means to impose illegal burdens.

17 In *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, [1993] A.C. 70, the House of Lords has also recognized a right to restitution for payments made pursuant to *ultra vires* taxes. Without even referring to unjust enrichment, Lord Goff held, at p. 172, that restitution was available as a matter of "common justice":

> ... the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law -- enshrined in a famous constitutional document, the Bill of Rights 1688 -- that taxes should not be levied without the authority of Parliament; and full effect can only be given to that [page16] principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right.

18 However, the general availability of restitution for *ultra vires* taxes has to date not been clearly established. In *Air Canada*, La Forest J. was of the opinion that policy considerations operated to take claims for taxes paid pursuant to unlawful legislation outside of the restitutionary context. He proposed a general rule that the Crown should be immune to claims for recovery of unconstitutional and *ultra vires* levies. But La Forest J. did not command a majority in that case and so the status of his proposed immunity rule was never clear. It is necessary, therefore, to consider why such an immunity rule should be rejected before discussing the proper basis for restitution in this case.

4.2 *Rejecting the Immunity Rule*

19 In *obiter* statements pronounced in *Air Canada*, La Forest J. explained on behalf of three members of a six-judge panel that, while

> [i]t is clear that the principles of unjust enrichment can operate against a government to ground restitutionary recovery ... in this kind of case, where the effect of an unconstitutional or *ultra vires* statute is in issue, I am of the opinion that special considerations operate to take this case out of the normal restitutionary framework, and require a rule responding to the specific underlying policy concerns in this area. [Emphasis added; p. 1203.]

20 Like Robertson J.A., I accept Wilson J.'s rationale for rejecting a rule which would immunize public authorities from restitutionary claims with respect to monies paid under invalid legislation. Wilson J. was of the view that "[w]here the payments were made pursuant to an unconstitutional statute there is no legitimate basis on which they can be retained" (*Air Canada*, at p. 1216). As Professor Hogg explained at p. 55-13:

[page17]

> Where a tax has been paid to government under a statute subsequently held to be unconstitutional, can the tax be recovered by the taxpayer? In principle, the answer should be yes. The government's right to the tax was destroyed by the holding of unconstitutionality, and the tax should be refunded to the taxpayer. [Footnote omitted.]

This very principle was recognized by a unanimous Court in *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, where it was held that an *ultra vires* law cannot constitute a juristic reason for the state's enrichment.

21 As Wilson J. explained in dissent in *Air Canada*, the immunity rule proposed by La Forest J. amounts to saying that "the principle should be reversed *for policy reasons* in the case of payments made to governmental bodies" (p. 1215 (emphasis in original)). Those policy reasons, according to La Forest J., included the fact that the unconstitutional tax at issue in *Air Canada* came close to raising a merely technical issue. Relying on this passage, the trial judge in the present

case held that the impugned regulation was deficient only in form, insofar as it resulted from the Province's failure to tailor the charge to the cost of regulating the licensees. In my view, privileging policy considerations in the case of *ultra vires* taxes threatens to undermine the rule of law.

22 Professor Hogg has explained that

> the constitutional principle that ought to dominate all others in this context is the principle that the Crown may not levy a tax except by the authority of the Parliament or Legislature. This principle, enshrined in the Bill of Rights of 1688, ensures not merely that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes (and vote supply). To permit the Crown to retain a tax that has been levied without legislative authority is to condone a breach of one of the most fundamental constitutional principles. [Footnote omitted; pp. 55-16 and 55-17.]

[page18]

23 Professors Hogg and Monahan argue, at pp. 246-47, that permitting taxpayers to recover taxes paid pursuant to unconstitutional statutes is more consistent with the well-settled rule that the Crown may recover monies paid out of the consolidated revenue fund without legislative authority, where the expenditure was not authorized. Such has always been the case,

> even if it was made under a mistake of law, and even if the recipient could have raised the defences of estoppel or change of position to an action by a private plaintiff. In this situation, the governing rule is the fundamental constitutional principle that prohibits the Crown from spending public funds except under the authority of the Parliament or Legislature. To apply the ordinary rules of restitution so as to render an unauthorized expenditure irrecoverable would in effect permit an important constitutional safeguard to be evaded. The same reasoning ought to apply when it is the subject suing the Crown to recover a payment made to the Crown, since the same constitutional principle is in issue. [Emphasis added; footnotes omitted; p. 247.]

24 If the constitutional rule requiring the Crown to only spend public funds under legislative authority has sufficient weight to compel recovery of an unauthorized expenditure by the Crown, notwithstanding the principles of unjust enrichment, then it is difficult to understand a common law bar to the recovery of unconstitutionally imposed taxes. Presumably, the constitutional limitations on the Crown's power to spend are of equal importance as the constitutional limitations on the Crown's power to raise revenue. In my view, these principles are really two sides of the same coin.

25 Another policy reason given by La Forest J. for the immunity rule was a concern for fiscal inefficiency and fiscal chaos (p. 1207). My view is that concerns regarding potential fiscal chaos are best left to Parliament and the legislatures to address, should they choose to do so. Where the state leads evidence before the court establishing a real concern about fiscal chaos, it is open to the court to suspend [page19] the declaration of invalidity to enable government to address the issue. In *Eurig*, Major J. suspended a declaration of invalidity for six months. Because, in that case, unconstitutionally levied probate fees were used to defray the costs of court administration in the Province, he expressed concern that an immediate deprivation of this source of revenue might have harmful consequences for the administration of justice. Moreover, this Court's decision in *Air Canada* demonstrates that it will be open to Parliament and to the legislatures to enact valid taxes and apply them retroactively, so as to limit or deny recovery of *ultra vires* taxes. Obviously, such legislation must also be constitutionally sound.

26 La Forest J.'s proposed immunity rule seems to have arisen in part out of a concern that the provinces might be constitutionally barred from passing remedial legislation by the holding in *Amax Potash*. La Forest J. referred to the

American case of *United States v. Butler*, 297 U.S. 1 (1936), in which the Supreme Court held unconstitutional the *Agricultural Adjustment Act*, making almost $1 billion in invalid taxes repayable by the government. In response, Congress passed an Act which provided that no refunds for such taxes would be allowed unless the claimant could establish the burden of the tax. La Forest J. stated that, "[i]n view of *Amax, supra*, a province faced with a similar situation could not enact a similar measure" (p. 1205).

27 The legislation at issue in *Amax Potash* was s. 5(7) of the Saskatchewan *Proceedings against the Crown Act*, R.S.S. 1965, c. 87, which provided:

> **5.** ...
>
> (7) No proceedings lie against the Crown under this or any other section of this Act in respect of anything heretofore or hereafter done or omitted and purporting [page20] to have been done or omitted in the exercise of a power or authority under a statute or a statutory provision purporting to confer or to have conferred on the Crown such power or authority, which statute or statutory provision is or was or may be beyond the legislative jurisdiction of the Legislature;

In declaring this provision to be unconstitutional, Dickson J. explained that

> if a statute is found to be *ultra vires* the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means. [p. 592]

The impugned provision in *Amax Potash* sought to immunize the Province from any claim relating to any action or omission authorized by legislation subsequently declared *ultra vires*. In this sense, the legislation attempted to attach legal consequences to acts undertaken pursuant to invalid laws. By contrast, in *Air Canada*, the Province of British Columbia enacted a new and valid tax which it imposed retroactively. It then retained the monies paid pursuant to the invalid legislation as payment for the new and valid retroactive tax. The critical distinction between these two cases is that the valid retroactive tax at issue in *Air Canada* constituted a legal basis for the taking and retaining of the monies, independently of the prior unconstitutional tax. For this reason, I find La Forest J.'s concern about the impact of *Amax Potash* on the Provinces' ability to enact retroactive legislation so as to limit recovery of unconstitutional taxes to be, with respect, unwarranted.

28 Turning to La Forest J.'s concern about potential fiscal inefficiency, I agree with Wilson J. in *Air Canada*, where she queries:

> Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's [page21] mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me) it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due. [p. 1215]

29 Concerns about fiscal chaos and inefficiency should not be incorporated into the applicable rule. I agree with Professor Birks that

> [s]o far as concerns the fear of wholesale reopening of past transactions and the danger of

> fiscal disruption, the principle of legality [including that government must tax with legislative authorization and within its constitutional limitations] outweighs those dangers and requires that judges leave it to legislatures to impose what restrictions on the right of restitution they think necessary, wise and proper. At all events, a merely hypothetical danger of disruption certainly does not warrant an undiscriminating denial of restitution. [p. 204]

30 For these reasons, I would not adopt the general immunity rule proposed by La Forest J. It is important to note, however, that La Forest J. had envisioned the rule against recovery of *ultra vires* taxes as operating outside of the private law context. In his view, the special policy concerns meant that the issue of recovery of *ultra vires* taxes was outside of the normal unjust enrichment and restitution framework. As he put it, at p. 1204, "[w]hat this suggests is that there are solid grounds of public policy for not according a general right of recovery in these circumstances, and that this prohibition exists quite independently of the law of restitution" (emphasis added). As such, failure to adopt the immunity rule articulated by La Forest J. does not suggest that *within* the law of unjust enrichment policy considerations might not apply to limit the liability of public bodies in certain contexts. [page22] Because La Forest J.'s immunity rule was formulated outside of the law of unjust enrichment, its rejection should not have a bearing on the future development of this branch of the law. This being said, as I will now demonstrate, the law of unjust enrichment should not find application in cases for the recovery of illegally imposed taxes.

31 Having rejected the immunity rule, this raises the question of whether claims for the recovery of unconstitutional taxes should be analysed on the basis of the private law rules of unjust enrichment or constitutional principles. As explained above, the recovery of unconstitutional taxes is warranted on the basis of limitations to the state's constitutional authority to tax, and in particular on the fundamental constitutional principle that there shall be no taxation without representation (see Birks, at c. 6; Hogg, at p. 55-16; and Hogg and Monahan, at pp. 246-47). This would place the restitutionary right clearly within a public law context. However, there is no question that the law of unjust enrichment, although developed in the private law context, can apply to public bodies. Indeed, the present case was argued at the lower courts and before this Court on the grounds of unjust enrichment. I must therefore discuss why, in my view, an unjust enrichment analysis is inappropriate in this case before setting out the proper restitutionary basis for the repayment of *ultra vires* taxes.

4.3

Basis for the Constitutional Remedy: Why an Unjust Enrichment Framework Is Inappropriate

32 Restitution is a tool of corrective justice. When a transfer of value between two parties is normatively [page23] defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions. In *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, McLachlin J. (as she then was) neatly encapsulated this normative framework: "The concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted" (p. 804).

33 There are at least two distinct categories of restitution: (1) restitution for wrongdoing; and (2) restitution for unjust enrichment: P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-7. This case raises the separate notion of restitution based on the constitutional principle that taxes should not be levied without proper legal authority. The first category is not readily applicable here since, in the case of *ultra vires* taxes enacted in good faith, it cannot be said that the government was acting as a "wrong-doer". The choice, then, is between restitution for unjust enrichment or restitution based on constitutional grounds.

34 The Province submits that, from a moral and public policy perspective, it cannot be said to have unjustly benefited from an enrichment as a result of the *ultra vires* charges. I would not decide this appeal as a matter of unjust enrichment. The taxpayers in this case has recourse to a remedy as a matter of constitutional right. This remedy is in fact the only appropriate remedy because it raises important constitutional principles which would be ignored by treating the claim under another category of restitution. Claims of unjust enrichment against the government may still be

appropriate in certain circumstances (see *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575, 2004 SCC 75). Nevertheless, it is my view that the analytical framework of the modern doctrine of unjust enrichment is inappropriate in this case.

[page24]

35 In a colloquial sense, it might be said that the retention of improperly collected taxes unjustly enriches governments. However, a technical interpretation of "benefit" and "loss" is hard to apply in tax recovery cases. Furthermore, in the context of this case, the unjust enrichment framework adds an unnecessary layer of complexity to the real legal issues. Some of the components of the modern doctrine are of little use to a principled disposition of the matter, but are rather liable to confuse the proper application of the key principles of constitutional law at issue.

36 The application of private law principles in the realm of public and constitutional law is not without its difficulties. These difficulties have in the past been resolved by a flexible application of the unjust enrichment principle. McLachlin J. had explained in *Peel* that the three-part formulation of the unjust enrichment principle was capable of going beyond the traditional categories of recovery and of allowing the law to develop in a flexible way as required to meet changing perceptions of justice. This restitutionary framework was recently restated and refined in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25. *Garland* established a two-part analysis for determining whether there was a juristic reason for the enrichment that should operate to deny recovery. First, the plaintiff is required to show that no established category of juristic reason for the enrichment exists. If no reason exists, the burden shifts to the defendant to show that there is some other reason why recovery should be denied. At this point of the analysis, the Court explicitly recognized that the juristic reasons for the enrichment had to be considered in light of the reasonable expectation of the parties and certain public policy considerations (para. 46). It is at this second stage of the test that courts would weigh the equities in the particular circumstances of each case.

[page25]

37 McLachlin J. had previously explained in *Peel* that

> [t]he courts' concern to strike an appropriate balance between predictability in the law and justice in the individual case has led them in this area, as in others, to choose a middle course between the extremes of inflexible rules and case by case "palm tree" justice. The middle course consists in adhering to legal principles, but recognizing that those principles must be sufficiently flexible to permit recovery where justice so requires having regard to the reasonable expectations of the parties in all the circumstances of the case as well as to public policy. [p. 802]

38 The *Garland* approach is, as one can see, very complex; it requires that courts look only to *proper* policy considerations. By proper policy considerations, I mean those that have traditionally informed the development of restitutionary law. Otherwise, they risk turning the test into a subjective analysis that has less to do with legal reasoning than with the dispensing of "palm tree" justice. As previously explained, La Forest J. was prepared to immunize public bodies in *Air Canada* where monies were paid pursuant to an unconstitutional statute for reasons of public policy. He explained that "[c]hief among these are the protection of the treasury, and a recognition of the reality that if the tax were refunded, modern government would be driven to the inefficient course of reimposing it either on the same, or on a new generation of taxpayers, to finance the operations of government" (p. 1207). The question in the present case became, ultimately, whether such concerns are properly considered within the *Garland* test. In my view, they are not. Considerations related to preserving the public purse do not properly fall within the second branch of the juristic reason analysis, which is more concerned with broad principles of fairness. In *Garland*, for example, the overriding public

policy concern was ensuring that criminals do not profit from their crime (para. 57). This is not to say that any and all fairness considerations are appropriate. As I said above, they must be rooted in the policy considerations [page26] that are traditionally found in unjust enrichment cases.

39 For the above reasons, I would conclude that the ordinary principles of unjust enrichment should not be applied to claims for the recovery of monies paid pursuant to a statute held to be unconstitutional. I do not therefore need to address in any length the distinction between mistake of law and mistake of fact, which used to be of significance in unjust enrichment cases for mistaken payments. Traditionally, although monies paid under mutual mistake of fact were recoverable, monies paid under mutual mistake of law were not. However, this Court has abandoned the distinction between mistake of fact and mistake of law as it applies to the law of unjust enrichment: see *Air Canada*; *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; and *Pacific National Investments*. There can be no doubt that the ordinary principles of unjust enrichment now apply in cases of payments made pursuant to mutual mistake of law. While this point perhaps needed to be clarified, it is of little moment in this case given that unjust enrichment is an inappropriate framework for restitution.

40 Restitution for *ultra vires* taxes does not fit squarely within either of the established categories of restitution. The better view is that it comprises a third category distinct from unjust enrichment. Actions for recovery of taxes collected without legal authority and actions of unjust enrichment both address concerns of restitutionary justice, but these remedies developed in our legal system along [page27] separate paths for distinct purposes. The action for recovery of taxes is firmly grounded, as a public law remedy in a constitutional principle stemming from democracy's earliest attempts to circumscribe government's power within the rule of law. Unjust enrichment, on the other hand, originally evolved from the common law action of *indebitatus assumpsit* as a means of granting plaintiffs relief for quasi-contractual damages (Maddaugh and McCamus, at p. 1-4; Goff and Jones, *The Law of Restitution* (4th ed. 1993), at p. 7; *Peel*, at pp. 784 and 788, *per* McLachlin J.).

41 From a comparative perspective, it is interesting to note that in Quebec our Court has expressed the view that actions for recovery of illegally collected taxes could be brought by the more simple route that I suggest. In its opinion , such claims could be brought under art. 1491 of the *Civil Code of Québec*, S.Q. 1991, c. 64, or under the predecessor provisions, arts. 1047 and 1048 of the *Civil Code of Lower Canada*, as actions for "undue payment" (*Ross v. The King* (1902), 32 S.C.R. 532; *Abel Skiver Farm Corp. v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403, at p. 423, *per* Beetz J.; *Willmor Discount Corp. v. Vaudreuil (City)*, [1994] 2 S.C.R. 210, at p. 218, *per* Gonthier J.; see also J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), at pp. 556-58; *Ville de Sept-Îles v. Lussier*, [1993] R.J.Q. 2717 (C.A.)).

5. Passing-On Defence

42 Robertson J.A. found that the only possible defence the Province could raise in the present case was that the appellants had passed on the cost of the charge (paras. 46-48). The basic premise of the passing-on defence is that if the taxpayer has passed on the burden of the tax payments to others, usually via price increases charged to its customers, the taxpayer has not suffered a deprivation, the taxing authority's enrichment was not at its [page28] expense, and it would receive a windfall if it were awarded recovery. However, unlike Robertson J.A., I would reject the passing-on defence in the context of the recovery of taxes paid pursuant to *ultra vires* legislation.

43 La Forest J. would have applied the defence, if necessary, so as to deny recovery in *Air Canada*. He found that

> the evidence supports that the airlines had passed on to their customers the burden of the tax imposed upon them. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. If the airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the province received is relevant only in so far as it was received at the airlines'

> expense. [pp. 1202-3]

44 There are three major criticisms of the passing-on defence: first, that it is inconsistent with the basic premise of restitution law; second, that it is economically misconceived; and third, that the task of determining the ultimate location of the burden of a tax is exceedingly difficult and constitutes an inappropriate basis for denying relief.

45 The defence of passing on has developed almost exclusively in the context of recovery of taxes and other charges paid under a mistake of law. If, as La Forest J. suggests in *Air Canada*, "[t]he law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss" (p. 1202), then the defence ought to have arisen in other contexts as well. At the very least, the defence of passing on should also apply to mistaken payments, whether of fact or law, but such has generally not been the case in Canada (see Maddaugh and McCamus, at [page29] p. 11-46). Professors Maddaugh and McCamus suggest that the reason the defence has not been applied outside the context of *ultra vires* taxes is because it is inconsistent with the basic principles of restitutionary law. They argue that "the mere fact that the taxpayer has mistakenly paid, with its own money, the revenue authority is sufficient to establish an unjust enrichment at the plaintiff's expense. As between the taxpayer and the Crown, the question of whether the taxpayer has been able to recoup its loss from some other source is simply irrelevant" (p. 11-45).

46 It is on this same basis that the Australian High Court refused to recognize the defence in *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51. Brennan J. explained that

> [t]he fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did not pay its own money to the Commissioner. The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter. It may be that, if Royal recovers the overpayments it made, the policy holders will be entitled themselves to claim a refund from Royal of so much of the overpayments made by Royal to the Commissioner as represents the amount paid to Royal by the policy holder. However that may be, no defence of "passing on" is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys. [Footnotes omitted; pp. 90-91.]

47 I note that *Royal Insurance* is a case involving the overpayment of taxes, but in my view the principle is equally applicable to the present case. As mentioned earlier, restitutionary principles provide for restoration of "what has been taken or received from the plaintiff without justification" (*Royal Insurance*, at p. 71). Restitution law is not concerned by the possibility of the plaintiff obtaining [page30] a windfall precisely because it is not founded on the concept of compensation for loss.

48 In addition to being contrary to the basic principles of restitution law, the defence of passing on has also been criticized for being economically misconceived and for creating serious difficulties of proof. In *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, 2004 SCC 38, LeBel J., writing in dissent but not on this point, commented on the inherent difficulties in a commercial marketplace of proving that the loss was not passed on to consumers. LeBel J. noted that every commercial entity could be accused of passing on all or part of any damages suffered by it, by its own rates or charges to its customer. This is because it is difficult to determine what effect a change in a company's prices will have on its total sales. Unless the elasticity of demand is very low, the plaintiff is bound to suffer a loss, either because of reduced sales or because of reduced profit per sale. Where elasticity is low, and it can be demonstrated that the tax was passed on through higher prices that did not affect profits per sale or the volume of sales, it would be impossible to demonstrate that the plaintiff could not or would not have raised its prices had the tax not been imposed, thereby increasing its profits even further. LeBel J. referred to these various figures as "virtually unascertainable" (para. 205, citing White J. in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), at p. 493). LeBel J. ultimately concluded that "[t]he passing on defence would, in effect, result in an argument that no damages are ever recoverable in commercial litigation because anyone who claimed to have suffered damages

but was still solvent had obviously found a way to pass the loss on" (para. 206, citing Ground J. in *Law Society of Upper Canada v. Ernst & Young* (2002), 59 O.R. (3d) 214 (S.C.J.), at para. 40).

[page31]

49 Although LeBel J. was criticizing the application of the passing-on defence in tort law, his criticisms are equally appropriate, if perhaps not more so, in the context of restitution law. This is because, unlike restitution law, tort law is premised on the concept of compensation for loss, such that concerns about potential windfalls are appropriate.

50 Recognition of the defence in *Air Canada* has also led to uncertainty in its application. In *Canadian Pacific Air Lines*, released contemporaneously with *Air Canada*, the defence was applied to the claim for recovery of a beverage tax, which the Court noted was imposed on passengers, not on the airline. The airline was simply a collector of the tax. This holding is uncontentious insofar as the airline was merely collecting the tax as an agent of the Crown. In my view, the defence of passing on was not necessary to arrive at that conclusion. In the same case, the airline was allowed to recover the social services tax paid on the value of the aircraft and aircraft parts with no discussion of the defence. However, La Forest J. in *Air Canada* found the defence to be applicable to the tax on fuel so as to deny recovery. The holdings in these cases with respect to the application of the passing-on defence are difficult to reconcile.

51 For the above reasons, I would reject the passing-on defence in its entirety.

6. Application of the Doctrine of Protest and Compulsion

52 Robertson J.A. granted recovery of the illegal user charge on the basis that it was paid under protest. This is another issue that had posed problems [page32] in the context of recovery of money paid under an *ultra vires* tax. The doctrine of protest and compulsion functions as an exception to the passing-on defence. As Professors Maddaugh and McCamus explain, "the defence [of passing on] would no longer be available once the taxpayer signaled, through protest, that the unlawfulness of the taxation measure was being challenged" (pp. 11-44 and 11-45). Thus, even though Robertson J.A. accepted the Province's argument that the appellants had passed on the cost of the tax, he found that the payments made under protest and compulsion were recoverable. Because I have rejected the passing-on defence as generally inapplicable in the context of *ultra vires* taxes, it is not necessary to deal with the doctrine of protest and compulsion. I think some general comments will, however, be useful.

53 In my view, the doctrine of protest and compulsion is simply not applicable to cases such as the present. This flows from the constitutional basis for the right of restitution in this case: that the Crown should not be able to retain taxes that lack legal authority. It therefore matters little whether the taxpayer paid under protest and compulsion. If the law proves to be invalid, then there should be no burden on the taxpayer to prove that they were paying under protest. Such a finding would be inconsistent with the nature of the cause of action in this case. As Lord Goff said in *Woolwich*, at p. 172, "full effect can only be given to that principle [that taxes should not be levied without proper authority] if the return of taxes exacted under an unlawful demand can be enforced as a matter of right". The right of the party to obtain restitution for taxes paid under *ultra vires* legislation does not depend on the behaviour of each party but on the objective consideration of whether the tax was exacted without proper legal authority.

[page33]

54 I also have concerns about the applicability of the doctrine of protest and compulsion to cases where the tax, although collected pursuant to valid legislation, was misapplied in relation to the taxpayer. The tax is valid, but the taxpayer should never have had to pay it. The problem, in my view, stems from the notion of compulsion in the context

of payments made pursuant to law. Duress first found recognition as a limited ground for the recovery of damages against an intimidating party in tort. A contract entered into under duress was held to be voidable at the instance of the coerced party (see Maddaugh and McCamus, at pp. 26-2 and 26-3). The recovery of benefits conferred under duress is achieved via an action in restitution (*ibid*., at p. 26-6.1). Duress vitiates the voluntary nature of the payment.

55 Professors Maddaugh and McCamus explain, at p. 11-20, that "if one is mistaken about the law, one pays because one believes one is obliged to do so by law. If one is responding to duress, it must be that the individual believes or strongly suspects that there is no legal requirement to pay." However, in my opinion, the absence of duress on the part of the taxpayer should not be an important factor. It is not up to the taxpayer but rather to the party that makes and administers the law to bear the responsibility of ensuring the validity and applicability of the law (see also *Ontario (Liquor Control Board)*). I agree with Wilson J. in *Air Canada* that

> payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments "under protest". Any taxpayer paying taxes exigible under a statute which it has no reason to [page34] believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so. [pp. 1214-15]

Although made in the context of *ultra vires* legislation, Wilson J.'s comments are equally applicable to the situation where a taxpayer is required to pay a levy because of an incorrect application of the law. In either case, the protest requirement is inappropriate.

56 There is a second concern which arises in cases where monies have been paid to public authorities pursuant to unconstitutional legislation or as a result of the misapplication of an otherwise valid law. In *Eurig*, for example, payment under protest and the commencement of legal proceedings was held to be sufficient to trigger the exception allowing recovery. The end result is that whenever a tax is declared *ultra vires*, only the successful litigants will be granted recovery of the unconstitutional charges. All other similarly situated persons will not benefit from the Court's holding. This raises concerns about horizontal equity that are similar to those raised by the doctrine of constitutional exemption. This Court has alluded to such concerns in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, and in *Miron v. Trudel*, [1995] 2 S.C.R. 418. In my view, constitutional law should apply fairly and evenly, so that all similarly situated persons are treated the same.

57 I would therefore discard the doctrine of protest and compulsion insofar as it applies to payments made to public authorities, whether pursuant to unconstitutional legislation or as the result of a misapplication of otherwise valid legislation. Once the immunity rule is rejected, there is no need to distinguish between cases involving unconstitutional legislation and cases where delegated legislation is merely *ultra vires* in the administrative law [page35] sense. In all such cases, the payment of the charge should not be viewed as voluntary in a sense that would prejudice the taxpayer. Rather, the plaintiff is entitled to rely on the presumption of validity of the legislation, and on the representation as to its applicability by the public authority in charge of administering it.

58 In cases not involving payments made to public authorities pursuant to unconstitutional legislation or the misapplication of an otherwise valid law, my view is that courts should insist on proof of compulsion in fact. The mere fact that the payment was made in protest should be neither necessary nor sufficient to establish compulsion. Protest may accompany a voluntary payment (in order to protect a hypothetical restitutionary entitlement), and compulsion may occur without any evidence of formal protest. Insisting on compulsion in fact is more principled and ensures that all similarly situated persons will be treated equally, regardless of protest.

7. Application of Limitations Law

59 My view is that claims such as the present may be subject to an applicable limitation period. The New Brunswick *Limitation of Actions Act* provides that:

> **9** No other action shall be commenced but within six years after the cause of action arose.

60 Section 9 was clearly intended to cover all other actions not specifically provided for in the legislation. There is no reason why modern restitutionary claims ought not to be subject to s. 9. I agree with Robertson J.A. that such a result does not run afoul of the principles developed by this Court in *Amax Potash*:

[page36]

> In my view, the reasoning adopted in *Amax Potash* has no application to cases in which the provinces are relying on a pre-existing statutory prescription period. There is a substantive difference between existing legislation that bars potential claims, unless brought within a fixed period, and legislation enacted for the specific purpose of barring restitutionary claims based on an invalid or unconstitutional tax. A prescription statute is adopted for purposes of providing a defendant with "peace of mind"; to be secure in the knowledge that he or she is no longer at risk from a stale claim accompanied by stale testimony. It is not adopted for the purpose of barring claims outright. A *Limitation of Actions Act* is valid legislation adopted for a valid purpose. It does not seek to achieve indirectly what cannot be achieved directly. [para. 42]

61 Finally, the point at which time will begin to run must be determined. The cause of action was complete at the moment the Province illegally received the payment. For this reason, the appellants can only recover the user charges paid during the six years preceding the filing date of their Notice of Application (May 25, 2001).

8. Conclusion

62 For the above reasons, I would allow the appeal in part and dismiss the cross-appeal. The appellants are entitled to recover all user charges paid on or after May 25, 1995, with interest. However, I conclude that this is not an appropriate case for the awarding of compound interest as the appellants did not allege any wrongful conduct on behalf of the Province that might warrant moral sanction (see *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, 2002 SCC 43). The appellants are entitled to their costs in this Court and in the courts below.

Solicitors:

Solicitors for the appellants/respondents on cross-appeal: Mockler Peters Oley Rouse, Fredericton.

[page37]

Solicitor for the respondents/appellants on cross-appeal: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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

Solicitor for the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Ottawa.

Solicitors for the intervener the Consumers' Association of Canada: Arvay Finlay, Vancouver.

cp/e/qllls

Indexed as:

Gladstone Petroleum Ltd. v. Husky Oil (Alberta Ltd.)

Between
Gladstone Petroleum Ltd., plaintiff, appellant, and
Husky Oil (Alberta) Ltd., defendant, respondent

[1982] S.J. No. 1057

140 D.L.R. (3d) 701

[1982] 6 W.W.R. 577

18 Sask.R. 273

16 A.C.W.S. (2d) 160

No. 7305

Saskatchewan Court of Appeal
Judicial Centre of Regina

Woods, Hall and Tallis JJ.A.

September 7, 1982

(47 paras.)

On appeal from the Court of Queen's Bench.

Counsel:

E. John Moss, Q.C. and Dale R. Doan, for the appellant.
W.M. Elliot, Q.C., for the respondent.
D.G. Bogdasavich, for the Department of the Attorney General.

The judgment of the Court was delivered by

1 TALLIS J.A.:-- This appeal concerns the validity of two Orders- in-Council of the Province of Saskatchewan,

which unitized a series of oil tracts containing producing wells in the "Dodsland Field" into a compulsory unit called The Gleneath Unit. The appellant company which owned producing wells in this compulsory unit initiated litigation against the respondent company and sought, inter alia, a declaration that the Orders-in-Council and Unit Plan were invalid. Halvorson, J. dismissed the action with written reasons now reported in 8 S.R. 211.

2 The "Dodsland Field" as defined by Ministers Orders under The Oil and Gas Conservation Act, 1965 R.S.S. Ch. 360 (hereinafter referred to as "the Act") is located in the Kindersley area in Saskatchewan. It is approximately 23 miles long, east to west, and up to 6 miles wide. At all times material to this action there were approximately 300 producing wells in this field. The source of oil was a single pool located in what is commonly called the Viking Dodsland sand.

3 In April, 1961, the appellant company, Gladstone Petroleum Ltd. (hereinafter called "Gladstone") acquired from the Crown a net royalty petroleum and natural gas lease PR117 (hereinafter called "the lease") of the lands which are the subject matter of this litigation, namely, the Southeast quarter and Southwest quarter of Section Twelve (12), Township Thirty-one (31), Range Twenty-Two (22), West of Third Meridian, being the four tracts numbered 76, 77, 86 and 87, later included in the Gleneath Unit.

4 After obtaining the lease Gladstone drilled four producing wells thereon during the month of May, 1961. By an agreement dated July 5, 1961, Gladstone agreed to sell all crude oil produced from the said leased lands to Royalite Oil Company (later taken over by British American and still later by Gulf Oil Company). It is common ground that these four wells were very efficient with the aggregate production for the period of May, 1961, to May 31, 1966, being approximately 222,000 barrels of crude oil.

5 Prior to drilling the four producing wells Gladstone established a line of credit and borrowed money from the Bank of Nova Scotia in Calgary. As security it executed an assignment under Section 82 of the Bank Act directing Royalite to make the payments for the crude oil directly to the Bank of Nova Scotia in Calgary.

6 In 1965 the respondent Husky Oil (Alberta) Ltd. (hereinafter called "Husky") and some of the other owners of producing oil wells in the "Dodsland Field" held meetings to discuss the operation of their wells as a unit. Feasibility studies were conducted by engineering committees with special consideration being given to water flooding the proposed unit area. Mr. J. M. Fulton as the representative of Gladstone attended many of these meetings and served on some of the committees that were established by the owners of the various wells that would be included in the proposed unit. Husky was interested in water flooding and viewed it as the principal, if not the only reason for unitization. Prior to the actual application for unitization Husky applied to the Department of Mineral Resources for permission to water flood the Gleneath portion of the "Dodsland Field". Mr. Fulton attended the public hearing called by the Minister of Mineral Resources (hereinafter called "the Minister") and vigorously opposed the application and proposed plan for water flooding.

7 On March 16, 1966, the Minister approved the flood plan in the following terms:

> " MINISTER'S APPROVAL
>
> Dodsland Field - Water Flood
>
> MA 13/66Whereas the Department of Mineral Resources has received an application from Husky Oil (Alberta) Ltd. for approval of a plan to water flood a certain portion of the Viking Sand Pool, Dodsland Field; and
>
> Whereas an inquiry was held at Regina, Saskatchewan, on March 9, 1866, to examine the merits of the plan; and

Whereas it has been demonstrated that water flooding of the Viking Sand within the boundaries of the proposed Gleneath Unit will materially increase the ultimate recovery of crude oil from that portion of the Pool:

Now therefore, by virtue of the power vested in me by The Oil and Gas Conservation Act I, Alexander C. Cameron, do hereby approve in principle the plan for water flooding a certain portion of the Viking Sand Pool, Dodsland Field submitted by Husky Oil (Alberta) Ltd. and do hereby grant permission to construct the facilities for the said water flood.

Dated at Regina, Saskatchewan, this 16th day of March, 1966.

A C. CAMERON,
Minister of Mineral Resources."

This ministerial approval is not impugned in these proceedings.

8 Husky then applied to the Minister for a hearing before The Oil and Gas Conservation Board of Saskatchewan (hereinafter called "the Board") to consider a plan for unitization of 90 wells in a portion of the Dodsland Field. This portion of the Dodsland Field included the 4 producing wells of Gladstone. The application by Husky was in the following form:

" HUSKY OIL (ALBERTA) LTD.
815 - SIXTH STREET S. W.
CALGARY, ALBERTA

February 7, 1966

Oil and Gas Conservation Board Department of Mineral Resources Government Administration Building Regina, Saskatchewan Attention:-Honourable A. C. Cameron Minister of Mineral Resources.

Dear Sir:

Re:Proposed Gleneath Unit -

Dodslan Field

Enclosed please find 10 copies of a Plan of Unit Operations governing the proposed Gleneath Unit. Also included are 10 copies of an Engineering Report to support the Plan of Unit

Operations.

On behalf of the following operators, we hereby apply for a hearing to consider the unitization of the 90 tracts described in part XlX of the enclosed Plan of Unit Operations:

Altair Oil and Gas Company
Atlantic Refining Company
Can American Petroleums Ltd.
Clark Oil & Refining Corporation
Columbian Carbon
Golden Eagle Oil and Gas Limited
Husky Oil (Alberta) Ltd.
Imperial Oil Limited
Israel Continental Oil Company
Marathon Oil Company
New Continental Oil Company of Canada Limited
Pheasant Petroleums Limited
Sun Oil Company
Triad Oil Company
United Canso Oil and Gas Ltd.

The tract factors described in the Plan have been accepted by these companies.

It is our intention to carry out a pressure maintenance operation by injecting water on an inverted 9-spot pattern utilizing the wells in Legal Subdivisions 2 and 12 of each section in the area as injection wells. Engineering calculations as presented in the enclosed engineering study indicate total oil recoveries can be more than doubled through the use of a waterflood program.

The Operators of the wells in the area have elected Husky Oil (Alberta) Ltd. as Chairman of the Operating and Engineering Committees. All operators are aware of the plans and have copies of the proposed Plan of Unit Operations as well as the Engineering Study. We would appreciate an early hearing on the unitization plans to ensure early commencement of construction in the spring.

If we can be of any assistance to your staff, please feel free to contact us.

Your very truly,

"R.J. Christensen"

R.J. Christensen,
Chairman Operators Committee.
VOCW:H
Enclosures
cc: All Operators."

The tract factors "A" and "B" in the proposed Unit Plan were the means of determining the allocation of the share of production and the share of operating and capital costs attributable to any given oil well. Tract factor "A" was to apply during the initial 2 years following unitization with Tract Factor "B" replacing it as the permanent factor thereafter.

9 Pursuant to Section 34(1) of the Act, the Minister made an order in the following terms:

> "FROM Alexander C. Cameron, DATE February 28, 1966 Minister of Mineral Resources,
>
> TO Mr. Jas. T. Cawley, Chairman of The Oil and Gas Conservation Board.
>
> RE:Unitization in the Dodsland Field
>
> I hereby order The Oil and Gas Conservation Board to hold a public hearing to consider the application of Husky Oil (Alberta) Ltd., 815 Sixth Street, South West, Calgary, Alberta, for unit operation in the Dodsland Field in Saskatchewan.
>
> "A.C.Cameron"
> Alexande C. Cameron
>
> Minister of Mineral Resources."

Following the issuance of the above order, the Secretary of the Board issued and published the following notice of hearing:

> " PROVINCE OF SASKATCHEWAN
>
> The Oil and Gas Conservation Board
>
> Notice of Hearing
>
> Unitization in the Dodsland Field
>
> Whereas the Minister of Mineral Resources has ordered The Oil and Gas Conservation Board to hold a public hearing to consider an application for unit operation in the Dodsland Field in Saskatchewan:
>
> Now therefore take notice that a public hearing will be held by The Oil and Gas Conservation Board on the 23rd day of March, 1966, commencing at 2.00 p.m., in the Auditorium on the thirteenth floor of the Saskatchewan Power Corporation Building, corner of Scarth Street and Victoria Avenue, Regina, Saskatchewan, for the purpose of considering the said application.
>
> The application and supporting material may be perused in the office of the Secretary of

The Oil and Gas Conservation Board in the Government Administration Building, Regina, Saskatchewan, after March 3, 1966. Request for copies of the application and supporting material, if required, should be made to the applicant, Husky Oil (Alberta) Ltd., 815-Sixth Street, South West, Calgary, Alberta.

Written submissions, including counter-proposals, with respect to the said application should be submitted in ten copies to the Board at the office of the undersigned before March 18, 1966.

Dated at Regina, Saskatchewan, this 28th day of February, 1966.
"Thos S. Tamaki"
Thos S. Tamaki, Secretary, The Oil and Gas Conservation Board,
Government Administration Building,
Regina Saskatchewan. "

10 The Board heard evidence on March 23, 1966, and then adjourned the hearing for completion on April 15, 1966. At the opening of the hearing the secretary of the Board read the Minister's Order directing a hearing. Gladstone was represented by able and experienced counsel in the person of Mr. E. J. Moss, Q.C. Husky and other interested parties were also represented by counsel. The proposed unitization plan was vigorously opposed by Gladstone with the principal objections being that the proposed plan did not allocate it a fair share of production from the unit and that the proposed costs were not reasonable in quantum or fairly allocated. Gladstone asked to be excluded from the proposed plan. Counsel of Gladstone cross-examined witnesses and called evidence. No objection was taken to the procedure followed by the Board and no question was raised as to its jurisdiction or the scope of the inquiry that had to be undertaken. In my opinion, one can fairly infer that counsel in calling evidence and making oral submissions dealt with the relevant issues that they felt should be of pressing concern to the members of the Board.

11 On May 17, 1966, Order-in-Council 995/66 was promulgated in the following terms:

"O.C.995/66 Regina, May 17, 1966.
Approved and Ordered. Lieutenant Governor.

The Executive Council has had under consideration a report from the Minister of Mineral Resources, dated May 2, 1966, stating that:

1.pursuant to The Oil and Gas Conservation Act, the Oil and Gas Conservation Board held public hearings on March 23, 1966, and April 15, 1966, for the purpose of considering the need for unit operation in the Dodsland Field;

2.the Board, upon consideration of the submissions and evidence at the hearing, found that:

(a the said unit operation is reasonably necessary to prevent waste, to increase

substantially the recovery of oil and gas and to protect correlative rights;

(b the value of the estimated recovery of oil and gas resulting from the unit operation will exceed the estimated additional cost incidental to such operation:

(c the unit operation will result in general advantage to the owners of oil and gas rights in the proposed unit;

3.the attached plan of unit operation for The Gleneath Unit is based on the recommendations of the Board following the said hearing;

4.the said unit operation in accordance with the attached plan is considered to be desirable and in the public interest.

Upon consideration of the foregoing report and on the recommendation of the Minister of Mineral Resources, the Executive Council advises that His Honour's Order to issue, pursuant to The Oil and Gas Conservation Act, effective on and after June 1, 1966, ordering the operation of certain portion of the Dodsland Field in Saskatchewan as a unit in accordance with the attached plan of unit operation for The Gleneath Unit.

R.L. Parrott,
Clerk of the Executive Council.

PLAN OF UNIT OPERATION

Governing the Unitized Management, Operation and Further Development of the Gleneath Unit, Dodsland Field

PART I Interpretation

101. This plan shall be construed with reference to The Interpretation Act and the terms and interpretation of The Oil and Gas Conservation Act and regulations thereunder.
102. ..."

Following this Order-in-Council and pursuant to the Plan of Unit Operation (hereinafter called "the plan") approved therein, Husky was appointed operator of the Gleneath Unit and as of June 1, 1966, took over all of the oil wells located in the unit to operate them in accordance with the Plan.

12 Gladstone requested a re-hearing before the Board. By letter dated November 10, 1966, the Minister advised counsel for Gladstone as follows:

Administration Building

Regina Saskatchewan,

Novembe 10, 1966.

Mr. E.John Moss, Moss & Wimmer, Barristers & Solicitors, 1919 Scarth Street, Regina, Saskatchewan.

Dear Mr. Moss:

Re:Gleneath Unit.

This will confirm that I propose to order a re-hearing in respect of the above Unit.

This re-hearing will present an opportunity for any or all interested parties to submit any new evidence which they consider pertinent. The Board will make its recommendations upon the evidence submitted at the time of the re-hearing.

I may say, however, that in order to allow sufficient time for preparation of material, we do not propose to schedule the re-hearing until after the new year.

Your sincerely,

"A C. Cameron"
A C. CAMERON. "

On June 20, 1967, the Minister ordered the Board to hold a re-hearing. The Order read as follows:

"Chairman, Oil & Gas Conservation Board, Regina, Saskatchewan.

Dear Sir:

Re: Gleneath Unit

I hereby order The Oil and Gas Conservation Board to hold a public hearing to consider:

(1)amendment of Tract Factors "B" set forth in the plan of unit operation for The Gleneath Unit in the light of certain mechanical discrepancies that have become apparent in the formation of the Unit;

(2)any other matter or matters relevant to unit operation of The Gleneath Unit that may be

submitted for consideration at such hearing by an interested party

(a) who has shown sufficient cause for consideration thereof; at the hearing (b) who has submitted, not later than 10 days before the date of the hearing, necessary information and engineering data in support of and substantiating the matter or matters to be heard at the hearing."

13 On August 1, 1967, the re-hearing took place before the Board. Gladstone was represented by Mr. E.J. Moss, Q.C., and applied to be excluded from the Plan. Failing that, it submitted that certain alleged inequities arising from the tract factors should be corrected. At this re-hearing evidence was called by Gladstone and other interested parties. Counsel for the interested parties, including learned counsel for Gladstone made full submissions. No attempt was made to expand the scope of the re-hearing to consider the balance of the wells in the Dodsland Field being incorporated into the Plan.

14 Following this re-hearing, the Board recommended slight changes to the tract factors and the area of the Unit. This culminated in Order-in-Council 1654/67 dated September 18, 1967, which reads:

"O.C.1654/67. Regina, September 18, 1967.
Approved and Ordered. Lieutenant Governor.

The Executive Council has had under consideration a report from the Minister of Mineral Resources, dated September 7, 1967, stating:

1.that The Gleneath Unit was established by Order in Council 995/66;

2.that, pursuant to The Oil and Gas Conservation Act, the Oil and Gas Conservation Board held a public hearing on August 1, 1967, to consider applications for enlarging the unit, revising tract factors and amending the plan of unit operation of The Gleneath Unit;

3.that, upon due consideration of the submissions and evidence adduced at the hearing, the board found:

(a that the area proposed to be added to the unit is believed to be underlaid by the pool or one of the pools underlying the unit area;

(b that the addition of a tract in the manner set forth in the attached schedule of amendments to the plan of unit operation of The Gleneath Unit is reasonably fair and equitable and in the public interest

(c that the tract factors should be amended as set forth in the attached schedule.

Upon consideration of the foregoing report and on the recommendation of the Minister of Mineral Resources, the Executive Council advises that His Honour's Order do issue, pursuant to The Oil and Gas Conservation Act, effective on and after October 1, 1967, ordering the

enlargement of The Gleneath Unit and amending the plan of unit operation of The Gleneath Unit as set forth in the attached schedule.

Garne C. Holtzman, A/ Clerk of the Executive Council.

SCHEDULE

The plan of unit operation for the Gleneath Unit is amended as hereinafter set forth:

1.Part I

Clause (c) of section 102 is rescinded and the following is substituted therefor:

..."

The effect of this Order-in-Council was to leave Gladstone in the Unit although an adjustment was made whereby it received a slightly larger share of the total production of the Unit.

15 Gladstone was dissatisfied and commenced this action on October 11, 1967, to challenge the validity of the Orders-in-Council in question. The trial was finally held on January 21, 1980. This delay may be partly attributable to the desirability of disposing of certain other litigation in which the parties were involved: See: Guyer Oil Company, Ltd., Golden Eagle Oil and Gas Limited and Husky Oil (Alberta) Ltd., and John M. Fulton and Gladstone Petroleum Ltd., [1977] 2 S.C.R. 791.

16 Shortly after the Plan was in force, Gladstone objected to paying its allocated share of costs of the Unit. Under the terms of the Plan it fell into default with the result that a receivership order was obtained withholding funds from its share of production so that Husky was protected as operator and all royalties payable to the Crown as lessor were secured.

17 On this appeal Gladstone contends that the judgment of Halvorson, J., should be reversed on the following grounds:

(1)The learned trial Judge erred in concluding that the plaintiff Gladstone, by its conduct must be taken to have waived the requirement of Section 34(1) of the Act and further erred in holding that a waiver or acquiescence by the plaintiff could cure any defect which would otherwise invalidate the Orders-in-Council and Unit Plan. The learned trial Judge should have held that non-compliance with Section 34(1) of the Act invalidated the Plan.

(2)The learned trial Judge erred in not holding that each breach of Section 35 of the Act alleged in the plaintiff's amended statement of claim had been proven and should have held that breaches were proven which resulted in the invalidity of the Plan.

(3)The learned trial Judge erred in not holding that clauses 907 and 908 of the Plan were in breach of Section 36(2) of the Act and that in consequence the Plan was invalid.

(4)The learned trial Judge erred in not holding that the Plan was invalid by reason of

conflict with Section 82 of the Bank Act.

18 In argument before this Court, the appellant contended that if the Orders-in-Council and Plan were declared invalid for any one or more of the above grounds, the respondent was liable for damages in trespass.

19 Before this Court the respondent relied upon the reasons of the learned trial Judge and supported the dismissal of the action on additional grounds which may be summarized as follows;

> (1)Section 5(7) of The Proceedings Against the Crown Act, R.S.S. 1978 C. P-27 is a bar to the action and in any event the action against Husky is improperly conceived because if a litigant asserts than an Order-in- Council is invalid, then steps should be taken in an appropriate way against the Government of Saskatchewan, and not by private suit against a party carrying out obligations under an enactment which in the face of it is valid and is presumed to be valid until set aside.
>
> (2)The Orders-in-Council under consideration are administrative acts or steps rather than judicial or quasi-judicial acts and accordingly are not subject, in the circumstances of this case, to court review.

20 I turn now to a consideration of the appellant's first point in argument. The pertinent sections of the Act are as follows:

> "34.-(1)The minister upon his own motion may, and upon the application of any interested person shall, order that a hearing be held by the board to consider the need for the operation as a unit of an entire field or pool.
>
> (2)An application under subsection (1) shall be in writing and shall be accompanied by:
>
> (a)a proposed plan of unit operation containing the terms and provisions that the applicant desires to have included in a unit operation order; and
>
> (b)such number of copies of the plan as the minister may require.
>
> (3)The applicant shall also furnish the minister with such further information and material as he may require.
>
> (4)If the board finds that:
>
> (a)the operation of a field or pool or a portion thereof as a unit is reasonably necessary to prevent waste, to increase substantially the recovery of oil or gas and to protect correlative rights; or
>
> (b)the value of the estimated additional recovery of oil or gas resulting from the operation

> of a field or pool or a portion thereof as a unit will exceed the estimated additional cost, if any, incidental to the conduct of the operation; or
>
> (c)the operation of a field or pool or a portion thereof as a unit will result in general advantage to the owners of the oil and gas rights within the field or pool or portion thereof;
>
> it may recommend to the minister that the field or pool or portion thereof be operated as a unit.
>
> 35.-(1) Upon the recommendation of the minister after the hearing, the Lieutenant Governor in Council may order that the field or pool or portion thereof be operated as a unit."

At the outset it should first be noted that the appellant does not question the constitutional validity of the Act. The appellant is not seeking to review the report or recommendation of the Board to the Minister, but seeks to strike down each of the impugned Orders-in-Council on the basis of a failure to observe a condition precedent prescribed by statute with the consequent result that each of the Orders- in-Council is invalid, null and void ab initio: vide The Attorney General of Canada v. Inuit Tapirisat of Canada and the National Anti-poverty Organization, [1980] 2 S.C.R. 735; Gloucester Properties Ltd. and Chichester Properties Ltd. v. R. in Right of British Columbia Environment and Land Use Committee and Provincial Agricultural Land Commission, [1981] 4 W.W.R. 179 (B.C.C.A.).

21 The learned trial Judge rejected this contention for the following, inter alia, reasons:

> "The Minister's order issued in the following terms:
>
> 'I hereby order The Oil and Gas Conservation Board to hold a public hearing to consider the application of Husky Oil (Alberta) Ltd., 815 - Sixth Street, South West, Calgary, Alberta, for unit operation in the Dodsland Field in Saskatchewan."
>
> (emphasis added)
>
> Counsel for the plaintiff submits that section 34(1) is mandatory and that the Minister must direct the Board to consider "the entire field", and that failure to do so made his order void. As well, regardless of the wording of the Minister's order, the Board was obliged to consider the entire Dodsland field, according to counsel.
>
> While it is not free from doubt, it does appear that the Minister's order related to the Gleneath Unit and not the whole Dodsland oil field.
>
> Likewise, I am satisfied that in assessing the application of the defendant, the Board did not consider that portion of the Dodsland field which was not included in the application. The chairman of the Board testified before me to the effect that although the entire field was not discussed at the hearing (as borne out by the transcript), it may have been considered privately by the Board members. I view this with scepticism.

...

> This deficiency in the Minister's order and in the hearing is not fatal to the subsequent unit operation order in the circumstances of this case because, in my view, the plaintiff, by its conduct, must be taken to have waived the defects. Although the plaintiff contested the unitization, it did not object at the hearing to the form of the Minister's order or to the fact that the Board was not considering the entire oil field. None of the plaintiff's evidence before me was directed to establishing that the plaintiff had desired the Board to assess the whole Dodsland field, or that the plaintiff had been adversely affected by the omission. I must conclude that at the hearing neither the plaintiff nor anyone else had any interest in widening the scope of the inquiry. As I see it, the plaintiff acquiesced in the limited review conducted by the Board and cannot now be heard to complain.
>
> It becomes unnecessary for me to decide whether the deficiencies are in the nature of mandatory requirements or whether they are merely directory. Suffice it to say that while it appears mandatory that the Minister order a hearing upon request, a strong case can be made out for the contention that the details of the order are directory."

22 In argument before this Court learned counsel for the appellant contended that before the Lieutenant Governor in Council could validly enact the Orders-in-Council that unitized the wells in the Gleneath Unit, the following conditions precedent had to be met:

> (1)There had to be an order from the Minister to the Board to consider unitization of the Dodsland Field as a whole.
>
> (2)There had to be a recommendation to the Minister from the Board following a hearing by the Board in which the Board considered unitization of the Dodsland Field as a whole.
>
> (3)There had to be a recommendation to the Lieutenant Governor in Council from the Minister.
> (emphasis is mine)

Learned counsel conceded that the third condition had been observed but submitted that there had been a complete failure to comply with conditions (1) and (2) with the result that the impugned orders-in-council are invalid, null and void ab initio. I understood learned counsel to be using the word "void" in the context that each of the Orders-in-Council in question is absolutely void - "a nullity incapable of any legal consequence not only bad but incurably bad - so much so that all the world can ignore it and nothing can be founded on it": vide Benjamin Leonard MacFoy v. United Africa Co. Ltd., [1962] A.C. 152, 160; Hoffmann-La Roche & Co. A.G. and Others v. Secretary of State for Trade and Industry, [1975] A.C. 295 at 319.

23 In the circumstances of this case, the appellant is really contending that the Minister's order directing the hearing is "void" because it did not order a hearing into unitization of the Dodsland Field as a whole and that the recommendation of the Board to the Minister is "void" because the Board did not consider unitization of the Dodsland Field as a whole. On account of this the Orders-in-Council purportedly made under Section 35(1) of the Act are alleged to be nullifies in law. It is to be noted that the alleged invalidity of the Orders-in-Council is not based on a want of substantive authority or legislative competence vested in the Lieutenant Governor in Council. Under Section 35(1) of the Act, the legislature has clearly delegated to the Lieutenant Governor in Council the necessary authority to make an order for unitization of a

field or pool or portion thereof, upon the recommendation of the Minister after an appropriate hearing and recommendation by the Board. (emphasis is mine)

24 In my opinion this ground of appeal must fail for the reasons given by the learned trial Judge. There was ample evidence adduced at trial to support the finding of the learned trial Judge that the appellant, by its conduct, must be taken to have waived any defects now alleged in the Minister's Order and the hearing and re-hearing before the Board. I do not view the alleged defects in this case as fatal to the validity of the Orders-in-Council and Plan, because in my view they are tantamount to procedural irregularities which can be waived by conduct. The defects alleged in this case do not, in my opinion, constitute breaches of statutory conditions precedent as that term is used in The Attorney General of Canada v. Inuit Tapirisat of Canada and the National Anti-poverty Organization, and Gloucester Properties Ltd. and Chichester Properties Ltd. v. R. in Right of British Columbia Environment and Land Use Committee and Provincial Agricultural Land Commission, (B.C.C.A.) (supra). This is not, for example, a situation where there has been a failure or refusal to hold a statutory hearing or failure to give notice of hearing to interested parties resulting in a denial of natural justice in the sense that the appellant was never allowed to state his case before the Board: vide R. v. Korponey, 65 C.C.C. (2d) 65 (S.C.C.). Furthermore, in my view the Minister's Order directing or hearing did not restrict the scope of the hearing before the Board to a consideration of the proposed Gleneath Unit only. I am satisfied that the words "for unit operation in the Dodsland Field in Saskatchewan" comply with the requirements of Section 34(1) of the Act which must be read in the light of Section 35(1). The record of proceedings before the Board on the hearing and rehearing do not indicate that any attempt was made by the Board or any member thereof to restrict the scope of the hearing. On the contrary, it appears to me that counsel chose to limit the scope of the hearing by defining the issues as they perceived them to be at that time and then called evidence and made submissions on that basis. Under the circumstances the appellant should not now be heard to complain about alleged irregularities in the proceedings as a basis of striking down Orders-in-Council enacted many years ago. In my opinion the circumstances of this case are readily distinguishable from Foster et al v. Saskatchewan Telecommunications, [1979] 1 W.W.R. 258, because the appellant in this case had a full opportunity to canvass all aspects of unitization when appearing before the Board.

25 I turn now to a consideration of the second ground of appeal which raises a number of alleged breaches of Section 35 of the Act, any one of which the appellant claims is sufficient to invalidate the Gleneath Unit Plan and render it invalid, null and void ab initio. The alleged breaches of Section 35 may be summarized as follows for the purpose of this ground of appeal:

(a)The allocation to Gladstone of its share of production is less than it should be.

(b)The costs charged to Gladstone are excessive and inequitable.

(c)The Unit Plan contains no provision as required by Sub-section 35(2)(e) of the Act.

(d)Sections 908 and 1801 of the Unit Plan are in contravention of Sub-section 35(2)(j) of the Act.

(e)Section 310 and 901 of the Unit Plan are in contravention of Sub-section 35(3) of the Act.

26 I find it convenient to first deal with points (a) and (b). The Act contains the following, inter alia, provisions which are pertinent to this aspect of the case:

"2-(1)In this Act:

inter alia

(a)allocated production' or 'allowable production' or 'allowable' means oil or gas authorized by the Minister to be produced;

(i)just and equitable share' of a producer or developed unit, unless otherwise agreed upon by the interested persons, means that part of the allowable production for the pool that is substantially in the same proportion that the quantity of recoverable oil and gas in each developed unit of the tract or tracts concerned in the pool bears to the recoverable oil or gas in the total developed area of the pool, subject to reasonable measures for the prevention of waste and to reasonable adjustment by reason of structural position, and that, if produced, will minimize reasonably avoidable drainage from each developed unit and will enable the producer to utilize his fair share of the reservoir energy;" ...

"3.The purposes of this Act are:

(a to prevent waste;

(b to regulate all operations for the production of oil and gas in such manner that the greatest possible ultimate recovery thereof by prudent and proper operations and practices may be realized;

(c to protect the correlative rights of each owner;

(d to enable each owner to obtain his just and equitable share of the allowable production of any pool."

...

"35-(1)Upon the recommendation of the Minister after the hearing, the Lieutenant Governor in Council may order that the field or pool or portion thereof be operated as a unit.

(2)An order under Sub-section (1) shall specify the date on which it will come into force and shall include:

inter alia

(c an allocation among the separately owned tracts in the unit area of all the oil and gas produced and not required in the conduct of such operation or unavoidably lost, such allocation to be based proportionately on the contributions, other than physical equipment, made by the owners of the separately owned tracts to the unit operation;

> (d a provision for the credits and charges to be given or made in the adjustment among the owners of the separately owned tracts in the unit area for their respective investments in wells, tanks, pumps, machinery, materials and equipment contributed to the unit operation by those owners;
>
> (e a provision for the net amount to be charged against the owner of each separately owned tract, which amount shall be considered to be the portion of the expenses of the unit operation chargeable against the tract;
>
> (f unless otherwise provided, a provision that the expenses of unit operation, including capital investments, shall be charged to the separately owned tracts in the same proportions that those tracts share in the unit production;"

By way of background it should be noted that the allocation of production and costs was fully canvassed at the Board hearing into the application for unitization and also at the re- hearing. At the hearings the appellant objected to the proposed allocation and called evidence with a view to persuading the Board that the proposed tract factors for its wells were insufficient because of their greater than average productivity. The allocation of costs was also dealt with and a submission was made that an exemption should be made for the appellant under Section 35(2)(f). After hearing all the evidence adduced and the submissions of the various interested parties, including the appellant, the Board presumably made a recommendation to the Minister who then made his recommendation to the Lieutenant Governor in Council.

27 At the trial before Halvorson, J., extensive expert evidence was called to show that the Unit Plan as established under the Orders-in-Council contained inequities in the allocation of production and costs which affected the appellant adversely. In effect, the Court was asked to re- hear and reconsider matters that had been dealt with by the Board. In my opinion this is tantamount to asking the Court to assume an appellate function and substitute its view of a proper allocation of production and costs for the decision of the Lieutenant Governor in Council. The original allocation was based on certain projections whereas the evidence at trial was to a large extent based on actual production experience. In my opinion the appellant was, under the Act, entitled to ask for further re-hearing. It would seem to me that such requests could be based on actual production and cost experience in the Unit operation. However, he chose not to do so and is not now entitled to ask the Court to sit in appeal on the original allocation of production and costs.

28 It was common ground before this Court that all persons concerned with the Unit Plan, including the member of the Board, the Minister and the Lieutenant Governor in Council were acting in good faith. The Act vests broad discretion in the Lieutenant Governor in Council to enable it to pursue the policy and objects of the Act. Competing interests are bound to be affected by the exercise of this statutory power. In this case the learned trial Judge found on the evidence adduced, with the benefit of 14 years of hindsight, that unitization had worked to the financial detriment of the appellant. He further found, based on the evidence adduced before him, that the Lieutenant Governor in Council, in exercising its discretion may have erred in assessing the appellant's share of production and costs. I would also add that experience has shown that the water flood plan was not nearly as successful as originally projected in terms of secondary production.

29 The learned trial Judge held that Section 35(1) of the Act gave the Lieutenant Governor in Council an absolute and unfettered discretion in performing its administrative functions, e.g. allocation of production and costs. In the light of a number of authorities and references, I agree with learned counsel for the appellant that such a statement is too wide: vide Padfield and Others v. Minister of Agriculture, Fisheries and Food and Others, [1968] 1 All E.R. 694; Re Multi-Malls Inc. et al. and Minister of Transportation and Communications et al, 1976 14 O.R. (2d) 49 (leave to appeal refused by S.C.C. on Oct. 13/76); Re Doctors Hospital and Minister of Health et al, (1976) 12 O.R. (2d) 164; The Attorney General of Canada v. Inuit Tapirisat of Canada and the National Anti-poverty Organization, (supra); Frank Roncarelli and The Honourable Maurice Duplessis, [1959] S.C.R. 121; Abuse of Power: The Regulation and Control of

The Abuse of Power Through Equity and Equitable Remedies by J.E. Sexton, Q.C., 1979 L.S.U.C. 109 at 118; Abuse of Power by Those Vested With A Statutory Power of Decision by G.J. Smith, Q.C., 1979 L.S.U.C. 133 at 141-143. Assuming that the Court does, under appropriate circumstances, have power to review the exercise of a statutory discretion vested in the Lieutenant Governor in Council, I am satisfied that declaratory relief is not available in this case. The record does not disclose any departure by the Lieutenant Governor in Council from the objects and purposes of the Act. The Orders-in-Council were not motivated by any improper considerations and accordingly were not tainted by any improper purpose. The Court does not have the power to direct the manner in which the discretion vested in the Lieutenant Governor in Council is to be exercised. The Act clearly contemplates that the Lieutenant Governor in Council will exercise a discretion within the statutory framework of the Act and in my opinion it did so. This branch of the case was succinctly dealt with by the learned trial Judge who said:

"I do not read sections 3 and 35 as obligating Cabinet to assure that the respective owners receive their precise shares of production. Cabinet must also have in mind the factors of waste and maximum ultimate recovery. Public policy becomes a consideration, and in some instances it may transcend the interests of the participating parties. It can be appreciated that it may not always be compatible to protect fully the rights of the owners, and at the same time prevent waste and attain optimum production." Accordingly the first two limbs of the second ground of appeal must fail.

30 I now turn to a consideration of point (c) in the second ground of appeal. This argument was not pressed before this Court but in any event I agree with the learned trial Judge that clause 706 of the Plan complies with the requirements of the Act.

31 In point (d) of the second ground of appeal, the appellant alleges that clause 1801 of the Unit Plan is in contravention of Section 35(2)(j) of the Act which reads:

> "35.-(2)An order under subsection (1) shall specify the date on which it shall come into force and shall include:
>
> ...
>
> (j) such further provisions, terms and conditions as may be considered necessary to provide for the proper operation of the unit area so as to prevent waste, obtain the greatest possible recovery of oil and gas under prudent and proper operations and practices and protect the interests of the respective owners of the oil and gas rights within the unit area."

Section 1801 of the Unit Plan provides as follows:

> "1801. For the purpose of this plan all terms, conditions and agreements contained in any contracts or leases, profits a prendre or other dispositions covering the separate Numbered Tracts within the Unit Area or the Unitized Zone underlying the same, are to the extent that they are inconsistent with this plan, hereby superseded by, altered and amended to conform to the terms, provisions and intent of this plan."

In my opinion the Act clearly contemplates the necessity of provisions like clause 1801 in a unitization plan. Such provisions are a practical necessity in terms of the overall operation of the Plan. I therefore reject the appellant's contention that the Plan is invalid on this ground.

32 I turn now to a consideration of point (e) in the second ground of appeal wherein the appellant contends that clauses 310 and 901 are in contravention of Section 35(3) of the Act which provides:

"35.-(3)In a vote upon a motion before the operating committee appointed pursuant to an order under this section each vote shall have a value corresponding to the percentage of the expense of unit operation borne by the person voting or his principal."

Clauses 310 and 901 of the Plan read:

"310. Each representative, in voting on all matters coming before the Operating Committee, shall have a voting interest equal to the participating interest in effect at that time of the working interest owner represented."

...

"901. The Operator shall set up a Joint Account for all costs, expenses and liabilities incurred by it on behalf of the working interest owners and all moneys received by it for the credit of the interest owners in connection with the Unit and, except as otherwise expressly provided this plan, all the said costs, expenses and liabilities shall be charged and all of the said moneys shall be credited to all the working interest owners in a proportion to their respective participating interests effective at such time as the charges and credits, or either of them were incurred with the exception of Unit allocation of capital costs which shall be on the basis of Tract Factors "B". "

On this branch of the case I find myself in respectful agreement with the reasons for judgment of the learned trial Judge who held as follows:

"Clause 310 of the plan prescribes that owners in the unit shall have a vote which is equal to their participating interests, that is, their share of production. This is in obvious conflict with section 35(3) of the Act which provides that the value of a vote shall correspond to the owner's share of expenses. The problem is compounded by the use in the plan of different formulae to calculate the share of expenses at different times, and by the production expenses and capital costs not being treated the same. (clause 901).

Is the entire unitization plan ultra vires because clause 310 offends section 35(3) of the Act? I think not.

While it is clear enough that there must be some rules regarding voting in order to prevent chaos in the operation of the unit, it does not follow that the voting rights must be specified in the plan. Indeed, unlike section 35(2), the Act does not require that the provisions of section 35(3) be included in the plan. Therefore, even if clause 310 were ultra vires, this would not be fatal to the whole plan because section 35(3) could then be resorted to for voting procedures.

The same result is reached by approaching this problem from a different angle. It is a rule of statutory interpretation that where a regulation or order is at variance with the statute, the wording of the statute prevails. (see Joseph Belanger v. The King (1915-17) 54 SCR 265). As I see it, the conflict raised here does not invalidate the order, it merely sets the stage for potential difficulties if voting at a meeting is challenged. As I stated previously, these difficulties will be magnified because of the two classes of expenses and the two formulae for charging.

> In particular, the plaintiff alleges that the appointment of the defendant as the operator of the unit is invalid due to the inconsistency between section 35(3) and clauses 310 and 901. However, when the timing of the appointment is reviewed, it can be seen that the voting values would have been the same regardless of whether the clauses or the section were applied. This is so because at that time the interest in production was the same as the interest in expenses."

33 I would also reject this argument for the additional reason that Gladstone through its representative, J.M. Fulton, participated in the Gleneath Unit Organization meeting of the Operating Committee which was held on May 27, 1966, pursuant to O.C. 995/66 and should not now be heard to complain about alleged procedural defects. At this meeting Mr. Fulton did not challenge the voting procedure employed. He did query whether proper notice of the meeting had been given and after that issue was dealt with he proceeded to participate in the meeting. The following, inter alia, matters were dealt with:

> (1)Sun Oil Company moved and Imperial Oil Limited seconded a motion that Husky Oil (Alberta) Ltd. be elected operator of the Gleneath Unit. Gladstone through Mr. J.M. Fulton nominated Golden Eagle Oil and Gas Limited and this motion was seconded by Bralorne Pioneer Petroleums Ltd. After discussion and debate the motions were put to a vote based on unit participation of the various owners. Husky was elected as operator.
>
> (2)Gladstone through its representative, Mr. J.M. Fulton, was appointed to the Engineering Committee of the Unit.

I therefore hold that Gladstone effectively waived any objection that it might have had to the voting procedures followed and reject the contention that Husky's appointment as operator was invalid for that reason.

34 In its third ground of appeal the appellant contends that clauses 907 and 908 of the Plan were in breach of Section 35(2) of the Act with the consequent result that the Plan is invalid. Section 36(2) of the Act provides:

> "36-(2)If the person so charged fails to pay the expenses, resort may be had to interests, herein called additional royalty interests and which are exclusive of a one-eighth (1/8) royalty interest and that would not be otherwise chargeable with such expenses, such as oil payments, overriding royalties or other royalties and payments to be paid out of or calculated on the amount of production."

Clauses 907 and 908 of the Plan read:

> "907.The Operator shall have a lien upon the interest of each working interest owner in the Unit production allocated to each Numbered Tract and upon the interest of each working interest owner in the Unit Facilities, to secure the payment of any amount that may at any time become due and payable by such working interest owner to the operator under this plan.
>
> 908.In addition to the Operator's right to collect any indebtedness hereunder by enforcement of the said lien by appropriate action, the Operator shall also have the right to take and sell so much of the Unit Production to which any indebted working interest owner may be entitled hereunder as shall be sufficient to pay such indebtedness, together with interest thereon, as herein provided, and the Operator shall apply the proceeds of the sale against such indebtedness together with the said interest." I do not view these clauses in the Plan as being in conflict with Section 36(2) of the Act. However, if I am in error, I agree with the learned trial Judge that clauses 907 and 908 are

severable from the other provisions in the Plan and could not form a basis for holding that the Orders-in-Council and Plan are invalid.

35 In its fourth-ground of appeal, the appellant contends that the Plan was invalid by reason of conflict with Section 82 of the Bank Act. On this view I adopt, with respect, the following reasons of the learned trial Judge:

> "Prior to unitization the plaintiff had assigned to a chartered bank the production from the plaintiff's oil wells in question pursuant to section 82 of the Bank Act. It is common ground that the assignment is in proper form and was registered as required.
>
> Clauses 907 and 908 of the plan specify that the operator of the unit has a lien on oil produced in the unit to secure payment of expenses, and the clauses further provide for seizure and sale of the oil to realize payment. In my view clause 1801 does not apply to a section 82 assignment.
>
> Counsel for the plaintiff contends that the lien clauses of the plan do not recognize the priority of the section 82 security of the chartered bank, and the order is, therefore, in conflict with the Bank Act. This being so the clauses cannot prevail, and because they are not severable, according to counsel, the entire order is illegal.
>
> I am unable to agree with this submission. In my opinion, the question is one of priority and not of validity. These clauses in the plan do not purport to create a first charge on the oil, and do not, therefore, conflict with the first charge given to the bank under section 82. There is no reason why the operator cannot have a lien along with the bank on the oil produced.
>
> Admittedly, the clauses fall within provincial legislation authorized under section 92(13) of the B.N.A. Act, being the property and civil rights subsection. The purpose of clauses 907 and 908 is to ensure that the scheme for orderly production of oil can be operated properly. This is not in conflict with the federal legislation which has the regulation of banking as its object. The purpose and effect of each is clearly different, and the question of paramountcy does not arise."

In my opinion the above conclusion is supported by the following, inter alia, authorities: In The Matter Of A Reference As To The Validity of Section 31 Of The Municipal District Act Amendment Act, 1941, Being Chapter 53 Of The Statutes Of Alberta, 1941, And As To The Operation Thereof, [1943] S.C.R. 295: Canada Trust Co. v. Cenex Ltd. and Byrnes & Hall Construction (1971) Ltd. et al, 13 Sask. R. 435. This ground of appeal accordingly fails.

36 In this case it was agreed by the parties prior to trial that the issue of damages would not be tried at that time. However, at the trial the appellant asserted its right to damages and did present an overview of its alleged loss. The trial Judge held that the testimony of the witnesses established that the appellant had suffered a significant economic loss as a consequence of having its wells governed by the Plan. Before this Court the appellant contended that it was entitled to damages in trespass against the respondent Husky, on the basis of invalidity of the Orders-in-Council under attack. The within appeal poses the question whether a third party, acting under an Order-in-Council, can be liable in trespass or otherwise, when the Order-in-Council has not been held to be invalid. In the circumstances of this case, I would not allow such a claim for damages even if the Orders-in-Council were invalid for the reasons advanced by the appellant. In this action the appellant does not seek damages against the Government of Saskatchewan, or any Minister, or Member of a Board but against the respondent Husky who was entitled to treat the Orders-in-Council and Plan under which it was operating as valid.

37 Lord Wilberforce in his dissenting judgment in F. Hoffmann-La Roche & Co. A.G. and Others and Secretary of State for Trade and Industry, [1975] A.C. 295 at 358-9, perceived in English law "an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action."

38 I adopt, with respect, the approach of Denning, L.J. in F. Hoffmann-La Roche & Co. A.G. and others and Secretary of State for Trade and Industa, (supra) at pages 319-20 where he said:

> "As against all this, however, the plaintiffs submit that the order made by the Secretary of State is invalid, or, at all events, that they have an arguable case that it is invalid. They say that the Monopolies Commission treated them unfairly; that the commission acted contrary to the rules of natural justice; and that the order of the Secretary of State discriminated unlawfully against them; and on this account they say that the report of the Monopolies Commission was void and the statutory order based on it was a nullity.
>
> I will assume for present purposes that the Monopolies Commission did act contrary to the rules of justice - though I would not wish to imply that it was in fact the case. Mr. Yorke says that their report would be void. He referred as to passages from Ridge v. Baldwin [1964] A.C. 40, 80; Durayappah v. Fernando [1967] 2 A.C. 337, 355 and Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147, 171.
>
> I have always understood the word "void" to mean that the transaction in question is absolutely void - a nullity incapable of any legal consequences - not only bad but incurably bad - so much so that all the world can ignore it and that nothing can be founded on it: see MacFoy v. United Africa Co. Ltd., [1962] A.C. 152, 160.
>
> If the word "void" is used in that sense, the report of the Monopolies Commission was certainly not void. A failure to observe the rules of natural justice does not render a decision or order or report absolutely void in the sense that it is a nullity. The legal consequences are best told by recounting the remedies available in respect of it. A person who has been unfairly treated (by reason of the breach of natural justice) can go to the courts and ask for the decision or order or report, or whatever it is, to be quashed, or for a declaration that it is invalid, that it has not and never has had any effect as against him. But it is a personal remedy, personal to him. If he does not choose himself to query it and seek a remedy, no one else can do so: see Durayappah v. Fernando [1967] 2 A.C. 337, 353. But it is within the discretion of the court whether to grant him such a remedy or not. He may be debarred from relief if he has acquiesced in the invalidity or has waived it. If he does not come with due diligence and ask for it to be set aside, he may away with nothing: see Reg. v. Aston University Senate, Ex parte Roffey [1969] 2 Q.B. 538. If his conduct has been disgraceful and he has in fact suffered no injustice, he may be refused relief: see Glynn v. Keele University [1971] 1 W.L.R. 487 and Ward v. Bradford Corpn. (1971) 70 L.G.R. 27. If it is a decision or order or report which affects many other persons besides him, the court may not think it right to declare it invalid at his instance alone: see Maxwell v. Department of Trade and Industry (unreported), December 20, 1972, a decision of Wiens, J., of which we were supplied with a transcript. Moreover, pending a decision by the courts as to its validity, other persons may be justified in acting on the footing that it is valid. If the decision or order or report is good on the face of it, and there is no good reason for supposing it to be invalid, other persons can treat it as valid. To it I would apply the words of Lord Radcliffe in Smith v. East Elloe Rural District Council [1956] A.C. 736, 769-770:

> "An order, ... is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

> So here, the report of the Monopolies Commission, even if it was made in breach of the rules of natural justice, is still capable of legal consequence. The question, therefore, is of what legal consequences is it capable? In my opinion, when the Secretary of State received the report of the Monopolies Commission, he was entitled to treat it as valid and to act as he did on the faith of it. It was perfectly good on the face of it. Under the statute he was authorised to make an order if it appeared to him "on the facts found by the commission as stated in the report" that the prices charged were such as "to operate, against the public interest": see section 3(4)(c) of the Act of 1965. Applying that provision, the Secretary of State was entitled to go by the facts stated in the report. He was entitled to make the statutory order so as to compel the plaintiffs to reduce their prices. Likewise when the Secretary of State laid the order before Parliament, each House was entitled to treat the order as valid."

39 The recent judgment of the Privy Council in Dunlop v. Woollahra Municipal Council [1981] 1 All E.R. 1202, adopts a similar approach. The appellant Dunlop claimed damages against the respondent because it had passed two resolutions in the form of building restrictions which resulted in economic loss to him. The resolutions were admittedly passed in good faith and on the basis of legal advice. However, these resolutions were declared to be invalid and void in the earlier action of Dunlop v. Council of the Municipality of Woollahra, [1975] 2 N.S.W.L.R. 446. In a subsequent action culminating in an appeal to the Privy Council, the appellant Dunlop advanced three causes of action which may be characterized as follows:

> (a)Trespass on the case, in that he had suffered loss as a result of the council's unlawful, intentional and positive acts.

> (b)Negligence.

> (c)Abuse of public office by the Council in passing the resolutions.

40 The appellant's claim failed on all grounds and in my opinion the following principles enunciated in the reasons of judgment of Lord Diplock at pages 1208-1209 in dealing with the claim of trespass on the case are of significance:

> "The Beaudesert claim

> Paragraph 13 is clearly based on the words used by the High Court in Beaudesert Shire Council v. Smith (1966) 120 CLR 145 at 156 to lay down a broad principle of law which the three members of the court considered could be extracted from eight English cases, mostly old, which they had previously cited:

> '... it appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.'

Their Lordships understand that they are not alone in finding difficulty in ascertaining what limits are imposed on the scope of this innominate tort by the requirements that in order to constitute it the acts of the tortfeasor must be 'positive', having as their 'inevitable consequence' harm or loss to the plaintiff and, what is crucial in the instant case, must be 'unlawful'. The eight cases referred to as a solid body of authority for the proposition appear to be so miscellaneous in character that they throw no further light on the matter. Nor, although Beaudesert was decided some 14 years ago, has it been clarified by judicial exegesis in the Australian courts, or followed in any other common law jurisdiction. It has never been applied in Australia in any subsequent case. In Kitano v. The Commonwealth (1973) 129 CLR 151 Mason J, whose reasons for judgment were later adopted by the Full Court of the High Court of Australia, expressed the view that an act done in breach of a statutory duty in respect of which the statute neither expressly nor by implication provides a civil remedy in damages is not necessarily 'unlawful' within the meaning of the Beaudesert principle although it clearly is unlawful in the ordinary sense of that term. A plaintiff, said Mason J (at 175), 'must show something over and above what would ground liability for breach of statutory duty if the action were available', but what that something more was he did not attempt to identify. He held that the plaintiff, Kitano, did not bring himself within the Beaudesert principle because, inter alia, 'he had not succeeded in showing that the act was tortious (and not merely a contravention of the statute)'. In Grand Central Car Park v Tivoli Freeholders [1969] VR 62 McInerney J held that carrying on a trade without a permit in-contravention of a statute did not fall within the epithet 'unlawful' in the formulation of the Beaudesert principle.

In the instant case Yeldham J did not find it necessary to embark on a general consideration of what kinds of act were intended by the authors of the judgment in Beaudesert to be included in the expression 'unlawful'. The only acts relied on were the passing of two invalid resolutions: so what he was concerned with, and what their Lordships are concerned with, was a specific question: whether an act which in law is null and void and so incapable of affecting any legal rights is, for that reason only, included in that expression. The learned judge found no difficulty in answering that question in the negative. He pointed out that in the Beaudesert judgment the principle is stated twice, once before the citation of the old authorities relied on (at 152) and once after (at 156), and that in the earlier statement the word unlawful' is replaced by 'forbidden by law'. He went on to cite a number of English cases in which the distinction between unlawfulness or illegality on the one hand and invalidity on the other is clearly drawn. Of these their Lordships need only mention Mogul Steamship Co. Ltd. v. McGregor, Gow & Co, both in the Court of Appeal (1889) 23 QBD 598) and in the House of Lords ([1892] AC 25, [1891-4] All ER Re 263). The rejection of one of the appellant's arguments in that case turned on this very distinction.

It is true, as Lord Halsbury LC pointed out in the above-cited case, that prior to 1892 the word 'unlawful' had sometimes been used to describe acts that were void and incapable of giving rise to legal right or obligation; but this extended use of the expression he condemned as inaccurate and so far as their Lordships are aware it has not been used in that extended sense in any subsequent English judgments. Their Lordships have no doubt that in using the expression 'unlawful' in Beaudesert the High Court intended it to be understood in what for the past 90 years has been its only accurate meaning. Their Lordships accordingly agree with Yeldham J that Dr Dunlop fails on his Beaudesert claim."
(emphasis added)

41 In my view, Canadian jurisprudence supports this approach. In Welbridge Holdings Ltd., and The Metropolitan Corporation of Greater Winnipeg, [1971] S.C.R. 957, the plaintiff claimed damages in negligence based on alleged reliance on the validity of a zoning by-law which in litigation terminating in the Supreme Court of Canada was declared to be invalid: see Gordon Blanchard Wiswell, William Arthur Johnston and Geraldine Mary Wilson and The Metropolitan Corporation of Greater Winnipeg, [1965] S.C.R. 512. In rejecting the claim in negligence in Welbridge Holdings Ltd., and The Metropolitan Corporation of Greater Winnipeg, (supra) Laskin, C.J.C. stated, inter alia, at pp. 968-9:

> "The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component (as the Wiswell case determined) and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.
>
> Its public character, involving its political and social responsibility to all those who live and work within its territorial limits, distinguishes it, even as respects its exercise of any quasi-judicial function, from the position of a voluntary or statutory body such as a trade union or trade association which may have quasi-judicial and contractual obligations in dealing with its members: cf. Abbott v. Sullivan, [1952] 1 All E.R. 226; Orchard v. Tunney, [1957] S.C.R. 436. A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability": see Davis, 3 Administrative Law Treatise, 1958, at p. 487. (emphasis added)
>
> A narrower basis of liability is, however, proposed in the present case, one founded only on the failure to carry out the anterior procedural requirements for the enactment of By-law No. 177. Although those requirements were held in the Wiswell case to be expressions of a quasi-judicial function, this did not mean that the hearing to which they were relevant was a step unrelated to the legislative exercise in which the defendant was engaged. In approving what Freedman J.A. said in the Wiswell case in the Manitoba Court of Appeal, Hall, J. agreed that the enactment of the by-law was "[not] simply a legislative act": see [1965] S.C.R. 512, at p. 520. But that did not import that there was no legislative function involved in the enactment. There clearly was."

42 In my opinion the above principles can properly be extended in their application to the circumstances of this case: see also Harris vs. The Law Society of Alberta, [1936] S.C.R. 88; Compensation for Invalid Administrative Action by P.C. Rose (1981) Vol. 131, N.L.J. 1228.

43 I turn now to a consideration of the respondent's contention that this action is barred under Section 5(7) of the Proceedings Against the Crown Act. I agree with learned counsel for the appellant that this provision has no application to this case because there is no allegation that the Act or Orders-in-Council are ultra vires the legislative of Saskatchewan. The constitutional validity of the Act is not in issue.

44 In the various cases cited before this Court, it appears that a direct attack was made on the impugned Orders-in-Council or municipal resolutions by actions brought against the Government or Municipal Corporations.

45 The respondent contends that the within action is improperly conceived because if a litigant asserts that an Order-in-Council is invalid, then steps should be taken in an appropriate way against the Government of Saskatchewan and not by private suit against a party carrying out obligations under an enactment which is presumed to be valid until set aside. In this case, the Orders-in-Council may affect many other persons in addition to the appellant. Approximately 25 well owners came under the Plan upon the enactment of Order-in-Council 995/66.

46 I do not agree with this contention because our jurisprudence does not preclude Husky from being named as a party defendant in an action but in the circumstances of this case the relief sought by way of declaration could not be granted unless an appropriate notice specifying the grounds of the alleged invalidity has been served under Section 8 of the Constitutional Questions Act. In this way consideration could be given by the Court to the interests of persons not before it as parties: vide F. Hoffmann-La Roche & Co. A.G. and Others and Secretary of State for Trade and Industry, (supra). I would observe that the learned Chambers Judge in Regina ex rel. Central Canada Potash Co. Limited and Schmitt v. Minister of Mineral Resources of Saskatchewan, [1972] 6 W.W.R. 62, affirmed [1973] 1 W.W.R. 193; further affirmed [1973] 2 W.W.R. 672, directed that all persons apparently interested or affected by the mandamus application should be served with notice thereof.

47 The within appeal is dismissed with costs.

TALLIS J.A.

qp/s/qlwlh/qlmjm

Case Name:

Welbridge Holdings Ltd. v. Winnipeg (Greater)

**Welbridge Holdings Ltd. (Plaintiff), Appellant; and
The Metropolitan Corporation of Greater Winnipeg (Defendant),
Respondent.**

[1970] S.C.J. No. 102

[1970] A.C.S. no 102

[1971] S.C.R. 957

[1971] R.C.S. 957

22 D.L.R. (3d) 470

[1972] 3 W.W.R. 433

Supreme Court of Canada

1970: December 17 / 1970: December 17.

Present: Martland, Judson, Ritchie, Spence and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal Law -- Alleged reliance of builder on validity of zoning by-law -- By-law later declared invalid -- Building permit revoked and work on apartment project abandoned -- Failure of municipality to carry out anterior procedural requirements for enactment of by-law -- Whether any portion of builder's loss may properly be recovered from municipality as being attributable to its actionable fault.

The plaintiff leased certain lands in the City of Winnipeg with the intention of constructing thereon a multi-storey apartment building. It allegedly relied on the validity of an amending zoning by-law which, in litigation terminating in this Court, was declared to be invalid (see Wiswell et al. v. Metropolitan Corporation of Greater Winnipeg, 1965 S.C.R. 512). A building permit was not sought until shortly after the Wiswell action was instituted, and it was refused by the designated officer because of, inter alia, the pending litigation on the validity of the said by-law. An appeal was taken immediately to the Board of Adjustment which, by its decision, directed the officer to issue the requested permit for a twelve-storey building. Following the issue of the permit, a contract was executed by the plaintiff and a construction firm for the erection of the building. The trial judgment in the Wiswell case declaring the by-law to be invalid was handed down some weeks later and the building permit was thereupon revoked. Save for some subsequent protective

construction, all work on the apartment project was then stopped.

An action for damages founded on negligence was brought by the plaintiff against the defendant municipal corporation. The action was dismissed at trial, and on appeal to the Court of Appeal it was held (one member of the Court dissenting) that the appeal should be dismissed. The plaintiff then appealed to this Court.

Held: The appeal should be dismissed.

A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach.

A narrower basis of liability was, however, proposed in the present case, one founded on the failure to carry out certain anterior procedural requirements for the enactment of the zoning by-law. Those requirements provided for notice to affected parties and although they were held in the Wiswell case to be expressions of a quasi-judicial function, this did not mean that the hearing to which they were relevant was a step unrelated to the legislative exercise in which the defendant was engaged. Moreover, even if the quasi-judicial function were taken in isolation, it was not accepted that the defendant in holding a public hearing as required by statute would, in bringing it on and in carrying it to a conclusion, come under a private tort duty to use due care to see that the dictates of natural justice were observed.

Also, there was nothing false or misleading or careless in the representations made to the plaintiff and it could not be accepted that those representations involved an assumption of responsibility to the plaintiff for the procedural regularity of the rezoning proceedings.

Cases Cited

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, considered; McGillivray v. Kimber (1915), 52 S.C.R. 146; Windsor Motors Ltd. v. District of Powell River (1969), 4 D.L.R. (3d) 155, distinguished.

APPEAL from a judgment of the Court of Appeal for Manitoba [(1970), 12 D.L.R. (3d) 124, 72 W.W.R. 705.], dismissing an appeal from a judgment of Hunt J. Appeal dismissed.

C.K. Tallin, Q.C., and A.F. Kristjansson, for the plaintiff, appellant.
A.S. Dewar, Q.C., and R.J. Scott, for the defendant, respondent.

Solicitors for the plaintiff, appellant: Tallin, Kristjansson, Parker & Smith, Winnipeg.
Solicitors for the defendant, respondent: Thompson, Dilts & Co., Winnipeg.

The judgment of the Court was delivered by

LASKIN J.:-- This appeal arises out of an action of tort for damages founded on negligence. As pleaded and argued, it involves the applicability of the principles of law canvased in Hedley Byrne & Co. Ltd., v. Heller & Partners Ltd. [[1964] A.C. 465, [1963] 2 All E.R. 575.] to a municipal corporation in certain circumstances of alleged reliance on the validity of a zoning by-law which, in litigation terminating in this Court, was declared to be invalid. The plaintiff-appellant in the present proceedings was not a party to the action which attached the by-law, but in the result it

abandoned plans for and work in progress on a multi-storey apartment building. There is no doubt that it suffered monetary loss; and the principal question presented here, which was decided adversely to the plaintiff-appellant in the Courts below, is whether any portion of the loss may properly be recovered from the defendant as being attributable to its actionable fault.

The facts surrounding the enactment of the by-law, and which lie at the heart of the issue now in appeal, are detailed in the judgments delivered in this Court in the action in which the by-law was originally and ultimately declared invalid: see Wiswell et al. v. Metropolitan Corporation of Greater Winnipeg [[1965] S.C.R. 512.]. It is enough to refer here only to those that bear directly on the plaintiff-appellant's cause of action, as supported by additional evidence adduced at trial in the present case.

The defendant came into being on April 1, 1961, and, as part of its assigned functions, took control of zoning in the City of Winnipeg. Certain Winnipeg Zoning Board orders were then in force (through periodic extensions) under which, in variance of the general zoning by-law, construction of an apartment block was authorized on lands of one Dr. B.J. Ginsburg, situated in a R1 (single family residential) zone. That owner applied for a further extension of these orders, and it was granted by the defendant on January 11, 1962, to April 30, 1963. Shortly after the extension was approved, the owner applied for a rezoning of his property from R1 to R4A (multiple family dwellings). The sought-after rezoning was effected under By-law No. 177 of April 13, 1962, and covered not only Dr. Ginsburg's land (comprising three lots) but also adjacent land (comprising three lots as well) owned by one Harris.

The plaintiff was incorporated on June 21, 1962, by persons who were interested in apartment land in Winnipeg. These persons had come to Winnipeg after By-law No. 177 was passed to look for apartment house land, and they obtained, through another company, an agreement to lease the Ginsburg land for 99 years from July 1, 1962. On August 12, 1963, the benefit of this agreement was assigned tot he plaintiff, and a formal lease was executed under date of September 6, 1963. The plaintiff had much earlier ascertained from officials of the defendant that the land was zoned R4A, and it followed up its inquiry by a letter from its solicitors dated August 10, 1962, to the defendant for the attention of its solicitor.

In his argument in this Court, counsel for the plaintiff-appellant stressed the importance of this letter which in its material parts was as follows:

> I act for Welbridge Holdings Ltd. which has arranged to lease the premises known as 3 Academy Road and 587 Wellington Crescent, for a term of 99 years, with intention of constructing thereon a luxury multi-storey apartment building.
>
> To ensure that there would be no prohibition against such a development, we obtained a copy of By-lay No. 177 of your Corporation enacted on April 13, 1962, and have noted that the zoning by-law was amended, reclassifying Lots 40 to 45 both inclusive, D.G.S. 45 St. Boniface, Plan 308, excepting that part of Lots 44 and 45 taken for a road diversion, as an "R4-A" Multiple Family Districts....
>
> In speaking to Mr. Lennox recently, we gathered that when Mr. Irving Keith made his submissions to the Council, he indicated that Lots 40 to 45 would be developed. At the present time negotiations are pending to acquire Lots 40, 41 and 42. Although serious consideration is therefore being given to a development which would encompass all of said Lots 40 to 45 both inclusive, it may be that negotiations to acquire Lots 40 to 23 may not be concluded, as said lands are owned by a different person than the owner of Lots 43 to 45 both inclusive. We would therefore like to have an assurance that should our client finally decide only to proceed with the development of said Lots 43 to 45 inclusive, no difficulty will be encountered by reason of no

development taking place on said Lots 40 to 42 both inclusive.

What counsel sought to establish through this letter was a representation by the defendant to the plaintiff of the validity of By-law No. 177 and reliance by the plaintiff on this representation in the steps it subsequently took to put up an apartment building on the leased land. On this foundation, counsel sought to fix the defendant with a duty of care owed to the plaintiff and to show that there was a breach thereof with resulting damage exposing the defendant to liability when the by-law was declared invalid. A duty of care was alleged to exist, however, independently of the latter, and to be a continuing one originating at the time that proceedings leading to the enactment of the by-law were initiated.

The submission based on the letter of August 10, 1962, fails in limine because the record does not disclose any reply to it, and, moreover, the letter is simply a manifestation of ordinary prudence on the part of a developer in assessing the risks of a project which it proposes to undertake. There is no suggestion that the defendant was importuning or encouraging the plaintiff in its proposed development or giving it any assurances save as they were assumed by the plaintiff from the fact of the enactment of the rezoning by-law.

A closer examination of this issue in connection with the alleged continuing duty of care and breach thereof may properly begin with a review of the steps in the enactment of By-law No. 177 and a reference to the reasons given in this court in the Wiswell case for declaring it to be invalid. The infirmity of the by-law resided not in any want of substantive authority, but rather in the failure to observe self-imposed antecedent procedures for notice to affected parties. Soon after the defendant came into being, it adopted a "Procedure for Amendments to Zoning By-Laws and Town Planning Schemes". Briefly, and applicant for an amending by-law would have to apply to the Director of Planning, then a Technical Committee would give prior consideration to the proposed amendment, and thereafter the Director, having given preliminary consideration to the application with favourable results, would report fully to the Committee on Planning. This Committee, if it should recommend that the application go forward, would then give public newspaper notice of a hearing on the application, as required by the defendant's governing statute. In addition, the procedure adopted by the defendant would require the Director of Planning at this stage to give the applicant notices to be posted on the subject premises not less than fourteen days before the hearing date. After hearing representation, the Committee would decide whether or not the application should be proceeded with, and if its decision was to proceed, it would recommend to the Council of the defendant that the necessary amending by-law be passed.

A district home owners' association had opposed the extension of the Zoning Board orders to April 30, 1963, but without success. The consideration of the further application to Dr. Ginsburg's land from R1 to R4A followed the prescribed procedures, including the giving of public notice, through newspaper advertisements, of the date of hearing of the application, but there was a failure to provide the applicant with notices to be posted on his premises. The association did not in fact see the newspaper notices because its secretary, who had the responsibility for such matters, was away on vacation at the time. No express notice was given to the association of the rezoning hearing (although such notice was given to Dr. Ginsburg's solicitors), nor were any of the officers of the association aware of the pendency of the hearing. In the result, no one appeared on its behalf to oppose the enactment of what became By-Law No. 177. On November 28, 1963, more than eighteen months after that by-law was passed, the association instituted a declaratory action to impeach its validity and, as already noted, it succeeded finally in this Court.

The evidence shows that the association did not learn of the rezoning By-law No. 177 until about two weeks before action brought and that it came to the association's notice at a Board of Adjustment hearing on November 12, 1963, to consider an application for a variation of the zoning to permit a thirteen-storey building instead of the twelve-storey building that was authorized under the rezoning by-law.

The majority decision of this Court (Judson J. was alone in dissent from the four other members of the five who sat in the case) was to the effect that the defendant municipality was engaged in a quasi-judicial rather than in a legislative proceeding in respect of the hearing on the rezoning application, and, consequently, in dealing with the matter, which involved a resolution of conflicting interests, if was bound to see that notice was given to the association as an interested party, and known to the defendant to be interested. The defendant had failed to give notice in disregard

of its own procedures designed to that end, and hence the by-law was invalid. Hall J. (Martland J. concurring) was of the opinion that the by-law was, in the circumstances void, but Cartwright J., as he then was, (Spence J. concurring), although agreeing substantially with Hall J., did not find it necessary to come to a decision on that issue and dealt with the case on the assumption that the by-law was merely voidable. It is immaterial in the present proceedings whether the by-law was void or voidable only. The question of law that is raised is the same in either case and is sufficiently posed by the declaration of invalidity.

To complete the framework of facts within which that question must be resolved I note that soon after the agreement to lease the Ginsburg land was made with its assignor, the plaintiff engaged architects and firm of solicitors and embarked on necessary preparations (including demolition of existing structures) to comply with building requirements. A building permit was not sought until shortly after the Wiswell action was instituted, and it was refused by the designated officer because of, inter alia, the pending litigation on the validity of the rezoning by-law. An appeal was taken immediately to the Board of Adjustment which, in a decision on December 17, 1963, directed the officer to issue the requested permit for a twelve-storey building. Following the issue of the permit, a contract was executed by the plaintiff and construction firm for the erection of the building. The trial judgment in the Wiswell case declaring By-law No. 177 to be invalid was handed down on January 28, 1964, and the building permit was thereupon revoked. Save for some subsequent protective construction, all work on the apartment project was then stopped.

The present proceedings, which were launched on January 19, 1967, are collateral to those in the Wiswell case, not in any sense of seeking any different result from that reached therein on the validity of the rezoning by-law, but in being posited on the very grounds on which that case was decided and on the circumstances which gave rise to those grounds. In seeking thus to establish a duty of care owed to it by the defendant and a breach thereof, the plaintiff has accepted the finding of the Manitoba Courts in the Wiswell case that the defendant acted in good faith (this Court did not pass on the question), and there is therefore no need to consider the defendant's liability on any ground other than negligence.

If the plaintiff has a cause of action as alleged, it is not destroyed or blocked by the fact that a building permit was necessary before the plaintiff could proceed with actual construction. The defendant's contentions in its factum that the Board of Adjustment which granted the permit was an independent statutory authority and that the plaintiff knew at the time that the rezoning by-law was under attack are not tenable defences to an action based on negligence in the procedures leading to the enactment of the by-law. These contentions seem to ignore the fact that extensive planning is necessary to qualify for a building permit and that, moreover, its issuance can be enforced by mandamus if the requirements for it are met. The exact position of the Board of Adjustment, whether agent of or statutory authority independent of the defendant, is, on this view, not central to liability; at the most, it might have a bearing on the range of damages.

The liability in negligence sought to be imposed upon the defendant is not a vicarious one, resting upon the fault of a servant or agent of the defendant, but rather an original, independent liability. As I took the argument, it was said to proceed from a duty of the defendant, in enacting a rezoning by-law enlarging he development possibilities of designated land, to exercise reasonable care to see that the procedures upon which valid enactment depended were followed; and this duty was owed specially to those persons having or obtaining an interest in the affected land which enabled them to exploit those possibilities. There was, in the circumstances, more than merely a duty at large to the residents of the municipality or to the smaller number residing in the affected area. If a duty such as is urged exists, I would not exclude the appellant from the class of those to whom it was owning, merely because the appellant did not come into existence until after the invalid by-law was passed and did not acquire any interest in the affected land until about sixteen months after its passage.

It is important to emphasize in this case that a duty of care of the defendant to the plaintiff cannot be based merely on the fact that economic loss would foreseeably result to the latter if By-law No. 177 should prove to be invalid. Indeed, it has long been recognized, as Lord Wright said in Liesbosch (Dredger) v. Edison (S.S.) [[1933] A.C. 449.], at p. 460, that "the law cannot take account of everything that follows a wrongful act", a proposition that was

recently applied in SCM (United Kingdom) Ltd. v. W.J. Whittall & Son Ltd. [[1970] 3 All E.R. 245.]. However, the concern here is not with the consequences for which reparation should be made, but with whether there is liability for an consequences, however direct they be. On this issue, the Hedley Byrne case does not assist the plaintiff-appellant, even apart from the fact that it dealt with negligent words and not with negligent acts of omission as in the present case.

Accepting that Hedley Byrne has expanded that concept of duty of care, whether in amplification or extension of Donoghue v. Stevenson [[1932] A.C. 562.], it does not, nor, in my view, would any underlying principle which animates it, reach the case of a legislative body, or other statutory tribunal with quasi-judicial functions, which in the good faith exercise of its powers promulgates an enactment or makes a decision which turns out to be invalid because of anterior procedural defects. McGillivray v. Kimber [(1915), 52 S.C.R. 146.], so far as it has a majority rationale, rests either on a complete want of jurisdiction or on intentional wrongdoing which might, in any event, be said to be reflected in the want of jurisdiction. It was not concerned with negligence. I refer also to what Rand J. said about that case in Roncarelli v. Duplessis [[1959] S.C.R. 121.], at p. 141.

Under the considerations on which Hedley Byrne's enunciation of principle rests, it cannot be said in the present case either that a special relationship arose between the plaintiff and the defendant or that the defendant assumed any responsibility to the plaintiff with respect to procedural regularity. This would equally be my view if the plaintiff had been the applicant for the rezoning by-law. A rezoning application merely invokes the defendant's legislative authority and does not bring the applicant in respect of his particular interest into any private nexus with the defendant, whose concern is a public one in respect of the matter brought before it. The applicant in such case can reasonably expect honesty from the defendant but not a wider duty. Beyond this, I would adapt to the present case what the late Mr. Justice Jackson said in dissent in Dalehite v. United States [(1953), 346 U.S. 15.], at p. 59 (a case concerned with the Federal Tort Claims Act, 1946, of the United States), as follows:

> When a [municipality] exerts governmental authority in a manner which legally binds one or many, [it] is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such [municipality] shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits.
>
> (The words in brackets are mine).

The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component (as the Wiswell case determined) and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.

Its public character, involving its political and social responsibility to all those who live and work within its territorial limits, distinguishes it, even as respects its exercise of any quasi-judicial function, from the position of a voluntary or statutory body such as a trade union or trade association which may have quasi-judicial and contractual obligations in dealing it its members: cf. Abbott v. Sullivan [[1952] 1 All E.R. 226.]; Orchard v. Tunney [[1957] S.C.R. 436.]. A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of canada) may act beyond its powers in the ultimate view of a court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability": see Davis, 3 Administrative Law Treatise, 1958, at p. 487.

A narrower basis of liability is, however, proposed in the present case, one founded only on the failure to carry out the anterior procedural requirements for the enactment of By-law No. 177. Although these requirements were held in the Wiswell case to be expressions of a quasi-judicial function, this did not mean that the hearing to which they were relevant was step unrelated to the legislative exercise in which the defendant was engaged. In approving what Freedman J.A. said the Wiswell case in the Manitoba Court of Appeal, Hall J. agree that the enactment of the by-law was "[not] simply a legislative act": see [1965] S.C.R. 512, at p. 520. But that did not import that there was no legislative function involved in the enactment. There clearly was.

Moreover, even if the quasi-judicial function be taken in isolation, I cannot agree that the defendant in holding a public hearing as required by statute comes under a private tort duty, in bringing it on and in carrying it to a conclusion, to use due care to see that the dictates of natural justice are observed. Its failure in this respect may make its ultimate decision vulnerable, but no right to damages for negligence flows to any adversely affected person, albeit private property values are diminished or expense is incurred without recoverable benefit. If, instead of rezoning the land involved herein to enhance its development value, the defendant had rezoned so as to reduce its value and the owners had sole it thereafter, could it be successfully contended, when the rezoning by-law was declared invalid on the same ground as By-law No. 177, that the owners were entitled to recoup their losses from the municipality? I think not, because the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care. The situation is different where a claim for damages for negligence is based on acts done in pursuance or in implementation of legislation or of adjudicative decrees.

Windsor Motors Ltd. v. District of Powell River [(1969), 4 D.L.R. (3d) 155, 68 W.W.R. 173.], a judgment of the British Columbia Court of Appeal, is a useful illustration in this connection. Hedley Byrne was applied against a municipality by reason of advice negligently given by its licence inspector to the plaintiff that he could lawfully open a used car business in a certain location. The inspector went further and issued a licence to the plaintiff who had gone into business in reliance on the advice and licence. In fact, the zoning regulations forbade a used car business at the particular location, and the plaintiff had to move at considerable loss. The municipality's liability, moreover, was vicarious, arising upon a conclusion that it had to answer for its employee who knew of the plaintiff's reliance on his special knowledge when the plaintiff sought the employee's advice.

Finally, I refer to what appears to me to be the main ground upon which Freedman J.A., dissenting in the present case in the Manitoba Court of Appeal, would have imposed liability upon the defendant, relying on the Hedley Byrne doctrine. He said this (see (1970), 12 D.L.R. (3d) 124, at pp. 138-139):

> ... Metro's negligence was not spent with [the] omissions [as to notice]. It extended to its continuing representation that an apartment block could lawfully be erected on the site of reason of By-law 177 rezoning the land. With respect to that continuing representation Metro most assuredly owed a duty to the plaintiff. Indeed, it is clear from the evidence that the plaintiff received specific assurances from Metro that the land in question had been rezoned and that a high-rise apartment block could be erected there. It was on the faith of that continuing representation that the plaintiff proceeded with its plans, with resultant loss and damage.

I do not see how actionable negligence flows from the representation. Although I do not read the evidence as strongly against the defendant as did Freedman J.A., the fact was that the land had been rezoned. There was, therefore, noting false or misleading or careless in the representations or statements made to the plaintiff. I cannot accept what must be implicit in the learned judge's reasoning that the representation involved an assumption of responsibility to the plaintiff for the procedural regularity of the rezoning proceedings. If the passage quoted is intended to suggest a vicarious liability, as in the Windsor Motors Ltd. case, there is no factual basis on which it can be put. I have already noted that the argument before this Court charged the defendant itself with actionable negligence. What has gone before in these reasons covers this issue, and I need not repeat it.

Since the action fails on the main substantive point it is unnecessary to deal with a number of preliminary issues raised in the case touching statutory and other bars to the plaintiff's action. Accordingly, the appeal is dismissed with costs.

Appeal dismissed with costs.

Indexed as:

Just v. British Columbia

John Just, appellant;
v.
Her Majesty The Queen in right of the Province of British Columbia, respondent.

[1989] 2 S.C.R. 1228

[1989] S.C.J. No. 121

File No.: 20246.

Supreme Court of Canada

1989: February 24 / 1989: December 7.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts -- Liability -- Government -- Policy decision or operational decision -- Boulder crashing onto car on highway -- System in place for inspection and remedial work on rock slopes -- Whether or not parties in relationship of sufficient proximity to warrant imposition of duty of care -- If so, whether policy decision to which liability does not attach or operation decision to which liability would attach -- Highway Act, R.S.B.C. 1979, c. 167, ss. 8, 14 -- Crown Proceeding Act, R.S.B.C. 1979, c. 86, ss. 2, 3.

Heavy snow fall forced appellant and his daughter to stop in a line of traffic by a rocky slope on a major highway. A boulder, which worked loose from the wooded slopes above the highway, came crashing down upon appellant's car, killing appellant's daughter and causing him very serious injuries. Appellant contended that respondent negligently failed to properly maintain the highway.

The Department of Highways had set up a system for inspection and remedial work upon rock slopes. Inspection and recommendations were made by engineers and the work was effected by a rock scaling crew responsible for performing remedial work throughout the entire province. The department's practice had been to make visual inspections from the highway unless rock falls or a history of instability in an area indicated a need for the rock engineer to climb the slope. Numerous informal inspections were carried out by highway personnel as they drove along the road.

The trial judge found that the entire system of inspection and the way it was implemented was a policy matter which did not give rise to liability. No finding was made as to whether or not the system of inspection [page1229] was reasonable

or whether the inspections themselves were properly carried out. The Court of Appeal upheld the finding of the trial judge.

Held (Sopinka J. dissenting): The appeal should be allowed.

Per Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.: The province owes a duty of care, which ordinarily extends to their reasonable maintenance, to those using its highways. The Department of Highways could readily foresee the risk that harm might befall users of a highway if it were not reasonably maintained. That maintenance could be found to extend to the prevention of injury from falling rock.

Government agencies may be exempt from the application of the traditional tort law duty of care if an explicit statutory exemption exists or if the decision arose as a result of a policy decision. Whether or not a decision is characterized as a policy decision or as an operational decision rests on the nature of the decision and not on the identity of the actors. Generally, decisions concerning budgetary allotments for departments or government agencies should be classified as policy decisions. A policy decision may be open to challenge on the basis that it is not made in the bona fide exercise of discretion.

If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered. The manner and quality of an inspection system, since it was clearly part of the operational aspect of a governmental activity, should be assessed when consideration is given to the standard of care issue. At this stage, the requisite standard of care must be assessed in light of all the surrounding circumstances including budgetary restraints and the availability of qualified personnel and equipment. In this case a new trial was necessary to make the necessary findings of fact on the negligence issue.

Per Sopinka J. (dissenting): Respondent had the power to carry out the inspections but was under no duty to do so. Conduct within the limits of this discretion gives rise to no duty of care; conduct outside of these limits may attract a private law duty of care.

[page1230]

The respondent's liability, pursuant to the Crown Proceeding Act, was no greater than that of a municipality. A municipality has, within its statutory discretion, the authority to maintain highways but no duty to do so. A litigant may not attack a policy and it is not appropriate for a Court to pass on it, absent evidence that a policy was adopted for some ulterior motive and not for a municipal purpose. In order for a private duty to arise, it would have to be shown that the Rockwork Section acted outside its delegated discretion to determine whether to inspect and the manner in which the inspection is to be made.

Policy decisions are immune from review because they usually entail not only a decision to do something but also some call upon the public purse. Respondent was acting within its discretion when it decided that inspections should be done and the manner in which they were to be done. Responsibility for deciding the extent to which the inspection program was to be implemented was delegated to the Rockwork Section.

Cases Cited

By Cory J.

Applied: Anns v. Merton London Borough Council, [1978] A.C. 728; City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2; Laurentide Motels Ltd. v. Beauport (City), [1989] 1 S.C.R. 705; Yuen Kun Yeu v. Attorney-General of Hong Kong, [1988] A.C. 175; Barratt v. District of North Vancouver, [1980] 2 S.C.R. 418; Blessing v. United States, 447 F.S. 1160; Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1; Indian Towing Co., 350 U.S. 61 (1955); United States v. S.A.

Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984).

By Sopinka J. (dissenting)

City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2; London Passenger Transport Board v. Upson, [1949] A.C. 155; Barratt v. District of North Vancouver, [1980] 2 S.C.R. 418; Kent v. East Suffolk Rivers Catchment Board, [1940] 1 K.B. 319; Anns v. Merton London Borough Council, [1978] A.C. 728.

Statutes and Regulations Cited

Crown Proceeding Act, R.S.B.C. 1979, c. 86, ss. 2, 3(2).
Federal Tort Claims Act, 28 U.S.C. s. 2680.
Highway Act, R.S.B.C. 1979, c. 167, s. 8.
Ministry of Transportation and Highways Act, R.S.B.C. 1979, c. 280, s. 14.
Municipal Act, R.S.B.C. 1960, c. 255, s. 513(2). [page1231]

Authors Cited

Holding, John D. "The Relationship Between Recent Trends in Tort Litigation and the Current Insurance Crisis in Canada" (1986), 54 Assurances 435. Klar, Lewis. "Negligence -- Reactions Against Alleged Excessive Imposition of Liability -- A Turning Point?" (1987), 66 Can. Bar Rev. 159. Ontario. Ontario Task Force on Insurance. Final Report of the Ontario Task Force on Insurance. Toronto: The Task Force, 1986. Osborne, Philip. "A Critical Evaluation of Liability Insurance, Litigation and Personal Injury Compensation: The Lessons and Choices for Ontario." Study prepared for the Ontario Task Force on Insurance and cited in Final Report of the Ontario Task Force on Insurance. Toronto: The Task Force, 1986. Rea, Samuel A., Jr. "Economic Perspectives on the Liability Insurance Crisis," in Insurance Law. Special Lectures of the Law Society of Upper Canada, 1987. Don Mills, Ont.: De Boo, 1987. Stradiotto, Rino A. "Canadian Perspectives on Tort Law: Personal Injury Damages" (1988), 46 The Advocate 737. Trebilcock, Michael J. "The Insurance -- Deterrence Dilemma of Modern Tort Law: Trends in North American Tort Law and Their Implications for the Current Liability Crisis." Study prepared for the Ontario Task Force on Insurance and cited in Final Report of the Ontario Task Force on Insurance. Toronto: The Task Force, 1986.

APPEAL from a judgment of the British Columbia Court of Appeal (1986), 10 B.C.L.R. (2d) 223, [1987] 2 W.W.R. 231, 40 C.C.L.T. 160, 1 M.V.R. (2d) 357, dismissing an appeal from a judgment of McLachlin J. (1985), 64 B.C.L.R. 349, [1985] 5 W.W.R. 570, 33 C.C.L.T. 49, 34 M.V.R. 124. Appeal allowed, Sopinka J. dissenting.

T.R. Berger and J.N. Laxton, Q.C., for the appellant.
William A. Pearce and Harvey M. Groberman, for the respondent.

Solicitors for the appellant: Laxton, Pidgeon & Co., Vancouver.
Solicitor for the respondent: The Attorney General of British Columbia, Victoria.

The judgment of Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. was delivered by

1 CORY J.:-- This appeal puts in issue the approach that should be taken by courts when considering the liability of government agencies in tort actions.

[page1232]

Factual Background

2 On the morning of January 16, 1982, the appellant and his daughter set out, undoubtedly with high hopes and great expectations, for a day of skiing at Whistler Mountain. As a result of a heavy snow fall they were forced to stop in the northbound line of traffic on Highway 99. While they were waiting for the traffic to move forward a great boulder weighing more than a ton somehow worked loose from the wooded slopes above the highway and came crashing down upon the appellant's car. The impact killed the appellant's daughter and caused him very serious injuries. He then brought this action against the respondent contending that it had negligently failed to maintain the highway properly.

3 Highway 99 is a major commuter road between Vancouver and the major ski resorts located at Whistler Mountain. The appellant alleged that there had been earlier rock falls near the scene of the tragedy. As well it was said that the climatic conditions of freezing and thawing, coupled with a heavy build-up of snow in the trees and resulting tree damage created a great risk of rock falls. Trees were said to be a well-known factor in levering rocks loose. It was contended that inadequate attention had been given to all these factors by the respondent and that a reasonable inspection would have demonstrated that the rock constituted a danger to users of the highway.

4 At the time of the accident the Department of Highways had set up a system for inspection and remedial work upon rock slopes particularly along Highway 99. At the apex of the organization was a Mr. Eastman, the regional geotechnical material engineer. He is a specialist in rock slope maintenance and together with another engineer was responsible for inspecting rock slopes and making recommendations regarding their stability.

5 The Department contained a rock work section which included Mr. Oliver, the rock work engineer responsible for rock stabilization and inspections on Highway 99. The section also included a rock [page1233] scaling crew which was formed in 1971 to perform remedial work on the slopes. This crew serviced the entire province. The crew's function was to remove potentially dangerous rocks by prying them loose using a crowbar. As well, they removed trees that were considered a hazard to the safety of those using the highways. Mr. Oliver was required to inspect rock cut areas to assess the stability of the slope and to determine whether there was a risk that a rock might fall on the highway. His inspection duties extended to the entire slope from which such a danger might arise.

6 When the rock work engineer inspected the rock slopes on Highway 99 he would report his findings and recommendations to the district highways manager responsible for the area. The district manager in turn through the regional geotechnical material engineer submitted requests for the services of the rock scaling crew. The rock scaling crew itself had no discretion as to where and when it worked; its schedule was determined by the requests for remedial work made to the rock work section.

7 Prior to the accident the practice had been for the Department of Highways to make visual inspections of the rock cuts on Highway 99. These were carried out from the highway unless there was evidence or history of instability in an area in which case the rock engineer would climb the slope. In addition there were numerous informal inspections carried out by highway personnel as they drove along the road when they would look for signs of change in the rock cut and for rocks in the ditch.

Decisions at Trial and on Appeal

8 In the reasons of the trial judge (1985), 64 B.C.L.R. 354, the term "rock scaling crew" is used to refer to the rock work section. In any event it was found at p. 354 that:

> ... the rock scaling crew had virtually an absolute discretion as to when and where it would work. It created the standards and it determined their enforcement. Its discretion went far beyond the limited operational [page1234] discretion of how to go about enforcing policies set by others. In

> effect, the Department of Highways had conferred upon the rock scaling crew the responsibility of formulating policy with respect to the prevention of rock falls on highways.

The reasons continued with the finding that there were no standards to which the rock scaling crew was required to work or against which its conduct could be evaluated as that determined its own standards. It was found that the decision as to what inspection was to be undertaken on a particular site was a "policy" decision. The conclusion was set out at p. 355 in these words:

> The number and quality of inspections as well as the frequency of scaling and other remedial measures were matters of planning and policy involving the utilization of scarce resources and the balancing of needs and priorities throughout the province. Decisions of that nature are for the governmental authorities, not the courts.

9 No finding was made as to whether or not the system of inspection set forth by the Department of Highways was a reasonable one or whether the inspections themselves were properly carried out. Rather, as indicated, it was found that the entire system of inspection as well as the way in which it was carried out was a matter of planning and policy for which there was no liability.

10 The Court of Appeal (1986), 10 B.C.L.R. (2d) 223, determined that the trial judge had considered the proper indicia in determining that the number and quality of decisions as to the inspections and the decisions as to the work to be done on a particular site were matters of policy, as opposed to an operational decision. That court upheld the finding of the trial judge that the decisions involved in this case constituted a policy decision for which there was no liability rather than the implementation of policy. The appeal was dismissed without calling upon the respondent.

[page1235]

Test to be Applied

11 In cases such as this where allegations of negligence are brought against a government agency, it is appropriate for courts to consider and apply the test laid down by Lord Wilberforce in Anns v. Merton London Borough Council, [1978] A.C. 728. At pages 751-52 he set out his position in these words:

> Through the trilogy of cases in this House -- Donoghue v. Stevenson [1932] A.C. 562, Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465, and Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case [1970] A.C. 1004, per Lord Reid at p. 1027. [Emphasis added.]

That test received the approval of the majority of this Court in City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2. As well it was specifically referred to by both Beetz and L'Heureux-Dubé JJ. in Laurentide Motels Ltd. v. Beauport (City), [1989] 1 S.C.R. 705. It may be that the two-step approach as suggested by Lord Wilberforce should not always be

slavishly followed. See Yuen Kun Yeu v. Attorney-General of Hong Kong, [1988] A.C. 175 (P.C.), at pp. 190, 191, 194. Nevertheless it is a sound approach to first determine if there is a duty of care owed by a defendant to the plaintiff in any case where negligent misconduct has been alleged against a government agency.

[page1236]

12 In the case at bar the accident occurred on a well used major highway in the Province of British Columbia. All the provinces across Canada extol their attributes and attractions in the fierce competition for tourist business. The skiing facilities at Whistler are undoubtedly just such a magnificent attraction. It would be hard to imagine a more open and welcoming invitation to use those facilities than that extended by the provincial highway leading to them. In light of that invitation to use both the facilities and the highway leading to them, it would appear that apart from some specific exemption, arising from a statutory provision or established common law principle, a duty of care was owed by the province to those that use its highways. That duty of care would extend ordinarily to reasonable maintenance of those roads. The appellant as a user of the highway was certainly in sufficient proximity to the respondent to come within the purview of that duty of care. In this case it can be said that it would be eminently reasonable for the appellant as a user of the highway to expect that it would be reasonably maintained. For the Department of Highways it would be a readily foreseeable risk that harm might befall users of a highway if it were not reasonably maintained. That maintenance could, on the basis of the evidence put forward by the appellant, be found to extend to the prevention of injury from falling rock.

13 Even with the duty of care established, it is necessary to explore two aspects in order to determine whether liability may be imposed upon the respondent. First, the applicable legislation must be reviewed to see if it imposes any obligation upon the respondent to maintain its highways or, alternatively, if it provides an exemption from liability for failure to so maintain them. Secondly, it must be determined whether the province is exempted from liability on the grounds that the system of inspections, including their quantity and quality, constituted a "policy" decision of a government agency and was thus exempt from liability.

[page1237]

The Applicable Legislation

14 The Highway Act, R.S.B.C. 1979, c. 167, s. 8, provides for construction and maintenance of highways in these words:

> 8. The minister may ... maintain a highway across any land taken under the powers conferred by this Act ....

and the Ministry of Transportation and Highways Act, R.S.B.C. 1979, c. 280, s. 14, as follows:

> 14. The minister has the management, charge and direction of all matters relating to the acquisition, construction, repair, maintenance, alteration, improvement and operation of ... highways ....

The liability of the respondent in respect of the exercise of these powers is limited by ss. 2 and 3 of the Crown Proceeding Act, R.S.B.C. 1979, c. 86, in this manner:

> 2. Subject to this Act,

. . .

(c) the Crown is subject to all those liabilities to which it would be liable if it were a person, ...

3. ...

(2) Nothing in section 2

. . .

(f) subjects the Crown, in its capacity as a highway authority, to any greater liability than that to which a municipal corporation is subject in that capacity.

On their face these statutory provisions do not appear to absolve the respondent from its duty of care to maintain the highways reasonably. Rather, by inference they appear to place an obligation on the province to maintain its highways at least to the same extent that a municipality is obligated to repair its roads.

Was the Decision of the Rock Section as to the Quantity and Quality of Inspections a "Policy" Decision Exempting the Respondent from Liability?

15 The respondent placed great reliance on the decision of this Court in Barratt v. District of North Vancouver, [1980] 2 S.C.R. 418. In the Barratt case injury occurred as a result of a [page1238] pothole on the road. It was established that the City of North Vancouver had a policy of inspecting its roads for potholes every two weeks. Indeed it had inspected the road where the accident occurred one week earlier and found no pothole. It was found that the inspection policy established by the municipality was a reasonable and proper one. However, Justice Martland in giving the reasons for this Court went on to express an opinion that the municipality could not be held negligent for formulating one inspection policy rather than another. He put it this way at pp. 427-28:

> In essence, he [the trial judge] is finding that the Municipality should have instituted a system of continuous inspection to ensure that no possible damage could occur and holds that, in the absence of such a system, if damage occurs, the Municipality must be held liable.
>
> In my opinion, no such duty existed. The Municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the Municipality cannot be held to be negligent because it formulated one policy of operation rather than another.

This statement was not necessary to the decision as it had already been determined that the system of inspection established by the municipality was eminently reasonable. Neither was there any serious question raised that there had been any negligence in carrying out the system of inspection. The finding that a reasonable system of inspection had been established and carried out without negligence constituted the basis for the conclusion reached by the Court in that case. With the greatest respect, I am of the view that the portion of the reasons relied on by the respondent went farther than was necessary to the decision or appropriate as a statement of principle. For example, the Court would not have approved as "policy" a system that called for the inspection of the roads in a large urban municipality once every five years. Once a policy to inspect is established then it must be open to a litigant to attack the system as not having been adopted in a bona fide exercise of discretion [page1239] and to demonstrate that in all the circumstances, including budgetary restraints, it is appropriate for a court to make a finding on the issue.

16 The functions of government and government agencies have multiplied enormously in this century. Often government agencies were and continue to be the best suited entities and indeed the only organizations which could protect the public in the diverse and difficult situations arising in so many fields. They may encompass such matters as the manufacture and distribution of food and drug products, energy production, environmental protection, transportation and tourism, fire prevention and building developments. The increasing complexities of life involve agencies of government in almost every aspect of daily living. Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of "policy". Thus the dilemma giving rise to the continuing judicial struggle to differentiate between "policy" and "operation". Particularly difficult decisions will arise in situations where governmental inspections may be expected.

17 The dividing line between "policy" and "operation" is difficult to fix, yet it is essential that it be done. The need for drawing the line was expressed with great clarity by Becker J. of the United States District Court, in Blessing v. United States, 447 F.S. 1160. The case required him to deal with a claim under the Federal Tort Claims Act, 28 U.S.C. s. 2680 which provides:

[page1240]

> The provisions of this chapter and section 1346(b) of this title shall not apply to --
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

He wrote at p. 1170:

> Read as a whole and with an eye to discerning a policy behind this provision, it seems to us only to articulate a policy of preventing tort actions from becoming a vehicle for judicial interference with decision-making that is properly exercised by other branches of the government and of protecting "the Government from liability that would seriously handicap efficient government operations," United States v. Muniz, 374 U.S. 150, 163, 83 S.Ct. 1850, 1858, 10 L.Ed. 2d 805 (1963). Statutes, regulations, and discretionary functions, the subject matter of s. 2680(a), are, as a rule, manifestations of policy judgments made by the political branches. In our tripartite governmental structure, the courts generally have no substantive part to play in such decisions. Rather, the judiciary confines itself -- or, under laws such as the FTCA's discretionary function exception, is confined -- to adjudication of facts based on discernible objective standards of law. In the context of tort actions, with which we are here concerned, these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political or economic decisions.

18 The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions [page1241] may well be subject to claims in tort. What guidelines are there to assist courts in differentiating between policy and operation?

19 Mason J., speaking for himself and one other member of the Australian High Court in Sutherland Shire Council v. Heyman (1985), 60 A.L.R. 1, set out what I find to be most helpful guidelines. He wrote:

> Anns decided that a duty of care cannot arise in relation to acts and omissions which reflect the policy-making and discretionary elements involved in the exercise of statutory discretions. It has been said that it is for the authority to strike that balance between the claims of efficiency and thrift to which du Parcq LJ referred in Kent v. East Suffolk Rivers Catchment Board [1940] 1 KP 319 at 338 and that it is not for the court to substitute its decision for the authority's decision on those matters when they were committed by the legislature to the authority for decision (Dorset Yacht Co. v. Home Office, [1970] AC 1004 at 1031, 1067-8; Anns, at p. 754; Barratt v. District of North Vancouver (1980) 114 D.L.R. (3d) 577). Although these injunctions have compelling force in their application to policy-making decisions, their cogency is less obvious when applied to other discretionary matters. The standard of negligence applied by the courts in determining whether a duty of care has been breached cannot be applied to a policy decision, but it can be applied to operational decisions.
>
> Accordingly, it is possible that a duty of care may exist in relation to discretionary considerations which stand outside the policy category in the division between policy factors on the one hand and operational factors on the other. This classification has evolved in the judicial interpretation of the "discretionary function" exception in the United States Federal Tort Claims Act -- see Dalehite v. United States (1953) 346 US 15; ... United States v. Varig Airlines, supra. The object of the Federal Tort Claims Act in displacing government immunity and subjecting the United States Government to liability in tort in the same manner and to the same extent as a private individual under like circumstances, subject to the "discretionary function" exception, is similar to that of s. 64 of the Judiciary Act, 1903 (Cth).
> [page1242]
> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to

> action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness. [Emphasis added.]

20 The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary infinitely and may be made at different levels although usually at a high level.

21 The decisions in Anns v. Merton London Borough Council and City of Kamloops v. Nielsen, supra, indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a bona fide exercise of discretion. To do so they must specifically consider whether to inspect and if so, the system of inspection must be a reasonable one in all the circumstances.

22 For example, at a high level there may be a policy decision made concerning the inspection of lighthouses. If the policy decision is made that there is such a pressing need to maintain air safety by the construction of additional airport facilities with the result that no funds can be made available for lighthouse inspection, then this would constitute a bona fide exercise of discretion that would be unassailable. Should then a lighthouse beacon be extinguished as a result of the lack of inspection and a shipwreck ensue no liability can be placed upon the government agency. The result would be the same if a policy decision were made to increase the funds for job retraining and reduce the funds for lighthouse inspection so that a [page1243] beacon could only be inspected every second year and as a result the light was extinguished. Once again this would constitute the bona fide exercise of discretion. Thus a decision either not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. This is so provided it constitutes a reasonable exercise of bona fide discretion based, for example, upon the availability of funds.

23 On the other hand, if a decision is made to inspect lighthouse facilities the system of inspections must be reasonable and they must be made properly. See Indian Towing Co., 350 U.S. 61 (1955). Thus once the policy decision to inspect has been made, the Court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care.

24 At a lower level, government aircraft inspectors checking on the quality of manufactured aircraft parts at a factory may make a policy decision to make a spot check of manufactured items throughout the day as opposed to checking every item manufactured in the course of one hour of the day. Such a choice as to how the inspection was to be undertaken could well be necessitated by the lack of both trained personnel and funds to provide such inspection personnel. In those circumstances the policy decision that a spot check inspection would be made could not be attacked. (See United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984).)

25 Thus a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances.

26 The consideration of the duty of care that may be owed must be kept separate and distinct from [page1244] the consideration of the standard of care that should be maintained by the government agency involved.

27 Let us assume a case where a duty of care is clearly owed by a governmental agency to an individual that is not exempted either by a statutory provision or because it was a true policy decision. In those circumstances the duty of care owed by the government agency would be the same as that owed by one person to another. Nevertheless the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably, while a government agency such as the respondent may be responsible for the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in

light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard duty of care imposed upon it.

28 It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a [page1245] duty of care in situations which arise from its pure policy decisions.

29 In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.

30 The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

31 Turning to the case at bar it is now appropriate to apply the principles set forth by Mason J. in Sutherland Shire Council v. Heyman, supra, to determine whether the decision or decisions of the government agency were policy decisions exempting the province from liability. Here what was challenged was the manner in which the inspections were carried out, their frequency or infrequency and how and when trees above the rock cut should have been inspected, and the manner in which the cutting and scaling operations should have been carried out. In short, the public authority had settled on a plan which called upon it to [page1246] inspect all slopes visually and then conduct further inspections of those slopes where the taking of additional safety measures was warranted. Those matters are all part and parcel of what Mason J. described as "the product of administrative direction, expert or professional opinion, technical standards or general standards of care". They were not decisions that could be designated as policy decisions. Rather they were manifestations of the implementation of the policy decision to inspect and were operational in nature. As such, they were subject to review by the Court to determine whether the respondent had been negligent or had satisfied the appropriate standard of care.

32 At trial the conclusion was reached that the number and frequency of inspections, of scaling and other remedial measures were matters of policy; as a result no findings of fact were made on the issues bearing on the standard of care. Since the matter was one of operation the respondent was not immune from suit and the negligence issue had to be canvassed in its entirety. The appellant was therefore entitled to a finding of fact on these questions and a new trial should be directed to accomplish this.

33 It may well be that the respondent at the new trial will satisfy the Court that it has met the requisite standard of care. It is apparent that although the Crown Proceeding Act imposes the liability of a person upon the Crown, it is not in the same position as an individual. To repeat, the respondent is responsible not for the maintenance of a single private

road or driveway but for the maintenance of many hundreds of miles of highway running through difficult mountainous terrain, all of it to be undertaken within budgetary restraints. As noted earlier, decisions reached as to budgetary allotment for departments or government agencies will in the usual course of events be policy decisions that cannot be the basis for imposing liability in tort even though these political policy decisions will have an effect upon the frequency [page1247] of inspections and the manner in which they may be carried out. All of these factors should be taken into account in determining whether the system was adopted in bona fide exercise of discretion and whether within that system the frequency, quality and manner of inspection were reasonable.

34 To proceed in this way is fair to both the government agency and the litigant. Once a duty of care that is not exempted has been established the trial will determine whether the government agency has met the requisite standard of care. At that stage the system and manner of inspection may be reviewed. However, the review will be undertaken bearing in mind the budgetary restraints imposed and the availability of personnel and equipment to carry out such an inspection.

Disposition

35 In the result, a new trial must be held to determine whether the respondent had in all the circumstances met the standard of care that should reasonably be imposed upon it with regard to the frequency and manner of inspection of the rock cut and to the cutting and sealing operations carried out upon it.

36 The appellant is entitled to costs of the appeal to this Court and in the Court of Appeal of British Columbia. The issue of costs of the first trial is reserved to the judge presiding at the new trial.

The following are the reasons delivered by

37 SOPINKA J. (dissenting):-- This appeal raises the issue of the liability for negligence of a public body in the absence of the breach of a statutory duty of care. The facts are set out in the reasons of Justice Cory, which I have had the advantage of reading. Regrettably, I find that I cannot agree with his conclusion. In my opinion, the conclusion of the trial judge (1985), 64 B.C.L.R. 349, and a unanimous Court of Appeal (1986), 10 B.C.L.R. (2d) 223, was the correct one. This conclusion is expressed by Hinkson J.A., speaking for the court, [page1248] affirming the following passage from the reasons of McLachlin J. (as she then was):

> ... I conclude that the decisions here complained of fall within the area of policy and cannot be reviewed by this court. The number and quality of inspections as well as the frequency of scaling and other remedial measures were matters of planning and policy involving the utilization of scarce resources and the balancing of needs and priorities throughout the province. Decisions of that nature are for the governmental authorities, not the courts.

38 In comparatively recent years the law of torts has evolved by imposing on public authorities a common law duty of care based on the neighbourhood or proximity principle, frequently called the Anns principle. This has resulted in substantially increasing their liability in negligence for activity which they are authorized to carry on by statute but in respect of which the statute imposes no duty of care. This change in the law was not brought about by legislation but through the evolution of the common law which has traditionally taken account of the changing views and needs of society. The expansion of liability by reason of this and other developments in the law of torts has created a crisis in this area of the law leading to demands for the fundamental reappraisal of the tort system itself. The basic premise of adjusting losses on the basis of fault is being subjected to intense criticism. In the United States there is a growing consensus that the tort system is responsible for the crisis in liability insurance. There is now substantial support for wholesale legislative reform of the tort system. These developments are discussed in the Final Report of the Ontario Task Force on Insurance (May 1986) to the Ministry of Financial Institutions, at p. 52. Reference is made to the study made by Professor Michael J. Trebilcock and entitled "The Insurance -- Deterrence Dilemma of Modern Tort Law: Trends in North American Tort Law and Their Implications for the Current Liability Crisis" (April 21, 1986). At pages

[page1249] 53-54 of the Final Report of the Ontario Task Force on Insurance, it is stated that:

> A crucial finding in the Trebilcock study was that the current "explosion" in American tort law was not the result of judicial extensions of already-advanced American strict liability doctrines but rather the judicial extension of traditional negligence liability and its application to an ever-widening range of activities and injuries.

The Report goes on to state at p. 54:

> There is every indication that similar tendencies exist in Canadian negligence law and that similar developments will occur in the future in Canada as well. The reason for this inevitable expansion of liability, even within the bounds of traditional negligence doctrine, is a matter that is intractably and unavoidably rooted in what we will later describe as the "insurance-deterrence dilemma" in modern tort law.

39 The insurance-deterrence dilemma is described in a study paper prepared by Philip Osborne for the Task Force and cited at pp. 61-62 as follows:

> The massive transformation of the fault system ... is a change which is explicable only on the basis of liability insurance and judicial compassion for the victims of social progress. Judges who in their written judgments give no indication of the prevalence of liability insurance are in fact keenly aware that in almost all cases the defendant is not paying, and that they are in the last analysis deciding whether or not the plaintiff should be compensated from insurance monies .... The prevalence of liability insurance fundamentally altered the moralistic nature of the loss-shifting function of fault. The loss-shifting mechanism was converted into a loss-spreading mechanism and it became more realistic to speak of the fault system as a fault-insurance system. The punitive and deterrent aspects of fault were diminished and compensation became the predominant function of tort law.

40 Other commentators are generally in support of the above criticisms of the tort system: Holding, "The Relationship Between Recent Trends in Tort Litigation and the Current Insurance Crisis in [page1250] Canada" (1986), 54 Assurances 435; Stradiotto, "Canadian Perspectives on Tort Law: Personal Injury Damages" (1988), 46 The Advocate 737; Rea, "Economic Perspectives on the Liability Insurance Crisis," in Insurance Law, Special Lectures of the Law Society of Upper Canada, 1987; Klar, "Negligence -- Reactions Against Alleged Excessive Imposition of Liability -- A Turning Point?" (1987), 66 Can. Bar Rev. 159.

41 I draw attention to these developments in order to emphasize that while the law of torts must move with the times, this is not a time to move. Yet, I am of the opinion that the reasons of my colleague would considerably expand the liability for negligence of public authorities by subjecting to judicial review their policy decisions which were hitherto not reviewable.

42 The starting point for the application of the Anns principle is that there is no statutory duty in favour of the plaintiff to do the thing the lack of which is alleged to have caused the injury to the plaintiff. Many public bodies have the power to carry out a function but no duty to do so. In these circumstances, they have a discretion whether to do the thing or not. Conduct within the limits of that discretion gives rise to no duty of care. Conduct outside of these limits may attract a private law duty of care. In City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2, Wilson J. speaking for the majority, summed up the Anns principle as follows, at p. 11:

> Lord Wilberforce found that the defendant in Anns was under a private law duty to the plaintiff. It had to exercise a bona fide discretion as to whether to inspect the foundations or not and, if it decided to inspect them, to exercise reasonable skill and care in doing so. He concluded that the allegations of negligence were consistent with the Council or its inspector having acted

> outside any delegated discretion either as to the making of an inspection or as to the manner in which the inspection was made.

[page1251]

43 If a statutory duty to the plaintiff is breached, the private duty based on the neighbourhood principle is unnecessary. In London Passenger Transport Board v. Upson, [1949] A.C. 155, at p. 168, Lord Wright stated:

> The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty.

My colleague, Cory J., states (at p. 1237) that the statutory provisions "place an obligation on the province to maintain its highways at least to the same extent that a municipality is obligated to repair its roads." Sections 2 and 3(2) of the Crown Proceeding Act, R.S.B.C. 1979, c. 86, referred to by him, make it clear that the respondent's liability cannot be greater than that of a municipality. The extent of the liability of a municipality in British Columbia was settled by Barratt v. District of North Vancouver, [1980] 2 S.C.R. 418. While a municipality has the authority to maintain highways, it has no duty to do so. What it does in this respect is within its statutory discretion. At page 426, Martland J. said:

> The Municipality, under the provisions of subs. 513(2), had authority to lay out, construct, maintain and improve highways. Unlike the provisions of some other similar statutes, no duty was imposed upon the Municipality to maintain its highways.

44 My colleague's reasons are based essentially on an attack on the policy of the respondent with respect to the extent and manner of the inspection program. In my opinion, absent evidence that a policy was adopted for some ulterior motive and not for a municipal purpose, it is not open to a litigant to attack it, nor is it appropriate for a court to pass upon it. As stated by Lord du Parcq in Kent v. East Suffolk Rivers Catchment Board, [1940] 1 K.B. 319, at p. 338:

> ... it must be remembered that when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, there would be some inconvenience in [page1252] submitting to the subsequent decision of a jury, or judge of fact, the question whether the authority had acted reasonably, a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift.

This statement was approved by Lord Wilberforce in Anns v. Merton London Borough Council, [1978] A.C. 728, at p. 754.

45 If a court assumes the power to review a policy decision which is made in accordance with the statute, this amounts to a usurpation by the court of a power committed by statute to the designated body. As pointed out by Wilson J. in City of Kamloops v. Nielsen, supra, at pp. 9-10:

> It is for the local authority to decide what resources it should make available to carry out its role in supervising and controlling the activities of builders. For example, budgetary considerations may dictate how many inspectors should be hired for this purpose, what their qualifications should be, and how often inspections should be made. He approved the statement of du Parcq L.J. in Kent v. East Suffolk Rivers Catchment Board ... that public authorities have to strike a balance between the claims of efficiency and thrift and whether they get the right balance can only be decided through the ballot box and not in the courts.

46 In Anns v. Merton London Borough Council, supra, Lord Wilberforce was of the opinion that although the exercise by a public authority of discretionary power was not entirely immune from attack, it was open to challenge only if no consideration was given to whether to exercise the power which, there as here, was whether to inspect and the manner of the inspection, supra, at p. 755. He did not elaborate as to whether such a challenge could be by way of a claim for damages by a person injured by the failure to inspect. Lord Salmon, however, was of the view that an improper exercise of discretion could only be corrected by certiorari or mandamus, and did not give rise to an action for damages, supra, at p. 762.

47 In the following passage, at p. 755, Lord Wilberforce makes it clear that a decision to inspect, [page1253] and the time, manner and techniques of inspection, may all be within the discretionary power:

> There may be a discretionary element in its exercise -- discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care. But if he can do this, he should, in principle, be able to sue.

48 If, as here, the statute creates no duty to inspect at all, but simply confers a power to do so, it follows logically that a decision to inspect and the extent and manner thereof are all discretionary powers of the authority.

49 It is not suggested here that the respondent failed to consider whether to inspect or the manner of inspections. The trial judge and the Court of Appeal found that a policy decision [page1254] was made that inspections would be carried out by a crew of men called the Rockwork Section. In view of the fact that the crew had responsibility for the inspection of the slopes of all highways, the extent and manner of the inspection was delegated to the Rockwork Section. While it might be suggested that guidelines for inspection should have been laid down for the guidance of the crew, this would be second guessing the policy decision and not a matter for the Court. The appellant's attack on the conduct of the respondent and its employees is an attack on the manner in which they carried out the inspection and scaling of the mountain. The Rockwork Section had decided it could not closely monitor all slopes at all times. Some slopes would only be visually inspected from the highway. The appellant contended that the slopes above man-made cuts should have been closely inspected and that the trees should have been removed within ten feet of a cut slope. The trial judge made the following important findings concerning the decision of the respondent as to the extent and manner of the inspection program:

> The question in the case at bar is thus whether the failure of the Crown to take the steps which the plaintiff says it should have taken to prevent the rock fall was a matter of policy or operational. In order to answer it, it is necessary to consider the nature of the decisions here in question. The Crown had never established as a matter of policy that all slopes above highways must be inspected for potential rock fall. Nor had it laid out specific guidelines for dealing with problems if danger was perceived. What it had done was to establish a small crew of men (the rock scaling crew) to deal with problems arising on cliff faces throughout the Province. This crew responded to specific requests from various highway districts for inspection and scaling. For the most part, however, it developed and followed its own program. Given that it was responsible for inspection of slopes and appropriate remedial measures for all the highways in the Province, it could not closely monitor all slopes at all times. The slope here in question was visually inspected from the highway on a number of occasions. However, there had never been scaling or close inspection of the area above the cut because the rock scaling crew did not deem that work to be a priority.

50 In stating that the authority "must specifically consider whether to inspect and if so the system must be a reasonable one in all the circumstances", my colleague is extending liability beyond what was decided in Anns v. Merton London Borough Council, Barratt v. District of North Vancouver, and City of Kamloops v. Nielsen, supra. The

system would include the time, manner and technique of inspection. On this analysis it is difficult to determine what aspect of a policy decision would be immune from review. All that is left is the decision to inspect. It can hardly be suggested that all the learning that has been expended on the difference between policy and operational was expended to immunize the decision of a public body that something will be done but not the content of what will be done. It seems to me that a decision to inspect rather than not inspect hardly needs protection from review. The concern that has resulted in extending immunity from review in respect of policy decisions is that [page1255] those entrusted with the exercise of the statutory powers make the decision to expend public resources. It is not engaged by a decision simply to do something. It is the decision as to what is to be done that will entail the taxation of the public purse. Lord Wilberforce underscores this concern when he states, at p. 754:

> Let us examine the Public Health Act 1936 in the light of this. Undoubtedly it lays out a wide area of policy. It is for the local authority, a public and elected body, to decide upon the scale of resources which it can make available in order to carry out its functions under Part II of the Act -- how many inspectors, with what expert qualifications, it should recruit, how often inspections are to be made, what tests are to be carried out, must be for its decision. It is no accident that the Act is drafted in terms of functions and powers rather than in terms of positive duty. As was well said, public authorities have to strike a balance between the claims of efficiency and thrift (du Parcq L.J. in Kent v. East Suffolk Rivers Catchment Board [1940] 1 K.B. 319, 338): whether they get the balance right can only be decided through the ballot box, not in the courts.

51 In this case, the extent of the inspection program was delegated to the Rockwork Section. The respondent acted within its statutory discretion in making that decision. It was a decision that inspections should be done and the manner in which they should be done. In order for a private duty to arise, it would have to be shown that the Rockwork Section acted outside its delegated discretion to determine whether to inspect and the manner in which the inspection is to be made.

52 The principal authorities in this Court do not support my colleague's view that the manner and extent of inspections are operational. Indeed, they confirm that these are the very substance of policy. In Barratt v. District of North Vancouver, supra, the respondent municipality had authority under s. 513(2) of the Municipal Act, R.S.B.C. 1960, c. 255, to lay out, maintain and improve highways. It [page1256] was, however, under no statutory duty to maintain highways. The respondent adopted a system of road inspections which required an inspector to travel all roads once in each two-week period. An accident occurred when the plaintiff rode his bicycle into a pot-hole on Marine Drive which had been inspected a week before. There was no allegation that the inspection was made improperly or negligently. I do not agree with my colleague that the basis for this decision was a determination that the policy was reasonable. That finding does not appear in the reasons of Martland J. although he referred to the evidence that the system of road inspection was well organized. The basis for the decision was that the program of inspection was a matter of policy or planning which could not be the basis for an allegation of negligence. At page 428 Martland J. states:

> In my opinion, no such duty existed. The Municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the Municipality cannot be held to be negligent because it formulated one policy of operation rather than another.

Then, after citing du Parcq L.J. in Kent v. East Suffolk Rivers Catchment Board, supra, he continued, at p. 428:

> My conclusion is that the trial judge sought to impose upon the Municipality too heavy a duty, that the determination of the method by which the Municipality decided to exercise its

> power to maintain the highway, including its inspection system, was a matter of policy or planning, and that, absent negligence in the actual operational performance of that plan, the appellant's claim fails.

53 In City of Kamloops v. Nielsen, supra, the City of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It exercised this power in favour of regulating construction [page1257] in accordance with a by-law which, inter alia, provided for the depth of footings. The by-law also imposed a duty in the City's building inspector to enforce the by-law by inspection. The inspector failed to inspect as required in order to determine whether work was progressing in accordance with the by-law. Wilson J., speaking for the majority, held that the provisions of the by-law were policy whereas in carrying out the inspection required by the by-law, the inspector was bound to act with reasonable care. It is clear that the provisions of the by-law which "provided for a scheme of inspections at various stages of construction" (at p. 12) was considered policy. The failure to enforce a stop work order and to inspect in order to determine whether the by-laws were being complied with was conduct outside of the area of delegated discretion. It was a departure from the duty created by the by-law and therefore a common law duty of care based on the proximity principle arose. It is significant that in the course of her reasons Wilson J. dealt with the judgment in Barratt v. District of North Vancouver, supra. She makes clear in the following passage, at p. 20 of her reasons, that Barratt v. District of North Vancouver decided that a decision by the municipality as to the extent of inspections is a policy matter which cannot be the foundation for an action in negligence:

> The second is that it seems to be central to his judgment that no duty was imposed upon the municipality. It was in the discretion of the municipality whether or to what extent it exercised its maintenance power. The courts could not therefore interfere in the absence of negligence in the implementation of the policy it adopted with respect to inspection. This, it appears to me, is the ratio of the decision in Barratt. [Emphasis added.]

54 In order for a private duty to arise in this case, the plaintiff would have to establish that the Rockwork Section, having exercised its discretion as to the manner or frequency of inspection, carried out the inspection without reasonable care or at all. [page1258] There is no evidence or indeed allegation in this regard. In this respect, the decision in Barratt v. District of North Vancouver, supra, is on all fours and ought to be applied here. I would therefore dismiss the appeal.

qp/i/qlcvd

Indexed as:

Garland v. Consumers' Gas Co.

Gordon Garland, appellant;
v.
The Consumers' Gas Company Limited, respondent.

[1998] 3 S.C.R. 112

[1998] S.C.J. No. 76

File No.: 25644.

Supreme Court of Canada

1998: March 23 / 1998: October 30.

Present: L'Heureux-Dubé, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law -- Criminal interest rate -- Late payment penalty -- Gas utility charging late payment penalty of five percent on accounts not paid by due date -- Whether late payment penalty constitutes "interest at a criminal rate" -- Criminal Code, R.S.C., 1985, c. C-46, s. 347.

Costs -- Class actions -- Class proceedings fund -- Costs of procedural motion awarded against class representative in his personal capacity -- Whether costs award should be set aside -- Law Society Act, R.S.O. 1990, c. L.8, s. 59.4 -- Class Proceedings Act, 1992, S.O. 1992, c. 6.

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board, bills its customers on a monthly basis, and each bill includes a "due date" for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty which does not compound or increase over time. It was implemented in 1975 following a series of rate hearings conducted by the Board. In granting the respondent's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to the respondent of carrying accounts receivable. The Board recognized that if a bill is paid very soon after the due date, the penalty can be shown to represent a very high rate of interest, but it noted that customers could avoid such a charge by paying their bills on time. The appellant commenced an action on behalf of a large number of the respondent's customers alleging that the LPP violates s. 347 of the Criminal Code because -- for a significant number of customers each month -- it constitutes interest at a rate exceeding 60 percent per year. He submitted actuarial evidence showing that under the normal billing plan, the LPP gives rise to an interest rate exceeding

60 percent per annum for customers who pay within 37 days after the due date. Under the equal billing plan, the point at which the interest rate falls below 60 percent is between 24 and 90 days after the due date, depending on the month. The appellant also submitted statistical evidence indicating that while many of the respondent's customers pay late, most pay only a few days late. In support of this action, the appellant applied for and received financial assistance from the Ontario Class Proceedings Committee. He also moved for certification of a class proceeding on behalf of all customers who paid LPP charges after April 1, 1981, when s. 347 of the Code came into force. Prior to the disposition of that motion both the appellant and the respondent moved for summary judgment on various grounds. A judge of the Ontario Court (General Division) granted summary judgment in favour of the respondent and dismissed the action. The respondent moved for an order amending the judge's formal judgment. The appellant refused to consent to the motion. The motion was granted and the judge assessed costs to be payable by the appellant personally. The Court of Appeal dismissed the appellant's appeal of the dismissal of his action.

Held (Bastarache J. dissenting): The appeal should be allowed and the matter remitted to the Ontario Court (General Division).

Per L'Heureux-Dubé, Cory, McLachlin, Iacobucci, Major and Binnie JJ.: Section 347 of the Code applies to the LPP imposed by the respondent. For the purposes of s. 347, "interest" is an extremely comprehensive term which expressly includes charges or expenses "in the form of a . . . penalty". However, not every charge or expense will be subject to the criminal interest rate provision. In order to constitute "interest" under s. 347, a charge -- whatever its form -- must be "paid or payable for the advancing of credit under an agreement or arrangement". Under s. 347(2), "credit advanced" encompasses not only "the money" advanced under an agreement or arrangement, but also "the monetary value of any goods, services or benefits" which may be so advanced. The most plausible interpretation of s. 347(2) is that an "advance" of "the monetary value of any goods, services or benefits" means a deferral of payment for such items. The respondent provides goods and services to its customers, for which a specified amount of money is payable each month on a certain date. The deferral of that payment past the due date constitutes "credit advanced" within the meaning of s. 347(2), assuming that such deferral is permitted under the payment relationship which exists between the parties. Moreover, the credit is advanced by the respondent to its customers "under an agreement or arrangement". The arrangement between the parties creates two payment options: a short-term option, which costs nothing, and a longer-term option, which involves an additional charge. While it is clear that the respondent neither encourages late payments nor seeks to profit from them, under the terms prevailing between the parties customers are permitted to defer their payment, albeit for a price. That is an arrangement for the advancing of credit under the broad language adopted in s. 347. On the facts of this case, a penalty incurred, pursuant to the terms of a standing arrangement between the parties, for the deferral of payment of a specified amount of money owing for goods, services or benefits is an "interest" charge within the meaning of s. 347 and is subject to that law's prohibitions against requiring or receiving interest at a criminal rate.

Section 347 creates two separate offences. Section 347(1)(a) makes it illegal to enter into an agreement or arrangement to receive interest at a criminal rate, while s. 347(1)(b) makes it illegal to receive a payment or partial payment of interest at a criminal rate. Section 347(1)(a) should be narrowly construed. Whether an agreement or arrangement for credit violates the provision is determined as of the time the transaction is entered into. If the agreement or arrangement permits the payment of interest at a criminal rate but does not require it, there is no violation of s. 347(1)(a), although s. 347(1)(b) might be engaged. It is clear that there is no violation of s. 347(1)(a) in this case. The arrangement between the respondent and its customers does not, on its face, require the payment of interest at a criminal rate. Section 347(1)(b) should be broadly construed. Whether an interest payment violates the provision is determined as of the time the payment is received. For the purposes of s. 347(1)(b), the effective annual rate of interest arising from a payment is calculated over the period during which credit is actually outstanding. Pursuant to the decision in Nelson, there is no violation of s. 347(1)(b) where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement. The actuarial evidence submitted in this case shows that if a regular billing customer waits 38 days or longer to pay, the annual interest rate represented by the five percent charge drops below the criminal

threshold of 60 percent per annum. It cannot be said, however, that payment of the LPP within 38 days is a "voluntary" act within the meaning of Nelson. While strictly speaking, it is true that customers may delay their payment of the LPP beyond 38 days, there is clearly no invitation to do so, and it would be disingenuous to conclude that customers actually perceive themselves to be at liberty to wait that long. Statistical evidence submitted by the appellant strongly supports the opposite conclusion.

The motions judge erred in awarding costs against the appellant in his personal capacity. The purpose of s. 59.4 of the Law Society Act is to protect class representatives from personal exposure to costs in actions where financial support has been granted by the Class Proceedings Fund. Since the appellant has successfully applied for support from the Class Proceedings Fund, he should not be exposed to personal liability for any costs arising in this action, including costs incurred in the context of procedural motions.

Per Bastarache J. (dissenting): While the definition of "interest" includes the notion of "penalty", the application of s. 347 is also predicated upon the existence of an "agreement or arrangement" for the advancement of credit. On the facts of this case, the respondent has not entered into an agreement or arrangement to give credit to the appellant or to any other customers who have paid the LPP. Far from being a consensual extension of credit, the respondent's LPP represents an effort to prevent or deter customers from unilaterally taking credit. The decisions of the Ontario Energy Board approving the LPP confirm that the penalty is not "paid or payable for the advancing of credit", but is an incentive for timely payment. Further indicia supporting this view are the fact that the penalty is not compounded, the fact that it is a one-time payment which does not increase over time, the fact that there is no sanction for the non-payment of the penalty, and the fact that the penalty triggers contemporaneously with the account becoming overdue. Since s. 347 of the Code is not applicable, the action should be dismissed. A contract for the extension of credit should not be implied in every case where there is late payment pursuant to a sale of goods. This case involves a regulated industry and a rate approval scheme has been established with the specific purpose of protecting consumer interests. To limit the choice of means of the regulator by resorting to the criminal law power is inappropriate and unwarranted.

Cases Cited

By Major J.

Distinguished: Nelson v. C.T.C. Mortgage Corp. (1984), 16 D.L.R. (4th) 139, aff'd [1986] 1 S.C.R. 749; referred to: William E. Thomson Associates Inc. v. Carpenter (1989), 69 O.R. (2d) 545; Tomell Investments Ltd. v. East Marstock Lands Ltd., [1978] 1 S.C.R. 974; Immeubles Fournier Inc. v. Construction St-Hilaire Ltée, [1975] 2 S.C.R. 2; Attorney-General for Ontario v. Barfried Enterprises Ltd., [1963] S.C.R. 570; Delta v. Active Chemicals Ltd. (1984), 57 B.C.L.R. 213; Mira Design Co. v. Seascape Holdings Ltd. (1981), 34 B.C.L.R. 55; Aectra Refining & Marketing Inc. v. Lincoln Capital Funding Corp. (1991), 6 O.R. (3d) 146; Degelder Construction Co. v. Dancorp Developments Ltd., [1998] 3 S.C.R. 90.

By Bastarache J. (dissenting)

Coffelt v. Arkansas Power & Light Co., 451 S.W.2d 881 (1970); State ex rel. Utilities Commission v. North Carolina Consumers Council, Inc., 198 S.E.2d 98 (1973).

Statutes and Regulations Cited

Class Proceedings Act, 1992, S.O. 1992, c. 6.
Commercial Concentration Tax Act, R.S.O. 1990, c. C.16, s. 15(10).
Criminal Code, R.S.C. 1970, c. C-34, s. 305.1.
Criminal Code, R.S.C., 1985, c. C-46, s. 347(1), (2).
Excise Tax Act, R.S.C., 1985, c. E-15, s. 7(1).
Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 163.1, 227(9).

Interest Act, R.S.C., 1985, c. I-15 [formerly R.S.C. 1970, c. I-18].
Law Society Act, R.S.O. 1990, c. L.8, ss. 59.2 [ad. 1992, c. 7, s. 3], 59.4 [idem].
Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3.
Municipal Franchises Act, R.S.O. 1990, c. M.55.
Ontario Energy Board Act, R.S.O. 1990, c. O.13.
Small Loans Act, R.S.C. 1970, c. S-11, ss. 2 "cost", 3.

Authors Cited

Antle, Stephen. "A Practical Guide to Section 347 of the Criminal Code -- Criminal Rates of Interest" (1994), 23 C.B.L.J. 323.
Canada. House of Commons Debates, 1st Sess., 32nd Parl., vol. III, July 21, 1980, p. 3146.
Feldman, Michael. "Criminal Interest Rates in the Context of Early Payment of a Debt Obligation" (1985), 2 Bus. & L. 70.
Goode, Royston Miles. Consumer Credit Law. London: Butterworths, 1989.
Keest, Kathleen E. The Cost of Credit: Regulation and Legal Challenges. Boston: National Consumer Law Center, 1995.
Oxford English Dictionary, 2nd ed. Oxford: Clarendon Press, 1989, "agreement", "arrangement".
Ziegel, Jacob S. "Section 347 of the Criminal Code" (1994), 23 C.B.L.J. 321.
Ziegel, Jacob S. "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost" (1986), 11 C.B.L.J. 233.

APPEAL from a judgment of the Ontario Court of Appeal (1996), 30 O.R. (3d) 414, 93 O.A.C. 155, 28 B.L.R. (2d) 278, [1996] O.J. No. 3162 (QL), affirming a decision of the Ontario Court (General Division) (1995), 22 O.R. (3d) 451, 122 D.L.R. (4th) 377, 17 B.L.R. (2d) 239, [1995] O.J. No. 302 (QL), dismissing the appellant's action. Appeal allowed, Bastarache J. dissenting.

Barbara L. Grossman, Michael L. McGowan, Christopher D. Woodbury and Dorothy Fong, for the appellant.
Fred D. Cass, John J. Longo, Daniel Boivin and Janet Clark, for the respondent.

Solicitors for the appellant: McGowan & Associates, Toronto.
Solicitors for the respondent: Aird & Berlis, Toronto.

The judgment of L'Heureux-Dubé, Cory, McLachlin, Iacobucci, Major and Binnie JJ. was delivered by

1 **MAJOR J.**:-- This appeal concerns the interpretation and application of s. 347 of the Criminal Code, R.S.C., 1985, c. C-46 -- the "Criminal Interest Rate" provision. Section 347 makes it an offence to enter into an agreement for, or to receive, interest at a rate exceeding 60 percent per year. The respondent sells natural gas to Ontario residents. Customers who do not pay their bills on or before a specified date each month are subject to a five percent penalty for late payment. The main issue is whether that penalty, depending on when it is paid, may be said to constitute "interest at a criminal rate" within the meaning of s. 347 of the Code.

2 A subsidiary issue is whether the trial judge erred in awarding $500 in costs against the appellant personally in connection with a procedural motion. The appellant submits that because this putative class action has been approved for support by the Ontario Class Proceedings Committee, any award of costs must be assessed against the Class Proceedings Fund and may not be awarded against him in his personal capacity.

I. Facts

3 The respondent, Consumers' Gas Company Limited ("Consumers' Gas" or "CG"), is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the Ontario Energy Board Act, R.S.O. 1990, c. O.13, and the Municipal Franchises Act, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a "due date" for the payment of current charges. The due date normally falls on the 10th day (for commercial customers) or the 16th day (for residential customers) after the bill is issued. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. Customers can avoid the LPP by participating in a pre-authorized payment system, whereby the amount of their monthly bill is deducted automatically on the due date from a designated bank account.

5 Consumers' Gas offers its customers two billing plans. Under the normal plan, customers are simply billed for the cost of goods and services which they consume each month. Under the "Equal Billing Plan", CG estimates the customer's yearly consumption, bills an equal amount each month for 10 months, settles any balance in the 11th month, and bills for actual use in the 12th. About half of CG's customers subscribe to each type of plan. Late-paying customers are subject to the LPP regardless of which plan is used.

6 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting CG's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to CG of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of five percent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty can, if calculated as an interest charge, be shown to represent a very high rate of interest. However, it noted that customers could avoid such a charge by paying their bills on time, and that in any event in the case of the average bill the dollar amount of the penalty would not be very large.

7 On several occasions since its adoption, the LPP has been reviewed and re-approved by the OEB in essentially the same form. From 1981 until 1989, rate orders issued by the Board with regard to Consumers' Gas incorporated the following provision (applicable to residential customers):

> PENALTY FOR LATE PAYMENT:
>
> When payment in full is not made within sixteen (16) days of the date of mailing, or the hand delivery of the bill, a penalty of five per cent (5%) of the current amount billed shall be levied....

Beginning in 1989, CG rate orders incorporated this statement from the respondent's Handbook of Rates and Distribution Services (applicable to all customers):

> SECTION F - PAYMENT CONDITIONS
>
> Payment in full should be received by the Company ... on or before the due date specified in the monthly bill, which date is at least ten (10) days (sixteen (16) days in the case of Rates 1, 2, 6 and

> 9), after the date of rendering the bill. A penalty of five (5) percent of the unpaid portion of the current amount billed shall be added to the amount due if payment is not received as outlined above....

The record indicates that every rate order of the OEB regarding the respondent issued between 1981 and the filing of this action has incorporated the LPP as a component of the respondent's rate structure.

8 Customers are made aware of the LPP in several ways. The due date for payment of current charges appears at the top of every residential bill, and is defined on the reverse as "the date that your account must be paid to avoid a late payment penalty". The significance of the due date is also conveyed by the fact that two different amounts payable appear on the face of the bill: one amount is "payable by due date" while the other, somewhat higher, is "payable after due date". In addition, a variety of informational brochures are provided by CG to its customers. The pamphlet entitled "Getting to Know Us" includes the following definitions of terms contained in the monthly bill:

> 6. Payable by due date -- This is the total amount payable on or before the due date in order to avoid a late payment penalty charge....
> 7. Due date -- The date on which your account must be paid in full in order to avoid a late payment penalty charge.
> 8. Payable after due date -- The total amount payable after the due date. This amount includes the late payment penalty charge.

Elsewhere in the same brochure, it is explained that:

> You should pay your gas bill on or before the due date shown on the bill, in order to avoid late payment charges. These charges are designed to encourage late-paying customers to pay their accounts promptly, thus minimizing the cost of carrying outstanding accounts....
>
> If you do not pay your account by the due date, you must pay the amount "payable after due date" that includes a late payment penalty.

9 The appellant, Gordon Garland, is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. Garland asserts that the LPP violates s. 347 of the Criminal Code because -- for a significant number of customers each month -- it constitutes interest at a rate exceeding 60 percent per year. He commenced an action on behalf of over 500,000 Consumers' Gas customers seeking restitution of LPP charges received by the respondent in violation of s. 347 of the Code.

10 Garland contends that because the LPP is a one-time charge, the effective rate of interest arising from it depends on when a customer actually pays his or her overdue bill. Actuarial evidence submitted by Garland shows that, under the normal billing plan, the LPP gives rise to an interest rate exceeding 60 percent per annum for customers who pay within 37 days after the due date. It is only on the 38th day after the due date that the interest rate falls below 60 percent and so within the legal limit. It thereafter decreases gradually from 60 percent until paid. Under the Equal Billing Plan, the calculation is more complex -- Garland's actuarial evidence indicates that for such customers, the point at which the interest rate falls below 60 percent is between 24 and 90 days after the due date, depending on the month. For the purpose of this appeal, these calculations are presumed to be accurate.

11 Garland has also submitted statistical evidence indicating that while many of the respondent's customers pay late, most pay only a few days late. Specifically, the evidence shows that between 1981 and 1991, an average of 34.3 percent of customers failed to pay by the due date on at least one of their bills, but 81 percent of those customers paid within 10 days thereafter. Thus, overall during that period, 27.9 percent of CG's customers paid an LPP charge within 10 days after the due date, i.e., well within the time period during which the rate of interest arising from that charge is alleged to have exceeded 60 percent. Again, these figures are presumed to be true for the purposes of this appeal.

12 Finally, Garland has submitted documentary evidence showing that for budgeting purposes, Consumers' Gas makes and relies on forecasts of the revenue it will receive from LPP charges each year. For 1994, the estimate was $7.1 million, and for 1995, the budget forecast was $7.4 million. Garland has also submitted evidence showing that the total of LPP charges received by CG between 1981 and 1993 was $71.2 million.

13 In support of this action, Garland applied for and received financial assistance from the Ontario Class Proceedings Committee, pursuant to s. 59.2 of the Law Society Act, R.S.O 1990, c. L.8. Garland also moved, pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6, for certification of a class proceeding on behalf of all customers who paid LPP charges after April 1, 1981, when s. 347 of the Code came into force. Prior to the disposition of that motion, both Garland and Consumers' Gas moved for summary judgment on various grounds. Summary judgment was granted in favour of Consumers' Gas and the action was dismissed. Garland's appeal was dismissed by the Ontario Court of Appeal. This appeal follows.

II. Relevant Statutory Provisions

14 Criminal Code, R.S.C., 1985, c. C-46

Criminal Interest Rate

347. (1) Notwithstanding any Act of Parliament, every one who

(a) enters into an agreement or arrangement to receive interest at a criminal rate, or

(b) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

"credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

"criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

...

"interest" means the aggregate of all charges and expenses, whether in the form of

> a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;
>
> ...
>
> (3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.
>
> (4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

III. Judicial History

A. Ontario Court (General Division) (1995), 22 O.R. (3d) 451

15 As noted, cross-motions for summary judgment were filed by Garland and Consumers' Gas before this action was certified as a class proceeding. By agreement of the parties, a hearing was held before Winkler J. on the threshold question raised in CG's motion, i.e., whether s. 347 has any application to the circumstances of this case.

16 Consumers' Gas raised three arguments to support its contention that s. 347 does not apply and that Garland's action should be dismissed. First, it asserted that the purpose of the LPP is to encourage timely payment, not to achieve a rate of return on an advancement of credit, and therefore the LPP is not "interest" within the meaning of s. 347. In particular, CG pointed out that unlike an interest charge, the LPP is a one-time penalty which does not increase over time. Second, CG argued that s. 347 is intended to cover loans of money, and does not apply where, as here, the alleged "credit" consists solely of the value of goods, services or benefits advanced. Finally, CG relied on the decision in Nelson v. C.T.C. Mortgage Corp. (1984), 16 D.L.R. (4th) 139 (B.C.C.A), aff'd [1986] 1 S.C.R. 749, to argue that even if the LPP is a charge for the advancement of credit, it cannot violate s. 347 because the payment of the penalty and the interest rate arising from it are determined by voluntary acts of the customer, not by any agreement between the parties.

17 In response, Garland argued that "credit advanced" need not involve a loan of money. He asserted that the arrangement between CG and its customers, which allows for the deferral of payment for goods and services, is a credit arrangement within the meaning of s. 347. Garland further contended that the LPP is, in substance, an interest charge payable for the advancement of such credit. Finally, Garland asserted that the decision in Nelson is distinguishable from this action, because incurring and paying the LPP are not "voluntary" acts of the customer within the meaning of Nelson. In his submission, the actual receipt of interest at a criminal rate by CG constitutes a violation of para. (b) of s. 347(1), even if such an interest rate is not necessarily required on the face of the arrangement between the parties.

18 Winkler J. focused his analysis largely on the significance of the Nelson decision. In his view, Nelson established three principles applicable to the case at bar (at p. 467):

> [F]irst, that whether an agreement or arrangement violates s. 347 must be determined at the time the agreement is entered into; second, that whether the lender is in breach of s. 347 cannot turn on the voluntary conduct of the borrower, and third, that there is no violation of s. 347 where the payment of a criminal interest is not required by the agreement or arrangement.

Applying these principles, Winkler J. concluded that the LPP could never give rise to an offence under s. 347 because the payment of the penalty at a criminal rate of interest turns on the voluntary conduct of the customer. Winkler J. found that, as in Nelson, no payment of illegal interest is required under the arrangement between Consumers' Gas and its customers, at the time that arrangement is entered into. If the customer pays on time, no LPP will be levied. Likewise, if the customer misses the due date but then further delays payment of the LPP for a sufficient amount of time (e.g., 38 days), the resulting rate of interest falls below 60 percent. Winkler J. gave no weight to statistical evidence indicating that a consistent percentage of CG's customers every month do in fact pay an LPP at an illegal interest rate. He held that in any given case, it is always the customer who determines whether or not to incur the LPP and whether to pay it during the window of time when it may be considered a criminal rate.

19 Despite this conclusion, Winkler J. went on to consider whether the LPP may be said to constitute "interest" payable for the "advancing of credit under an agreement or arrangement" within the meaning of s. 347. He noted that s. 347 is broadly written and covers a wide range of transactions. In particular, he rejected the contention that the provision applies only to lenders and borrowers of money, and held that "credit advanced" can also refer to the deferral of payment for goods or services. However, he did not agree that any late payment is necessarily a deferral of payment or an advancement of credit, particularly where, as here, substantial efforts have been made to encourage the customer to pay on time. He stressed the distinction between the situation where a customer simply fails to pay by a stipulated time -- which he held to be the case on the facts before him -- and the situation where a lender agrees to delay its demand for payment in exchange for consideration. He found that s. 347 applies only to the latter situation. Winkler J. emphasized that the LPP is a one-time payment which does not compound over time, and that there are no immediate consequences for failing to pay it by a given date once it has been incurred. He concluded that the LPP is not levied in order to allow customers to take more time in paying their bills, but rather to discourage them from so doing. Accordingly, he found that the LPP is not an interest charge within the scope of s. 347.

20 Winkler J. granted summary judgment in favour of Consumers' Gas and dismissed the action.

B. Ontario Court of Appeal (1996), 30 O.R. (3d) 4l4

21 The Ontario Court of Appeal (Doherty, Abella and Charron JJ.A.) agreed with the conclusion of Winkler J. that Nelson is dispositive, and noted in particular that the reasons in Nelson were substantially affirmed by this Court. In obiter dictum, the Court of Appeal also agreed that s. 347 applies to transactions where the alleged "credit advanced" consists entirely of the value of goods, services, or benefits. However, the court expressed no opinion on the question of whether the LPP can be characterized as "interest" payable for the "advancing of credit under an agreement or arrangement" within the meaning of s. 347. The appeal was dismissed.

IV. Issues

22

(1) Does the late payment penalty charged by Consumers' Gas come within the scope of s. 347 of the Criminal Code?
(2) Did the motions judge err in awarding costs against Garland in his personal capacity?

V. Analysis

A. Does the late payment penalty charged by Consumers' Gas come within the scope of s. 347 of the Criminal Code?

23 Section 347 (formerly s. 305.1) of the Criminal Code, which came into effect on April 1, 1981, created Canada's first general anti-usury provision since Confederation. Prior to the adoption of s. 347, lenders and borrowers enjoyed absolute freedom under federal law to agree upon any rate of interest, subject only to the contractual restraints imposed at common or civil law and the special disclosure requirements arising under the Interest Act, R.S.C., 1985, c. I-15 (formerly R.S.C. 1970, c. I-18). The main exception to that rule was the Small Loans Act, R.S.C. 1970, c. S-11, s. 3, which limited the imposition of interest and other charges on loans of $1,500 or less. That Act, which was designed to protect borrowers seeking small personal loans, was repealed by the bill which created s. 347. See William E. Thomson Associates Inc. v. Carpenter (1989), 69 O.R. (2d) 545 (C.A.), at pp. 548-49. The current provision goes far beyond the scope of the Small Loans Act, both by criminalizing a particular interest rate for the first time, and by imposing a generally applicable ceiling on all types of credit arrangements without regard to the sophistication of the parties or the amount in issue.

24 Under s. 347, an effective annual rate of interest which exceeds 60 percent of the credit advanced under an agreement or arrangement is a criminal interest rate. The statute creates two offences with regard to such interest. Section 347(1)(a) makes it illegal to enter into an agreement or arrangement to receive interest at a criminal rate. Section 347(1)(b) makes it illegal to receive a payment or partial payment of interest at a criminal rate. The scope of the language in s. 347 is extremely broad. Interest is defined, with the exception of six specific items, as the aggregate of all charges and expenses, in any form, that are paid or payable for the advancing of credit under an agreement or arrangement. The definition of credit is similarly expansive. It includes the aggregate of the money and the monetary value of any goods, services or benefits advanced under an agreement or arrangement, minus any fees, commissions or similar charges incurred by the creditor.

25 The ostensible purpose of s. 347 was to aid in the prosecution of loan sharks. See House of Commons Debates, 1st Sess., 32nd Parl., vol. III, July 21, 1980, at p. 3146; Thomson, supra, at p. 549. However, it is clear from the language of the statute -- e.g., its reference to insurance and overdraft charges, official fees, and property taxes in mortgage transactions -- that s. 347 was designed to have a much wider reach, and in fact the section has most often been applied to commercial transactions which bear no relation to traditional loan-sharking arrangements. Although s. 347 is a criminal provision, the great majority of cases in which it arises are not criminal prosecutions. Rather, like the case at bar, they are civil actions in which a borrower has asserted the common-law doctrine of illegality in an effort to avoid or recover an interest payment, or to render an agreement unenforceable. For this reason, the provision has attracted criticism from some commercial lawyers and academics, and calls have repeatedly been made for its amendment or repeal. See, e.g., J. S. Ziegel, "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost" (1986), 11 C.B.L.J. 233; "Section 347 of the Criminal Code" (1994), 23 C.B.L.J. 321. Nevertheless, it is now well settled that s. 347 applies to a very broad range of commercial and consumer transactions involving the advancement of credit, including secured and unsecured loans, mortgages and commercial financing agreements.

26 The extent of s. 347's scope is the subject of this appeal. At issue is whether the section applies to penalties for late payment, and in particular the five percent LPP imposed by Consumers' Gas on customers who fail to pay their bills by a prescribed due date. The question has two parts. The first is whether the LPP can be said to constitute "interest" under s. 347, as opposed to being simply an incentive for timely payment. The second is whether the principles set forth in the Nelson case preclude the application of s. 347 here on the ground that any interest rate arising from the LPP depends on the voluntary conduct of the customer. These issues will be addressed in turn.

1. Is the LPP "interest" within the meaning of s. 347?

27 Pursuant to s. 347(2), "interest" is defined as:

> ... the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty,

> commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement ... but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

It is apparent from this definition that for the purposes of s. 347 "interest" is an extremely comprehensive term, encompassing many types of fixed payments which would not be considered interest proper at common law or under general accounting principles. In particular, charges or expenses "in the form of a ... penalty" are expressly included as interest under s. 347. At common law, interest is a charge for the use or retention of money which accrues day by day; it does not include penalties. See Tomell Investments Ltd. v. East Marstock Lands Ltd., [1978] 1 S.C.R. 974, at p. 983; Immeubles Fournier Inc. v. Construction St-Hilaire Ltée, [1975] 2 S.C.R. 2, at pp. 10-11; Attorney-General for Ontario v. Barfried Enterprises Ltd., [1963] S.C.R. 570.

28 In adopting s. 347, Parliament opted for the more inclusive "cost of the loan" concept derived from the Small Loans Act, which s. 347 replaced. Section 2 of that Act provided:

> 2. ...
>
> "cost" of a loan means the whole of the cost of the loan to the borrower whether the cost is called interest or is claimed as discount, deduction from an advance, commission, brokerage, chattel mortgage and recording fees, fines, penalties or charges for inquiries, defaults or renewals or otherwise....

The broad language of s. 347 was presumably intended (as it was in the Small Loans Act) to prevent creditors from avoiding the statute simply by manipulating the form of payment exacted from their debtors -- a practice which has historically undermined the effectiveness of anti-usury laws applying a strict definition of interest: Thomson, supra, at pp. 548-49; see also K. Keest, The Cost of Credit (1995), at p. 38. It is the substance, and not merely the form, of a charge or expense which determines whether it is governed by s. 347.

29 The LPP at issue in this appeal is a fixed payment, rather than a charge which accrues day by day. The motions judge emphasized that point in concluding that the LPP does not come within the scope of s. 347. At p. 473, he stated in part:

> First, the penalty is not compounded. Although it is expressed as a percentage of the amount owing, it is in fact a lump sum which is charged only if payment is not made by the due date. Second, the penalty is a one-time payment which does not increase over time.

The same argument has been advanced by the respondent in this appeal. To distinguish between fixed and time-sensitive charges is inconsistent with the plain language of s. 347, and to the extent the motions judge relied on such a distinction, such reliance was unfounded. As noted, Parliament expressly expanded the meaning of interest under s. 347 to include one-time charges, whether payable at the outset of a transaction (e.g., fees and commissions) or after repayment is due (e.g., fines and penalties). A time factor, while essential to the definition of common-law interest, is not necessary to bring a payment within the ambit of s. 347, and the LPP cannot be excluded on that ground.

30 It is equally clear, however, that not every charge or expense will be subject to the criminal interest rate provision. In order to constitute "interest" under s. 347, a charge -- whatever its form -- must be "paid or payable for the advancing of credit under an agreement or arrangement" (emphasis added). To contend that the LPP comes within the scope of s. 347 simply because it is a "penalty" is a formalistic and unpersuasive argument. The issue is whether that penalty constitutes, in substance, a cost incurred by customers to receive credit under an arrangement with Consumers' Gas.

31 There is a basic disagreement in this case about how the LPP should properly be characterized for the purposes of s. 347. The appellant asserts that the LPP is a price paid by customers for the privilege of retaining money that is owed to Consumers' Gas beyond a certain date. As such, he submits, it is in essence a charge for credit under a standing arrangement between the parties. The respondent submits that the LPP is merely an incentive for timely payment and has nothing to do with credit. It asserts that because it lends no money to its customers, but merely bills them for goods and services, there is no extension of credit within the meaning of s. 347. Furthermore, it submits that even if the deferral of payment for those goods and services is in fact a form of credit, such credit is unilaterally taken by late-paying customers, not advanced under any agreement or arrangement between the parties.

32 The dispositive question, therefore, is whether the LPP may be said to constitute a charge or expense "paid or payable for the advancing of credit under an agreement or arrangement". In answering that question, the Court should look to the substance, not merely the form, of the payment relationship which exists between Consumers' Gas and its customers. The basic features of that relationship are not in dispute and may be briefly stated: Consumers' Gas provides goods and services to its customers, but does not bill them immediately upon delivery or performance. Instead, it issues a bill each month for the total charges incurred in the preceding service period. The amount owing on the bill is due by a specified date. Customers who do not pay by that date must pay the amount owing plus an additional five percent penalty.

"Credit Advanced"

33 As a first step, it is necessary to determine whether the relationship between Consumers' Gas and its customers involves any advancement of credit within the meaning of s. 347. Although s. 347 is not confined to loan-sharking, in general the section arises in transactions which involve an advance of money in some form, whether in a conventional loan, a mortgage, a commercial financing agreement or otherwise. This case presents a more unusual situation, since it is clear that Consumers' Gas does not actually lend any money to its customers.

34 In keeping with the thrust of the section in general, "credit advanced" is broadly defined in s. 347(2):

> "credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

Notably, this definition encompasses not only "the money" advanced under an agreement or arrangement, but also "the monetary value of any goods, services or benefits" which may be so advanced. The scope of s. 347 therefore is not confined exclusively to loans of money. The respondent submits, however, that the reach of s. 347 is limited to cases in which at least some money has been advanced. This argument is based on a grammatical analysis of s. 347(2), since "money" is preceded by the definite article "the", whereas the phrase "goods, services or benefits" is modified by the indefinite article "any". Both the motions judge and the Court of Appeal rejected that contention as overly formalistic, and I agree. Section 347 applies to arrangements involving the monetary value of goods, services or benefits even in the absence of an outright advance of money.

35 The most plausible interpretation of s. 347(2) is that an "advance" of "the monetary value of any goods, services or benefits" means a deferral of payment for such items. A debt is deferred -- and credit extended -- when an agreement or arrangement permits a debtor to pay later than the time at which payment would otherwise have been due. See R. M. Goode, Consumer Credit Law (1989), at p. 109. The substance of such "credit" is a determined amount of money which is payable over time. Unlike the principal of a loan, however, such credit is not initially paid out to the debtor in the form of money, but arises when a debt is incurred for goods, services or benefits, and that debt is then deferred in full or in part by agreement of the parties.

36 An example is a credit sale. Such transactions are analogous to loans even though no money actually changes hands. In place of borrowing funds to pay for goods or services which have been provided, the debtor retains possession of his or her own money and the vendor assumes the position of a creditor by virtue of deferring the debt. Ordinarily in such circumstances, a premium is charged on the deferred amount, reflecting the value of the money which is now owed to the creditor but remains in the control of the party who has been permitted to delay payment. Under this interpretation of s. 347, the retailer who provides financing on a sale at an interest rate exceeding 60 percent per year is subject to the same criminal sanctions as the loan shark who lends money directly at such a rate.

37 It is crucial to bear in mind that the "credit advanced" in such situations consists of "monetary value" -- a specific amount of money that is owed for goods, services or benefits pursuant to an agreement or arrangement -- and not the goods, services or benefits themselves. If every sale, performance of services or conveyance of benefits were understood to be an advance of "credit", there would be virtually no limit to the application of s. 347. That section, despite its broad scope, is essentially concerned with regulating the relationship between creditors and debtors, not the relationship between commercial actors in the ordinary course of business.

38 This distinction can be illustrated with an example. Assume the purchase of a car for $1,000. Payment of the purchase price will normally be due at a date specified in the sale agreement or when the car is tendered. No credit exists in such a situation, regardless of whether the seller is in fact paid on time, because the car is not advanced to the purchaser as "credit". However, if the seller and purchaser enter into an arrangement to delay payment of the purchase price for one month, then credit has been advanced and any premium charged by the seller for that extension of time must comply with the requirements of s. 347. The "monetary value" of the car is now a fixed amount -- $1,000 -- under their agreement, and the advancement of that credit begins at the moment when payment would otherwise have been due.

39 The car itself, which may in reality be worth more or less than $1,000, is not the "credit advanced" and is not relevant for the purposes of s. 347. If the opposite were true, it would be virtually impossible to calculate an interest rate arising from such a transaction, since the value of the credit would be undefined. In addition, and more importantly, any transaction involving an "advance" of goods, services or benefits -- such as a rental or leasing agreement -- would be swept within the ambit of s. 347, and many such transactions would undoubtedly give rise to "interest" exceeding the legal limit. Assume that instead of being purchased, the car is rented for a day at a price of $50. If the car were to constitute credit advanced under s. 347(2), then the return of the car to the rental agency would presumably be a repayment of principal, and the charge paid for the advancing of that credit -- $50 for one day -- would give rise to an astronomical interest rate based on the value of the car. Such an absurd result could not have been intended by Parliament when it adopted s. 347. For the deferral of a debt to constitute "credit advanced" under s. 347, there must be a specified amount owing, and that amount must actually be due in the absence of an arrangement permitting later payment.

40 In the case at bar, Consumers' Gas provides goods and services to its customers, for which a specified amount of money is payable each month on a certain date. In light of the principles stated above, the deferral of that payment past the due date constitutes "credit advanced" within the meaning of s. 347(2), assuming that such deferral is permitted under the payment relationship which exists between the parties. The remaining question, therefore, is whether credit is advanced by Consumers' Gas to its customers "under an agreement or arrangement".

"Agreement or Arrangement"

41 As noted at the outset, "interest" under s. 347 is a charge which is "paid or payable for the advancing of credit under an agreement or arrangement". Consumers' Gas contends that even if credit may be said to include the deferral of payment for goods or services, no "agreement or arrangement" for the advancing of such credit exists where a customer simply fails or refuses to pay a bill on time and thereby takes such "credit" unilaterally. In the respondent's view, an agreement or arrangement for credit only arises when the creditor agrees to delay its demand for payment, normally in exchange for some form of consideration.

42 The respondent submits that in the case at bar there is no such consensual arrangement -- the LPP is imposed not as compensation for credit but as a means to deter customers from paying late. The respondent emphasized, as it did in the courts below, that the LPP does not have the "characteristics which one would expect" of a charge for credit, since it is a one-time payment which does not repeat, compound or increase over time, and no additional penalties accrue if a customer fails to pay it by any particular date. It is contended that the LPP is more akin to the late payment penalties which are authorized under federal and provincial statutes, such as the Excise Tax Act, R.S.C., 1985, c. E-15, s. 7(1), the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 163.1 and 227(9), and the Commercial Concentration Tax Act, R.S.O. 1990, c. C.16, s. 15(10). The respondent submits that Parliament could not have intended for those provisions to constitute agreements or arrangements for the advancing of credit within the meaning of s. 347.

43 The respondent also relies on decisions of the OEB to support its argument regarding the purpose of the LPP. In particular, it cites the original order of the OEB approving the implementation of the penalty. In that decision, the Board emphasized the deterrent effect of such penalties, and specifically rejected the option of imposing a conventional interest charge on overdue accounts. See Reasons for Decision, E.B.R.O. 302-II (September 4, 1975). The Board held at pp. 116-18:

> The primary objective of this charge is to encourage customers to pay promptly and thus minimize the growing cost of carrying accounts receivable.... The Applicant [Consumers' Gas] submits that these costs as well as extraordinary collection costs should be borne by customers who cause them to be incurred.
>
> ...
>
> The late payment penalty charge is a well established and practical device in widespread use in Ontario and elsewhere to encourage prompt payment of utility bills....
>
> The Board recognizes that a few regulatory Boards and text-book writers have been critical of a penalty charge of the kind used by the Applicant. However, the Board does not think that a monetary incentive for prompt payment is wrong in principle. Interest charged on over-due accounts on a daily basis has an appeal on theoretical grounds, but it gives little incentive to pay by a named date, gives little weight to collection costs and seems complicated.

Similarly, in 1988 the OEB reviewed the fairness of the LPP and concluded that it should be maintained in its existing form. See Reasons for Decision, E.B.R.O. 452 (December 21, 1988). In so finding, the Board noted at p. 330 that "the late payment penalty should be large enough to deter those customers who otherwise might be tempted to defer payment". Consumers' Gas submits that the Board's characterization of the LPP should be accorded curial deference by this Court.

44 The respondent's arguments on this point were accepted by the motions judge, who held as follows at pp. 469-71:

> From the foregoing [OEB] decisions, it is apparent that the OEB does not view the LPP charged by Consumers' Gas as an interest charge for the advancing of credit. Instead, as the defendant submits, the OEB considers it to be an incentive for timely payment....
>
> ...
>
> I accept the plaintiff's argument that a deferral of payment constitutes credit. However, I do not agree that just because a customer does not pay on time means that there has been a deferral of payment or that credit has been advanced, particularly where the company has done what it could to encourage the customer to pay on time. A distinction must be drawn between the situation in which a customer fails to pay within a stipulated time, because of inadvertence, choice or because

> he does not have the money, and the situation in which an agreement is entered into whereby the lender of money or issuer of goods agrees to delay its demand for payment, in exchange for the consideration of an additional charge. In my view, s. 347 is applicable only to the latter situation. The facts before me reveal the former situation.

The Court of Appeal dismissed Garland's appeal on separate grounds and declined to reach the issue of whether the LPP is a charge "payable for the advancing of credit under an agreement or arrangement".

45 It is true that there is an important difference between the consensual granting of credit and the unilateral taking of it. See, e.g., Goode, supra, at p. 108. As noted, s. 347 does not apply to situations in which a buyer or consumer fails to pay on time, without the consent of the other party, for goods, services or benefits provided. The facts in this case, however, present a different situation. The payment relationship which exists between Consumers' Gas and its customers is defined by a standing arrangement. The terms of that arrangement are imposed by Consumers' Gas, after approval by the OEB. They are clearly conveyed to every customer and do not change from month to month. Those terms provide, in plain language, that a customer's gas bill may be paid either before or after the due date. As the motions judge observed at p. 466:

> [T]he bill received by the customer states the amount "payable by due date", the "due date" and the amount "payable after due date". The bill does not indicate that payment must be made by the due date and I question the ability of Consumers' to sue as soon as the due date has passed.

It is also made clear, however, that Consumers' Gas prefers to receive payment by the due date, and that customers who, for whatever reason, fail to meet that deadline must pay a price of five percent on top of the amount owing for that month.

46 In short, the arrangement between the parties creates two payment options: a short-term option, which costs nothing, and a longer-term option, which involves an additional charge. The motions judge recognized this as well in the closing words of his decision, when he observed (at pp. 473-74) that the transaction between the parties "is a two-price system by which customers can opt to pay one price by the due date or another price thereafter". He concluded that such an arrangement "represents a discount which is forfeited if payment is not made by the due date" (p. 474). It can just as easily be said that the LPP represents a premium imposed when payment is made over the longer period. Customers who do not like these terms presumably may end their relationship with the respondent; by continuing to subscribe to its services they accept the terms of the prevailing arrangement, including the imposition of the LPP. It cannot properly be contended that Consumers' Gas, having designed those terms itself, does not consent to the customer acting in accordance with them.

47 The respondent does not deny that the LPP is imposed under an arrangement, but disputes the nature of that arrangement. As noted, it argues that the intended purpose of the LPP is not to exact a price for credit but to discourage the taking of credit in the first place. That assertion is not entirely supported by the record. The OEB found that deterrence of late payments is the "primary objective" of the LPP. However, it also held that when such deterrence is not effective, another purpose of the penalty is to ensure that the "cost of carrying accounts receivable" is recovered from customers who, by delaying payment, cause such costs to be incurred (Reasons for Decision, E.B.R.O. 302-II, supra, at p. 116). Before approving the respondent's request to implement the LPP in 1975, the OEB held a series of hearings, during which the Associate Comptroller of the respondent was examined with regard to the purpose of the LPP. He stated in part:

> Q: The cost of money is a real problem is it?
>
> A: Yes, sir.

Q: You don't want the customers to be sitting with lots of the company's money for long periods of time. You require cash flow. Is that fair?

A: Yes, sir, that is correct.

Q: It costs the company money to borrow money?

A: Yes, sir.

...

Q: Isn't this late payment charge then a charge to the customer for keeping the money past a certain time period, for keeping the money for a certain length of time?

A: Partly that and partly to recover our collection costs.

Transcript of Examination of D. C. Morton, January 24, 1975 (Case on Appeal, at pp. 376-77). Similarly, in one of its informational brochures ("Some special billing charges"), Consumers' Gas explains the purpose of the LPP to its customers as follows (Case on Appeal, at p. 680):

> The primary purpose of this charge is to encourage our customers to pay on or before the due date and thereby maintain the company's cash flow. Revenue from this penalty helps to offset our costs of carrying outstanding gas accounts receivable and collecting delinquent accounts.

Compensation for the cost of payment deferred is the hallmark of a credit arrangement.

48 Even if deterrence were the only intended purpose of the LPP, that would not be determinative of the issue before the Court. The nature of the arrangement between Consumers' Gas and its customers is a question of law. That question turns on how the LPP operates in substance, not on what the respondent hopes to achieve by imposing it. Nor does the Court owe curial deference to the OEB with regard to the characterization of the penalty. It is clear that Consumers' Gas neither encourages late payments nor seeks to profit from them. The issue, however, is not what the company would prefer but what it has consented to. Under the terms prevailing between the parties, customers are permitted to defer their payment, albeit for a price. That is an arrangement for the advancing of credit under the broad language adopted in s. 347. As the OEB recognized, a five percent penalty is an effective deterrent precisely because it constitutes a high cost, in economic terms, for the retention of money. It is the severity of that cost which, in the view of the appellant, runs afoul of s. 347.

49 This conclusion is not affected by the fact that late payment penalties exist in certain federal and provincial statutes. Such penalties are readily distinguishable from the LPP at issue here. The contractual relationship between a public utility and its customers regarding the payment of monthly charges is not comparable to the political relationship between a government and its citizens regarding the payment of taxes. There is no agreement or arrangement between the latter parties governing the imposition of taxes, let alone permitting the payment of one amount by a due date and another amount thereafter. In any event, for the purposes of s. 347, tax is not the monetary value of goods, services, or benefits provided by the government, and the deferral of tax, even if such deferral were permitted, would not constitute

"credit" within the meaning of s. 347(2). See Delta v. Active Chemicals Ltd. (1984), 57 B.C.L.R. 213 (C.A.), at p. 217.

50 For these reasons, I conclude that the LPP imposed by Consumers' Gas is a "charg[e] ... in the form of a ... penalty ... payable for the advancing of credit under an agreement or arrangement". As such it is an interest charge for the purposes of s. 347.

51 The conclusions reached in this appeal may not follow intuitively from the concepts of "credit" and "interest" as those terms are employed at common law and in everyday life. The result here is mandated by the extremely broad compass given to those terms by Parliament under s. 347. As Huddart L.J.S.C. observed in Mira Design Co. v. Seascape Holdings Ltd. (1981), 34 B.C.L.R. 55, at p. 60:

> The thrust of the definitions of "credit advanced" and "interest" is to cover all possible aspects of any transaction to ensure that the cost of using someone else's money never exceeds the criminal rate. Thus, they focus on the actual benefit given to the borrower and the real cost of borrowing. The actual benefit is the real amount in the borrower's hands minus all the penalties, commissions and other costs incurred. The cost of borrowing is also widely defined. Clearly the intention of the legislature was to concentrate on the substance of the transaction, not on its mechanics or form.

52 It should be noted however that s. 347 is a deeply problematic law. Some of its terms are most comfortably understood in the narrow context of street-level loan sharking, while others compel a much broader application. The two facets of the statute do not comfortably co-exist. The Court is aware that the present decision may have the effect of increasing the importance of s. 347 in some consumer and commercial transactions. Given the interpretive difficulties inherent in the provision and the volume of civil litigation which it has already spawned, it is with some reluctance that we are legally driven to this conclusion. However, the plain terms of s. 347 must govern its application. If the section is to be given a more directed focus, it lies with Parliament, not the courts, to take the required remedial action.

53 In any event, the result reached in this appeal is limited. On the facts of this case, a penalty incurred, pursuant to the terms of a standing arrangement between the parties, for the deferral of payment of a specified amount of money owing for goods, services or benefits is an "interest" charge within the meaning of s. 347 and is subject to that law's prohibitions against requiring or receiving interest at a criminal rate.

2. Is the Application of s. 347 Precluded by the Principles Set Forth in Nelson v. C.T.C. Mortgage Corp.?

54 As noted, s. 347 creates two separate offences. Section 347(1)(a) makes it illegal to enter into an agreement or arrangement to receive interest at a criminal rate. Section 347(1)(b) makes it illegal to receive a payment or partial payment of interest at a criminal rate. The relationship between these two provisions has been the subject of much comment in the courts below and in academic writings. In particular, controversy exists about whether an agreement which does not expressly require the payment of criminal interest at the time it is entered into may nevertheless give rise to an actual payment of interest at an illegal rate. Such cases can arise if an additional charge is incurred while credit is outstanding, or if the actual period for repayment is shortened by the occurrence of a determining event or an act by one of the parties. See, e.g., Mira Design, supra; Aectra Refining & Marketing Inc. v. Lincoln Capital Funding Corp. (1991), 6 O.R. (3d) 146 (Gen. Div.); S. Antle, "A Practical Guide to Section 347 of the Criminal Code -- Criminal Rates of Interest" (1994), 23 C.B.L.J. 323, at p. 334; Ziegel, "The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost", supra, at p. 240; M. Feldman, "Criminal Interest Rates in the Context of Early Payment of a Debt Obligation" (1985), 2 Bus. & L. 70.

55 The leading decision on this issue is Nelson, supra. The facts and judgments in Nelson are set forth in detail in the companion case to this appeal, Degelder Construction Co. v. Dancorp Developments Ltd., [1998] 3 S.C.R. 90, and need not be fully repeated. Briefly, the Nelsons were guarantors of a mortgage on which a number of fixed fees were payable

in addition to conventional interest. Had the mortgage been repaid when it was due, the fees and interest would have produced an effective interest rate of 52.49 percent per annum. However, the mortgage contained a right of prepayment which was exercised by the debtor early in the life of the agreement. When the interest rate was calculated over the term during which the mortgage was actually outstanding, it was 84.1 percent per annum. The Nelsons sued the lender alleging that the mortgage agreement was void and unenforceable under s. 305.1 (now s. 347).

56 The issue at trial and on appeal was whether the rate of interest should be calculated over the full term of the mortgage as stated in the agreement, or over the shorter period that the mortgage was actually outstanding. The British Columbia Court of Appeal split on the question. Hutcheon J.A., dissenting, held that the case turned on the distinction between ss. 347(1)(a) and 347(1)(b). In his view, subs. (1)(a) prohibits entering into an agreement which, on its face, requires the payment of illegal interest; he found that such a situation was not before him. However, he held that subs. (1)(b) prohibits the actual receipt of an illegal interest payment, and the rate in such situations must be based on the time elapsed since the money was advanced, even if that period differs from the term foreseen in the agreement. The majority, per Seaton J.A., found that such an approach would produce an absurd result in a situation where the period of repayment is within the exclusive control of the debtor. As Seaton J.A. held at pp. 144-45, Parliament cannot have intended that "an innocent mortgagee who has entered into a perfectly lawful agreement should as the result of the voluntary act of the mortgagor in prepaying the mortgage become guilty of an offence under [s. 347(1)(b)]". The majority recognized that the same might not be true if a mortgage were payable on the demand of the creditor rather than at the debtor's option. The reasons of the majority were agreed to in substance by this Court.

57 The gravamen of Nelson is that an agreement or arrangement for credit which is legal on its face cannot become illegal under s. 347 through the voluntary act of the debtor. Consumers' Gas contends that this principle precludes the application of s. 347 in the case at bar, because incurring and paying the LPP are voluntary acts of the customer. The motions judge accepted the argument that Nelson is dispositive of this case and dismissed the action on that basis. The Ontario Court of Appeal agreed. In particular, the Court of Appeal noted that the decision in Nelson was affirmed by this Court.

58 The reasons in Dancorp, which are being released simultaneously with this decision, revisit Nelson and set forth the following general principles governing the interpretation of s. 347 (at para. 34):

> (1) Section 347(1)(a) should be narrowly construed. Whether an agreement or arrangement for credit violates s. 347(1)(a) is determined as of the time the transaction is entered into. If the agreement or arrangement permits the payment of interest at a criminal rate but does not require it, there is no violation of s. 347(1)(a), although s. 374(1)(b) might be engaged.
>
> (2) Section 347(1)(b) should be broadly construed. Whether an interest payment violates s. 347(1)(b) is determined as of the time the payment is received. For the purposes of s. 347(1)(b), the effective annual rate of interest arising from a payment is calculated over the period during which credit is actually outstanding.
>
> (3) There is no violation of s. 347(1)(b) where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement. [Emphasis in original.]

59 Applying the first principle stated above, it is clear that there is no violation of s. 347(1)(a) in this case. The arrangement between Consumers' Gas and its customers does not, on its face, require the payment of interest at a criminal rate. The payment of such interest depends on the occurrence of subsequent events.

60 With regard to s. 347(1)(b), Consumers' Gas makes two arguments. First, it contends that a customer can avoid the LPP entirely by paying on time, and therefore any customer who incurs the penalty does so voluntarily. Second, it contends that the amount of time which passes between the due date and the actual payment of the LPP -- and therefore the effective rate of interest arising from the penalty -- is entirely within the control of the customer. Consumers' Gas

submits that under the third principle stated above, receipt of the LPP cannot constitute a violation of s. 347(1)(b).

61 The respondent's assertion that customers "voluntarily" pay the LPP is unpersuasive. The prepayment of the mortgage in Nelson was a voluntary act because it was wholly at the debtor's initiative and was not compelled by the lender's demand or by a determining event set out in the agreement. A customer's failure to pay the LPP by a named date is not voluntary in the same sense. The LPP is automatically triggered by an event specified in the arrangement between the parties, i.e. the passage of time. The fact that the respondent consents to the possibility of late payment, and thereby presents its customers with the option of paying before or after the due date, does not mean that a customer "voluntarily" incurs the LPP when he or she fails to pay on time. A penalty is not "voluntary" simply because it could conceivably be avoided through prompt payment. If that were the case, then all penalties could be considered voluntary, and the inclusion of the term "penalty" in s. 347(2) would become meaningless. When a penalty is specified in an agreement or arrangement for credit, the lender bears the risk that the payment of that penalty might give rise to a violation of s. 347(1)(b).

62 It is unnecessary, in the context of this appeal, to create a general rule regarding which kinds of payments are "voluntary" within the meaning of Nelson. It bears noting in particular that the "voluntariness" of certain automatic payment terms, such as acceleration clauses triggered by the debtor's default or insolvency, remains an open question. Some writers have suggested that a distinction should be drawn between clauses which accelerate repayment automatically, and those which give the lender the option of demanding repayment upon the occurrence of a stated event. In the latter case, it would be the lender's demand which attracts s. 347, and the lender could avoid liability by declining to accelerate repayment. See, e.g., Antle, supra, at p. 327. In my view, such a distinction is not required in this case, since the issue presented here concerns a penalty -- which is provided for explicitly in s. 347 -- and not an acceleration clause.

63 The respondent's second argument with regard to "voluntariness" presents a closer question. The actuarial evidence submitted in this case shows that if a regular billing customer pays the LPP within 38 days of incurring it, the five percent charge represents an annual interest rate exceeding 60 percent per annum. If the customer waits 38 days or longer to pay, the rate drops below the criminal threshold. The respondent submits that because the LPP does not compound or increase over time, and because no further sanctions are imposed by the company for late payment once the due date has passed, it is open to the customer to pay the LPP at any time after it has been incurred, including after the date when the interest rate arising from the penalty would no longer be illegal. It is claimed that to find liability under s. 347 in such circumstances would offend the principle of "voluntariness" set forth in Nelson.

64 This case is unlike Nelson in several important respects. In Nelson, the mortgage was not yet due when the debtor chose to repay it and he was presumably under no pressure from the lender to pay early. Here, by contrast, payment of the monthly bill is overdue and the LPP is already owing at the time the customer actually pays Consumers' Gas; the question is not whether to pay early, but rather how late is too late. Because there is no specific contractual term governing the time for payment after the imposition of the LPP, technically it may be argued that there is an indefinite extension of credit. It is obvious, however, that that is not really the case -- the customer does not have the option of never paying his or her bill. There is an implied limit to the term for which credit is extended, after which the respondent will undertake to recover the money that is owed to it. The record does not disclose if or when Consumers' Gas would actually sue a customer for non-payment or discontinue service. However, in one of its informational brochures ("To Your Credit"), the respondent explains to its customers the procedures which it employs for "collecting past due bills" (Case on Appeal, at p. 687):

> We send out a broad range of bill messages and notices to remind customers to pay past due bills. The sequence of bill messages and notices depends upon a customer's credit rating and the particular circumstances surrounding the account.

The respondent gives examples of "what happens if bills are not paid on time", including the following (Case on Appeal, at p. 688):

> Probability of the gas supply being cut-off to severely overdue accounts. This will result in personal inconvenience, a service reconnection charge and a security deposit payment.

65 Strictly speaking, it is true that customers may delay their payment of the LPP beyond 38 days, but there is clearly no invitation to do so, and it would be disingenuous to conclude that customers actually perceive themselves to be at liberty to wait that long. Statistical evidence submitted by the appellant strongly supports the opposite conclusion. Approximately 81 percent of late payers pay the penalty within 10 days of incurring it, that is, at an effective rate of interest far beyond the criminal limit. Consumers' Gas and the OEB have been aware of such statistics since at least 1988. See E.B.R.O. 452, at pp. 325-26. Indeed, the respondent tracks such statistics carefully for the purpose of budgeting revenue collected under the LPP as a component of its cash flow. In light of these facts, it cannot be said that payment of the LPP within 38 days is a "voluntary" act within the meaning of Nelson.

66 For the foregoing reasons, the LPP charged by Consumers' Gas comes within the scope of s. 347 of the Criminal Code.

B. Did the motions judge err in awarding costs against Garland in his personal capacity?

67 On September 13, 1995, Consumers' Gas moved for an order amending the formal judgment of the motions judge. Garland refused to consent to that motion. The motion was granted, and the judge assessed $500 in costs "payable to the defendant ... by the plaintiff personally, forthwith". Garland asserted that that award contravenes s. 59.4 of the Law Society Act, which was added by s. 3 of the Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7.

68 Section 59.4 provides:

> 59.4__(1) A defendant to a proceeding may apply to the board for payment from the Class Proceedings Fund in respect of a costs award made in the proceeding in the defendant's favour against a plaintiff who has received financial support from the Class Proceedings Fund in respect of the proceeding.
>
> ...
>
> (3) A defendant who has the right to apply for payment from the Class Proceedings Fund in respect of a costs award against a plaintiff may not recover any part of the award from the plaintiff.

The purpose of this provision is to protect class representatives from personal exposure to costs in actions where financial support has been granted by the Class Proceedings Fund. Such protection is important for promoting the purposes of the Class Proceedings Act, 1992. Garland has successfully applied for support from the Class Proceedings Fund. Accordingly, he should not be exposed to personal liability for any costs arising in this action, including costs incurred in the context of procedural motions. The award of personal costs against Garland is set aside.

VI. Conclusions and Disposition

69 The appeal is allowed with costs in the cause. (i) Section 347 of the Criminal Code applies to the LPP imposed by the respondent. The LPP is an interest charge within the meaning of s. 347(2), and the law's application is not precluded by the principles set forth in the Nelson decision. Summary judgment is set aside, and this action is remitted to the Ontario Court (General Division) for proceedings in accordance with the Class Proceedings Act, 1992. (ii) The award of costs in the amount of $500 against the appellant in his personal capacity is set aside.

The following are the reasons delivered by

70 BASTARACHE J. (dissenting):-- The late payment policy of the Consumers' Gas Company Limited provides that bills rendered to residential customers which are not paid on the due date will be subject to a penalty of five (5) percent of the unpaid amount.

71 Between 1981 and 1989, the late payment penalty policy clause contained in Consumers' rate schedules for residential customers read:

> PENALTY FOR LATE PAYMENT:
>
> When payment in full is not made within sixteen (16) days of the date of mailing, or the hand delivery of the bill, a penalty of five per cent (5%) of the current amount billed shall be levied. Where payment is made by mail, payment will be deemed to be made on the date postmarked.

72 Commencing in 1989, the provision for late payment penalties was contained in Consumers' Handbook of Rates and Distribution Services as follows:

> SECTION F - PAYMENT CONDITIONS
>
> Payment in full should be received by the Company, or by an institution authorized by the Company to accept payments on its behalf, on or before the due date specified in the monthly bill, which date is at least ten (10) days (sixteen (16) days in the case of Rates 1, 2, 6 and 9), after the date of rendering the bill. A penalty of five (5) percent of the unpaid portion of the current amount billed shall be added to the amount due if payment is not received as outlined above. When payment is mailed, the penalty will be added if the postmark on the envelope containing such payment is later than the specified due date.

73 It is the appellant's position that Consumers' Gas offers two payment options to its customers, the no-credit option and the credit option. By the appellant's reasoning, all customers who pay their bills on time adhere to the no-credit option. By contrast, customers who do not pay on time receive credit commencing on the due date and ending when the bill is paid. In my view, no such option exists. Customers have only one option, which is to pay on time. The only question remaining is then the characterization of the late payment policy.

74 Section 347(2) of the Criminal Code, R.S.C., 1985, c. C-46, defines "interest" in these terms:

> "interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

75 The definition of interest includes the notion of "penalty". However, the application of s. 347 is also predicated upon the existence of an "agreement or arrangement" for the advancement of credit. The term "agreement" is defined in the Oxford English Dictionary (2nd ed. 1989), as "an arrangement between two or more persons as to a course of action". The term "arrangement" is defined as a "settlement of mutual relations or claims between parties".

76 The application of s. 347 is then predicated upon a consensual extension of credit. There is a critical difference

between, on the one hand, a unilateral taking of credit and, on the other hand, an extension of credit by mutual consent between the debtor and the creditor. As R. M. Goode, in his book Consumer Credit Law (1989), states, at p. 108:

> If a person takes credit without having been granted it - as where he is slow in paying his dentist's bill or his solicitor's account - there is no extension of credit within the Consumer Credit Act. . . . [I]f a person allows delay in settlement of a debt without binding himself to grant time to the debtor, there is no agreement for credit. This is so whether the delay in the demand for payment arises from inadvertence or inactivity - as where the supplier is simply dilatory in sending out his accounts - or is an intentional indulgence, as where the supplier agrees to allow further time to pay or to accept payment by instalments. Only where this deferment is not just an indulgence but contractual is there an agreement for credit . . . .

77 On the facts of this case, there is no such consensual extension of credit. I believe that Consumers' Gas has not entered into an agreement or arrangement to give credit to the appellant or to any other customers who have paid the late payment penalty. Indeed, far from being a consensual extension of credit, the respondent's late payment penalty represents an effort to prevent or deter customers from unilaterally taking credit. It is simply a penalty exacted by the respondent because the appellant has not paid his bills on a timely basis. To illustrate my view, here is a statement from an American case: Coffelt v. Arkansas Power & Light Co., 451 S.W.2d 881 (Ark. 1970), per Smith J., at p. 884:

> The late charge, far from being an exaction of excessive interest for the loan or forbearance of money, is in fact a device by which consumers are automatically classified to avoid discrimination. Its effect is to require delinquent ratepayers to bear, as nearly as can be determined, the exact collection costs that result from their tardiness in paying their bills. The appellant's argument actually means in substance not that the utility company be prevented from collecting excessive interest but that its customers who pay their bills promptly be penalized by sharing the burden of collecting costs not of their making.

See also State ex rel. Utilities Commission v. North Carolina Consumers Council, Inc., 198 S.E.2d 98 (N.C. Ct. App. 1973).

78 In the present case, there is no agreement whereby the customers of Consumers' Gas are permitted or even encouraged to pay late. Rather, customers are encouraged to pay on time by the imposition of a penalty to be added to payments which are overdue.

79 The decisions of the Ontario Energy Board approving the late payment penalty confirm that the penalty is not "paid or payable for the advancing of credit". Instead, the Ontario Energy Board considers it to be an incentive for timely payment. In fact, the Board specifically rejected the credit option in its decision on the rate application in these terms (E.B.R.O. 302-II, September 4, 1975, at pp. 118-19):

> . . . the Board does not think that a monetary incentive for prompt payment is wrong in principle. Interest charged on over-due accounts on a daily basis has an appeal on theoretical grounds, but it gives little incentive to pay by a named date, gives little weight to collection costs and seems complicated. If interest is charged on a monthly basis, it is subject to the same criticism. . . .

80 While this is not determinative of the issue, it is one of several indicia to be considered in characterizing the late payment penalty. Winkler J., of the trial court, also considered the fact that the penalty is not compounded; the penalty is a one-time payment which does not increase over time; there is no sanction for the non-payment of the penalty; the penalty triggers contemporaneously with the account becoming overdue.

81 Because in this case there is no consensual extension of credit, it follows that the late payment penalty is not "paid or payable for the advancing of credit under an agreement or arrangement" within the definition of "interest". Section 347 of the Criminal Code is not applicable and therefore the action should be dismissed. I adopt Winkler J.'s conclusion

on this issue, 22 O.R. (3d) 451, at p. 471:

> I accept the plaintiff's argument that a deferral of payment constitutes credit. However, I do not agree that just because a customer does not pay on time [this] means that there has been a deferral of payment or that credit has been advanced, particularly where the company has done what it could to encourage the customer to pay on time. A distinction must be drawn between the situation in which a customer fails to pay within a stipulated time, because of inadvertence, choice or because he does not have the money, and the situation in which an agreement is entered into whereby the lender of money or issuer of goods agrees to delay its demand for payment, in exchange for the consideration of an additional charge. In my view, s. 347 is applicable only to the latter situation. The facts before me reveal the former situation.

82 Section 347 of the Criminal Code cannot be interpreted as a complete code for consumers. The protection of consumers against such penalty clauses cannot be done by way of an undue extension of these terms. Other options, such as to invalidate abusive penalty clauses, are available to protect consumers. I do not believe that a contract for the extension of credit should be implied in every case where there is late payment pursuant to a sale of goods. This implication, in my view, is an interference with the freedom to contract. I would also note that in the present case, we are dealing with a regulated industry and that a rate approval scheme has been established with the specific purpose of protecting consumer interests. To limit the choice of means of the regulator by resorting to the criminal law power is inappropriate and unwarranted.

83 For the above reasons, I would dismiss the appeal.

Appeal allowed with costs, Bastarache J. dissenting.

cp/d/hbb

Indexed as:

Garland v. Consumers' Gas Co.

Gordon Garland, appellant;
v.
Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited, respondent, and Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited, interveners.

[2004] 1 S.C.R. 629

[2004] S.C.J. No. 21

2004 SCC 25

File No.: 29052.

Supreme Court of Canada

Heard: October 9, 2003;
Judgment: April 22, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

(91 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Restitution -- Unjust enrichment -- Late payment penalty -- Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code -- Whether customers have claim for unjust enrichment -- Defences that can be mounted by utility to resist claim -- Whether other ancillary orders necessary.

Summary:

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant [page630] commenced a class action seeking restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the Criminal Code. He also sought a preservation order. In a previous appeal to this Court, it was held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and the matter was remitted back to the trial court for further consideration. As the case raised no factual dispute, the parties brought cross-motions for summary judgment. The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB's orders. The Court of Appeal disagreed, but dismissed the appellant's appeal on the grounds that his unjust enrichment claim could not be made out.

Held: The appeal should be allowed. The respondent is ordered to repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 of the Code after the action was commenced in 1994 in an amount to be determined by the trial judge.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a prima facie case. The prima facie case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

Here, the appellant has a claim for restitution. The respondent received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The transfer of those funds constitutes a benefit to the respondent. The parties are agreed that the second prong of the test has been satisfied. With respect to the third prong, the only possible juristic reason from an established category that could justify the enrichment [page631] in this case is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are inoperative to the extent of their conflict with s. 347 of the Criminal Code. The appellant has thus made out a prima facie case for unjust enrichment.

The respondent's reliance on the orders is relevant when determining the reasonable expectations of the parties at the rebuttal stage of the juristic reason analysis even though it would not provide a defence if the respondent was charged under s. 347 of the Code. However, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the Criminal Code. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime. In weighing these considerations, the respondent's reliance on the inoperative OEB orders from 1981-1994, prior to the commencement of this action, provides a juristic reason for the enrichment. After the action was commenced and the respondent was put on notice that there was a serious possibility its LPPs violated the Criminal Code, it was no longer reasonable to rely on the OEB rate orders to authorize the LPPs. Given that conclusion, it is only necessary to consider the respondent's defences for the period after 1994.

The respondent cannot avail itself of any defence. The change of position defence is not available to a defendant who is a wrongdoer. Since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. Section 18 (now s. 25) of the Ontario Energy Board Act should be read down so as to exclude protection from civil liability damage arising out of Criminal Code violations. As a result, the defence does not apply in this case and it is not necessary to consider the constitutionality of the section.

This action does not constitute an impermissible collateral attack on the OEB's orders. The OEB does not have

exclusive jurisdiction over this dispute, which is a private law matter under the competence of civil courts, nor does it have jurisdiction to order the remedy sought by the appellant. Moreover, the specific object of the action is not to invalidate or render inoperative the OEB's orders, but rather to recover money that was illegally [page632] collected by the respondent as a result of OEB orders. In order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the Code granted leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347 does not contain any such indication.

The de facto doctrine does not apply in this case because it only attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation regulated by a government authority is not supported by the case law and does not further the doctrine's underlying purpose.

A preservation order is not appropriate in this case. The respondent has ceased to collect the LPPs at a criminal rate, so there would be no future LPPs to which a preservation order could attach. Even with respect to the LPPs paid between 1994 and the present, a preservation order should not be granted because it would serve no practical purpose, because the appellant has not satisfied the criteria in the Ontario Rules of Civil Procedure, and because Amax can be distinguished from this case. A declaration that the LPPs need not be paid would similarly serve no practical purpose and should not be made.

Cases Cited

Applied: Peter v. Beblow, [1993] 1 S.C.R. 980; explained: Pettkus v. Becker, [1980] 2 S.C.R. 834; Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762; referred to: Garland v. Consumers' Gas Co., [1998] 3 S.C.R. 112; Sprint Canada Inc. v. Bell Canada (1997), 79 C.P.R. (3d) 31; Ontario Hydro v. Kelly (1998), 39 O.R. (3d) 107; Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690; Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275; Sharwood & Co. v. Municipal Financial Corp. (2001), 53 O.R. (3d) 470; Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd., [1976] 2 S.C.R. 147; RBC Dominion Securities Inc. v. Dawson (1994), 111 D.L.R. (4th) 230; Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Mack v. Canada (Attorney General) (2002), 60 O.R. (3d) 737; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249, [page633] 2004 SCC 7; Oldfield v. Transamerica Life Insurance Co. of Canada, [2002] 1 S.C.R. 742, 2002 SCC 22; Lipkin Gorman v. Karpnale Ltd., [1992] 4 All E.R. 512; Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; R. v. Jorgensen, [1995] 4 S.C.R. 55; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576.

Statutes and Regulations Cited

Civil Code of Quebec, S.Q. 1991, c. 64, arts. 1493, 1494.

Constitution Act, 1867, ss. 91(19), (27), 92(13).

Criminal Code, R.S.C. 1985, c. C-46, ss. 15, 347.

Municipal Franchises Act, R.S.O. 1990, c. M.55.

Ontario Energy Board Act, R.S.O. 1990, c. O.13, s. 18.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 25.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 45.02.

Authors Cited

Constantineau, Albert. A Treatise on the De Facto Doctrine. Toronto: Canada Law Book, 1910.

Fridman, Gerald Henry Louis. Restitution, 2nd ed. Scarborough, Ont.: Carswell, 1992.

Goff of Chieveley, Robert Goff, Baron, and Gareth Jones. The Law of Restitution, 6th ed. London: Sweet & Maxwell, 2002.

Lange, Donald J. The Doctrine of Res Judicata in Canada. Markham, Ont.: Butterworths, 2000.

Maddaugh, Peter D., and John D. McCamus. The Law of Restitution. Aurora, Ont.: Canada Law Book, 1990.

McInnes, Mitchell. "Unjust Enrichment -- Restitution -- Absence of Juristic Reason: Campbell v. Campbell" (2000), 79 Can. Bar Rev. 459.

Smith, Lionel. "The Mystery of 'Juristic Reason'" (2000), 12 S.C.L.R. (2d) 211.

Ziegel, Jacob S. "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 J. Cont. L. 121.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 57 O.R. (3d) 127, 208 D.L.R. (4th) 494, 152 O.A.C. 244, 19 B.L.R. (3d) 10, [2001] O.J. No. 4651 (QL), affirming a decision of the Superior Court of Justice (2000), 185 D.L.R. (4th) 536, [page634] [2000] O.J. No. 1354 (QL). Appeal allowed.

Counsel:

Michael McGowan, Barbara L. Grossman, Dorothy Fong and Christopher D. Woodbury, for the appellant.

Fred D. Cass, John D. McCamus and John J. Longo, for the respondent.

Christopher M. Rupar, for the intervener the Attorney General of Canada.

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Alan H. Mark and Kelly L. Friedman, for the intervener Toronto Hydro-Electric System Limited.

Mark M. Orkin, Q.C., for the intervener the Law Foundation of Ontario.

Patricia D. S. Jackson and M. Paul Michell, for the intervener Union Gas Limited.

The judgment of the Court was delivered by

1 IACOBUCCI J.:-- At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are

necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution [page635] Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("*OEBA*"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of five percent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers could avoid such a charge by paying their bills on time, and that, in any event, in the case of the average [page636] bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ("*Garland No. 1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Code*. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

> **18.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any [page637] person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch.

> **25.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Criminal Code, R.S.C. 1985, c. C-46

> **15.** No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.
>
> **347.** (1) Notwithstanding any Act of Parliament, every one who
>
> (*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or
>
> (*b*) receives a payment or partial payment of interest at a criminal rate,
>
> is guilty of
>
> (*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
>
> (*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. *Ontario Superior Court of Justice* (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory [page638] language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The *OEBA* indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were

welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Ct. (Gen. Div.)), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland No. 1* with respect [page639] to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the *OEBA* provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law, or, to the extent that it did, the interference was incidental. Although the respondent did not strictly comply with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. *Ontario Court of Appeal* (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no [page640] jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 *OEBA* (the equivalent provision to s. 18 of the 1990 *OEBA*) did not provide grounds to dismiss the appellant's action. He did not agree that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that while s. 25 provides a defence to any proceedings in so far as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence, either. It was of limited application and is largely irrelevant in modern times. As for the "regulated industries defence", it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurtry C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had

been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the [page641] respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980, McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's [page642] claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent [page643] to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the

money it had collected in contravention of s. 347, even if it could have recovered the same amount of money on an altered rate structure. He also noted that, in his opinion, the issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have been required to proceed to trial with respect to damages. He would also have declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(*b*) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, McLachlin C.J. stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative [page644] by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28 1. Does the appellant have a claim for restitution?

(a) Was the respondent enriched?
(b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?
(b) Does s. 18 (now s. 25) of the *OEBA* ("s. 18/25") shield the respondent from liability?
(c) Is the appellant engaging in a collateral attack on the orders of the Board?
(d) Does the "regulated industries" defence exonerate the respondent?
(e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?
(b) Should this Court make a declaration that the LPPs need not be paid?
(c) What order should this Court make as to costs?

[page645]

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the

other orders sought by the appellant.

A. *Unjust Enrichment*

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784). In this case, the parties are agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel*, *supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter*, *supra*, at p. 990, "[t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment". Other considerations, she held, belong more appropriately under the third element -- absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward [page646] economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated", he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter*, *supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was off-set by a corresponding decrease in regular rates. Thus McMurtry C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit". It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains [page647] that the "straightforward economic approach" from *Peter*, *supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel*, *supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs

and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel, supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor J. S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *J. Cont. L.* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP [page648] in finding that a benefit was not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455 (adopted in *Pettkus, supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> ... the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law -- for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter, supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> ... The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a [page649] corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while English courts require "that the enrichment be unjust" (see discussion in L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at pp. 212-13). It is not of great use to speculate on why Dickson J. in *Rathwell, supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel, supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice".

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have

taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, other judges have decided cases by asking whether the plaintiff has a positive reason for demanding restitution". In his article, "The Mystery of 'Juristic Reason'", *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason" should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust [page650] Enrichment -- Restitution -- Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel, supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in [page651] my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and [page652] that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust

enrichment endorsed by McLachlin J. in *Peel, supra,* where she stated that courts must effect a balance between the traditional "category" approach according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra,* generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec*, S.Q. 1991, c. 64).

(ii) *Application*

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code.* The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell, supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter, supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust [page653] enrichment. In the leading Canadian text, *The Law of Restitution, supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell, supra*, stating, at p. 46:

> ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference, supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he wrote, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the *OEBA* because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the [page654] OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and

civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code* is *intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment [page655] outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, its reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7.

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because the orders are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; [page656] *New Solutions, supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland No. 1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that Consumers' Gas was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer [page657] reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 percent, as defined in s. 347 of the *Criminal Code*.

[page658]

B. *Defences*

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks, supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the

respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position [page659] defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks, supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a [page660] fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the *Ontario Energy Board Act*

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 *OEBA*. The former and the present sections are identical, and read:

> An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

I agree with McMurtry C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli, supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25, thus, cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of

claims. If the [page661] provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked [page662] collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

[page663]

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and as a result the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest'". Absent such recognition in the statute of "public interest", he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the [page664] defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse'" (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes, therefore it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

[page665]

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the

language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) *De Facto* Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was valid at the time -- the Board orders -- they should be exempt from liability by virtue of the *de facto* doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and in my view does not further the underlying purpose of the doctrine. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held, at p. 756, that:

[page666]

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Manitoba Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> ... the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which ... recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies ... . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the acts [page667] of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755) :

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and as a result this doctrine should not be a bar to the appellant's recovery.

C. *Other Orders Requested*

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future [page668] LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it. Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax*-type order allows the defendant to spend the monies being held in the ordinary course of business -- no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore) which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

[page669]

88 Finally, the appellant's use of *Amax, supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598) :

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration That the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and as a result such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be [page670] avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

Solicitors:

Solicitors for the appellant: McGowan Elliott & Kim, Toronto.

Solicitors for the respondent: Aird & Berlis, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.

Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

[page671]

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

cp/e/qw/qllls

Case Name:

Canada (Attorney General) v. Amnesty International Canada

Between
Attorney General of Canada, Applicant, and
Amnesty International Canada and British Columbia Civil Liberties Association, Respondents

[2009] F.C.J. No. 545

[2009] A.C.F. no 545

2009 FC 426

Dockets T-581-08, T-1685-08

Federal Court
Ottawa, Ontario

Mactavish J.

Heard: April 21, 2009.
Judgment: April 28, 2009.

(79 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Stay of action -- Another proceeding pending -- Application by the Attorney General (AG) for an order staying a public interest hearing dismissed -- The purpose of the hearing was to examine complaints regarding the transfer of detainees held by Canadian Forces in Afghanistan to Afghan authorities -- The AG submitted that the hearing ought to be stayed until final determination of its applications for judicial review challenging the Commission's jurisdiction to investigate the complaints -- While there was a serious issue to be tried, the AG failed to establish that irreparable harm would result if a stay was not granted.

Government law -- Armed forces -- Military law -- Provost marshal and military policing -- Military Police Complaints Commission -- Practice and procedure -- Application by the Attorney General (AG) for an order staying a public interest hearing dismissed -- The purpose of the hearing was to examine complaints regarding the transfer of detainees held by Canadian Forces in Afghanistan to Afghan authorities -- The AG submitted that the hearing ought to be stayed until final determination of its applications for judicial review challenging the Commission's jurisdiction to investigate the complaints -- While there was a serious issue to be tried, the AG failed to establish that irreparable harm would result if a stay was not granted.

Application by the Attorney General for an order staying a public interest hearing to be held by the Military Police Complaints Commission. The purpose of the public interest hearing was to examine complaints regarding the transfer of detainees held by Canadian Forces' personnel in Afghanistan to Afghan authorities. The Attorney General filed applications for judicial review in order to challenge the Commission's jurisdiction to investigate the complaints. The Attorney General took the position that the public interest hearing ought to be stayed until final determination of its applications for judicial review. Amnesty International Canada and the British Columbia Civil Liberties Association opposed the granting of a stay.

HELD: Application dismissed. While there was a serious issue to be tried, the Attorney General failed to establish that irreparable harm would result if a stay was not granted. The Attorney General could not rely upon the reputational interests of the individual subjects of the complaints and there were many steps that could be taken to reduce the risk of inadvertent disclosure of potentially injurious information by witnesses at the hearing. Furthermore, the costs potentially thrown away in the litigation did not amount to irreparable harm.

Statutes, Regulations and Rules Cited:

Afghanistan Public Interests Hearing Rules, s. 10

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 38

Complaints about the Conduct of Members of the Military Police Regulations, P.C. 1999-2065, s. 2(2)

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.2

National Defence Act, R.S.C. 1985, c. N-5, s. 250.18(1), s. 250.38(1), s. 250.40(1)(b), s. 250.44

Counsel:

Alain Préfontaine and Zoe Oxaal, for the Applicant.

Paul Champ, for the Respondents.

Freya Kristjanson and Nigel Marshman, for the Intervener (The Military Police Complaints Commission).

REASONS FOR ORDER AND ORDER

1 **MACTAVISH J.**:-- The Attorney General of Canada seeks an order staying a "Public Interest Hearing" to be held by the Military Police Complaints Commission until the final determination of two applications for judicial review brought by the Attorney General. The hearing is to examine complaints received by the Commission with respect to the transfer of detainees held by Canadian Forces' personnel in Afghanistan to the custody of Afghan authorities. The Attorney General's applications for judicial review challenge the jurisdiction of the Commission to investigate the subject matter of the complaints.

2 For the reasons that follow, I find that the Attorney General of Canada has not demonstrated with clear and convincing evidence that irreparable harm will result if the stay is not granted. As a consequence, the motion will be dismissed.

Background

3 The actions of the Canadian Forces in Afghanistan with respect to the capture and detention of insurgents have been described in detail in my decisions in *Amnesty International Canada et al. v. Canada (Canadian Forces)*, 2008 FC 162, ("*Amnesty #1)*, and *Amnesty International Canada et al. v. Canada (Canadian Forces)*, 2008 FC 336, ("*Amnesty #2*). It is unnecessary to repeat that description for the purposes of this motion.

4 Briefly stated, as part of Canada's military operations in Afghanistan, Canadian Forces personnel are from time to time required to capture and detain insurgents, or those assisting the insurgents, who may pose a threat to the safety of either Afghan nationals or members of the Canadian military and allied forces.

5 Following capture by the Canadian Forces, detainees are initially held in a Canadian Forces temporary detention facility at Kandahar Airfield. The Canadian Forces have discretion to determine whether a detainee will be kept in Canadian custody, transferred to the Afghan authorities or released.

6 Concerns have been raised with respect to the treatment accorded to detainees once they are in the hands of Afghan authorities, and reports of their mistreatment have been received by Canadian officials. Because of these concerns, Amnesty International Canada and the British Columbia Civil Liberties Association (BCCLA) have filed three complaints with the Military Police Complaints Commission, one in early 2007, and two in June of 2008.

7 Two complaints (the "detainee complaints") relate to the transfer of detainees held by the Canadian Forces in Afghanistan to the custody of the Afghan authorities, where, it is alleged, they face a substantial risk of torture. The third complaint (the "failure to investigate complaint") asserts that Military Police officials failed to investigate potential wrongdoing by members of the Canadian Forces who directed the transfer of detainees to Afghan authorities.

8 On March 12, 2008, the Commission Chairman decided to exercise his discretion to hold a "Public Interest Hearing" into the three complaints, in accordance with sections 250.38(1) and 250.40(1)(b) of the *National Defence Act*, R.S.C. 1985, c. N-5. The hearing was initially scheduled to commence on February 17, 2009.

9 In the meantime, the Attorney General of Canada brought applications for judicial review with respect to all three complaints. The applications assert that the issues raised by each complaint are beyond the jurisdiction of the Commission, as they do not involve the conduct of members of the military police in the performance of any "policing duties or functions".

10 On January 29, 2009, the Attorney General of Canada wrote to the Commission advising that a stay of proceedings would be sought from the Federal Court, unless the Commission was prepared to adjourn or stay its own proceedings pending the determination of the Attorney General's applications for judicial review. The Commission then adjourned the hearings, so as to allow the parties to make submissions as to whether the Commission should adjourn or stay its proceedings.

11 On March 26, 2009, the Commission issued a decision refusing to stay or adjourn the proceedings pending the determination of the Attorney General's jurisdictional challenges. No application for judicial review has been commenced by the Attorney General with respect to this decision.

12 The Commission's hearing in relation to the three complaints is now scheduled to begin on May 25, 2009.

Should the Court Decline to Entertain the Motion?

13 The Military Police Complaints Commission was granted intervener status to allow it to argue the effect that the Commission's stay decision should have for the exercise of the Court's discretion to entertain the motion for a stay.

14 While acknowledging that section 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, authorizes the Court to

grant interim relief such as a stay in the context of a pending application for judicial review, the Commission contends that the Court should decline to exercise its jurisdiction in this case. According to the Commission, the Attorney General's motion for a stay essentially amounts to a collateral attack on the Commission's decision refusing to stay its proceedings. If the Attorney General was not happy with that decision, the Commission says that the appropriate course of action was for the Attorney General to seek judicial review of the Commission's decision, rather than bringing a fresh motion for a stay before this Court.

15 The Commission argues that by declining to exercise its jurisdiction, this Court would best recognize the appropriate role of the Court relative to an administrative tribunal. This would in turn engender respect for the Commission's legal process, having regard to the related public law doctrines of collateral attack, issue estoppel and abuse of process.

16 The Commission further submits that if the Court were to exercise its jurisdiction to deal with the motion, concerns would arise with respect to forum shopping, inconsistency, the integrity of the administrative process, and multiplicity of proceedings.

17 As a practical matter, given that the Commission is scheduled to commence its hearing in approximately one month's time, it is unlikely that an application for judicial review of the Commission's decision refusing to stay the matter could be brought, perfected, heard and decided in time to afford the Attorney General of Canada the relief that he now seeks. As the Commission concedes, this Court clearly has the jurisdiction to deal with the Attorney General's motion, and in light of the time constraints involved in this case, I intend to do so.

The Test for a Stay of Proceedings

18 The parties agree that in determining whether the Attorney General is entitled to a stay of the Commission's proceedings, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

19 That is, the Attorney General must establish:

1) That there is a serious issue to be tried in the underlying applications for judicial review;
2) That irreparable harm will result if the injunction is not granted; and
3) That the balance of convenience favours the granting of the stay.

20 Given that the test is conjunctive, the Attorney General has to satisfy all three elements of the test before he will be entitled to relief.

Serious Issue

21 In *RJR-MacDonald*, the Supreme Court of Canada observed that the threshold for establishing the existence of a serious issue is a low one. In this regard, the Supreme Court noted that:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. (at para. 50)

22 Insofar as the detainee complaints are concerned, the Attorney General contends that these complaints are not about the conduct of a member or members of the military police in the performance of any "policing duties or functions", as that expression is used in subsection 250.18(1) of the *National Defence Act*. Rather, the handling of detainees is a duty or function that relates to "military operations that result from established military customs or practice". As such, the conduct in issue is beyond the purview of the Commission: see subsection 2(2) of the

Complaints about the Conduct of Members of the Military Police Regulations, P.C. 1999-2065.

23 Amnesty and the BCCLA concede that a serious issue exists with respect to the two detainee complaints, as it relates to the definition of "policing duties and functions". Indeed, the Commission Chairman himself acknowledged the existence of a serious issue in this regard in his decision refusing to stay the Commission proceedings.

24 Insofar as the failure to investigate complaint is concerned, the Attorney General acknowledges that a complaint regarding the failure of military police officers to investigate unlawful conduct, properly framed, could form the subject matter of a complaint within the jurisdiction of the Military Police Complaints Commission. However, the Attorney General argues that the Commission has construed the failure to investigate complaint in such a way as to take it outside of the Commission's jurisdiction.

25 That is, by characterizing the failure to investigate complaint as raising systemic issues "resulting from a lack of direction and appropriate guidance from the upper command of the CF Provost Marshal's office", the complaint is no longer a complaint regarding the conduct of a member or members of the military police in the performance of policing duties or functions.

26 Amnesty and the BCCLA argue that this issue does not amount to a serious issue. I do not agree. Having regard to the low threshold that has to be met at this stage of the inquiry, I am satisfied that the Attorney General of Canada has demonstrated the existence of a serious issue with respect to all three complaints.

Irreparable Harm

27 A stay of proceedings should only be granted in cases where it can be demonstrated that irreparable harm will occur between the date of the hearing of the motion for interim relief and the date upon which the underlying application for judicial review is heard, if the injunction is not granted: *Lake Petitcodiac Preservation Assn. Inc. v. Canada (Minister of the Environment)* (1998), 149 F.T.R. 218, at para. 23.

28 Irreparable harm is harm that cannot be quantified in monetary terms, or which cannot be cured by an award of damages: *RJR-MacDonald*, at para. 59.

29 The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd*. 2005 FC 815, (2005), at para.59, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326.

30 That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*: see *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, at paras. 22-25, per Chief Justice Richard.

31 In this case, the Attorney General of Canada argues that three different forms of irreparable harm will result if the Commission's proceedings are not stayed. These are firstly, damage to the reputations of the individual Canadian Forces' members who are the subjects of the complaints; secondly, the risk of inadvertent disclosure of confidential information which may damage Canada's international relations, national defence or national security; and thirdly, the waste of public funds that will occur if it is ultimately determined that the Commission is acting outside of its jurisdiction. Each category of alleged irreparable harm will be considered in turn.

i) *Damage to Reputation*

32 Ten individuals have been named as subjects of the various complaints. The Attorney General represents eight of these individuals before the Commission, and two have retained private counsel. None of these individuals have brought their own applications for judicial review with respect to the actions of the Commission, nor have any of them been

named as parties in either of the Attorney General's applications. Furthermore, none of the subjects of the complaints sought leave to intervene in either proceeding. Thus the first question that arises is whether the Attorney General can rely on alleged harm to these individuals in support of his motion for a stay of proceedings.

33 In this regard, it is noteworthy that the Supreme Court observed in *RJR-MacDonald* that:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect *the applicants' own interests* that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. (at para. 58) (emphasis added)

34 The jurisprudence is clear that the question for the Court is not whether third parties may suffer irreparable harm if the relief sought is not granted, but rather whether the individual seeking the injunction or stay will himself suffer such harm: see, for example, *Mainil v. Canada (Canadian Wheat Board)*, 2004 FC 1768, at para. 61; *Chinese Business Chamber of Canada v. Canada*, 2005 FC 142, at para. 58; *Dodge v. Caldwell First Nation of Point Pelee*, 2003 FCT 36, at paras. 20-21.

35 Counsel for the Attorney General was careful in his submissions to distinguish between what he called the "corporate interests" of his client, and the personal interests of the individual subjects of the complaints, acknowledging that allegations of harm to reputation did not relate to the Attorney General's own "corporate interests".

36 The subjects of the complaints have full standing before the Commission: see section 250.44 of the *National Defence Act*. Counsel for the Attorney General acknowledged that as parties "directly affected" by the conduct of the Commission, each of these individuals could have commenced his or her own applications for judicial review with respect to the decisions of the Commission to deal with the complaints, and that none of them has chosen to do so. Counsel also conceded that "technically" or "procedurally" his client could not rely on harm to third parties in support of the motion for a stay.

37 However, counsel submits that because he represents the interests of eight of the subjects of the complaints in the proceedings before the Commission, the potential damage to the reputations of these individuals should be taken into account in support of the motion for a stay.

38 Counsel for the Attorney General cited no authority to support his argument in this regard, and I do not agree with his submission. While recognizing that the Attorney General of Canada is not an ordinary litigant and has public interest responsibilities, I am nevertheless satisfied that the reputational interests of the individual subjects of the complaints are clearly personal to them, and cannot be relied upon by the Attorney General to support the claim of irreparable harm.

39 Even if I were to consider the harm to the reputations of the individuals in question that would allegedly result if the Commission is allowed to proceed with its hearings, I would not find that it amounts to irreparable harm justifying the granting of a stay.

40 The only evidence before the Court on this issue is the second affidavit sworn by Major Jeffrey Harvey, who served as the Task Force Provost Marshall in Afghanistan in the period between August of 2006 and February of 2007. Appended to Major Harvey's affidavit is the "Notice of Potential Adverse Findings" served upon him by the Commission.

41 Major Harvey takes issue with the Commission's "shotgun style" in making what he says are general allegations against him based upon the fact that he once occupied the role of Task Force Provost Marshall. He says that by implying that he committed each of the transgressions identified in the "Notice of Potential Adverse Findings", his reputation will be tainted in the eyes of anyone who is made aware of the allegations through the public hearings.

42 Major Harvey is concerned that he may never be able to clear his name if the Court decides that the Commission

does not have the jurisdiction to inquire into the decision to transfer detainees. He further asserts that even if the Court determines that the Commission has the jurisdiction to examine some of the issues in this case, the Commission's current "systemic" approach "means that I may forever be guilty of professional negligence, even if by simple association".

43 At the same time, Major Harvey asserts that he is firmly convinced that he met the standards of professional conduct expected of him while serving as Task Force Provost Marshall. As evidence of this, he points to the fact that he was awarded the General Campaign Star for his service in Afghanistan.

44 There is no evidence before the Court from any of the other nine subjects of the complaints. Counsel for the Attorney General says that it was not necessary to bring forward evidence from these individuals, as they would have simply said the same thing as Major Harvey. I do not think that we can speculate as to what it is that these individuals might have said. While some may share the views of Major Harvey, it is quite possible that others may welcome the opportunity to testify before the Commission, in order to clear their names and restore their reputations.

45 Assuming that I can take the potential risk to Major Harvey's personal reputation into account in support of the Attorney General's motion, I have not been persuaded that the risk to his reputation that he might face as a result of the Commission proceedings amounts to irreparable harm.

46 Insofar as the allegations contained in the "Notice of Potential Adverse Findings" are concerned, that Notice was confidential and would not have been made public, but for Major Harvey's own actions in attaching it to the affidavit filed as part of the public record in this case. As such, any damage to his reputation that may result from public awareness of the allegations contained in the "Notice of Potential Adverse Findings" is entirely self-induced: see *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission)*, [1997] 3 S.C.R. 440, at para. 56.

47 Moreover, we cannot know at this stage of the proceedings what the result of the Attorney General's applications for judicial review will be. Nor can we know what might transpire before the Commission in relation to the allegations regarding Major Harvey, or what the ultimate findings of the Commission might be in relation to him. Major Harvey has asserted unequivocally in his affidavit that he has done nothing wrong. It may well be that the Commission hearings will provide him with a public forum in which to tell his side of the story, and that the Commission's final report may vindicate his position.

48 To find irreparable harm based upon Major Harvey's own fears of what *might* happen in the future would require the Court to embark on an exercise of "speculation and conjecture": see *Addy v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia-- Létourneau Commission)*, [1997] 3 F.C. 784, at para. 59; *Beno v. Canada Commission of Inquiry into the Deployment of Canadian Forces in Somalia -- Létourneau Commission)*, [1997] F.C.J. No. 936, at para. 20.

49 I acknowledge that there are cases where Courts have found the potential damage to the reputations of those facing legal proceedings to amount to irreparable harm justifying the staying of those proceedings. In this regard, the Attorney General relies on *Bennett v. British Columbia (Superintendent of Brokers)*, (1993), 22 B.C.A.C. 300, at paras. 17-20, and *Canada (Royal Canadian Mounted Police) v. Malmo-Levine* (1998), 161 F.T.R. 25, at paras. 2-22 and 25-26.

50 It is noteworthy, however, that in both *Bennett* and *Malmo-Levine*, there were allegations of bias on the part of the presiding officials. A review of the Courts' reasons in those cases makes it clear that this was a critical factor in the determination that the harm to reputation feared by the applicants in those cases constituted irreparable harm. No allegation of bias on the part of the Military Police Complaints Commission has been made in this case.

ii)

Risk of Disclosure of Confidential Information

51 The second category of harm that the Attorney General asserts will occur if the Commission's proceedings are not stayed relates to the risk of disclosure of potentially injurious information relating to Canada's international relations, national defence or national security.

52 As I understand it, the Attorney General's primary concern is that in the heat of cross-examination, a witness before the Commission might blurt out information that would otherwise be subject to the provisions of section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

53 Counsel for the Attorney General also expressed the concern that Commission counsel (who has already been provided with access to a great deal of section 38 information on a confidential basis) could inadvertently let potentially injurious information slip in the course of her questioning of witnesses.

54 In support of these arguments, the Attorney General relies upon the second affidavit sworn by Major Harvey, who discusses the lack of experience that Canadian Forces' members have with "filtering" confidential information. Major Harvey also discusses his own experiences with the rigors of cross-examination, and his concern that sensitive information may inadvertently be disclosed by a witness while the witness is under cross-examination.

55 I agree that once confidential information has been disclosed, the resulting harm cannot be undone. As a consequence, such disclosure could amount to irreparable harm: see *O'Connor v. Nova Scotia*, 2001 NSCA 47, at para. 16.

56 I also accept that any time a witness who possesses potentially injurious information gets into the witness box in any kind of public legal proceeding, there is at least a theoretical risk that confidential information could be inadvertently disclosed. That said, the burden is on the Attorney General to provide clear and convincing evidence that irreparable harm *will* result if the stay is not granted. The suggestion that it is *possible* that a witness *might* disclose confidential information on the witness stand does not meet this threshold.

57 Moreover, there is much that can be done to reduce the risk of inadvertent disclosure of potentially injurious information by witnesses before the Commission. The subjects of the complaints have already been provided with "Notices of Potential Adverse Findings", and counsel for the Commission is also required by the Commission's rules of procedure to prepare a summary of the anticipated evidence of each witness to be called. As a result, the likely areas of questioning for each witness should be relatively easy to identify. Careful preparation of witnesses by counsel will go a long way towards reducing the risk of inadvertent disclosure. Furthermore, alert counsel at the hearing, properly prepared and ready to make timely objections, can also pre-empt concerns with respect to potential inadvertent disclosure.

58 It is also clear from a review of the record that the Commission is alive to the necessity of maintaining the confidentiality of potentially injurious information, and that it is well aware of its obligations under section 38 of the *Canada Evidence Act*. Indeed, counsel for the Commission has been working cooperatively with the Department of Justice over the last few months in an effort to resolve section 38 issues in advance of the Commission hearings.

59 Special rules of procedure have also been developed by the Commission specifically for this hearing, in consultation with the parties, so as to address potential concerns with respect to the disclosure of potentially injurious information. Moreover, these Rules make it explicit that they are subject to the provisions of the *Canada Evidence Act*.

60 Furthermore, there are procedures that may be followed to reduce the risk of inadvertent disclosure in cases where a witness may have difficulty disengaging potentially injurious information from information that may safely be made public. These procedures include the use of summaries: see *Afghanistan Public Interests Hearing Rules*, section S.10, and the section 38 process itself: see the discussion in *Canada (Attorney General) v. Ribic*, 2003 FCA 246, at paras. 51-52.

61 I am not prepared to give any weight to counsel's suggestion that the Attorney General will suffer irreparable harm

because Commission counsel might herself inadvertently disclose potentially injurious information which is subject to notice under section 38 of the *Canada Evidence Act* through her questioning of witnesses.

62 It is clear from the record that Commission counsel is well aware of her obligations under section 38 of the Act. Commission counsel is an experienced lawyer, and I am not prepared to make a finding of irreparable harm based upon speculation as to the possibility that counsel might breach her professional and legal obligations in her conduct of the hearings.

63 Counsel for the Attorney General conceded that witnesses in the possession of potentially injurious information do testify in various types of public hearings, including high-profile proceedings that garner a great deal of media attention. Examples of this include security certificate proceedings in this Court, as well as Commissions of Inquiry such as those involving the Air India bombing and the Maher Arar affair.

64 Indeed, Brigadier General Joseph Paul André Deschamps testified before this Court in *Amnesty #1*, in the presence of the media, with respect to issues relating to the transfer of detainees by the Canadian Forces in Afghanistan, see paras. 32-36. There is no evidence before me that any potentially injurious information has inadvertently been disclosed by witnesses in any of these proceedings.

65 Counsel for the Attorney General stated that it takes "disciplined Commission counsel, Members of the Commission and people on edge to ensure objections in time", in order to ensure that potentially injurious information is not disclosed. While I do not disagree with counsel's observation, I see no reason why this will not occur in this case.

iii)

Costs Potentially Thrown Away

66 The final area of alleged irreparable harm relied upon by the Attorney General relates to the costs associated with the Public Interest Hearing that may ultimately be wasted, if this Court were to determine that the Commission was without jurisdiction to inquire into any of the complaints.

67 The estimated cost of the hearings for the Commission will be in the vicinity of $4 million. Counsel for the Attorney General submits that, in addition, his client will incur significant costs of its own, although no evidence has been provided as to what these costs may be. These costs could not be recovered, in the event that the Commission proceedings are ultimately stayed.

68 While recognizing that costs thrown away are not usually viewed as amounting to irreparable harm justifying the staying of proceedings, counsel submits that the waste of public funds of this order of magnitude, in times of fiscal restraint, simply cannot be justified, and would amount to irreparable harm.

69 In support of his position, the Attorney General relies on the decision of the Alberta Court of Queen's Bench in *Ermineskin Cree Nation v. Canada*, 2001 ABQB 760, at para.79.

70 While not disputing that significant costs will be incurred in connection with the Commission's hearings, Amnesty and the BCCLA ask me to consider these costs in the context of the overall cost of Canada's mission in Afghanistan. In this regard, the complainants observe that the cost of the hearings represents approximately 0.0005% of the cost of the mission as a whole.

71 A review of the *Ermineskin* decision cited by the Attorney General discloses that the sum total of the Court's analysis with respect to the cost of proceedings as irreparable harm justifying a stay is the following statement: "The issue of irreparable harm is related to the harm that would be done where both the Tribunal and this Court are trying and making findings on the constitutional question at the same time. This would be a waste of resources, both the Tribunal's and this Court's". Given the brevity of the Court's analysis on the issue, I am of the view that this decision is of limited

assistance.

72 There are, however, numerous decisions of this Court which have held that the inability of a party to recover the costs associated with a hearing does not amount to irreparable harm: see for example, *Canadian National Railways v. Leger*, [2000] F.C.J. No. 243, at para. 15; *Brocklebank v. Canada (Minister of National Defence*), [1994] F.C.J. No. 1496, at para. 11; *ICN Pharmaceuticals, Inc. v. Canada (Patented Medicine Prices Review Board*), [1995] F.C.J. No. 1644, at para. 3; *Bell Canada v. Communications, Energy and Paperworkers Union*, [1997] F.C.J. No. 207, at paras. 37-41; *Northwest Territories v. Public Service Alliance of Canada*, [2001] F.C.J. No.19 (F.C.A.), at para. 19.

73 Counsel for the Attorney General has argued that exceptional circumstances exist in this case justifying a finding of irreparable harm. That is, counsel says that the magnitude of the hearing scheduled to take place before the Commission is such that irreparable harm will indeed result if the proceedings are ultimately quashed. I do not agree.

74 Firstly, I note that counsel was unable to tell me how long the Commission hearings will likely take, other than to say that two weeks have been set for the hearings at this point. Thirteen witnesses are expected to testify. The budget submitted by the Commission in its request for supplementary funding is based upon a projected 30 days of hearings. Given the limited evidence available on this point, there is no reason to believe that the hearings in question will be of an unusual magnitude.

75 Secondly, the *Bell Canada* decision cited above involved pay equity litigation before the Canadian Human Rights Tribunal. Litigation of this nature is inevitably lengthy, complex and expensive. Nevertheless, Justice Richard, then of this Court, did not find that the costs of litigation that would potentially be lost if it were ultimately determined that the proceedings should be quashed amounted to irreparable harm.

76 Thus, while recognizing the need for restraint in the expenditure of public funds, I cannot find that the costs potentially thrown away in this case amount to irreparable harm.

Balance of Convenience

77 The test for a stay of proceedings is conjunctive. Given that the Attorney General has failed to satisfy the irreparable harm element of the test, it is not necessary to address the issue of the balance of convenience.

Costs

78 While I agree that Amnesty and the BCCLA should have their costs associated with this motion, I see no basis for making those costs payable forthwith, as the organizations have requested. Given that the two organizations were represented by the same counsel, they shall have one set of costs, on the ordinary scale.

79 Counsel for the Commission does not seek costs of the intervention, and none are awarded.

ORDER

THIS COURT ORDERS AND ADJUDGES that the motion for a stay is dismissed, with costs to the respondents.

MACTAVISH J.

cp/e/qlaim/qlpxm/qlaxw

Indexed as:

Canadian National Railways v. Leger

Between
Canadian National Railways, applicant, and
Roderick Leger, respondent, and
Canadian Human Rights Commission, intervenor

[2000] F.C.J. No. 243

[2000] A.C.F. no 243

95 A.C.W.S. (3d) 703

Court File No. T-1547-99

Federal Court of Canada - Trial Division
Ottawa, Ontario

Hansen J.

Heard: January 24 and 31, 2000.
Judgment: February 22, 2000.

(22 paras.)

Civil Rights -- Federal or provincial legislation -- Commission or boards -- Practice -- Judicial review -- Stay of proceedings.

Application by Canadian National Railways for a stay of proceedings pending its judicial review application of the decision by the Canadian Human Rights Commission to request an inquiry. Leger complained to the Commission in 1994, when he received a severance package from CN, on the ground that he was discriminated against by reason of mental disability. An inquiry was not ordered at that time, as the allegation was found to be unfounded. Leger filed a second complaint in 1996, alleging discrimination on the grounds of mental illness, failure to accommodate and forced resignation. In July 1999, the Commission decided to request a tribunal inquiry into the complaint. CN argued that the complaint fell outside the one-year statutory time bar, that the Commission's delay in processing the complaint was undue, that the issue was res judicata given the earlier dismissal of Leger's complaint, and that the conclusion that there was sufficient evidence of discrimination was patently unreasonable.

HELD: Application dismissed. While there was a serious issue to be tried, the one year limitation period was subject to the exercise of considerable discretion by the Commission, and the allegation pertaining to res judicata was answered in part by the fact that no determination on the merits was made following the first complaint. The second complaint was

also broader. The overall delay of six years raised a serious question to be tried. CN failed to establish that it would suffer irreparable harm if the hearing were to proceed. The tribunal was empowered to deal with whatever evidentiary problems arose as a result of the alleged undue delay. The expenditure of time and money on the Tribunal hearing, which could turn out to be wasted did not amount to irreparable harm. There was no indication that CN would incur costs or hardship outside of the ordinary course of litigation. Mere inconvenience did not amount to irreparable harm.

Statutes, Regulations and Rules Cited:

Canadian Human Rights Act, R.S.C. 1985, c. H-5, ss. 7, 14, 41(1), 41(1)(e), 44(3)(a)(ii), 44(3)(b)(ii), 49(1), 50.

Federal Court Act, R.S.C. 1985, c. F-7, ss. 18.2, 50.

Counsel:

Manon Savard, for the applicant.
Lewis Gottheil, for the respondent.
R. Daniel Pagowski, for the intervenor.

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1 **HANSEN J.** (Reasons for Order and Order):-- The applicant Canadian National Railway Company ("CN") moves for a stay of proceedings pursuant to sections 18.2 and 50 of the Federal Court Act, R.S.C. 1985, c. F-7, prohibiting the Canadian Human Rights Tribunal ("Tribunal") from inquiring into the discrimination complaint filed by the respondent, Roderick Leger on August 19, 1996. CN asks that the inquiry be stayed until this Court has ruled on CN's pending application for judicial review of the Canadian Human Rights Commission's ("Commission") decision to request an inquiry.

Background

2 The respondent was employed by CN from February 1971 to September 11, 1993, when he received a severance package providing a lump sum payment of $75,000.00. On December 5, 1994, he filed a complaint (A06333) with the Commission alleging discrimination on the basis of mental disability contrary to section 7 of the Canadian Human Rights Act, R.S.C. 1985, c. H-6 as amended ("CHRA"). At issue was CN's refusal of his application for a disability pension on the basis that he could not receive both a pension and the $75,000.00 severance package. He alleged he was under duress to resign and take only the severance package, and that CN had failed to accommodate him regarding his absences from work, despite its knowledge he suffered from depression and anxiety. The Commission declined to request an inquiry, finding "on the evidence the allegation of discrimination is unfounded."

3 On August 19, 1996, the Respondent filed a second complaint (A35254), alleging discrimination on the basis of disability (mental illness) in the form of harassment, failure to accommodate, and forced resignation, contrary to sections 7 and 14 of the CHRA. On March 23, 1998, the Commission appointed a conciliator to attempt to effect a settlement. No settlement was achieved and on July 30, 1999, the Commission decided, pursuant to section 49(1) of the CHRA to request a tribunal inquiry into this complaint.

4 On August 27, 1999, CN applied for judicial review of this decision, seeking an order prohibiting the establishment of a Tribunal or the undertaking of an inquiry, as well as a declaration that the Commission exceeded its jurisdiction on the following grounds:

1. The Commission neglected to exercise its discretion under subparagraphs 44(3)(a)(ii) and 44(3)(b)(ii) and paragraph 41(1)(e) of the CHRA and committed an error of law in failing

to dismiss the complaint on the basis of the statutory time bar;

2. The Commission's delay in processing the complaint was excessive, deprived CN of its right to be heard within a reasonable time, and violated the principles of procedural fairness;
3. The Commission should have dismissed the complaint on the basis of the doctrines of abuse of process, double jeopardy and res judicata /issue estoppel, since the second complaint was a restatement of the first complaint which had been conclusively dismissed by the Commission's decision of May 15, 1996.
4. The Commission's finding that there was sufficient evidence of discrimination and harassment to proceed to the next stage is patently unreasonable in that it is based on an investigation report which is biassed and incomplete.

CN requested that the Tribunal appointed to hear the matter grant an adjournment of the hearing until the application for judicial review is decided by this Court. The Tribunal denied this request by a decision dated November 26, 1999. The Tribunal hearing is scheduled to commence on March 6, 2000.

Analysis

5 The test to be applied in an application for stay of proceedings was articulated by the Supreme Court of Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.,[1] and RJR-MacDonald Inc. v. Canada (Attorney General)[2]. The applicant must establish (1) there is a serious issue to be tried; (2) it will suffer irreparable harm if the relief is not granted; and (3) the balance of convenience favours granting the stay.

(1) Serious issue to be tried:

As stated in RJR-MacDonald, supra, this branch of the test.

> ... should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits...Unless the case on the merits is frivolous or vexatious..., a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.[3]

6 The parties made extensive submissions on this first branch, focussing specifically on the grounds of delay and res judicata in the context of the standard of review and the likelihood of success on the merits. However, given the low threshold at this stage, it is not the role of the motions judge to enter into a detailed assessment of CN's case on the merits. Thus, I will address each of CN's judicial review grounds briefly, limiting my analysis to the question of whether they raise a serious issue.

7 I note CN did not make submissions on its fourth ground, that the Commission's decision to request an inquiry is patently unreasonable and based on an investigation report which is biassed and incomplete. I make no finding on this issue. With regard to CN's first ground, in which it relies on a "statutory time bar" in paragraph 41(1)(e) of the CHRA, the respondent correctly submits that this provision affords the Commission considerable discretion. Subsection 41(1) provides:

> 41.(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
>
> ...

> (e) the complaint is based on acts or omissions the last of which occurred morethan one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint. [emphasis added]
>
> * * *
>
> 41.(1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
>
> ...
>
> e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances. [Je souligne]

Given the Commission's leeway in this matter, I have difficulty with CN's position that the Commission failed to exercise its discretion in accepting the respondent's complaint more than one year after from the events in question. The statute clearly contemplates such an extension on the part of the Commission.

8 With regard to res judicata, CN submits that the respondent's second complaint is merely a reiteration of his first complaint, and should therefore have been dismissed by the Commission. However, as the respondent submits, the doctrine of res judicata or issue estoppel applies when a cause of action "has already been determined by a court of competent jurisdiction," or has been decided in a prior "judicial decision".[4] In the case before me, the first complaint was dismissed before the adjudication stage, on the basis of an investigation. This raises a doubt as to whether the doctrine of res judicata or issue estoppel is applicable. Furthermore, based on the record before the Court, there is some question as to whether the second complaint is merely a reiteration of the first. The first complaint focussed on the issue of whether it was discriminatory for CN to deny the respondent access to both the severance package and a disability pension; broader concerns regarding workplace conditions seem to have been canvassed only insofar as they supported (or didn't support) the respondent's allegation that he was under duress to accept the severance package. In his second complaint the respondent alleged that he was harassed by his supervisors, not accommodated with regard to his disability, and that CN took no steps to address his mistreatment at the hands of co-workers, all of which created a poisoned work environment and led to his release from employment. On its face, the second complaint appears to be more than a mere reiteration of the first. This is clearly a limited review of the matter and it remains for the Court to explore this issue further in the judicial review application. Without commenting further on the merits of this ground, I find that it is a serious question to be considered.

9 The issue of delay and the resultant violation of procedural fairness is to be more fully discussed in the context of the second branch of the test, "irreparable harm." CN points to the three-year delay from the date of the alleged discriminatory conduct (July 7, 1993) to the filing of the complaint (August 19, 1996), and a further three years from the date of filing to the Commission's decision to request an inquiry (July 10, 1999). As I have noted, the Commission has discretion to accept a complaint notwithstanding the lapse of over one year from the date of the alleged conduct. With regard to the second three-year period, I note that the file was not dormant during this time, but rather was referred to a conciliation, which failed. However, given the low threshold at this stage of the test, I find that this overall delay of approximately six years raises a serious issue to be tried.

(2) Irreparable Harm

10 The Federal Court of Appeal has stated in a number of cases that "the evidence as to irreparable harm must be clear and not speculative."[5] With this in mind, I now turn to CN's three main arguments in support of its assertion that it will suffer irreparable harm should a stay not be granted.

a) Abuse of Process and Procedural Unfairness

11 CN argues the actions of the Commission will result in it being the victim of abuse of process and procedural unfairness which harm cannot be remedied should the Tribunal hearing proceed as scheduled. This would manifest in its having to defend itself (a) on a complaint which is time-barred; (b) for a second time on the same complaint (res judicata / issue estoppel); and (c) on a complaint where its right to be heard within a reasonable time has been violated.

12 The first two manifestations of the alleged harm have been discussed under "serious issue to be tried" and need not be dealt with further. Based on my reasoning in that section, I find that neither of these constitute irreparable harm.

13 Regarding the violation of its right to be heard within a reasonable time, CN points to its inability to make full answer and defence, given the erosion of witnesses' memories, the unavailability of key witnesses, and its inability to obtain the required medical and physical evidence due to the passage of time. The unavailability of witnesses was addressed by the British Columbia Supreme Court in Watson v. British Columbia Council of Human Rights [1994] B.C.J. No. 3196, in which it was held that the absence of a witness was properly an issue for the Tribunal to consider in trying the complaint, but did not constitute grounds for a stay of proceedings. Similarly, in Volvo Canada Ltd. v. Ritchie [1989] N.S.J. No. 213, the Nova Scotia Supreme Court - Trial Division stated the following:

> On the issues of the delay in laying the complaint, the unavailability of evidence and the allegation that the principles of fundamental justice would be denied, the burden will be upon the complainant to prove her claim before the Board of Inquiry. The Board is empowered to determine questions of law or fact or both required to reach a decision (s. 26A(7)); the Board is obliged to give full opportunity to all parties to present evidence and make representation (s. 26A(3)); and the board has all the powers and privileges under the Public Inquiries Act (s. 26A(1)).

The Canadian Human Rights Tribunal is equally empowered to address these concerns at the inquiry, pursuant to its powers set out in section 50 of the CHRA. Therefore, these potential evidentiary difficulties do not constitute irreparable harm.

b) Demands of Litigation

14 CN also argues, having regard to the scope of the dispute, that the Tribunal hearing will require the expenditure of considerable time, effort, energy, and cost which would prove to be unnecessary and not recoverable should it be successful on the application for judicial review. It cites Canadian Airlines International Ltd. v. Canadian Human Rights Commission and Belloni (1992), 57 F.T.R. 311, in which Muldoon J. took into consideration the difficulty, complexity, cost, and time-consuming nature of preparations in granting a stay of an inquiry before the Canadian Human Rights Tribunal. It is important to consider the full context of Muldoon J.'s decision in Belloni, supra. In that case, in addition to the allegation of delay, it was found that the Commission had failed to communicate to the complainant an offer by the employer which might have settled the matter. It was in the context of this negligence on the part of the Commission that Muldoon J. considered the scope of the inquiry and the extent of the preparations required. The case at bar involves no comparable act of negligence on the Commission's part.

15 In a number of cases, this Court has held that the demands of litigation, including inconvenience to parties and witnesses, stress and the inability to recover costs are not sufficient to meet the irreparable harm branch of the test where they are incurred in the ordinary course of litigation.[6] I have no indication that CN will incur costs or hardship outside the ordinary course of litigation, and therefore, it has not established irreparable harm for the purposes of this stay application. Of particular relevance in this regard is Reed J.'s holding in ICN Pharmaceuticals Inc. v. Canada (Patented Medicine Prices Review Board)[7]:

> I have not been persuaded that the circumstances are such that I should stay the proceedings. While unnecessary time and costs will have been expended if the proceeding goes ahead and it is

> ultimately decided that the Board is without jurisdiction, this is more a matter of inconvenience than irreparable harm...

c) Possibility of Success on the Judicial Review Application

16 Reed J.'s holding in ICN Pharmaceuticals Inc., supra is equally applicable to CN's final submission on irreparable harm. CN claims it will be the victim of abuse of process and procedural unfairness should the tribunal hearing proceed as scheduled prior to the hearing of the judicial review application. In its submission, once the inquiry has been allowed to proceed, the judgment ultimately rendered on the judicial review application will be ineffective, untimely, and will therefore result in irreparable harm. I agree with counsel for the Respondent that this is a circular argument. It assumes that which still remains to be decided on the judicial review application. In any event, as Reed J. has noted in ICN Pharmaceutical Inc., supra, even in the event of a successful judicial review application, the applicant's participation in the inquiry will have constituted an inconvenience, not irreparable harm. At issue is the actual concrete harm to be suffered by the applicant, and CN has not established that it would suffer irreparable harm warranting a stay of proceedings.

17 Having determined that the applicant has not succeeded on the irreparable harm branch of the test, for the sake of completeness I will review its submissions regarding the balance of convenience.

3) The Balance of Convenience

18 This last branch of the test requires a weighing of the damage each party alleges it will suffer, taking into account the public interest.[8] In RJR-MacDonald, supra, the Supreme Court stated that:

> [w]hen the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.[9]

19 CN distinguishes the present case from RJR-MacDonald, supra, noting that it is only requesting a stay of proceedings, not the suspension of legislation. It submits that the harm it will suffer if the inquiry proceeds, detailed above, is greater than that which the respondent would suffer if a stay is granted. Specifically, it argues that the respondent cannot now claim that a further delay of a few months would cause him irreparable harm given that he waited more than three years before filing his complaint with the Commission. It further notes that the respondent currently receives CPP disability benefits and that there is nothing to indicate his livelihood is in jeopardy. Therefore, any harm he might suffer is purely financial and capable of being compensated in monetary terms.

20 In Bell Canada, supra, Richard A.C.J., as he was then, stated:

> [i]n arriving at a decision on the balance of convenience, the court must consider the public interest in having complaints of discrimination dealt with expeditiously (See Federal of Women Teachers' Association of Ontario v. Human Rights Commission (Ont.) Et al. (1988), 30 O.A.C. 301; 67 O.R. (2d) 492 at p. 518 (Div.Ct.)). The pay equity provisions are part of the Canadian Human Rights Act, a public statute which has been referred to by the Supreme Court of Canada as quasi-constitutional. The Commission and the complainants bear the onus of proof before the Tribunal.[10]

CN submits that the case at bar is to be distinguished from Bell Canada, supra, since in that case, Richard A.C.J. went on to note that potential recipients of pay equity adjustments had already waited six years and that many employees had ceased to be employed by Bell, had died, taken buy-outs, or retired; in the face of these changes, it was becoming

increasingly difficult to locate and compensate the employees in question.[11] CN submits that these concerns do not arise in the case at bar as the complaint is not systemic or policy-based and involves only an individual complainant.

21 In my opinion, the individual nature of this complaint does not eliminate the strong public interest in having Human Rights Tribunal hearings proceed as expeditiously as possible. There is no reason to believe that a stay of proceedings would result in only a few months delay. The decision of this Court on the judicial review application is subject to appeal. Furthermore, even putting aside the question of further delay while appeal rights are exercised, there is no guarantee that the Tribunal hearing can be rescheduled without further delay. Thus, if a stay is granted, it is likely to result in more than a few months delay for the respondent.

Conclusion

22 In my opinion, the public interest militates against causing further delay in the hearing of this complaint. I am not convinced that the applicant will suffer irreparable harm if the inquiry proceeds, nor am I convinced that such harm outweighs that which would be suffered by the respondent if the Tribunal hearing were postponed pending this Court's decision on the judicial review application. Accordingly, the motion by CN to stay the proceedings of the Tribunal is dismissed.

22a

ORDER

IT IS HEREBY ORDERED that the motion by the Canadian National Railway Company to stay the proceedings of the Canadian Human Rights Tribunal is dismissed. [The Court did not number this paragraph. Quicklaw has assigned the number 22a.]

HANSEN J.

cp/d/qlndn/qlhcs

1 [1987] 1 S.C.R. 110.

2 [1994] 1 S.C.R. 311.

3 Ibid. at 348.

4 Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267, at 278-279.

5 Imperial Chemical Industries PLC v. Apotex, Inc., [1990] 1 F.C. 221 (F.C.A.); Syntex Inc. v. Novopharm Ltd. (1991), 36 C.P.R. (3d) 129 (F.C.A.); Centre Ice Ltd. v. National Hockey League (1994), 53 C.P.R. (3d) 34 (F.C.A.).

6 Brocklebank v. Canada (Minister of National Defence) et al (1994), 86 F.T.R. 23 at 26 and 27, and Bell Canada v. Communications, Energy and Paperworkers Union of Canada et al (1997) 127 F.T.R. 44 (T.D.) at 56.

7 (1995), 65 C.P.R. (3d) 1 at 2.

8 RJR-MacDonald, supra at 348.

9 Ibid. at 349.

10 at 56-57.

11 Ibid. at 57.

Indexed as:

Brocklebank v. Canada (Minister of National Defence)

IN THE MATTER of a Charge Sheet charging the Applicant with torture, contrary to section 269.1 of the Criminal Code of Canada and negligent performance of a duty, contrary to section 124 of the National Defence Act, signed by the Respondents, Lieutenant-Colonel David Chupick and Major-General R.N. Fisher
AND IN THE MATTER of a General Court Martial convened by the Respondent, R.N. Fisher, for the purpose of trying the Applicant on the said charges, currently scheduled to commence on October 11, 1994
AND IN THE MATTER of the appointment of the Judge Advocate for the trial of the Applicant, in an Appointment Order dated September 9, 1994
Between
Private David John Brocklebank, applicant, and
The Minister of National Defence, Major-General R.N. Fischer, General Court Martial and its members convened by Major-General R.N. Fischer to sit on October 11, 1994 at Canadian Forces Base, Petawawa, Ontario, Respondents

[1994] F.C.J. No. 1496

[1994] A.C.F. no 1496

86 F.T.R. 23

25 W.C.B. (2d) 312

Action No. T-2333-94

Federal Court of Canada - Trial Division
Toronto, Ontario

Rothstein J.

Heard: October 6, 1994
Oral judgment: October 6, 1994

Reasons dated: October 13, 1994

(7 pp.)

Administrative law -- Natural justice -- Constitution of board or tribunal -- Bias, apprehension of -- Stay, when refused.

A private applied for an interim stay of a General Court Martial. He argued that there was a reasonable apprehension of bias since persons of the same class as members of the Court Martial were allegedly implicated but not charged. The evidence indicated that two of the seven charged were officers.

HELD: The application was dismissed. The fact that officers should have been charged and were not did not of itself give rise to a reasonable apprehension of bias. In the absence of evidence connecting all officers and specially the members of the Court Martial with the alleged preference, there was no factual basis that would create an apprehension of bias by the members of the Court Martial against the private in the minds of a reasonable observer. The private did not meet the threshold test. And irreparable harm was not established.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, s. 11(f) National Defence Act, R.S.C. 1985, c. N-5, ss. 71, 273

Edward Greenspan and Mark Rosenberg, for the applicant.
Arnold Fradkin and Lt.-Col. Peter Tinsley, for the respondent.

REASONS FOR ORDER

1 **ROTHSTEIN J.** (orally):-- On this application for an interim stay of the General Court Martial scheduled to commence on October 11, 1994 at Petawawa in respect of Private Brocklebank, I have listened to arguments from counsel with respect to the question of serious issue. I have considerable difficulty with respect to the propositions advanced by counsel for the applicant.

2 The applicant argues that there is a reasonable apprehension of bias where a General Court Martial consists exclusively of officers, when the applicant was charged with an offence relating to a situation in which it is alleged that some or most officers present, who were more culpable were not charged, a cover-up is alleged, and when it is alleged that the applicant's superior officer gave the illegal order which led to the event constituting the alleged offence. It is not argued that there is a reasonable apprehension of bias simply because the members of a Court Martial consist exclusively of officers while the accused is an enlisted man. Rather, the argument is that there is a reasonable apprehension of bias because persons of the same class as members of the Court Martial, i.e. officers, were allegedly implicated but were not charged in this case.

3 However, the evidence before me is that two of the seven of those charged were indeed officers. While Captain Sox was only charged recently, Major Seward was charged some 18 months ago. Thus, some persons of the same class as members of the General Court Martial, i.e. officers, have been charged. Even if other officers should have been charged and were not, this of itself does not give rise to a reasonable apprehension of bias simply because members of a General Court Martial are also officers. Just because some persons who belong to a large and diverse group may have received preference or may have been involved in a cover-up does not, without something more, mean that all other members of the group, and in particular, members of the General Court Martial, will be biased against persons not belonging to the

group, i.e. an enlisted man. In the absence of some other evidence that in some way connects all officers and specifically the members of the General Court Martial with the alleged preference given to the officers who were involved, there is no factual basis that would create an apprehension of bias by members of the General Court Martial against the applicant in the minds of a reasonable observer.

4 Counsel for the applicant does not argue actual bias but only a reasonable apprehension of bias. Yet such apprehension was not apparent to counsel who were closely involved with the matter for some seven or more months after they had been retained. Counsel for the applicant eloquently explained the development of the bias argument and why it was not until approximately September 1994 that he decided it was an issue. I can appreciate the way in which the theory of a case develops and that it can be a slow process. However, I am not satisfied that an apprehension of bias attributable to reasonable and right-minded informed persons at large is a sustainable proposition in this case when that apprehension of bias had not been obvious at an early stage to counsel themselves.

5 I also find difficulty with respect to the applicant's arguments respecting selective charging. Even if I were convinced that the allegation of selective charging could form the basis of a reasonable apprehension of bias and therefore an abuse of the process as alleged in this case, this argument assumes that the prosecutorial and judicial branches of the military justice system are one and the same. In fact they are independent and applicant's counsel says that he does not challenge the independence of the members of the General Court Martial. The law is clear that the courts should be loathe to interfere with prosecutorial discretion. See R. v. Power, [1994] 1 S.C.R. 601 at 620-629. The bias alleged in this context does not touch the judicial role performed by members of the Court Martial itself.

6 In addition to his claim of reasonable apprehension of bias, counsel for the applicant also cited section 273 of the National Defence Act, R.S.C. 1985, c. N-5, as authority for the proposition that the applicant, in the circumstances here, has a right to be tried in a civilian court. However, counsel for the respondent outlined the context in which section 273 of the National Defence Act is to be considered. Section 71 recognizes that nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court. Section 273 is a parallel section when an offence is committed outside of Canada. Further, paragraph 11(f) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, provides:

> 11. Any person charged with an offence has the right...
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

I think paragraph 11(f) is clear Charter recognition of the existence of a military justice system which is not displaced by the civilian criminal courts at the option of an accused person. I am very doubtful that section 273 provides an accused member of the Armed Forces, when he is charged under the National Defence Act, with the right to be tried in a civilian court.

7 A finding that there is no serious issue should not be made merely because a question of law is novel and, in the opinion of a motions judge, has little likelihood of success. However, when a legal issue is of questionable merit and there is an absence of a factual underpinning to which to apply the legal question, I am quite satisfied that a serious issue has not been demonstrated.

8 In summary, I am satisfied that the applicant has not met the threshold serious issue test required for the granting of a stay of proceedings.

9 With respect to irreparable harm, applicant's counsel submits that the applicant will be required to incur significant legal costs for an improperly convened General Court Martial and will be unable to recover these costs. He also argues that the applicant could lose his right to silence, be subject to considerable worry and anxiety, suffer a loss of reputation

and could also lose the benefit of the publication ban which currently governs this matter, if it is later determined that the General Court Martial was improperly convened and a second trial in a civilian court is necessary.

10 I am not convinced that the difficulties which may be faced by Private Brocklebank are any different than the ordinary exigencies that go along with criminal litigation. Accused persons do incur costs, may lose their right to silence, may experience additional worry, anxiety and stress, and publication bans may lose their effect in cases where the accused must face a second trial due to a finding, on appeal, of an illegality in respect of the initial trial. If the applicant's arguments are taken to their logical conclusion, any time an accused raises a serious issue on any matter that can be raised prior to trial, such as the constitutional validity of a provision under which he is charged, or bias, a finding of irreparable harm would be inevitable. I have been cited no authority to support this proposition.

11 Counsel for the applicant did cite one case in which a court has held that inability to recover costs constituted irreparable harm. See Re Island Telephone Company Limited (1982), 206 APR 158 (P.E.I.S.C.). It is the only case brought before me that seems to touch on the issue, but it is specifically pertinent to the relationship between a regulated utility and the regulatory commission having jurisdiction over it. I do not say that the inability to recover costs may never constitute irreparable harm, but only that such inability has not been considered sufficient to meet the irreparable harm test where costs are incurred in the ordinary course of litigation.

12 In short I do not consider that the kind of harm claimed by the applicant has been recognized as "irreparable harm" by Canadian courts so as to justify the stay sought here.

13 In order to obtain a writ of prohibition or a stay of proceedings, all three components of the test set out in RJR McDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, (serious issue, irreparable harm, balance of convenience) must be met. Not having been satisfied that there is either a serious issue or irreparable harm in this case, I need not go on to deal with the balance of convenience.

14 The applicant's application for an interim stay to prohibit the General Court Martial scheduled for October 11, 1994 from proceeding is dismissed. In view of my decision on the applicant's stay application, the respondents' application to quash the stay application as being made out of time is dismissed. Although it may not be necessary, for completeness, the applicant's application to extend time is allowed.

15 I regret that I am unable to give more extensive reasons in this matter, and make reference to the many authorities cited to me today. However, the General Court Martial of Private Brocklebank begins on Tuesday, October 11, 1994. I do not think it would be fair to counsel for either side to wait even for 24 or 48 hours for this decision. Counsel must know immediately whether to prepare for the General Court Martial and whether to arrange for witnesses and organize other resources. In addition, although perhaps unlikely, in order not to preclude an effective appeal, I think it is important to issue this decision as quickly as possible. I shall provide an edited version of these oral reasons as soon as possible.

16 With the consent of the applicant, the respondent has moved to seal the file in this matter and in light of the fact that this application is consistent with the existing publication ban ordered, I will grant this request.

ROTHSTEIN J.

qp/d/hbb/mrr/DRS/DRS/DRS/DRS

Indexed as:

Bell Canada v. Communications, Energy and Paperworks Union

Between
Bell Canada, applicant, and
Communications, Energy and Paperworkers Union of Canada,
Canadian Telephone Employees Association and Femmes Action,
respondents

[1997] F.C.J. No. 207

[1997] A.C.F. no 207

127 F.T.R. 44

69 A.C.W.S. (3d) 1103

Court File Nos. T-1414-96, T-1985-96, T-2722-96

Federal Court of Canada - Trial Division
Montreal, Quebec

Richard J.

Heard: January 22, 1997
Judgment: February 21, 1997

(18 pp.)

Administrative law -- Judicial review -- Stay of proceedings pending before tribunal -- What applicant must establish -- Considerations, balance of convenience.

Application by Bell Canada to stay the proceedings of the Canadian Human Rights Tribunal pending the outcome of Bell's three judicial review applications. The Canadian Human Rights Commission investigated pay equity complaints filed by the Canadian Telephone Employees Association. Bell was then notified of the Commission's decision to request that the President name a Tribunal to inquire into the complaints. Bell applied for judicial review of the Commission's decision.

Bell also asked the President to refrain from naming a Tribunal; however, a tribunal was named. Bell then applied for judicial review of the President's decision. Bell requested that the Tribunal not proceed. The Tribunal held a hearing and rejected Bell's request for an adjournment. Bell then applied for judicial review of the Tribunal's decision. Bell challenged the appointment of the Tribunal. It raised issues of jurisdiction and bias. It claimed that the appointment of

the Tribunal was a nullity. Further, Bell claimed that its judicial review applications raised serious issues to be tried and that it would experience irreparable harm given the costs and disruptions to it by the proceedings.

HELD: Application dismissed. The Court would not intervene with the Tribunal's jurisdiction. Bell had not satisfied the three stage test for granting a stay of proceedings. Although Bell's application for judicial review of the Commission's decision to appoint a Tribunal raised serious questions to be tried, the other two judicial review applications depended on the outcome of the first application. Also, the allegations of bias did not raise serious issues to be tried. Further, there were no special circumstances permitting the Court to treat costs or alleged disruptions of the proceedings as causing Bell irreparable harm. Finally, as a matter of balance of convenience, it was neither in the public's nor the complainant's interests to delay the Tribunal proceedings.

Statutes, Regulations and Rules Cited:

Canadian Human Rights Act, ss. 11, 43(1), 44(1), 44(3), 49(1), 49(1.1), 50(1).
Federal Court Act, s. 18.2.

Counsel:

René Duval, for the intervenor.
Royal L. Heenan, Stanley Fisher and Thomas E.F. Brady, for the applicant.
Peter C. Englemann, for the respondent, Communications, Energy and Paperworkers Union of Canada.
Larry Steinberg, for the respondent, Canadian Telephone Employees Association.

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1 **RICHARD J.** (Reasons for Order):-- Bell Canada seeks an interim order pursuant to section 18.2 of the Federal Court Act staying any further proceedings by the Canadian Human Rights Tribunal pending the final disposition of Bell Canada's judicial review applications in Court Files Nos. T-1414-96, T-1985-96 and T-2722-96.

BACKGROUND:

2 Between June 27, 1991 and June 21, 1994, the Canadian Telephone Employees Association (the "CTEA") filed five pay equity complaints with the Commission.

3 By Memorandum of Understanding dated April 26, 1991, the CTEA, the Communications, Energy and Paperworkers Union of Canada (the "CEP") and Bell Canada agreed to conduct a pay equity study covering the entire company. A Joint Committee was formed to perform this study. The final report of the Joint Committee was released on November 23, 1992 and found a substantial wage gap between male and female employees at Bell Canada.

4 After completing its investigation of the CTEA's pay equity complaints and other pay equity complaints against Bell Canada, the Commission released investigation reports in March 1994, May 1995 and November 1995. All of the parties made extensive submissions to the Commission with respect to the investigation reports.

5 On May 30, 1996, Bell Canada was informed of the Canadian Human Rights Commission's decision of May 27, 1996, to request the President to name a Tribunal to inquire into certain specified complaints brought by the respondents CTEA and CEP against Bell Canada alleging violations of section 11 of the Canadian Human Rights Act,[1] (the "Act") by allegedly paying wages which discriminated on the basis of sex.

6 On June 14, 1996, Bell Canada began judicial review proceedings against this decision by the Commission. Among the grounds it relied upon where:

- bias on the part of the Commission in that, among other matters, the Commission's investigator had solicited new complaints from the complainants during the course of her investigation, action incompatible with an unbiased (and neutral) investigation;
- the CTEA's and CEP's complaints were based on the wages they had freely bargained collectively with Bell;
- improper use by the Commission of documents provided to it by Bell on a confidential basis;
- the failure of the Commission to conduct any job to job study, such as is required to found a complaint under section 11 of the Act, and which alone could allow a reasonable inference that Bell had paid wages which discriminated on the basis of sex;
- requesting the President to name a single tribunal to hear a mass of vague and contradictory complaints against Bell, none of which identified specific jobs alleged to be of equal value as is required by section 11 of the Act, and which sought to compare different establishments over different time periods in a way which made it impractical for Bell to make a full answer and defence thereto as required by the rules of natural justice.

7 After beginning its judicial review proceedings on June 14, 1996, in file T-1414-96, Bell Canada's solicitors informed the President on June 19, 1996, that it had begun judicial review proceedings of the Commission's decision of May 27, 1996, and requested her to refrain from naming a Tribunal pending the resolution of Bell Canada's judicial review application.

8 The President named a Tribunal to hear the complaints against Bell Canada on August 7, 1996.

9 Bell Canada's solicitors wrote to the President on August 14, 1996, alleging that her decision to name a Tribunal would be a legal nullity unless the Commission's decision of May 27, 1996, were upheld by the courts and requesting that the Tribunal take no steps prior to the resolution of Bell Canada's judicial review application in Court File No. T-1414-96.

10 On August 27, 1996, the deputy registrar of the Tribunal informed Bell Canada's solicitors by letter that the Tribunal intended to proceed with the complaints referred to it by the Commission regardless of Bell Canada's judicial review application.

11 Bell Canada brought a judicial review application dated September 6, 1996 against the President's decision of August 7, 1996 in Court File No. T-1985-96, on the basis that, since the Commission's request for her to name a Tribunal was a legal nullity, the naming of the Tribunal was necessarily a nullity.

12 The Tribunal held a hearing on October 23-24, 1996, on the question of adjourning its proceedings pending the resolution of Bell Canada's judicial review applications. It issued a decision on November 26, 1996, rejecting Bell Canada's request for an adjournment.

13 In the face of the decision by the Tribunal refusing to adjourn its proceedings pending the resolution of Bell Canada's two judicial review applications, Bell Canada brought a judicial review application on December 11, 1996 against the Tribunal's decision of November 26, 1996, in Court File No. T-2722-96.

14 The application for stay is brought in each judicial review application.

Bell Canada's allegations:

15 Bell Canada alleges that the Commission itself actively counselled the complainants in the various complaints against Bell Canada, suggesting the filing of new complaints and suggesting and accepting purported amendments to existing complaints which transformed them into new and untimely ones.

16 Bell Canada also alleges that the Commission's Investigation Report discloses information provided on a confidential basis during a mediation process engaged in by Bell Canada, the CTEA and the CEP between March and November 1994 in violation of the Commission's own undertaking. Bell Canada claims that such conduct by the Commission further demonstrates the bias vitiating its decision to request the naming of a Human Rights Tribunal.

17 Bell Canada claims that its judicial review applications in files T-1414-96 and T-1985-96 raise questions as to the sufficiency of the material relied on by the Commission in deciding to refer complaints against Bell Canada to the President and in deciding to deal with complaints against Bell Canada filed after the expiry of the one year time limit established by paragraph 41(e) of the Canadian Human Rights Act.

18 Bell Canada further alleges that its judicial review applications in files T-1414-96 and T-1985-96 against the Commission and the President raise additional serious questions to be tried. Among these are the issues of whether the Commission erred in not refusing to dismiss the complaints of the CTEA and CEP against the wages they had themselves freely negotiated in collective bargaining with Bell Canada and whether the Commission could lawfully refer the CEP's complaints to the President, when it had previously rejected the union's complaints of wage discrimination and had no evidence of any discriminatory wage increases before it.

19 Bell Canada alleges that the Tribunal erred in its decision of November 26, 1996, when it held that these grounds did not constitute a serious question to be tried. The Tribunal's decision appears to seek to pre-empt this Court in the exercise of its supervisory jurisdiction over federal tribunals in a manner, according to Bell Canada, that casts grave doubt upon the Tribunal's impartiality.

20 Bell Canada further claims that these issues are further reinforced by the scheme of the Canadian Human Rights Act, which permits the Commission to issue the Equal Wages Guidelines which purport to bind the Tribunal in its interpretation of section 11 of the Act upon which the CTEA and the CEP base their complaints. The resulting close institutional relationship between the Commission and the Tribunal raise serious concerns as to institutional bias affecting the Tribunal, particularly in the present circumstances.

ISSUE:

21 Whether a stay of proceedings before the Tribunal should be granted pending the final disposition of each of the three judicial review applications commenced by Bell Canada pursuant to s. 18.2 of the Federal Court Act.

PRELIMINARY SUBMISSION:

22 Bell Canada has questioned the jurisdiction of the Commission to appoint a Tribunal based on the conduct of the investigator and of the Commission and has alleged that the decision to appoint a Tribunal to inquire into the pay equity complaints is a nullity. Bell Canada claims that it is settled law that where a judicial review application raises issues going to the essence of an administrative tribunal's jurisdiction or of its constitution, then the courts will not hesitate to stay a tribunal's proceedings.[2] I will deal with this preliminary submission by reviewing the scheme of the Act and the role and function of the investigator, the Commission and the Tribunal.

23 At the outset, it should be noted that Bell Canada does not challenge the Commission's jurisdiction or that of the Tribunal over the persons involved or the subject matter of its investigation. Bell Canada is a federal undertaking and there is no challenge to the constitutionality of the legislation.

The role and the function of the Canadian Human Rights Commission:

For our purpose, the relevant parts of the Canadian Human Rights Act are as follows:

Section 43:

Designation of investigator

(1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.

Section 44:

Report

(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

Action on receipt of report

(3) On receipt of a report referred to in subsection (1), the Commission

(a) may request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal in accordance with section 49 to inquire into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

Section 49:

Human Rights Tribunal

(1) The Commission may, at any stage after the filing of a complaint, request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal, in this Part referred to as a "Tribunal", to inquire into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted.

President to appoint Tribunal

(1.1) On receipt of a request under subsection (1), the President of the Human Rights Tribunal Panel shall appoint a Tribunal to inquire into the complaint to which the request relates.

Section 50:

Duties

(1) A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear before the Tribunal, present evidence and make representations to it.

24 In Bell v. Canada (Canadian Human Rights Commission) and Cooper v. Canada (Canadian Human Rights Commission),[3] the Supreme Court of Canada examined the role of the Canadian Human Rights Commission under the Canadian Human Rights Act, its constitutive Act. The Supreme Court came to the conclusion that, looking at the Act as a whole, the role of the Commission was to deal with the intake of complaints and to screen them for proper disposition. Mr. Justice La Forest wrote as follows:

> The Act sets out a complete mechanism for dealing with human rights complaints. Central to this mechanism is the Commission. There is no provision in the Act which explicitly gives the Commission power to determine questions of law and nothing in the scheme of the Act implies that the Commission has this power. Looking at the Act as a whole, the role of the Commission is to deal with the intake of complaints and to screen them for proper disposition. The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. The Commission's striking down s. 15(c) of the Act (which is what a referral to a tribunal would amount to) would be an assumption by the Commission of an adjudicative role for which it has no mandate. Administrative bodies and tribunals are creatures of statute; the will of the legislature as it appears in that statute must be respected. The role of the Commission as an administrative and screening body, with no appreciable adjudicative role, is a clear indication that Parliament did not intend the Commission to have the power to consider questions of law.

25 In Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission),[4] Sopinka J. wrote as follows:

> Section 36(3) provides for two alternative courses of action upon receipt of the report. The Commission may either adopt the report "if it is satisfied" that the complaint has been substantiated, or it may dismiss the complaint if "it is satisfied that the complaint has not been substantiated". If the report is adopted, I presume that it is intended that a tribunal will be appointed under s. 39 unless the complaint is resolved by settlement.

26 Mr. Justice Dubé, in Miller v. Canada (Canadian Human Rights Commission),[5] described the process following a complaint as follows:

> Subsection 40(1) of the Act provides that complaints may be filed by any individual or group of individuals having reasonable grounds for believing that a person has engaged in a discriminatory

> practice. Thus, an employee of the Commission is included. Under section 41, the Commission is obligated to deal with complaints over which it has jurisdiction and which are not frivolous, vexatious or made in bad faith. Section 43 provides that the Commission may designate an "investigator" who shall investigate a complaint in a manner authorized by regulations (no regulations have been promulgated as yet). Subsection 44(1) stipulates that the investigator shall, after the conclusion of an investigation, submit to the Commission a report of his findings. Under subsection 44(3), the Commission is obligated to dismiss the complaint if satisfied that, having regard to all the circumstances, an inquiry into the complaint is not warranted. Alternatively, it may request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal ("the Tribunal"), in accordance with section 49, to inquire into the complaint when satisfied that the circumstances so warrant.
>
> Thus, subsection 44(3) confers a very broad discretion on the Commission to either dismiss a complaint or refer it to a Tribunal. As master of its own process, the Commission is mandated to weigh the evidence and to determine whether there is a reasonable basis for proceeding to the next stage. In the SEPQA decision, the Supreme Court has held that such a determination is part of the "investigatory" or "administrative" phase of the processing of a complaint and thus is not required to be made on a "judicial" or "quasi-judicial" basis. The Commission does not have to follow the whole panoply of the formal rules of natural justice, but it must adhere to the rules of procedural fairness in carrying out its determination. The Commission must inform the parties of the substance of the evidence secured by the investigator which was placed before the Commission. It must also provide the parties with the opportunity to respond and make all relevant representations.

Deference:

27 In dealing with complaints, the Commission must assess the probative value of evidence and decide to further investigate or not. In Boahene-Agbo v. Canada (Canadian Human Rights Commission),[6] Mr. Justice Teitelbaum wrote as follows:

> In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that are being balanced: the complainant's and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system ...
>
> Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted. Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of Canada (Attorney General) v. Mossop [1993] 1 S.C.R. 554.
>
> In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where

> further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such fundamental nature that merely drawing the decision maker's attention to the omission cannot compensate for it or (2) where fundamental evidence is inaccessible to the decision maker by virtue of the protected nature of the information or where the decision maker explicitly disregards it.

28 In Canadian Broadcasting Corp. v. Canadian Human Rights Commission et al.,[7] this Court held that in exercising its discretion under paragraph 41(e), the Commission owes a duty of fairness to those potentially affected by its decision. In that case, the Court found that the complainant was entitled by law to have the Commission examine all the circumstances surrounding her late filed claim and determine whether it ought to be investigated. In the circumstances of that case, the Court ordered the Commission to make a decision as to whether the time-barred complaint should be investigated on the basis of all relevant facts.

29 The Commission is the master of its own procedure and judicial review of an allegedly deficient investigation or decision is only warranted where such investigation or decision is clearly deficient.[8] In Selvarajan v. Race Relations Boards,[9] Lord Denning gave the following reasons:[10]

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion.... In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure.

The Tribunal is entitled to make procedural rulings such as whether to adjourn its proceedings without having those decisions subject to judicial review. In Re Cedarvale Tress Ltd.[11], the Ontario Court of Appeal wrote as follows:

> In my view there is an important distinction to be made between (i) the laying down of guidelines by the Court for the direction of persons who seek to invoke the jurisdiction of the Court, as to when and how they may do so when they seek to attack orders made by administrative tribunals as being in excess of or without jurisdiction, on the hand, and (ii) the laying down of guide lines as to the procedures to be followed by those tribunals themselves when an objection to their jurisdiction is made to them. The former is a proper exercise of the Court's function in relation to its own process. The latter, when directed to the processes of an administrative tribunal which has been given exclusive jurisdiction in its own field, is in my view not only unwise but unwarranted. It was pointed out by Wright, J., in the instant case, after reviewing various sections of the Labour Relations Act, that "the Board is supreme in its field and is free to exercise its supremacy on whatever evidence it chooses and, subject to a full right of audience, in whatever way it chooses" [p.385 O.R., p.415 D.L.R.]. He went on to observe, and rightly so, that the Supreme Court of Ontario retains its jurisdiction to act where it is made to appear that this Board, or any other administrative tribunal, has exceeded its jurisdiction. Notwithstanding his recognition of the Boards "supremacy", he then set forth his views as to how the Board should proceed.
>
> It is clear to me that under the Labour Relations Act the Board is master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and

convenient in the particular circumstances of the case before it.

Bias:

30 The applicant has also raised the issue of bias or impartiality. The Supreme Court formulated this test in Newfoundland Telephone Company Ltd. v. The Board of Commissioners of Public Utilities[12]: "The test is whether a reasonably informed bystander could reasonably perceive a bias on the part of an adjudicator".[13] The standard of conduct which is applicable to those performing an adjudicative function is different from those performing a purely administrative or investigative function. In the case of an administrative or investigate function, the standard is not whether there is a reasonable apprehension of bias on the part of the investigator, but rather whether the investigator maintained an open mind, that is whether the investigator has not predetermined the issue.

31 This test was recently used by Dubé J. in Miller v. Canada (Canadian Human Rights Commission).[14] Dubé J. wrote as follows:

> The basic test to insure fairness and to avoid a reasonable apprehension of bias has been enshrined in the jurisprudence[15] : it is whether reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, would perceive bias on the part of an adjudicator. The grounds of apprehension must be substantial. Mere suspicions are not sufficient.

32 Based on the nature of Bell Canada's challenge to the appointment of the Tribunal, and upon reviewing the scheme of the Act and the role and function of the investigator, the Commission and the Tribunal, I have concluded that the Court should not intervene at this stage. The preliminary submission of Bell Canada is rejected. The motion for a stay of proceedings must therefore be determined in accordance with the three-stage test for the granting of a stay of proceedings.

STAY OF PROCEEDINGS - THE APPLICABLE TEST:

33 A stay of proceedings and an interlocutory injunction are remedies of the same nature and they have sufficient characteristics in common to be governed by the same rules[16]. Accordingly, the three-stage test set for the granting of interlocutory injunctions should be applied to applications for stays.[17] In Whirlpool Corp. and Inglis Ltd. v. Camco Inc. and General Electric Co.[18], I reviewed this test:

> On an application for an interlocutory injunction, the three-part American Cyanamid[19] test (adopted in Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.[20]) should be applied[21]. The factors to be considered are as follows:
>
> - At the first stage, the applicant must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. A motions' court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action. Unless the case on the merits is frivolous or vexatious, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores[22] test.
>
> - At the second stage, the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. "Irreparable" refers to the nature of the harm rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which

cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration. Proof of irreparable harm must be clear and not speculative[23].

- The third stage, called the balance of convenience, involves a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. It has also been referred to as the balance of inconvenience. The factors which must be considered in assessing the balance of convenience and the relative weight to be attached to them are numerous and will vary in each individual case.

In the RJR-MacDonald[24] case, Justices Sopinka and Cory, on behalf of the Court, noted that in the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated that when everything else is equal, "it is counsel of prudence to ... preserve the status quo". They stated that this approach would seem to be of limited value in private law cases.

34 I will now apply these principles to this case.

Serious Question to be Tried:

35 The Supreme Court of Canada has held in the RJR-MacDonald case[25] that the threshold to satisfy the test of a serious question is a low one.

36 Since this application for a stay can be disposed of on the ground that Bell Canada has not satisfied the test of irreparable harm or balance of convenience, I am prepared, for the purpose of this stay application only, to assume, without deciding, that the application for judicial review in Court File No. T-1414-96 raises a serious question to be tried. The judicial review in Court File No. T-1985-96 of itself, does not raise any additional question and appears to be entirely dependent on the outcome of the application in Court File No. T-1414-96. Based on the material before me, the allegation of apprehended bias on the part of the Tribunal made by Bell Canada in Court File No. T-2722-96 does not raise a serious question to be tried. It is a bare, unsubstantiated claim which appears to rest only on Bell Canada's disagreement with the decision the Tribunal reached in disposing of its application for an adjournment. Bell Canada's allegation of institutional bias does not, in my opinion, raise a serious question either. The adoption of guidelines is contemplated and authorized by statute. The remaining allegations in Court File No. T-2722-96 also seem to be dependent on the outcome of the application for judicial review in Court File No. T-1414-96.

Irreparable Harm:

37 Bell Canada claims it will be required to expend considerable effort, undergo a disruption of its business as witnesses are prepared and called to testify, and incur the costs of litigation. All of this is preparation for the Tribunal hearings which will be unnecessary if any of its judicial review applications succeed. According to Bell Canada, it cannot be compensated for any of these matters in the event of success of any of its judicial review applications, not even for the monetary costs incurred during the hearing before the Tribunal, because the Tribunal, being legally non-existent, could not order any compensation for it.

38 Bell Canada argues that the exposure of a respondent to such costs and disruptions is well recognized in law as constituting irreparable harm under the second branch of the test for interim relief.

39 I do not accept that submission. Mr. Justice Rothstein stated as follows about this matter:[26]

> Counsel for the applicant did cite one case in which a court has held that inability to recover costs constituted irreparable harm. See Re Island Telephone Company Limited, 67 Nfld. & P.E.I.R. 158, (1987), 206 APR 158 (P.E.I.S.C.). It is the only case brought before me that seems to touch on the issue, but it is specifically pertinent to the relationship between a regulated utility and the regulatory commission having jurisdiction over it. I do not stay that the inability to recover costs may never constitute irreparable harm, but only that such inability has not been considered sufficient to meet the irreparable harm test where costs are incurred in the ordinary course of litigation.

40 In the case at bar, I do not find any special circumstances permitting the Court to treat costs or alleged disruptions as irreparable harm.

> As Madam Justice Reed stated in ICN Pharmaceuticals Inc. v. Canada (Patented Medicine Prices Review Board):[27]
>
> I have not been persuaded that the circumstances are such that I should stay the proceedings. While unnecessary time and costs will have been expended if the proceeding goes ahead and it is ultimately decided that the Board is without jurisdiction, this is more a matter of inconvenience than irreparable harm. See D&B Companies of Canada Ltd. v. Director of Investigation and Research (1994), 58 C.P.R. (3d) 342, at 345 (F.C.A.).

41 Accordingly, the applicant Bell Canada does not satisfy the second stage of the test.

Balance of Convenience:

42 In arriving at a decision on to the balance of convenience, the Court must consider the public interest in having complaints of discrimination dealt with expeditiously.[28] The pay equity provisions are part of the Canadian Human Rights Act, a public statute which has been referred to by the Supreme Court of Canada as quasi-constitutional. The Commission and the complainants hear the onus of proof before the Tribunal. Bell Canada has the right to be represented by counsel, to cross-examine witnesses and to call evidence and make submissions on its own behalf. Any substantive issues can be raised before the Tribunal.

43 The affidavit evidence indicates that the potential recipients of pay equity adjustments have already waited six years since the joint pay equity study commenced at Bell Canada which identified significant wage gaps between male-dominated and female-dominated groups. In the meantime, many employees have ceased to be employed by Bell Canada, have taken buy outs, have died and have retired. It will be very difficult for those employees who have left and who continue to leave Bell Canada to receive any money which would be owed to them as a result of pay equity adjustments. Every day that passes, it becomes more difficult to locate these employees and more employees leave.

44 I do not believe that this is in the public interest to delay proceedings before the Tribunal. As McKeown J. stated in Federation of Women Teachers' Association v. Ontario Human Rights Commission,[29] the role of the Commission as representing the public interest must be considered when deciding whether to stay its proceedings. As a matter of balance of convenience, taking into account the public interest, and the interest of the complainants, no stay should be granted[30].

45 Therefore, the third part of the test favours the respondents.

CONCLUSION:

46 Accordingly, the motion by Bell Canada to stay the proceedings of the Tribunal pending the final disposition of each of its applications for judicial review, in Court Files Nos. T-1414-96, T-1985-96 and T-2722-96, is dismissed.

RICHARD J.

qp/d/ln/hbb/mjb/DRS/DRS/DRS/qlltl

1 R.S.C. 1985, c. H-6.

2 Pfeiffer v. Redling, unreported, May 2, 1996, no. T-2127-95 (F.C.T.D.) at p. 8, [1996] F.C.J. No. 585; Great Atlantic & Pacific Tea Co. of Canada Ltd. v. Ontario (Human Rights Commission) (No. 2) (1993), 18 CHRR D/89 (Ont. Div. Ct.) at D/94-96; Re Law Society of Upper Canada v. Canada (Attorney General) (1996), 28 O.R. (3d) 460 (Gen. Div.) at pp. 467-469; International Association of Machinists v. Air Canada, supra, at 208-9; Ontario College of Art v. Ontario (Human Rights Commission) (No. 1) (1992), 19 C.H.R.R. D/195 (Ont. Gen. Div.) at D/198.

3 (1996) 140 D.L.R. (4th) 193 (S.C.C.).

4 [1989] 2 S.C.R. 879, at pp. 898-899.

5 (1996) 112 F.T.R. 195, May 29, 1996.

6 (1994) 86 F.T.R. 101.

7 (1994), 71 F.T.R. 214.

8 Miller v. Canada (Canadian Human Rights Commission), (1996) 112 F.T.R. 195, May 29, 1996, Dubé J.

9 [1976] 1 All E.R. 12 (C.A.) at. p. 19.

10 See also Canada (A.G.) v. Mossop, [1993] 1 S.C.R. 554; Slattery v. Canada (Canadian Human Rights Commission), [1994] 2 F.C. 574.

11 (1971) 22 D.L.R. (3d) 40 (Ont. C.A.).

12 [1992] 1 S.C.R. 623, at p. 636.

13 This test was also used by the Federal Court of Appeal in Arthur v. Canada (Minister of Employment and Immigration), [1993] 1 F.C. 94; (1992) 98 D.L.R. (4th) 254; (1992) 147 N.R. 288; (1992) 18 Imm. L.R. (2d) 22.

14 (1996) F.T.R. 1995, May 29, 1996.

15 Dubé J. refers to the following authorities:

> Committee for Justice and Liberty v. National Energy Board et al., [1978] 1 S.C.R. 369, at p.p. 394- 395; Re. W.D. Latimer Company Limited and Bray (1974) 52 D.L.R. (3d) 161, at p. 170 (Ont. C.A.); Vezina v. Canada (Canadian Human Rights Commission), [1992] 3 F.C. 675, at p. 680.

16 Manitoba (A.G.) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110.

17 RJR-MacDonald Inc. v. Canada (A.G.), [1994] 1 S.C.R. 311; National Bank of Canada v. Granda, [1984] 2 F.C. 249 (C.A.) at p. 255; International Association of Machinists v. Air Canada, (1991) 44 F.T.R. 206, at pp.208-209.

18 (1996) 105 F.T.R. 268; (1996) 65 C.P.R. (3d) 63.

19 American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.).

20 [1987] 1 S.C.R. 110.

21 RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311.

22 See note 16, supra.

23 Nature Co. v. Sci-Tech Educational (1992), 41 C.P.R. (3d) 359 at 367.

24 RJR-MacDonald Inc. v. Canada (A.G.), [1994] 1 SC.R. 311, at p.347. I note that there are additional considerations of public interest involved in Charter matters.

25 See note 24, supra.

26 Brocklebank v. Canada (Minister of National Defence), (1994) Court File No. T-2333-94, October 13, 1994, Rothstein J., [1994] F.C.J. No. 1496, reported at (1994) 86 F.T.R. 23.

27 Court File No. T-2541-95, December 6, 1995, Reed J., [1995] F.C.J. No. 1644, reported at (1995) 65 C.P.R. (3d) 1.

28 Federation of Women Teachers' Associations of Ontario v. Ontario Human Rights Commission, (1989), 67 O.R. (2d) 492 at p. 518 (Div. Ct.).

29 See note 28.

30 Federation of Women Teachers' Association of Ontario v. Ontario Human Rights Commission, (1989) 10 C.H.R.R. D/5877 (Ont. Div. Ct. per McKeown J.).

Indexed as:

Northwest Territories v. Public Service Alliance of Canada

Between
Government of the Northwest Territories, moving party/appellant, and
Public Service Alliance of Canada, respondent/respondent, and
Canadian Human Rights Commission, respondent/respondent

[2001] F.C.J. No. 19

[2001] A.C.F. no 19

33 Admin. L.R. (3d) 310

102 A.C.W.S. (3d) 978

Docket A-13-00

Federal Court of Appeal

Sharlow J.A.

January 10, 2001.

(20 paras.)

Practice -- Appeals -- Stay of proceedings pending appeal -- What constitutes irreparable harm -- Appeals from interlocutory orders.

Application by the government of the Northwest Territories for a stay of proceedings before the Canadian Human Rights Tribunal. The Public Service Alliance of Canada brought a complaint against the government. The government argued that the Tribunal was biased because of a lack of institutional independence. The Tribunal ruled that it did not lack institutional independence. The government applied for judicial review of this decision, which was dismissed on the basis that the government did not have standing to bring the application. The government appealed.

HELD: Application dismissed. There was a serious issue to be tried. However, the government would not suffer irreparable harm if a stay was not granted. The resources spent on litigation did not constitute irreparable harm.

Statutes, Regulations and Rules Cited:

Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 7, 11.

Counsel:

Written representations:
Earl Johnson, for the appellant.
Andrew Raven and David Yazbeck, for the respondent, PSAC.
René Duval and Philippe Dufresne, for the respondent, CHRC.

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1 **SHARLOW J.A.** (Reasons for Order):-- A Canadian Human Rights Tribunal is hearing a complaint by the Public Service Alliance of Canada (PSAC) against the Government of the Northwest Territories (the Government) alleging discrimination in the classification and pay of employees in female dominated groups contrary to the Canadian Human Rights Act, R.S.C. 1985, c. H-6. In an application for judicial review, the Government sought to challenge the impartiality of the Tribunal on the basis of a lack of institutional independence. On December 15, 1999, a motions judge dismissed the application for judicial review on the basis that the Government does not have the standing required to make that challenge. The Government appealed that decision, and now moves for a stay of the proceedings before the Tribunal pending the disposition of the appeal. The PSAC and the Canadian Human Rights Commission oppose the motion.

2 The relevant facts may be briefly stated. The complaint was made in 1989 and investigated by the Commission. On May 27, 1997, the Commission decided to seek the appointment of a Canadian Human Rights Tribunal to enquire into the section 7 and 11 aspects of the complaint. A panel was finally appointed on February 20, 1998 and a pre-hearing was scheduled for May 21, 1998.

3 Before the pre-hearing, the decision in Bell Canada v. Canadian Telephone Employees Association, [1998] 3 F.C. 244 (T.D.) was rendered. In that case, McGillis J. concluded that a reasonable apprehension of bias existed because of a lack of institutional independence.

4 The proceedings relating to the PSAC complaint against the Government were adjourned by the Tribunal pending the enactment of amendments to the Canadian Human Rights Act that were anticipated to address the concerns in the Bell Canada case. Those amendments came into force on June 30, 1998.

5 The Government took the position that the statutory amendments did not resolve the institutional bias questions referred to in the decision of McGillis J. On September 15, 1998, the Government filed a notice of motion with the Tribunal requesting it to refer the questions to the Federal Court, or alternatively to rule on the question itself. The Tribunal decided to rule on the question itself. In a decision dated December 4, 1998, it determined that it had the requisite institutional independence.

6 The Government filed an application for judicial review of the Tribunal's decision. The application was dismissed on December 15, 1999 on the basis that the Government did not have the necessary authority or standing to bring the application. The motions judge did not deal with the merits of the arguments with respect to institutional independence. The Government's appeal of that decision raises the issue of standing as well as the issue of the institutional independence of the Tribunal.

7 After the decision of the motions judge was rendered, and I assume with the acquiescence of all parties, proceedings commenced before the Tribunal with respect to the complaint of the PSAC against the Government. There is no indication that the Government sought to have the proceedings stayed, or that it sought an adjournment prior to November of 2000.

8 By that time there had been 76 days of hearings, mostly in Ottawa, which required the Government representatives to incur significant travel expenses. A further 62 days of hearings were scheduled between November 14, 2000 and July 6, 2001.

9 During approximately the same period, another case was before the Tribunal involving a complaint against Bell Canada. Bell Canada also took the position that the Tribunal lacked institutional independence, and brought an application for judicial review to have that point determined. On November 2, 2000, [2000] F.C.J. No. 1747, Tremblay-Lamer J. allowed that application saying, at paragraph 128:

> I conclude that the Tribunal's Vice-Chairperson erred in law and was not correct in determining that it [the Tribunal] was an institutionally independent and impartial body with respect to the power of the Commission to issue guidelines binding upon the Tribunal and the power of the Chairperson to approve the acting of a tribunal member after the expiry of his/her appointment to conclude a matter.

10 Tremblay-Lamer J. ordered a cessation of the proceedings of the Tribunal with respect to the complaint against Bell Canada until the problems she had identified were corrected. The complainants moved in this Court for a stay of her decision in order to permit the Tribunal to continue its proceedings pending the disposition of the appeal. That application was denied by me on November 29, 2000. The appeal of the decision of Tremblay-Lamer J. in the Bell Canada case is scheduled to be heard on April 3, 2001 (Appeal No. A-698-00). The appeal in this case is scheduled to be heard immediately after the Bell Canada appeal.

11 On November 10, 2000, after the Government became aware of the decision of Tremblay-Lamer J., it made a motion before the Tribunal to adjourn its proceedings pending the determination of this appeal. That motion was opposed by the other parties. It was denied by the Tribunal on November 14, 2000. The transcript of the reasons given by the Chairperson explains the decision to deny the adjournment and also discloses the state of the proceedings on that day. It reads in part as follows (Motion Record of the Government, page 167-8):

> Let me start by saying that we feel that there is a certain amount of prejudice on both sides of the issue. At this moment in time, however, we feel that it would be unfair to adjourn the proceedings. We are nearing the close of the case for the Commission and the Complainant and have only the evidence of Mr. Davis and Mr. Crook to complete. We also have the disclosure process to deal with, which may raise further evidentiary issues.
>
> Having said this, we do not wish to force any of the parties to respond to the bulk of the evidence or deal with fundamental legal issues without the benefit of a ruling from the Court of Appeal. In our view, there is serious prejudice on all sides -- and I want to emphasize on all sides -- if the Commission and the Complainant close their cases before we hear from the Court of Appeal.
>
> We accordingly feel that it would be fair to adjourn the hearing when the Commission and Complainant reach the end of their evidence, but before they close their cases. This would allow the Respondent to raise any issues which arises in the Court of Appeal before it presents its defence.
>
> We agree with the Respondent that the question before the Court of Appeal raises a serious issue in the present case. We, accordingly, feel obliged as a matter of natural justice to give all of the parties before us an opportunity to respond to any change in the law.

> I don't really want to go beyond that. I would say that, as we see it at this point in time, we should, in all likelihood, revisit this issue when the Commission and the Complainant have reached the end of their evidence. We will entertain the submissions of counsel at that time, but our feeling at this moment is that it would be unfair to go beyond that point without some elucidation from the Court of Appeal on the question of independence and impartiality.
>
> Having said that, we would like to move forward. We would like to deal with the evidence of Mr. Davis this week. We made it very clear to the parties in the last sitting that we would like to conclude the evidence of Mr. Davis this week. We would like to sit late, if that is necessary.
>
> Then there is the question of the evidence of Mr. Crook. My understanding is that that is, by the estimate of the Complainant, a week of evidence at most. We also have these issues to deal with on the question of the disclosure of documents. That's where I would leave it at the present time.

12 When pressed for clarification, the Chairperson said (Motion Record of the Government, page 170):

> Our ruling is that subject to submissions of counsel, because we don't know what is going to happen in the Court of Appeal and we don't know if your position is going to remain the same, but subject to the submissions of counsel, we are going to stop before we ask the Commission and the Complainant to close their case. We are not going to permit the Complainant and the Commission to close their case until such time as we have a ruling from the Federal Court of Appeal and you understand your position with respect to the Guidelines and the nature of this Tribunal.

13 There is nothing in the material before me to suggest that this ruling of the Tribunal has been reversed or amended in any way.

14 A motion to stay the Tribunal's proceedings pending the disposition of this appeal cannot be granted unless the tests in RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at 344, are met. A preliminary assessment must be made of the merits of the appeal to ensure that there is a serious question to be tried. If there is a serious question to be tried, it must be determined whether the Government would suffer irreparable harm if the stay is not granted and its appeal succeeds. If there would be irreparable harm to the Government, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the stay.

15 The first test requires a preliminary and tentative assessment of the grounds on which the appellants will argue that the decision under appeal is correct. I have no doubt that this test has been met.

16 The second test requires me to consider whether a refusal of the stay would result in irreparable harm if the Government's appeal ultimately succeeds. Harm is irreparable if it cannot be cured or quantified in monetary terms: RJR-Macdonald (cited above) at page 341.

17 The Government argues that its appeal, if successful, will finally establish that the Tribunal is institutionally incapable of providing it with a fair hearing, and if the stay is denied, its forced participation in Tribunal proceedings would be an incurable denial of its right to a fair hearing.

18 I am unable to accept this argument, particularly in light of the decision of the Tribunal to adjourn the proceedings to await the outcome of this appeal after the evidence of the Commission and the PSAC is completed and before their case is closed (unless it is persuaded by counsel that the proceedings should continue). The Government has suggested no basis on which I can conclude that merely permitting the Commission and the PSAC to adduce the remainder of their evidence will cause irreparable harm to the Government. In this regard, I note that the Government has not argued that

the manner in which it might conduct its cross-examination of the remaining witnesses for the Commission and the PSAC, or the manner in which it may deal with any evidentiary arguments, will depend on the legal effect of the guidelines.

19 The Government also argues that if the stay is not granted but its appeal eventually succeeds, it will have wasted all of the time and money required to prepare for and attend the hearing (including travel to Ottawa, where most of the hearings are held), and will have no means of recovering the wasted funds. I am unable to agree that resources that may be wasted on litigation is irreparable harm: Bell Canada v. Communications, Energy and Paperworkers Union of Canada, [1997] 127 F.T.R. 44 at 56 (F.C.T.D.).

20 Having concluded that the irreparable harm test is not met, this application for a stay of the proceedings of the Tribunal is denied, without prejudice to the right of the Government to make a new application for a stay if the Tribunal determines that it will continue its proceedings after the completion of the evidence of the Commission and the PSAC.

SHARLOW J.A.

cp/d/qlcvd/qlbdp

1987 CarswellPEI 50, 67 Nfld. & P.E.I.R. 158, 206 A.P.R. 158

1987 CarswellPEI 50

Island Telephone Co., Re

In The Matter of The Electric Power and Telephone Act, R.S.P.E.I. 1974, Chap. E-3.1

In The Matter of The Public Utilities Commission Act, R.S.P.E.I. 1974, Chap. P-31, as amended

In The Matter of an appeal by the Island Telephone Company Limited from an Order of the Prince Edward Island Public Utilities Commission made on the 8th day of October, A.D. 1987

Prince Edward Island Court of Appeal

Honourable Mr. Justice McQuaid

Judgment: November 26, 1987
Docket: Doc. AD-0007

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Counsel: Solicitors for Island Telephone - *Linda St. Jean* and *Ronald J. Keefe*.

Solicitor for Public Utilities Commission - *Maureen M. Gregory* appearing for Ronald H. MacMillan, Q.C.

Subject: Public

Communications Law --- Regulatory commissions — C.R.T.C. (Canadian Radio-Television and Telecommunications Commission) — Procedure

Practice on appeal — Staying of proceedings pending appeal — General — Electric Power and Telephone Act, S.P.E.I. 1984, c. 20, s. 28(1).

Pursuant to s. 28(1) of Act, Public Utilities Commission ordering hearing to be held to investigate telephone company's rate of return, operating expenses, overall revenue requirement and subscriber rates -- After hearing, Commission ordering company to file certain materials in advance of second phase of proceedings -- Company appealing order and applying for stay of proceedings pending appeal -- Application for stay allowed -- Stay granted where serious question to be tried, where irreparable harm resulting which would not be equitably compensated for by

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damages and where balance of convenience in favour of granting stay -- Grounds of appeal of grave import -- Preparation of stipulated materials putting company to considerable expense -- Questionable whether Commission possibly being made liable in damages if appeal proved successful -- Commission not inconvenienced by stay as appeal possibly providing guidelines for future proceedings.

***McQuaid, J.A.*:**

1 This is an application in chambers for a stay of proceedings with respect to an order issued by the Public Utilities Commission, dated 8 October, 1987, whereby the Commission imposed certain duties and obligations upon the Company to prepare and file with the Commission, immediately, certain materials.

2 The matter has its origin in an order of the Commission one year earlier, dated - October, 1986, requiring that a hearing be held "to investigate the Company's rate of return, operating expenses, overall revenue requirement and subscriber rates". This order was issued, on the initiative of the Commission itself, purportedly made pursuant to s. 28(1) of the *Electric Power and Telephone Act*, Stats, P.E.I. 1984, Cap. 20, which reads, in part:

> When the Commission believes ... that an investigation of any matter relating to any public utility should, for any reason, be made, it may, on its own motion, summarily investigate the same with or without notice.

3 The Commission, in fact, determined that the hearing in question should be made in two separate phases, phase I in which the Company's revenue requirements for two stipulated years would be reviewed, and phase II, to follow, in which the issue of just and reasonable subscriber rates would be reviewed.

4 The phase I hearing was, in fact, held during the summer of 1987. There were no intervenors. Following the conclusion of the phase I hearings, the Commission made certain findings, and on the basis of these findings, ordered that the phase II hearings should commence "shortly". In the meantime the company was to file other stipulated materials with the Commission in anticipation of the hearings to follow. This was the import of the order of the Commission, dated 8 October, 1987.

5 On 27 October, 1987, the Company filed notice of appeal from this order alleging several grounds which will be more specifically referred to infra.

6 This appeal was filed pursuant to s. 16.1 of the *Public Utilities Commission Act*, as amended in 1987. Two subsections of this section are relevant, the first touching the right of appeal, and the second touching the continuing involvement of the Commission in the proceedings.

> (1) An appeal lies from a decision or order of the Commission to the Appeal Division of the

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> Supreme Court upon a question of law or jurisdiction,
>
> . . . . .
>
> (3) The Commission shall be deemed to be a party to the appeal.

7 The filing of this appeal triggered Rule 62.02(2) and (3) of the Rules of Court.

> (2) Unless the Appeal Division or a judge thereof, or the court appealed from so orders, the filing of a notice of appeal does not operate as a stay of proceedings under the order appealed from, or invalidate any interlocutory order in the proceedings;
>
> (3) An order under paragraph (2) may be granted upon such terms as are just...

Hence the requirement of this application, which was filed, with notice to the Commission, 16 November, 1987. The grounds for the application were set out at length in the notice of application, which need not be repeated here. Suffice it to say for the moment, they would appear, on the face of it, at least, not frivolous or vexatious, but rather arguable. As it transpired, these grounds were, in fact argued, competently and in depth, by counsel both for the Company and the Commission.

8 During the course of this argument, I raised, on my own initiative, the issue of the right to standing on the part of the Commission in the matter of the issue presently before the Court, i.e., an application for a stay of the order of the Commission. Neither counsel appeared to have considered this to be an arguable issue, being of the view that s. 16.1(3) of the *Public Utilities Commission Act* opened the door to the Commission to participate. I am not nearly so confident, as counsel appeared to be, that such is the case.

9 What is presently before the Court is not an "appeal" either in the sense in which it is used in the *Act*, or, indeed, in any other sense. Nor is it a matter touching the appeal itself, or arising out of the appeal, for I have no right or jurisdiction, on the hearing of this application, to consider the merits of the appeal.

10 I think the matter must be looked at from its logical perspective. There is an extant and presently operative order or judgment issued by the Commission. An appeal lies from that order, and has been taken, by the Company. Regardless of any ruling which I might now make, that order remains extant and operative until dealt with in the forum of the Appeal Division, which will deal with it in a substantive way, and may confirm it, quash it, or vary it. That is what an "appeal" is all about, and it is to that process which the Commission has been made a party by statute, and in that regard, it possesses only those rights and powers, including the right of appearance, as a party, which the statute gives it, and nothing more can be read into that right than can be read into the statute.

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11 What is before me is an application by counsel for the Company that I exercise my discretion in a procedural, as opposed to a substantive, matter. I must consider throughout the order as being and remaining, notwithstanding any order which I may make, extant and operative. The only question before me is: shall that extant and operative order be implemented now, or is it more appropriate that its implementation be deferred pending the outcome of the indicated appeal.

12 Nothing in the exercise of that discretion goes to the validity or effectiveness of that order. Hence this application is not in any sense an appeal, nor does it in any way have any of the characteristics of an appeal. Accordingly, I would be of the view that the provisions of s. 16.1(3) have no relevance to the present proceedings. It follows, therefore, that the Commission is not a party to this application.

13 That does not mean, however, that the Company is automatically entitled to the relief which it seeks. It still must satisfy me that it is entitled.

14 Carruthers, C.J. in *Clow v. McNevin* (*No. 2*) (1986), 60 Nfld. & P.E.I.R. 360, in my view, correctly stated the guiding principle of law touching the grant of a stay of proceedings, in the following quotation:

> ...a stay of proceedings would be ordered only where some exceptional or unusual circumstances have been made known to the Court. Examples of such circumstances might include such situations where the appellant would be unduly prejudiced if no stay were granted pending appeal, if there has been a significant change in circumstances subsequent to the order appealed from, or if, on the face of the record, it would appear to the judge considering the application that it would be more likely than not that the appeal would be allowed.
>
> The onus lies upon him who seeks the stay to satisfy the court that the case falls within that class of exceptional or unusual circumstances.

15 It must be remembered that in *Clow*, as well as in virtually every other case on the issue that there existed both a plaintiff and a defendant, one of whom had secured judgment against the other, and whose right it would be for immediate execution. As a leading English authority (*The Annot Lyle*, (1886), 11 P.D. 114), stated, the Court does not

> make a practise of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled.

pending an appeal. On the other hand, it has also been said, in *Wilson v. Church* (*No. 2*) (1879), 12 Ch. D. 454, that

> when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory.

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16 While these three authorities in their context, as representative of litigious issues as between adversarial parties, are undoubtedly credible beacons, it cannot be said that they have particular applicability to the present situation which is not in that sense, adversarial. Here we are dealing with a mandatory order issued by a regulatory body against a party which has been arbitrarily brought before it. There exists no plaintiff and no defendant, no successful party and no unsuccessful party, no litigant who, in the wording of *The Annot Lyle* case, might be deprived of the fruits of his litigation if a stay were to be granted. One must, then, look elsewhere for guidance.

17 This may, perhaps, be best found in the recent decision of the Supreme Court of Canada in *Attorney General of Manitoba v. Metropolitan Stores* (*MTS*) *Ltd.*, [1987] 1 S.C.R. 110, where the issue was stay of proceedings. Because of what it considered to be their marked similarity, the Court appears to have founded its decision on the principles normally applicable to interlocutory injunctions, as enunciated in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504.

18 Beetz, J., speaking for the Court in the *Metropolitan Stores* case, at p. 127, considers the tests which he considered appropriate to apply.

> The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case.
>
> The injunction will be refused unless he can... The House of Lords has somewhat relaxed this first test in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court that there was a serious question to be tried as opposed to a frivolous or vexatious claim.

19 It is instructive to consider precisely what Lord Diplock did say in *American Cyanamid*, at p. 510, being mindful that he was speaking on an application for the granting of an interlocutory injunction.

> The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence in affidavits as to facts on which the claims of either party may ultimately depend, or to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be deal with at the trial... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favor of

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> granting or refusing the interlocutory relief sought.

20 Not only does this quotation from Lord Diplock clarify what was in the mind of Beetz, J., but, as well, it introduces another element, that the tests referred to throughout are disjunctive rather than conjunctive.

21 Beetz, J. goes on:

> The second test consists in deciding whether the litigant who seeks the interlocutory injunction, [or, in the instant case, the stay of proceedings], would, unless the injunction is granted, suffer irreparable harm, that is, hence not susceptible or difficult to be compensated in damages.

He then concludes:

> The third test called the balance of convenience, and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

The learned justice earlier observed that the public interest is one factor to be taken into consideration in determining the balance of convenience. Lord Diplock also commented to the effect that, in addition to the specific factors to which he referred, there might well be other special factors to be taken into consideration in the particular circumstances of individual cases.

22 With this as background, then, one must go back to the proceedings which give rise to the present application.

23 In its decision of 8 October, 1987, the Commission made what are alleged to be sundry findings of fact and law with respect the Company now takes issue as grounds for appeal. From this aspect of the decision a stay is irrelevant, for these findings, taken by themselves and in isolation, have no direct consequences applicable to the Company. The second aspect of the decision flows from the first. In consequence of having made those findings, the Commission went on to order the Company to conduct its immediate affairs in a manner specifically directed by the Commission.

24 I think it might be said that the appeal is directed primarily to the first aspect of the Commission's decision, whereas the application for a stay is directed primarily to the second aspect of the decision. If the Company's appeal be ultimately successful, then the duty imposed upon the Company by the Commission will be terminated *ab initio*. On the other hand, should the Company's appeal prove unsuccessful, then those duties will then unquestionably be required to be complied with.

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25 The crux of the issue is this: if no stay be granted, then the Company must, forthwith, fulfill those duties which the Commission has imposed upon it with a view to proceeding with phase II of its inquiry. If it later proves on appeal that the conclusions arrived at by the Commission in phase I of its inquiry, and which are the *sine qua non* for the progression into phase II, are fallacious or otherwise ill conceived, for whatever reason, then phase II of the inquiry cannot proceed, and accordingly the exercise in which the Company was required to engage by the Commission would have been for naught.

26 The duty which, then, falls upon the Court is to apply, as best it might, the several tests, generally encunciated in *American Cyanamid*, and generally confirmed in *Metropolitan Stores*, to the appeal filed, all without, nonetheless, attempting to examine the merits of that appeal.

27 As to the first test, I propose to apply this, not in the traditional way of determining whether the applicant has made out a *prima facie* case, which almost, of its own nature, implies some examination of the possible merits, but rather whether there exists a serious question to be tried, as opposed to one which is frivolous or vexatious.

28 As I read the grounds for appeal, these touch upon such matters as allegations of excessive jurisdiction, misinterpretation or misapplication of the governing statutes, breach of rules of natural justice in the conduct of the inquiry, interference in matters strictly falling within management discretion, and other issues of like nature. These are, indeed, all matters of grave import. Whatever the outcome at the appeal level might ultimately be, they are, on the face of it, serious questions to be tried, being neither frivolous nor vexatious.

29 With respect to the second test, irreparable harm, the Company argued, and I think with some merit, that compliance with the Commission's order touching the preparation of materials, would put it, the Company, to no inconsiderable expense which would be of no use should its appeal prove successful. Normally, this would be compensable in damages if such should be the case. However, it is questionable whether the Commission could be made liable in damages in such an eventuality. Even if it could, since the Commission is exclusively funded by those industries over which it has jurisdiction, the end result would be that the Company would, in reality, be required to contribute to the payment of its own award for damages. It appears to me that there is something not quite equitable in such an arrangement. I think the criteria required for the second test have been met.

30 The third test is that of the balance of convenience, or of inconvenience as the case may be. I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have theretofore existed. The public interest is equally well served, in the same sense, by any appeal, if one is to consider what has been advanced as the *quasi parens patriae* jurisdiction of the Commission.

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31 On the other hand, compliance with the Commission's order imposes upon the Company the expenditure of a considerable investment in time and funds which may or may not serve any useful purpose. If the Company's appeal is successful, then the balance of inconvenience unquestionably lies in its favor. If its appeal is unsuccessful, no harm be done by a stay, for the same preparation may then be done, but then most assuredly for a useful purpose.

32 I am satisfied that all three preconditions, both individually and collectively, have been met and warrant the granting of the requested stay of proceedings, and it will be so ordered.

33 There will be no order as to costs.

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KEYCITE

Island Telephone Co., Re, 67 Nfld. & P.E.I.R. 158, 1987 CarswellPEI 50, 206 A.P.R. 158, [1987] P.E.I.J. No. 114 (P.E.I. C.A. Nov 26, 1987)

Citing References

Negative and Cautionary Cases (Canada)

Not Followed in

1 New Glasgow (Town) v. MacGillivray Law Office Inc., 198 N.S.R. (2d) 116, 2001 CarswellNS 397, 24 M.P.L.R. (3d) 229, 621 A.P.R. 116, 2001 NSCA 155, [2002] N.S.J. No. 58 (N.S. C.A. [In Chambers] Oct 26, 2001) **(Judicially considered 2 times)**

2 Taylor v. Hogan, 107 Nfld. & P.E.I.R. 54, 1993 CarswellNfld 158, 336 A.P.R. 54, [1993] N.J. No. 29 (Nfld. T.D. Feb 05, 1993) **(Judicially considered 6 times)**

Positive & Neutral Cases (Canada)

Followed in

3 Newlab Clinical Research Inc. v N.A.P.E., 232 Nfld. & P.E.I.R. 332, 2003 CarswellNfld 265, 690 A.P.R. 332, [2003] N.J. No. 305, 2003 NLSCTD 167 (N.L. T.D. Nov 25, 2003)

4 Butler v Caboway Development Ltd., 1994 CarswellNfld 412 (Nfld. T.D. Dec 16, 1994)

5 Brocklebank v. Canada (Minister of National Defence), 86 F.T.R. 23, 1994 CarswellNat 750, [1994] F.C.J. No. 1496 (Fed. T.D. Oct 06, 1994) **(Judicially considered 4 times)**

6 Campbell v Fleming, 1994 CarswellNfld 447 (Nfld. U.F.C. Sep 15, 1994)

7 Genentech Inc. v. Canada (Patented Medicine Prices Review Board), 1992 CarswellNat 1090, 44 C.P.R. (3d) 335 (Fed. T.D. Sep 25, 1992)

8 Jensen v. Jensen, 111 N.S.R. (2d) 67, 1991 CarswellNS 299, 303 A.P.R. 67 (N.S. T.D. Feb 21, 1991) **(Judicially considered 2 times)**

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Considered in

9 2027625 Ontario Ltd. v Kitchener (City), 2007 CarswellOnt 7215, 39 M.P.L.R. (4th) 250 (Ont. S.C.J. Oct 12, 2007)

10 Stasiulis v. Veterinary Medical Assn. (Nova Scotia), 131 N.S.R. (2d) 37, 1994 CarswellNS 391, 371 A.P.R. 37 (N.S. S.C. Apr 07, 1994)

11 RJR-MacDonald Inc. v. Canada (Attorney General), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311, 164 N.R. 1, 1994 CarswellQue 120, 1994 CarswellQue 120F, 54 C.P.R. (3d) 114, 60 Q.A.C. 241, 46 A.C.W.S. (3d) 40, J.E. 94-423, 5 W.D.C.P. (2d) 136, [1994] S.C.J. No. 17, EYB 1994-28671 (S.C.C. Mar 03, 1994) **(Judicially considered 2420 times)**

12 Campbell v. Campbell, 113 Nfld. & P.E.I.R. 323, 1993 CarswellNfld 208, 353 A.P.R. 323, [1994] W.D.F.L. 24 (Nfld. U.F.C. Nov 03, 1993)

13 Purdy v. Fulton Insurance Agencies Ltd., 100 N.S.R. (2d) 341, 1990 CarswellNS 344, 272 A.P.R. 341, [1990] N.S.J. No. 361 (N.S. C.A. [In Chambers] Nov 30, 1990) **(Judicially considered 160 times)**

Referred to in

14 Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions), 99 B.C.L.R. (3d) 357, 2002 CarswellBC 546, 2002 BCCA 141, [2002] B.C.W.L.D. 276 (B.C. [In Chambers] Feb 15, 2002)

15 Gallant v. Dennis, 83 Nfld. & P.E.I.R. 269, 1989 CarswellPEI 76, 260 A.P.R. 269 (P.E.I. C.A. Dec 13, 1989) **(Judicially considered 5 times)**

16 Turbo Resources Ltd. v. Petro-Canada Inc., [1989] 2 F.C. 451, 22 C.I.P.R. 172, 39 F.T.R. 240 (note), 91 N.R. 341, 1989 CarswellNat 579, 1989 CarswellNat 626, 24 C.P.R. (3d) 1, 13 A.C.W.S. (3d) 1132, [1989] F.C.J. No. 14 (Fed. C.A. Jan 18, 1989) **(Judicially considered 174 times)**

17 Mullin v. Mullin, 74 Nfld. & P.E.I.R. 349, 1988 CarswellPEI 93, 231 A.P.R. 349 (P.E.I. C.A. Nov 22, 1988) **(Judicially considered 10 times)**

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Case Name:

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
1176560 Ontario Limited, 1184883 Ontario Inc. and 1205427 Ontario Limited, plaintiffs/defendants by counterclaim (respondent), and
The Great Atlantic & Pacific Company of Canada Limited, defendant/plaintiff by counterclaim (appellant)

[2003] O.J. No. 1822

Court File No. 02-CV-227777CP

Divisional Court File No. 745/02

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

Carnwath J.

April 25, 2003.

(22 paras.)

Counsel:

Joseph M. Steiner, for the defendant/plaintiff by counterclaim (appellant).
No counsel mentioned, for the respondent.

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1 **CARNWATH J.** (endorsement):-- Decision reserved.

CARNWATH J.

2 Endorsement issued.

CARNWATH J.

3 A & P has been granted leave to appeal to the Divisional Court - two questions arising out of the certification of this matter as a class action.

4 The issue to be decided is whether A & P has met the onus as set out in R.J.R.-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311.

The Serious Issue Test

5 Counsel for the plaintiffs fairly concedes the appeal raises a serious issue.

The Irreparable Harm Test

6 (a) I reject the submission of A & P that irreparable harm will flow from the continuing provision of confidential information to the plaintiffs. There is a confidentiality agreement in place consented to by A & P and is the subject of a Court order. The order provides the agreement is intended to deal with, among other things, "pre-trial" proceedings. This is a pre-trial proceeding.

7 In view of the order in place any concerns about irreparable harm are speculative at best. Evidence of irreparable harm must be "clear and not speculative." See Kanda Tsushin Kogyo Co. v. Coveley (1997), 96 O.A.C. 324 (Ont. Div.Ct.) at 329.

8 (b) I reject A & P's submission that the unrecoverable difference between the former full indemnity costs and the current substantial indemnity costs constitutes, in and of itself, an irreparable harm. The Legislature has chosen to change the method of assessing costs. All parties to litigation are affected by the change and must live with it.

9 (c) While A & P may be put to considerable expense in meeting the requirements of the Plan of Proceeding, I reject the submission that these potential expenses constitute irreparable harm. Litigation expenses can be recovered through a costs order. See Noble v. Noble, [2002] O.J. No. 4997, 2002 CarswellOnt 4445, and the authorities referred to therein. Winkler J. found:

> "It is common ground that the plaintiffs are prosperous, unencumbered by debt to A & P, and not intimidated by the counterclaim."

10 I find no irreparable harm to A & P if the stay is not granted.

The Balance of Convenience Test.

11 (a) A & P submits that the likelihood of decertification of the class action works to the prejudice of A & P. It must be remembered that the Divisional Court may well find that the plaintiffs meet the requirements of s. 5(1)(e)(i) and (iii) of the Class Proceedings Act. Moreover, if the requirements are not met, the Divisional Court may well choose to remit the matter to the case management judge to give the plaintiffs an opportunity to propose other representative plaintiffs who do meet the requirements.

12 (b) Decertification does not necessarily put an end to this action. Under s. 10(2) of the Act the court may permit the proceedings to continue as one or more proceedings between different parties.

13 (c) A & P has counterclaimed and has not undertaken to discontinue nor discontinued. The action remains alive until it does so.

14 (d) Winkler J. (para[80]) found that A & P "has engaged in a course of conduct that is intimidating, threatening and coercive ...". He further found (para[85]) "the conduct of A & P has crossed the line." He further found (para[86]) the conduct to be "particularly egregious".

15 Weighing the above factors I find little or no prejudice to A & P if a stay is not granted.

16 The granting of a stay would, I find, prejudice the plaintiffs, having regard to the delay between now and June 26, 2003, and any subsequent period should the Divisional Court take the matter under reserve.

Peripheral Submissions

17 (a) I reject the plaintiffs' submission that the stay motion be dismissed for delay. This is not a situation where discoveries have taken place and a date set for trial. Document discovery is well launched, but little else. Once having obtained leave to appeal on March 26, 2003, A & P served a Notice of Motion for a stay on April 7, 2003.

18 (b) I reject the plaintiffs' submission that Winkler J. foreclosed A & P from seeking a stay by directing the Plan of Proceeding be followed "regardless of any leave to appeal motion or appeals from certification". Such an order is beyond the jurisdiction of a judge. Winkler J. is deemed to be alive to the law and could not have intended such a result when employing the language he did.

19 (c) I find it unnecessary to determine if there is an obvious or any preference under r. 63.02(1) as between the court whose decision is to be appealed and the court to which an appeal is taken. I do find it would be entirely inappropriate for Winkler J. to hear this motion for stay, whether as a member of the court whose decision is to be appealed or as case management judge.

20 The motion for a stay is denied.

21 Counsel have until May 16, 2003 to agree on costs or to agree they be reserved to the panel, and so advice the Divisional Court office.

22 Failing such agreement, counsel have until May 30, to submit brief written submissions as to costs.

CARNWATH J.

qp/t/qw/qlrme/qlkjg/qlltl

Case Name:

Noble v. Noble

IN THE MATTER OF A Proceeding Under SS. 161 and 248 of the Business Corporations Act (Ontario), R.S.O. 1990, c. B.16
Between
Darlene Noble, and
Edward Noble, Yvonne Sin, Wellness Innovations Corp., Vibrotone Ltd., Adam Inc., Wellness America Inc., Wellness America LP and Ramedes Inc.

[2002] O.J. No. 4997

[2002] O.T.C. 1017

119 A.C.W.S. (3d) 183

Court File No. 02-CL-4593

Ontario Superior Court of Justice
Commercial List

Himel J.

Heard: December 19, 2002.
Judgment: December 31, 2002.

(22 paras.)

Practice -- Service -- Service of notice, writ or statement of claim out of jurisdiction -- Consideration by court of forum conveniens -- Appeals -- Stay of proceedings pending appeal -- What constitutes "irreparable harm" -- What constitutes "prejudice" to successful party -- Considerations.

Motion by the respondents, Edward Noble and others, for a stay pending their appeal of a decision dismissing an earlier motion. Darlene and Edward Noble separated in 1998. The divorce was obtained in Arizona, but the parties agreed to a court order to the effect that all outstanding issues relating to marital property and support would be heard in California. The Nobles owned and operated a number of companies, including one in Ontario. Fearing the dissipation of assets in Ontario, Darlene brought an oppression action under the Ontario Business Corporations Act. The respondents moved to have service ex juris set aside and the action stayed on the ground of the exclusive jurisdiction agreement between the parties as set out in the Arizona order. They also moved to have Ontario declared forum non conveniens. The motion was dismissed, and the respondents appealed. They applied for a stay of the order pending the appeal, arguing that they

would incur litigation costs.

HELD: Motion dismissed. The respondents had failed to establish that there was a genuine issue to be tried on appeal. Furthermore, they had not shown that there would be any irreparable harm to them. Costs of litigation could be addressed by a costs award following the disposition of the action. The balance of convenience favoured Darlene Noble, given the risk that the company's assets would dissipate should the oppression action not heard soon.

Statutes, Regulations and Rules Cited:

Business Corporations Act, ss. 161, 248. Ontario Rules of Civil Procedure, Rule 17, 63.02, 63.02(1), 63.02(1)(a), 63.02(10(a)(i), 63.02(1)(a)(ii), 63.02(b), 63.02(2), 63.02(3).

Counsel:

Edward J. Babin and Kristine DiBacco, for the applicant (responding party on the motion).
George Glezos, for the respondents (moving parties).

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1 HIMEL J. (endorsement):-- Edward Noble and companies controlled by him are respondents in an application brought by Edward's former spouse Darlene. Edward and the companies appeal a decision I rendered on November 12, 2002, dismissing a motion under Rule 17 of the Rules of Civil Procedure for an order to set aside service of the application record and to stay the application because of the parties' exclusive jurisdiction agreement and that Ontario is the forum non conveniens. I also dismissed a motion to expunge certain exhibits and portions of the applicant's affidavits on the basis that they were subject to solicitor-client privilege. I held that no such privilege attached to the documents which were already known to third parties and had been circulated in other proceedings. The respondents in this application brought under s. 161 and s. 248 of the Ontario Business Corporations Act have filed a notice of appeal of my decision to the Ontario Court of Appeal with respect to the motion on the court's jurisdiction (submitting that it is a final order) and have filed a notice for leave to appeal to the Divisional Court with respect to the motion to expunge (which they say is an interlocutory order). They also appeal the order of Farley J. setting a timetable in this matter. They appear today seeking a stay of my orders and Farley J.'s order pending the hearing of the appeals.

FACTUAL BACKGROUND:

2 The history and nature of these proceedings are set out in detail in my endorsement of November 12, 2002. Edward Noble takes the position that this court should stay the orders made pending the hearing of the appeal. Darlene Noble opposes the motion for stay and argues that her application under the OBCA was brought on an urgent basis for an investigation and appointing an inspector into the business and affairs of the respondent Wellness Innovations Corp (WIC). Affidavit evidence filed in this case alleges that the respondent Edward Noble has been misappropriating WIC's assets and corporate opportunities. Darlene claims that she has made repeated efforts to gain access to the books and records of WIC in order to determine its value but has been denied access to the underlying source materials. Darlene submits that there is reason to believe that Edward intends to dissolve or wind up WIC imminently and that her interest in WIC is in jeopardy. Accordingly, she takes the position that there is no evidence of the respondents in support of their stay motion, that the consequences of granting a stay would result in significant harm to the applicant and other stakeholders in WIC and that the respondents fail to meet any aspect of the three part test for a stay. She submits that the motion for leave to appeal and the appeal do not raise serious issues, that there is no evidence that they will suffer irreparable harm if a stay is not granted and the balance of convenience does not favour granting a stay.

THE COURT'S JURISDICTION TO HEAR THE MOTION FOR STAY:

3 Darlene takes the position that this court does not have jurisdiction to grant a stay and that the appellate court is the only court that has such jurisdiction. Counsel argues that since a notice of appeal to the Court of Appeal had been filed, this court lacks jurisdiction to grant a stay of my order. Counsel relies upon the case of Bijowski v. Caicco (1985), 3 C.P.C. (2d) 295 (Ont. C.A.) and the more recent cases of this court of O'Brien v. McNabb, [2000] O.T.C. 21 and Coccimiglio v. 1037687 Ontario Ltd. (1999), 45 C.P.C. (4th) 128.

4 Edward takes the position that the present wording of Rule 63.02 is different from the wording of the rule that was in place in 1985 when Bijowski was decided by Finlayson J.A. The current phrasing of the rule now confers more extensive jurisdiction upon the court whose decision is appealed to grant a stay. In fact, the present rule confers a concurrent jurisdiction upon the court whose decision is appealed as well as the court to which an appeal of a final order has been taken.

5 I heard argument on this issue initially and ruled that I did have jurisdiction to hear the motion. My reasons are as follows:

6 In 1985, Rule 63.02 read as follows:

> (1) An order, whether final or interlocutory, may be stayed on such terms as are just, by,
>
> (a) an order of the court whose decision is to be appealed, but the stay expires,
>
> (i) when the time for delivery of a notice of motion for leave to appeal or notice of appeal expires, or
> (ii) when a notice of motion for leave to appeal or notice of appeal is delivered, whichever is earlier; or
>
> (b) an order of a judge of the court to which a motion for leave to appeal has been made or an appeal has been taken.
>
> (2) A stay granted under subrule (1) may be set aside or varied, on such terms as are just, by a judge of the court to which a motion for leave to appeal may or has been made or to which an appeal may be or has been taken.

7 In Bijowski, supra, at 300, Finlayson J.A. interpreted the meaning of the superseded provision and said:

> In my respectful view, the purpose of r. 63.02 is to confer a restricted jurisdiction upon the trial Judge or another Judge of that Court in his absence to stay an order which is not automatically stayed because of the provisions of r. 63.01(2). The order that he makes is only effective until notice of appeal is delivered or the time for appeal expires whichever is earlier. The rule really contemplates the maintenance of the status quo during the time available to the unsuccessful party to appeal. Once an appeal is launched the jurisdiction is then in the Court of Appeal to determine whether it would be appropriate for the longer term before the appeal is disposed of to interfere with the judgment or order that is under appeal. (emphasis added)

8 The current Rule 63.02 reads as follows:

> (1) An interlocutory or final order may be stayed on such terms as are just,

(a) by an order of the court whose decision is to be appealed;
(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.

(2) A stay granted under clause (1)(a) expires if no notice of motion for leave to appeal or no notice of appeal, as the case may be, is delivered and the time for the delivery of the relevant notice has expired.
(3) A stay granted under subrule (1) may be set aside or varied on such terms as are just, by a judge of the court to which a motion for leave to appeal may be or has been made or to which an appeal may be or has been taken.

9 The wording of the old and new versions of Rule 63.02 is clearly different. The former Rule 63.02(1)(a) comprised two distinct situations where the court which had made an order would no longer have jurisdiction to grant a stay. The first, set out in Rule 63.02(1)(a)(i), involved the applicants having missed the deadline for filing their notice of appeal or notice of motion for leave to appeal. The second, in Rule 63.02(1)(a)(ii), arose once the applicants had filed their notice of appeal or notice of motion for leave to appeal. Any stay which was in effect at either time would expire, and the applicants would have to apply for a new stay before the appellate court.

10 Under the old Rule 63.02, in other words, there was no concurrent jurisdiction to grant stays of orders pending appeal. The court being appealed from had jurisdiction up until the appeal had been filed or its limitation period expired. The court being appealed to took over from there. This is what I understand Justice Finalyson's decision in Bijowski to mean.

11 In the cases of O'Brien v. McNabb, supra, and Coccimiglio v. 1037687 Ontario Ltd. supra, the comparison between the old Rule 63.02 and the new Rule 63.02 does not appear to have been fully argued. In the case before me, I have had the benefit of complete argument on this issue and, with all due respect to Justice Kozak, in my view, the new Rule 63.02 has changed and expanded the jurisdiction of the court being appealed from to hear a motion to stay its decision. I find the decision of Bijowski has limited application to the Rule which now governs.

12 The new Rule 63.02 deletes the former paragraphs (1)(a)(i) and (1)(a)(ii) described above. The new subrule (2), however, only refers to the scenario outlined in former paragraph (1)(a)(i). In other words, any stay obtained by the applicants from the court being appealed from only expires if they have missed their deadline to appeal or to apply for leave to appeal. The court whose decision is being appealed thus has no jurisdiction to grant a stay once the appellants (or applicants) miss their appeal deadline. This does not preclude appellants (or applicants) from obtaining a stay from the court being appealed from once they have given notice of appeal or notice of motion for leave to appeal. The rationale for this new provision is not described in the Rules nor is it considered in caselaw as far as I have been able to determine. However, there is a practical reason for such a provision of concurrent jurisdiction over stays of orders pending their appeal in that it serves the interests of justice and affords efficiency. Not only does it mean that counsel are not obliged to re-argue the motion for a stay once they have filed notice of appeal, but there is also an alternative forum in which to seek a stay should the matter be urgent.

13 Given the expanded provision in Rule 63.02, I find that the Rule confers jurisdiction upon me to hear this motion.

THE MOTION FOR STAY:

14 The test for a stay under Rule 63.02(1) of an order pending appeal is the same as the test for an interlocutory injunction: see Circuit World Corp. v. Lesperance (1997), 33 O.R. (3d) 674 (C.A.). It is a three-part test which is set out in the leading decision of RJR-Macdonald Inc. v. Canada (A.G.), [1994] 1 S.C.R. 311. The moving party must establish that the appeal or application for leave to appeal raises a serious issue, that it will suffer irreparable harm if the stay is not granted and that the balance of convenience or inconvenience favours the granting of a stay. The court is to proceed

on the assumption that the judgment under appeal is correct and the judge's findings must prima facie be accepted: Ogden Entertainment Services v. United Steelworkers of America, Local 440 (1998), 38 O.R. (3d) 448 at 450 (C.A.); 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 49 C.P.C. (2d) 239 at 243 (Div. Ct).

15 In deciding whether there is a serious issue to be tried, the court must make a preliminary assessment of the merits of the case and consider the relative strength of each party's case. In the case before me, I note that the respondents have not demonstrated any conflicting authorities to doubt the correctness of the decision. In fact, the only authority cited on point supports the decision. That is the case of TD Asset Management Inc. v. Repap Enterprises Inc. [2000] O.J. No. 2250 (Ont. Sup. Ct.) which was upheld on the leave to appeal application to the Divisional Court reported at [2000] O.J. No. 3395 (Ont. Sup. Ct.). In the leave to appeal application, O'Driscoll J. commented that there was no decision cited that conflicted with the order of Farley J. who refused to grant a stay, and that the applicant had not persuaded him that there is "good reason to doubt the correctness of the order in question". Justice O'Driscoll wrote at para. 28: "Moreover, there is nothing in this case of such general importance nor is there anything relating to the development of the law or the administration of justice that would require leave to be given. There is no issue that warrants resolution by a higher level of judicial authority. The issues under review are those that are of "vital importance" to the parties alone."

16 In my view, even if the appeal raises serious issues, the respondents have not presented any evidence to demonstrate that proceeding with the application will cause irreparable harm and a stay is necessary. Evidence of irreparable harm must be "clear and not speculative": see Syntex Inc. v. Novopharm Ltd. (1991), 126 N.R. 122; 36 C.P.R. (3d) 139 at 135 (Fed. C.A.) and Kanda Tsushin Kogyo Co. v. Coveley (1997), 96 O.A.C. 324 at 329 (Div. Ct.). That a party is likely to suffer irreparable harm is not enough. It is necessary that the applicant demonstrate evidence to support a finding that the applicant would suffer irreparable harm: see Centre Ice Ltd. v. National Hockey League (1994), 166 N.R. 44 (F.C.A.) at 46. The respondents point out that the denial of a stay will force them to deliver an appearance and file responding materials which will arguably, be attorning to the jurisdiction and would be highly prejudicial. However, so long as the party opposing a stay pending appeal agrees that the appealing party will not be considered to have attorned to the jurisdiction by filing pleadings and proceeding with the litigation, the appealing party will not suffer irreparable harm if a stay is refused and the action is allowed to proceed pending appeal: see Canaccord Capital Corp. v. Hongkong Bank of Canada, [1998] B.C.J. No. 1654 (C.A.); Shaw v. Servier Canada, Inc. [2002] Y.J. No. 76 (C.A.); Marren v. Echo Bay Mines Ltd., [2002] B.C.J. No. 2441 (C.A.). Here, Darlene is prepared to agree that the participation of the respondents pending the appeal will be without prejudice to their position on the appeal concerning Rule 17 and the jurisdictional issue.

17 Furthermore, the respondents argue that having to pursue the litigation while the appeal is pending would result in additional expenses. In Northwest Territories v. Public Service Alliance of Canada (2001) 33 Admin. L.R. (3d) 310 at 314, the Federal Court of Appeal held as follows: "The Government also argues that if the stay is not granted but its appeal eventually succeeds, it will have wasted all of the time and money required to prepare for and attend the hearing (including travel to Ottawa, where most of the hearings are held), and will have no means of recovering the wasted funds. I am unable to agree that resources that may be wasted on litigation is irreparable harm: Bell Canada v. C.E.P. (1997), 127 F.T.R. 44 (Fed. T.D.) at 56." In my view, if the respondents ultimately succeed on appeal, they may be compensated with costs of proceedings should they later be considered unnecessary. I adopt the rationale in 820099 Ontario Inc. v. Harold E. Ballard, supra, where Montgomery J. dismissed a motion for stay of execution pending appeal. In that decision, he considered the submission that the only harm to the applicant if a stay is denied is that legal and accounting expense will be incurred in unwinding the transaction and money would be wasted. At 243, he cited the case of Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923), 55 O.L.R. 127 9 C.A. where Middleton J.A. wrote at 132:

> There is a wide distinction between cases in which the refusal of a stay will render an appeal nugatory, and cases in which one of the parties must suffer inconvenience and possibly some substantial pecuniary loss. I am inclined to think that it will be found that the refusal of a stay under certain circumstances does not arise from absence of jurisdiction so much as from the view taken that the case is one in which it would be improper to exercise the latent power. In all cases

> in which the stay will impose little suffering upon the respondent, and this can be compensated by payment of actual damages which admit of easy and substantially accurate computation and in which on the other hand grievous loss and irremediable harm will be done the appellant if the stay is refused, the operation of the judgment ought to be stayed. The principle then is the same as that applied in the case of the application for an interim injunction - the balance of convenience, with an added factor of the greatest weight, the actual adjudication that has taken place, and which must be regarded as prima facie right.

18 In my view, the expenses of the litigation may be compensated with costs and that does not constitute irreparable harm. Irreparable harm is irremediable harm and not mere inconvenience.

19 As to the balance of convenience, I have weighed the harm that Edward says a refusal of a stay would cause and the harm if a stay is granted. On balance, I find that granting a stay would be prejudicial to the applicant who alleges that the respondents have been dissipating assets and the financial positions of the companies are in jeopardy. A stay would result in further delay of the application for relief under the OBCA. The application was commenced in July, 2002 on an urgent basis. The motion under Rule 17 delayed the hearing of the appointment of an inspector which is now scheduled for March 10, 2003. Given the concerns about dissipation of assets, it is important that the action proceed while the appeal is pending. I note that Justice Blair granted an order on August 6, 2002 restraining the respondents from misappropriating or appropriating to their own use funds or assets which belong to WIC and selling or disposing of assets of WIC other than in the ordinary course of business and at fair market value. I acknowledge that the respondents' counsel submits that such an order continues through the determination of the motion under Rule 17 and includes the period during the appeal. Nonetheless, in my view, there will still be prejudice caused by delay if a stay is granted.

20 In considering the test for staying an order pending an appeal as set out in RJR-Macdonald, supra, I am mindful that in each case the criteria may not be weighted equally. In Circuit World Corp. v. Lesperance, supra, Laskin J.A. wrote at 677:

> These three criteria are not watertight compartments. The strength of one may compensate for the weakness of another. Generally, the court must decide whether the interests of justice call for a stay: International Corona Resources Ltd. v. LAC Minerals Ltd. (1986), 21 C.P.C. (2d) 252 (Ont. C.A.) Nonetheless, in many cases whether to grant a stay will depend on the third criterion, called the balance of convenience or the balance of inconvenience.

21 Applying the test applicable to a motion for stay, I find that the respondents have failed to establish (1) that there is a serious issue to be tried, (2) that there will be irreparable harm caused to the respondents if a stay is not granted, and (3) that the balance of convenience favours the respondents. On the contrary, prejudice will be caused to the applicants if there is further delay of the litigation. In my view, the principles which apply in determining whether a court should impose a stay pending an appeal are clear. The purpose of a stay is to prevent injustice and ensure fairness to both sides until the appeal can be argued. That exercise involves a balance of competing interests. It is for that reason that the courts require that the three criteria be met to justify a stay. In my view, the respondents have not met any of those criteria. Accordingly, the motions for stay of my orders of November 12, 2002 and the order of Farley J. of December 5, 2002 are dismissed. This decision is conditional upon the applicant, who has already agreed, undertaking not to raise the issue of attornment to the jurisdiction by the respondents pending disposition of the appeals.

22 If the parties are unable to agree on the issue of costs, they may file written submissions as follows: the applicant Darlene Noble shall file submissions by January 13, 2003 and the respondents Edward Noble and companies shall file submissions by January 17, 2003.

HIMEL J.

cp/e/nc/qw/qlrme/qlkjg

drs/d/qleet/qljxb/qljal

Indexed as:

Anglers & Hunters v. Ontario (Ministry of Natural Resources)

Between
Ontario Federation of Anglers & Hunters ("OFAH"), C. Davison Ankney, Northern Ontario Tourist Outfitters Associations ("NOTO"), Dickson's Bear Hunt Ltd., Wilderness Canada Trips Inc., Bud Dickson, Rick Dickson, Neil Smith, Brenda Wilson-Smith, L.C. Meshake and Howard Meshake, applicants, and Her Majesty the Queen in right of Ontario as represented by the Ministry of Natural Resources and the Honourable John Snobelen, respondents

[1999] O.J. No. 1690

43 O.R. (3d) 760

98 O.T.C. 341

13 Admin. L.R. (3d) 209

62 C.R.R. (2d) 303

88 A.C.W.S. (3d) 677

Ontario Superior Court of Justice
Kenora, Ontario

Stach J.

Heard: April 19, 22 and 23, 1999.
Judgment: April 28, 1999.

(32 pp.)

Counsel:

Timothy S.B. Danson, for the applicants, OFAH and Ankney.
Gordon P. Acton, for the applicants, NOTO and others.
Hart Schwartz and R. Charney, for the respondents.
Andrew J. Roman, for the Schad Foundation (intervenor).

STACH J.:--

INTRODUCTION

1 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.

2 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 3 judges in the Divisional Court.

3 Even at this early stage the court received requests by 2 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.

4 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

5 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.[1] That Regulation had the immediate effect of terminating the spring bear hunt.

6 On April 12, 1999, the Ontario Federation of Anglers & 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 and s. 24(1) of the Charter that the Regulation is contrary to the Charter and of no force and effect.

7 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.

8 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

9 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.

10 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."

11 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."[2] 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).[3] I do not consider it necessary or desirable, however, that both be added.

12 In paragraph [10] 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 paragraph 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.

13 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. Inasmuch as the Foundation was the first to file its materials, it shall be the Foundation.

14 I note that some of the case law suggests that intervenor status should be difficult, if not impossible to attain in interlocutory injunctions.[4] Like my colleague J. Wright J. in Aroland First Nation v. Ontario,[5] 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.[6]

THE PRELIMINARY OBJECTION

15 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.

16 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.

17 The motion is adjourned.

ADDENDUM - April 22, 1999

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

19 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.

20 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).

21 I am satisfied also that this case is one of urgency within the meaning of s. 6(2) of the Judicial Review Procedure Act[7] 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

22 This is an application for judicial review of a decision made by the Minister of Natural Resources to promulgate Regulation 88/99 under the Fish and Wildlife Conservation Act 1997[8] [the "Act"], a Regulation that cancelled the spring bear hunt in Ontario.

23 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[9] ["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.

24 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 Regulation 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.

25 The applicants submit that the promulgation of Regulation 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

26 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; ("saison de chasse", "saison de pêche")

...

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

...

"Minister" means the Minister of Natural Resources; ("ministre")

...

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

28 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.

29 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.[10] 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.

30 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.

31 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.

32 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).

33 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.

34 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 section 7 liberty interests have been violated.

35 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 Regulation 88/99.

TEST FOR INJUNCTIVE RELIEF

36 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 (M.T.S.) Ltd. v. Manitoba Food and Commercial Workers, Local,[11] and reapplied by that Court in RJR-MacDonald v. Canada (A.G.)[12]:

> 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.

37 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 et al. v. Ontario (Minister of Agriculture and Food) et al. [See Note 13 below] 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".

38 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.

39 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

40 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 raises 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)

41 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?

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

43 First, the applicants submit that the Minister acted in bad faith in promulgating regulation 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.

44 The applicants rely on the Supreme Court of Canada's decision in Roncarelli v. Duplessis.[14] 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.

45 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[15] 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.

46 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 Regulation 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 contemplated by the enabling statute, that discretion is necessarily ultra vires.

47 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.[16] 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.

48 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.

[The Court had numbered this text paragraphs 48 and 49. QL has removed the number 49.]

SECOND JURISDICTIONAL ISSUE: FAIRNESS

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

51 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.[17]

52 In this case the applicants argue that the Environmental Assessment Act[18] 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.

53 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 or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities ...

54 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 Regulation 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.

55 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 NOTO, 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 fails 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".

56 There is no triable issue regarding the inadequacy of notice.

DID THE MINISTER HAVE JURISDICTION TO AFFECT HUNTING IN PROVINCIAL PARKS?

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

58 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 a 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 provincial 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

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

60 The Charter of Rights and Freedoms provides that

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

Section 1 of the Charter states,

> 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.

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

62 The courts have adopted a broad and liberal interpretation of section 2(b), leaving the most serious and strenuous analysis for section 1. In Irwin Toy v. Que (A.G.)[19] the Supreme Court of Canada held that "[a]ctivity is expressive if it attempts to convey meaning." It went on to state at 607:

> 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 content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

63 The applicants filed a considerable amount of material suggesting that hunting is a self-fulfilling and meaningful activity to those who 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.

64 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.

65 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.

66 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 OF RIGHTS AND FREEDOMS

67 The applicants submit that the impugned Regulation violates their section 7 rights. Section 7 of the Charter of Rights and Freedoms states:

> 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.

68 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.

69 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.

70 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.[20] Thus, the penal consequences for breaching the regulation do not by themselves create an independent ground of challenge.

71 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 of Rights 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.[21] 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 it 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.

72 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

73 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 operations 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.

74 To be sure, the financial assistance programme 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 programme goes far enough. Many outfitters are adamant that it does not.

75 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,

> This court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: see, for example, R. v. Mills (1986), 29 D.L.R. (4th) 161 at pp. 190, 193, 237 and 246, 26 C.C.C. (3d) 481, [1986] 1 S.C.R. 863; Nelles v. Ontario (1989), 60 D.L.R. (4th) 609 at p. 642, [1989] 2 S.C.R. 170, 41 Admin. L.R. 1. 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.

76 Since RJR-MacDonald was decided, the law of damages for Charter breach has not become significantly clearer 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

77 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.

78 The combined effect of these guidelines has been described as creating "a very low hurdle for governments and a high one for applicants seeking an interim injunction to restrain, even briefly, the operation of a law enacted by a democratically elected legislature".[22] 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.[23]

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

80 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.

81 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."

82 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.

83 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.

84 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.

85 Inasmuch 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.

86 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.

STACH J.

cp/s/rsm

1 S.O. 1997, c. 41 (proclaimed in force January 1, 1999);

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

3 See Ontario (Attorney General v. Dieleman (1993), 160 O.R. (3d) (Gen. Div.).

4 See Crown Trust Co. v. Rosenberg (1987) 60 O.R. (2d) 87 (Ont. H.C); Reichman v. Toronto Life Publishing 36 C.P.C. (2d) 176 (Ont. H.C.): Canada (A.G.) v. Cardinal Insurance Co. (1991), 7 C.P.C (3d) 167 (Gen. Div.);

5 (1996), 27 O.R. (3d) 732;

6 See Adler v. Ontario (1992), 8 O.R. (3d) 200 (Gen. Div.), aff'd [1996] 3 S.C.R. 609;

7 R.S.O. 1990, c. J.1;

8 S.O., 1997. c. 41 as am:

9 R.S.O. 1990, c. J.1, R.S.O. 1990, c. J.1:

10 O. Reg. 665/98, s. 61;

11 832 (1987), 38 D.L.R. (4th) 321 at 332;

12 111 D.L.R. (4th) 385 at 400;

13 108 D.L.R. (4th) 330 (Ont. Div. Ct.);

14 (1959) 16 D.L.R. (3d) 689 per Rand J. at 705;

15 See Rule 39.01(5);

16 Ont. Society for the Protection of Cruelty to Animals v. Veterinary Assoc. (Ont.) et al. (1996), 57 O.R. (2d) 667; Kehler v. Surrey [1991] B.C.J. No. 3019 (S.C.); Vancouver Island Peace Society v. Canada [1992] 3 F.C. 42 (T.D.);

17 Attorney-General of Canada v. Inuit Tapirisat of Canada et al. (1980), 115 D.L.R. (3d) 1 at 11 (S.C.C.);

18 R.S.O. 1990, c. 27 as am;

19 (1989), 58 D.L.R. (4th) 577 at 607;

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

21 Re Wilson et al. and Medical Services Commission of British Columbia et al. (1988), 53 D.L.R. (4th) 171 (B.C.C.A.);

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

23 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), Unreported decision, December 28-29, 1995, Ontario Court (General Division); Falkiner v. Ontario (Attorney General), [1996] O.J. No. 48, 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.);

Case Name:

Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)

Between
Ontario Restaurant Hotel & Motel Association, applicant, and
City of Toronto and Board of Health for The City of Toronto Health Unit, respondents

[2002] O.J. No. 2

155 O.A.C. 288

26 M.P.L.R. (3d) 286

110 A.C.W.S. (3d) 1140

Court File No. 776/01

Ontario Superior Court of Justice
Divisional Court

Chapnik J.

Heard: December 19, 2001.
Judgment: January 2, 2002.

(39 paras.)

Injunctions -- Interlocutory or interim injunctions -- Balance of convenience -- Circumstances when injunction will not be granted -- Sufficiency of damages in lieu of injunction -- Requirement of irreparable injury -- Evidence and proof -- Affidavit evidence.

Application by the Ontario Restaurant Hotel & Motel Assn. against Toronto (City) for an interim injunction preventing the City from forcing restaurant owners to disclose the results of food premises' inspections to the public. The application was antecedent to and in conjunction with an application for judicial review of the disclosure program before a full panel of the Divisional Court. A municipal bylaw set out that if a food premises had minor conditions presenting a minimal health risk, the premises had to post a green notice. If there were conditions that, if left uncorrected, could pose a significant health risk, the premises had to post a yellow notice and had up to 48 hours to correct the conditions. The Association challenged the jurisdictional and constitutional validity of the bylaw requiring the posting of inspection notices. It claimed that the green and yellow notices were illegal, misleading, and contrary to the public good. The Association relied on affidavit evidence of alleged experts in the field, but the evidence had not been tested by cross- examination. The Association did not tender evidence of actual harm occasioned to any restaurant

operator or provide evidence of its ability to pay damages. The disclosure program was widely recognized and accepted by the public.

HELD: Application dismissed. Although the Association demonstrated that there was a serious issued to be tried, it did not show that it would suffer irreparable harm if an interlocutory injunction were not granted or that the balance of convenience favoured the granting of an injunction. The restaurant owners could be compensated in damages for any harm they suffered. In addition, because the public had an interest in the ongoing health and safety conditions at food premises, the balance of convenience favoured the City.

Statutes, Regulations and Rules Cited:

City of Toronto Act, S.O. 1997, c. 26.

Food Premises Regulation.

Health Protection and Promotion Act, R.S.O. 1990, c. H.7.

Municipal Act, R.S.O., 1990, c. M.45.

Counsel:

Timothy S.B. Danson and Peter T.J. Danson, for the applicant.
Ansuya Pachai, for the respondents.

CHAPNIK J.:--

INTRODUCTION

1 On October 5, 2000, the City of Toronto passed a by-law for the protection of the health and safety of the public in respect of its restaurants and other food premises. By-Law No. 574-2000, as amended by By-Law No. 788-2000 (which came into effect on January 1, 2000) forces restaurant owners to publicly disclose results of food premises inspections through mandatory posting of inspection notices representing a "pass" (green), "conditional pass" (yellow) and "fail/closed" (red) designation (the Disclosure Program).

2 To obtain a green "pass", the premises may have minor conditions which present a minimal health risk. A yellow "conditional pass" notice is issued where significant conditions exist - those which present a health hazard if left uncorrected and, therefore, must be corrected within 24 to 48 hours. A red "fail" notice is issued for crucial conditions which present an immediate health hazard, requiring immediate correction or an order to close the premises.

3 The applicant challenges the jurisdictional and constitutional validity of section 30.1 of the said by-law requiring the posting of inspection notices. It claims that the green and yellow notices in particular are, not only illegal but are misleading in nature and, therefore, contrary to the public good.

4 The applicant also challenges the jurisdictional and constitutional validity of the Disclosure Program with respect to its implementation by the Board of Health for the City of Toronto Unit (the Board of Health).

5 In doing so, the Association (which is stated to represent about 4,000 restaurant, hotel and motel operators throughout Ontario) seeks injunctive relief pending the final determination of this application for judicial review. For the purposes of this motion, the applicant is only concerned with the green pass and the yellow conditional notices.

6 The interim relief sought is an injunction to prohibit the respondents from forcing restaurant operators to post/display the impugned green and yellow inspection notices; and to prevent the respondents, individually and collectively, from issuing, posting, or in any way disclosing through the Internet or any other medium of communication, the results of food premises inspections.

7 This application for an injunction is antecedent to and in conjunction with an as yet to be perfected application for judicial review before a full panel of the Divisional Court. While the applicant maintains the entire municipal Disclosure Program is illegal, as noted above, it is not seeking an injunction with respect to the current red closure notices.

STANDING

8 The applicant is a voluntary, unincorporated association which represents hotels, motels and restaurants in the province of Ontario.

9 The City of Toronto, in its factum, has raised the question of the applicant's legal status to maintain these proceedings. In such cases, the onus rests on the applicant to establish its legal capacity. However, for the purpose of this motion, the parties agreed not to raise the issue of status.

10 Notwithstanding this, it should be noted that the parties cannot confer standing on themselves by mutual accord. Accordingly, though not argued before me, this issue remains to be determined.

11 For the purpose of this motion, it is assumed, without deciding, that the applicant qualifies for standing as a public interest litigant, through some form of representative action, or as a consequence of the court's residual discretion.

THE INJUNCTION

12 The principles underlying a motion for interim injunctive relief are rooted in a three-pronged test, as set out in RJR MacDonald Ltd. v. Canada (Attorney General), [1995] 3 S.C.R. 199. The court must ascertain first, whether there is a serious issue to be tried; second, whether the applicant would suffer irreparable harm by reason of a refusal to grant the injunction; and third, whether the balance of convenience favours the granting of an injunction.

(a) Serious Issue to Be Tried

13 It is not the role of this court on a motion of this kind to determine the ultimate merit of the jurisdictional and constitutional issues raised by the applicant. Yet, some examination of the issues is necessitated in order to determine if the applicant has satisfied its onus to show there is a serious issue to be tried.

14 The threshold for making this determination is low, it involves only a preliminary assessment of the merits of the case and a finding that the claim is neither "frivolous" nor "vexatious". See RJR MacDonald at p. 337.

15 This case does not fall into the category of exceptional circumstances in which the court makes a more extensive review of the merits of the case.

16 The central jurisdictional issue raised by the applicant is whether the City can use a by-law and its power to control licensing of restaurants to enforce a program of a separate and distinct statutory body, namely, the Board of Health. In support of its argument that the City has no such jurisdiction, the applicant emphasizes that municipalities are creatures of provincial statute whose powers arise solely from the relevant enabling legislation, in this case, the Municipal Act, R.S.O., 1990, c. M.45, as amended, or the City of Toronto Act, S.O. 1997, c. 26, as amended.

17 According to the applicant, these statutes as well as the Health Protection and Promotion Act, R.S.O. 1990, c. H.7 (the HPPA) display a clear legislative intention to place responsibility for public health matters exclusively within the jurisdiction of the Board of Health. Accordingly, the City acted beyond the scope of its jurisdiction in passing the

by-law in question.

18 Moreover, the City does not have jurisdiction to use its by-law power to enforce programs of the Board, a separate statutory entity. It is argued that this represents an impermissible attempt by the City to legislate with respect to an area over which it has neither jurisdiction nor authority. In other words, the impugned by-law is ultra vires the powers of the City.

19 The Disclosure Program, according to the applicant, is also ultra vires due to uncertainty, discrimination, lack of conformity with the criteria in the HPPA and the proper construction of the term "notice". It fails to state the conditions which must be fulfilled for a food premises operator to obtain a green pass. There is nothing in the enabling legislation allowing for the categorization of food premises into the multiple categories available under the Program. The legislation only allows for the posting of notices where "a health hazard" exists and since this does not apply in the green and yellow notice categories (in that no health hazard is found to exist), the notices are not legally authorized.

20 The City countered this by suggesting there is no operational or jurisdictional conflict between the City's exercise of its licensing authority and the Board's exercise of its public health authority. According to the City, the co-operative operation of two separate sources of authority is not unusual in the municipal licensing context.

21 Further, the Municipal Act delegates to City Council, authority to enact by-laws for the licensing, regulating and governing of businesses within the municipality. Thus, it has power to introduce by-laws for the broad purpose of consumer protection and protection of the health and safety of the public.

22 As regards the power of the Board, its authority to implement programs designed for the protection of public health (which would include the inspection of food premises) is contained in the HPPA, its regulations and guidelines. It also has discretionary power, subject to the City's approval, to provide "any other health program or service" if it is of the opinion that this is necessary or desirable, having regard to the needs of persons in the area. It does, however, lack jurisdiction to establish its programs through the passing of by-laws.

23 The respondent contends that all food premises are treated equally under the impugned program and the mere fact that some food premises may not pass their inspections does not amount to discrimination. Indeed, the quality, fairness and consistency of the program is ensured by a Quality Assurance program. As to the content of the notices, they are based on health standards proscribed by the Food Premises Regulation and the inspection standards and procedures authorized by the Health Hazard Analysis Critical Control Point Protocol (the HACCPP).

24 It is the respondent's position that none of the above issues raised by the applicant constitutes a serious issue to be tried.

25 I disagree. The applicant has raised important issues of jurisdiction in this matter. A court will have to examine these issues which I find are neither frivolous nor vexatious. On a preliminary assessment, I am satisfied that the applicant has met the threshold of a serious issue to be tried.

26 Having made that finding, it is not necessary for this court to examine the other issues raised by the applicant or the constitutional matters. Suffice to say that these additional matters may also raise serious issues which should be tried.

(b) Irreparable Harm

27 The applicant Association claims that its members would suffer irreparable harm if the posting of the green and yellow notices were to continue. It relies on affidavit evidence of alleged experts in the field and of Sam Primucci, president of Pizza Nova Takeout Limited.

28 First, the evidence has been untested. No cross-examinations have taken place as yet, which might test the

credentials, experience or findings of these "experts"; second, the Pizza Nova alleged experiences which also have been untested by cross-examination, do not mandate any finding or conclusions on the issue of harm; third, there is no evidence of actual harm occasioned to any restaurant operator; fourth, while assuming the applicant has standing, counsel has not demonstrated how the Association itself would suffer irreparable harm if the injunction is refused. Finally, it has not been shown that any harm cannot be compensated by an award of damages; and there is a lack of evidence of the applicant's ability to pay damages.

29 The applicant has the onus of proving, on a balance of probabilities, that harm will be occasioned to one or more individuals by the refusal to grant the injunction and that the harm is not susceptible to be compensated in damages. In my view, it has not met that onus.

(c) Balance of Convenience

30 Without in any way commenting upon the serious issues which have been raised, in my view this case is essentially a competition between the rights of restaurant operators to promote their commercial interests without the restrictions now imposed upon them and the right of the City to protect the health and safety of the public and its confidence in the integrity of its food facilities, in the manner it has now implemented.

31 Where public interest considerations apply, this poses a high hurdle for applicants seeking to restrain the operation of a government program. Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources (1999), 43 O.R. (3d) 760 (S.C.) at 780.

32 The Disclosure Program has been in place for over a year. More than 18,000 public health inspections have been conducted under the program. There is, according to the respondents, wide public recognition and acceptance of it, resulting in greater awareness of food safety, higher compliance rates with food safety standards and lower enforcement costs for the Board. In short, the program provides an incentive to restaurant owners to comply with the health standards contained in the HPPA and the Food Premises Regulation.

33 Moreover, according to the City, since an offending establishment may correct a condition immediately or within 48 hours, the harm from posting a yellow conditional notice may well be nominal in its nature and effect. That, of course, remains to be determined.

34 Even were it found, however, as urged by the applicant, that the impugned notices do not impose a finding of "health hazard", it does not follow that the removal of the green and yellow notices will have no detrimental effect. The conditions and their amelioration are not unrelated to the continuing health and safety of the public.

35 Further, whether the Board, the City or both have a statutory duty to protect public health, the public has an interest in the ongoing health and safety issues inherent in this matter.

36 In my view, the balance of convenience, therefore, clearly favours the respondents.

CONCLUSION

37 Though the applicant has satisfied the first prong of the injunction test, it has not shown either irreparable harm or that the balance of convenience lies in its favour.

38 The applicant's motion for an interlocutory injunction pending the hearing of this matter by a full panel of the Divisional Court, is denied.

39 Costs are reserved to the panel hearing the application for judicial review.

CHAPNIK J.

cp/d/qlrme

Indexed as:

Reference re: Manitoba Language Rights (Man.)

**IN THE MATTER OF Section 55 of the Supreme Court Act, R.S.C. 1970, c. S-19, as amended,
AND IN THE MATTER OF a Reference by the Governor in Council concerning certain language rights under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867, and set out in Order-in-Council P.C. 1984-1136 dated the 5th day of April 1984**

[1985] 1 S.C.R. 721

[1985] S.C.J. No. 36

File No.: 18606.

Supreme Court of Canada

1984: June 11, 12, 13 / 1985: June 13.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ.

REFERENCE BY THE GOVERNOR IN COUNCIL

Constitutional law -- Language guarantees -- Manitoba statutes to be enacted, printed and published in both English and French -- Whether or not s. 23 of Manitoba Act, 1870 mandatory or directory -- Whether or not statutes, current, repealed and spent, valid if constitutional linguistic requirements not met -- Extent of force or effect, if any, if statutes invalid -- Whether or not Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes valid and of force or effect -- Manitoba Act, 1870, R.S.C. 1970, App. II, s. 23 -- Constitution Act, 1867, s. 133 -- Constitution Act, 1982, s. 52 -- An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890 (Man.), c. 14 -- Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1980 (Man.), c. 3.

The Governor General in Council by Order in Council P.C. 1984-1136 dated April 5, 1984, in accordance with s. 55 of the Supreme Court Act, referred to this Court four questions. The questions and this Court's answers are:

Question 1 - Are the requirements of s. 133 of theConstitution Act, 1867 and of s. 23 of theManitoba Act, 1870 respecting the use of boththe English and French languages in

(a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and

[page722]

(b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba mandatory?

Answer - Yes.

Question 2 - Are those statutes and regulations of theProvince of Manitoba that were not printed andpublished in both the English and Frenchlanguages invalid by reason of s. 23 of theManitoba Act, 1870?

Answer - Yes, but, for the reasons given by the Court,the invalid current Acts of the Legislaturewill be deemed temporarily valid for theminimum period of time necessary for theirtranslation, re-enactment, printing andpublication.

Question 3 - If the answer to question 2 is affirmative, dothose enactments that were not printed andpublished in English and French have any legalforce and effect, and if so, to what extent andunder what conditions?

Answer - The Acts of the Legislature that were notenacted, printed and published in English andFrench have no legal force and effect becausethey are invalid, but, for the reasons given bythe Court, the current Acts of the Legislaturewill be deemed to have temporary force andeffect for the minimum period of time necessaryfor their translation, re-enactment, printingand publication.

Question 4 - Are any of the provisions of An Act Respectingthe Operation of Section 23 of the Manitoba Actin Regard to Statutes, enacted by S.M. 1980,Ch. 3, inconsistent with the provisions ofs. 23 of the Manitoba Act, 1870, and if so aresuch provisions, to the extent of suchinconsistency, invalid and of no legal forceand effect?

Answer - If An Act Respecting the Operation of Section23 of the Manitoba Act in Regard to Statutes,enacted by S.M. 1980, Ch. 3, was not enacted,printed and published in [page723] bothofficial languages, then it is invalid and ofno force and effect in its entirety.

If it was enacted, printed and published in both official languages, then ss. 1 to 5 are invalid and of no force and effect.

I

Question 1:

The requirement that both English and French be used in the Records, Journals and Acts of Canada, Quebec and Manitoba, in s. 133 of the Constitution Act, 1867 and s. 23 of the Manitoba Act, 1870, is mandatory. The history and language of these sections indicate that the guarantee they entrench must be obeyed.

II

Questions 2 and 3:

The words "Acts of the Legislature" in s. 23 of the Manitoba Act, 1870 encompass all statutes, regulations, and delegated legislation of the Manitoba Legislature, enacted since 1890, which are covered by this Court's judgments in Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016, and Attorney General of Quebec v. Blaikie, [1981] 1 S.C.R. 312.

All of the unilingual Acts of the Legislature of Manitoba are, and always have been, invalid and of no force or effect. Section 23 of the Manitoba Act, 1870 entrenches a mandatory requirement to enact, print and publish all Acts of the Legislature in both official languages and, thus, establishes a constitutional duty on the Manitoba Legislature with respect to the manner and form of enactment of legislation. This duty protects the substantive rights of all Manitobans to equal access to the law in either French or English.

Section 52 of the Constitution Act, 1982 does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity. The words "of no force or effect" mean that a law thus inconsistent with the Constitution has no force or effect because it is invalid.

[page724]

The unilingual enactments of the Manitoba Legislature are inconsistent with s. 23 of the Manitoba Act, 1870 and are invalid and of no force or effect because the constitutionally required manner and form for their enactment has not been followed.

The Court must declare the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect. This declaration, however, without more, would create a legal vacuum with consequent legal chaos in the Province of Manitoba. The Manitoba Legislature has, since 1890, enacted nearly all of its laws in English only. The conclusion that all unilingual Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 is destroyed and the rights, obligations and any other effects arising under these laws are invalid and unenforceable. From the date of this judgment, the Province of Manitoba has an invalid and therefore ineffectual legal system until the Legislature is able to translate, re-enact, print and publish its current laws in both official languages.

The constitutional principle of the rule of law would be violated by these consequences. The principle of rule of law, recognized in the Constitution Acts of 1867 and 1982, has always been a fundamental principle of the Canadian constitutional order. The rule of law requires the creation and maintenance of an actual order of positive laws to govern society. Law and order are indispensable elements of civilized life. This Court must recognize both the unconstitutionality of Manitoba's unilingual laws and the Legislature's duty to comply with the supreme law of this country, while avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law.

There will be a period of time during which it would not be possible for the Manitoba Legislature to comply with its

constitutional duty under s. 23 of the Manitoba Act, 1870. It is therefore necessary, in order to preserve the rule of law, to deem temporarily valid and effective the Acts of the Manitoba Legislature, which would be currently in force were it not for their constitutional defect. The period of temporary validity will run from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing.

With respect to rights, obligations and any other effects which have purportedly arisen under repealed, [page725] spent or current unilingual Acts of the Manitoba Legislature, some will be enforceable and forever beyond challenge by the operation of legal doctrines such as the de facto doctrine, res judicata and mistake of law. Those rights, obligations and other effects not saved by the operation of these doctrines are deemed temporarily to have been, and to continue to be, valid, enforceable and beyond challenge until the expiry of the minimum period necessary for translation, re-enactment, printing and publishing of the Acts of the Legislature of Manitoba under which they arose. At the termination of the minimum period, these rights, obligations and other effects will cease to have temporary validity and enforceability, unless the Acts under which they arose have been translated, re-enacted, printed and published in both languages. As a consequence, to ensure the continuing validity and enforceability of rights, obligations and other effects not saved by the de facto or other doctrines, the repealed or spent Acts of the Legislature, under which these rights, obligations and other effects have purportedly arisen, may need to be re-enacted, printed and published, and then again repealed, in both official languages.

Temporary validity, however, will not apply to unilingual Acts of the Legislature passed after the date of this judgment. From the date of judgment, laws not enacted, printed and published in both languages will be invalid and of no force or effect ab initio.

The Court, as presently equipped, is unable to determine the period during which it would not be possible for the Manitoba Legislature to comply with its constitutional duty. Following a request for determination from the Attorney General of Canada or the Attorney General of Manitoba, made within one hundred and twenty days of the date of judgment, the Court will set a special hearing, accept submissions from the Attorney General of Canada, the Attorney General of Manitoba as well as the other interveners, and make a determination of the minimum period necessary for translation, re-enactment, printing and publishing of the Acts of the Manitoba Legislature.

III

Question 4:

An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1980 (Man.), c. 3, is invalid and of no force and effect in its entirety if it was not enacted, printed and published in both official [page726] languages. In any event, ss. 1 to 5 are invalid and of no force or effect because they violate the rights guaranteed in s. 23 of the Manitoba Act, 1870.

Cases Cited

Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016, affirming [1978] C.A. 351, 95 D.L.R. (3d) 42, affirming [1978] C.S. 37, 85 D.L.R. (3d) 252; Attorney General of Quebec v. Blaikie, [1981] 1 S.C.R. 312, followed; Attorney General of the Republic v. Mustafa Ibrahim, [1964] Cyprus Law Reports 195; Special Reference No. 1 of 1955, P.L.R. 1956 W.P. 598, considered; Pellant v. Hebert, St. Boniface Co. Ct., March 9, 1892, reported at (1981), 12 R.G.D. 242; Bertrand v. Dussault, St. Boniface Co. Ct., January 30, 1909, reported at 77 D.L.R. (3d) 458; Re Forest and Registrar of Court of Appeal of Manitoba (1977), 77 D.L.R. (3d) 445; R. v. Forest (1976), 74 D.L.R. (3d) 704; Attorney General of Manitoba v. Forest, [1979] 2 S.C.R. 1032; Bilodeau v. Attorney General of Manitoba, [1981] 5 W.W.R. 393; Société Asbestos Ltée v. Société nationale de l'amiante, [1979] C.A. 342; Re Public Finance Corp. and Edwards Garage Ltd. (1957), 22 W.W.R. 312; Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182; Montreal Street Railway Co. v. Normandin, [1917] A.C. 170; Howard v. Bodington (1877), 2 P. 203; R. ex rel. Anderson v. Buchanan (1909), 44 N.S.R. 112; Bribery Commissioner v. Ranasinghe, [1965] A.C. 172; Amax Potash Ltd. v. Government of

Saskatchewan, [1977] 2 S.C.R. 576; Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753; Procureur général du Québec v. Collier, [1983] C.S. 366; Procureur général du Québec v. Brunet, J.E. 83-510, rev'd on other grounds, J.E. 84-62 (S.C.); Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2), [1966] 2 All E.R. 536; Roncarelli v. Duplessis, [1959] S.C.R. 121; Reference re Disallowance and Reservation of Provincial Legislation, [1938] S.C.R. 71; Abbé de Fontaine's Case (1431), Y.B. 9 H. VI, fol. 32; Scadding v. Lorant (1851), 3 H.L.C. 418; 10 E.R. 164; R. v. Slythe (1827), 6 B. & C. 240; 108 E.R. 441; Margate Pier Co. v. Hannam (1819), 3 B. & Ald. 266; 106 E.R. 661; O'Neil v. Attorney-General of Canada (1896), 26 S.C.R. 122; Turtle v. Township of Euphemia (1900), 31 O.R. 404; R. v. Gibson (1896), 29 N.S.R. 4; R. v. Corporation of Bedford Level (1805), 6 East 355; 102 E.R. 1323; Parker v. Kett (1702), 1 Ld. Raym. 658; 91 E.R. 1338; Eadie v. Township of Brantford, [1967] S.C.R. 573; Texas v. White, 74 U.S. 700 (1868); Horn v. Lockhart, 84 U.S. 570 (1873); United States v. Insurance Companies, 89 U.S. 99 (1874); Baldy v. Hunter, 171 U.S. 388 (1898); Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645; Federation of Pakistan v. Tamizuddin Khan, P.L.R. 1956 W.P. 306; In re [page727] Initiative and Referendum Act, [1919] A.C. 935; Attorney-General for Alberta v. Attorney-General for Canada, [1947] A.C. 503, referred to.

Statutes and Regulations Cited

Act respecting a judgment rendered in the Supreme Court of Canada on 13 December 1979 on the language of the legislature and the courts in Quebec, 1979 (Que.), c. 61.
Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1980 (Man.), c. 3.
Act to amend an Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1982 (Man.), c. 3, s. 1.
Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890 (Man.), c. 14.
Colonial Laws Validity Act, 1865 (U.K.), 28 & 29 Vict., c. 63, s. 2.
Constitution Act, 1867, Preamble ss. 55, 57, 90, 92, 92A [en. Constitution Act, 1982, s. 50], 93, 95, 133.
Constitution Act, 1982, Preamble ss. 18(1), 41(a), 43, 52.
Interpretation Act, 1867 (Can.), 31 Vict., c. 1, s. 6(3).
Interpretation Act, R.S.C. 1970, c. I-23, s. 28 "shall".
Manitoba Act, 1870, R.S.C. 1970, App. II, ss. 2, 14, 17, 23.
Statute of Westminster, 1931 (U.K.), 22 Geo. V, c. 4.
Supreme Court Act, R.S.C. 1970, c. S-19, s. 55.

Authors Cited

Constantineau, A. The De Facto Doctrine, Toronto, Canada Law Book Co., 1910.
Dicey, A.V. The Law of the Constitution, 10th ed., London, MacMillan & Co. Ltd., 1959.
Honore, A.M. "Reflections on Revolutions", (1967) 2 Irish Jurist 268.
Jennings, W.I. The Law and the Constitution, 5th ed., London, University of London Press, 1959.
Odgers' Construction of Deeds and Statutes, 5th ed. by G. Dworkin, London, Sweet & Maxwell, 1967
Raz, J. The Authority of Law, Oxford, Clarendon Press, 1979.
Stavsky, M.M. "The Doctrine of State Necessity in Pakistan" (1983), 16 Cornell Int. L.J. 341.
Wade, E.C.S., and G.G. Phillips. Constitutional and Administrative Law, 9th ed., by A.W. Bradley, London, Longman, 1977.

[page728]

REFERENCE by the Governor General in Council, pursuant to s. 55 of the Supreme Court Act, concerning certain language rights under s. 23 of the Manitoba Act, 1870 and s. 133 of the Constitution Act, 1867.

Pierre Genest, Q.C., Edward R. Sojonky, Q.C., and Peter W. Hogg, Q.C., for the Attorney General of Canada.
Joseph Eliot Magnet, for the Société franco-manitobaine.
Gérald-A. Beaudoin, Q.C., for the Fédération des francophones hors Quebec.
Jean-K. Samson et André Binette, for the Attorney General of Quebec.
Vaughan L. Baird, Q.C., for Roger Bilodeau.
Stephen A. Scott and Warren J. Newman, for Alliance Québec.
Walter J. Roustan, for the Freedom of Choice Movement.
A. Kerr Twaddle, Q.C., and William S. Gange, for the Attorney General of Manitoba.
D.C.H. McCaffrey, Q.C., Colin J. Gillespie and J.F. Reeh Taylor, Q.C., for Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz and Patricia Maltman.

Solicitor for the Attorney General of Canada: R. Tassé, Ottawa.
Solicitor for the Société franco-manitobaine: Joseph E. Magnet, Ottawa.
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Solicitor for Douglas L. Campbell, James A. Richardson, Cecil Patrick Newbound, Russell Doern, Herbert Schulz and Patricia Maltman: D.C.H. McCaffrey, Winnipeg.

The following is the judgment delivered by

THE COURT:--

I

The Reference

1 This Reference combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity. The proceedings were initiated by Order-in-Council, P.C. 1984-1136 dated April 5, 1984, pursuant to s. 55 of the Supreme Court Act, R.S.C. 1970, c. S-19. The Order-in-Council reads:

> WHEREAS the Minister of Justice reports;
>
> 1. That it is important to resolve as expeditiously as possible legal issues relating to certain language rights [page729] under section 23 of the Manitoba Act, 1870 and section 133 of the Constitution Act, 1867.
> 2. That in order that such legal issues be addressed without delay, it is considered necessary that the opinion of the Supreme Court of Canada be obtained in relation to the following questions, namely:
>
> Question # 1

> do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

(Emphasis added.)

See also Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (the Patriation Reference), at pp. 841, 848, 877.

50 Since April 17, 1982, the mandate of the judiciary to protect the Constitution has been embodied [page746] in s. 52 of the Constitution Act, 1982. This section reads:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Prior to enactment of the Constitution Act, 1982, the governing provision was, pursuant to the Statute of Westminster, 1931, s. 2 of the Colonial Laws Validity Act, 1865, 1865 (U.K.), 28 & 29 Vict., c. 63, which provides:

> 2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

(Emphasis added.)

51 The constitutional jurisprudence, developed under the Colonial Laws Validity Act, 1865, was based on the invalidity doctrine. If Parliament or a provincial legislature was ultra vires its constitutionally allocated powers in enacting a certain Act, then the repugnancy of that Act with the provisions of the British North America Act, 1867 would mean that the Act was "absolutely void and inoperative".

52 Section 52 of the Constitution Act, 1982 does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity. The words "of no force or effect" mean that a law thus inconsistent with the Constitution has no force or effect because it is invalid.

53 Canadian courts have been unanimous in finding that failure to respect mandatory requirements to enact, print and publish statutes and regulations in both official languages leads to inconsistency [page747] and thus invalidity. See, Société Asbestos Ltée. c. Société nationale de l'amiante, supra; Procureur général du Quebec v. Collier, [1983] C.S. 366; Procureur général du Quebec v. Brunet, J.E. 83-510, reversed on other grounds, J.E. 84-62 (S.C.). These cases accord with the general principle that failure to comply with constitutional provisions dealing with the manner and form of the enactment of legislation will result in inconsistency and thus invalidity. See Bribery Commissioner v. Ranasinghe, supra.

54 In the present case the unilingual enactments of the Manitoba Legislature are inconsistent with s. 23 of the Manitoba Act, 1870 since the constitutionally required manner and form for their enactment has not been followed. Thus they are invalid and of no force or effect.

C) The Rule of Law

1. The Principle

55 The difficulty with the fact that the unilingual Acts of the Legislature of Manitoba must be declared invalid and of no force or effect is that, without going further, a legal vacuum will be created with consequent legal chaos in the Province of Manitoba. The Manitoba Legislature has, since 1890, enacted nearly all of its laws in English only. Thus, to find that the unilingual laws of Manitoba are invalid and of no force or effect would mean that only laws enacted in both French and English before 1890, would continue to be valid, and would still be in force even if the law had purportedly been repealed or amended by a post-1890 unilingual statute; matters that were not regulated by laws enacted before 1890 would now be unregulated by law, unless a pre-confederation law or the common law provided a rule.

56 The situation of the various institutions of provincial government would be as follows: the courts, administrative tribunals, public officials, municipal corporations, school boards, professional governing bodies, and all other bodies created by law, to the extent that they derive their existence from [page748] or purport to exercise powers conferred by Manitoba laws enacted since 1890 in English only, would be acting without legal authority.

57 Questions as to the validity of the present composition of the Manitoba Legislature might also be raised. Under the Manitoba Act, 1870, the Legislative Assembly was to be composed of 24 members (s. 14), and voters were to be male and over 21 (s. 17). By laws enacted after 1890 in English only, the size of the Legislative Assembly was increased to 57 members, and all persons, both women and men, over 18 were granted the right to vote: see Act to amend "The Manitoba Election Act", 1916 (Man.), c. 36; Act to Amend The Election Act, 1969 (Man.), 2nd Sess., c. 7; The Legislative Assembly Act, R.S.M. 1970, c. L110, s. 4(1). If these laws are invalid and of no force or effect, the present composition of the Manitoba Legislature might be invalid. The invalidity of the post-1890 laws would not touch the existence of the Legislature or its powers since these are matters of federal constitutional law: Constitution Act, 1867, ss. 92, 92A, 93, 95; Manitoba Act, 1870, s. 2.

58 Finally, all legal rights, obligations and other effects which have purportedly arisen under all Acts of the Manitoba Legislature since 1890 would be open to challenge to the extent that their validity and enforceability depends upon a regime of unconstitutional unilingual laws.

59 In the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law. The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in s. 23 of the Manitoba Act, 1870 and s. 52 of the Constitution Act, 1982, that this Court must [page749] find the unconstitutional laws of Manitoba to be invalid and of no force and effect.

60 Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. "The rule of law in this sense implies ... simply the existence of public order." (W.I. Jennings, The Law and the Constitution (5th ed., 1959), at p. 43). As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" (quoted by Lord Wilberforce in Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2), [1966] 2 All E.R. 536 (H.L.) at p. 577). According to Wade and Phillips, Constitutional and Administrative Law (9th ed. 1977), at p. 89: "... the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions."

61 It is this second aspect of the rule of law that is of concern in the present situation. The conclusion that the Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 will be destroyed and the rights, obligations and other effects arising under these laws will be invalid and unenforceable. As for the future, since it is reasonable to assume that it will be impossible for the Legislature of Manitoba to rectify instantaneously the constitutional defect, the Acts of the Manitoba Legislature will be invalid and of no force or effect until they are translated, re-enacted, printed and published in both languages.

62 Such results would certainly offend the rule of law. As we stated in the Patriation Reference, supra, at pp. 805-06:

[page750]

> The "rule of law" is a highly textured expression ... conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.
>
> (Emphasis added.)

Dr. Raz has said: "'The rule of law' means literally what it says: the rule of the law ... It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it". (The Authority of Law, (1979), at pp. 212-13). The rule of law simply cannot be fulfilled in a province that has no positive law.

63 The constitutional status of the rule of law is beyond question. The preamble to the Constitution Act, 1982 states:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.
>
> (Emphasis added.)

This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (per Rand J., Roncarelli v. Duplessis [1959] S.C.R. 121, at p. 142). The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, The Law of the Constitution (10th ed. 1959), at p. 183). It becomes a postulate of our own Constitutional order by way of the preamble to the Constitution Act, 1982, and its implicit inclusion in the preamble to the Constitution Act, 1867 by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".

64 Additional to the inclusion of the rule of law in the preambles of the Constitution Acts of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be [page751] brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.

65 This Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution.

66 The Court has in the past inferred constitutional principles from the preambles to the Constitution Acts and the general object and purpose of the Constitution. In the Patriation Reference, supra, the Court found the federal principle to be inherent in the Constitution in this way. At pp. 905-906 the Court said:

> The reason for the rule is the federal principle. Canada is a federal union. The preamble of the B.N.A. Act states that
>
> ... the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire

> to be federally united ...
>
> The federal character of the Canadian Constitution was recognized in innumerable judicial pronouncements. We will quote only one, that of Lord Watson in Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437, at pp. 441-42:
>
> > The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.
>
> The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. It would indeed offend the federal principle that "a radical change to ... (the) constitution [page752] (be) taken at the request of a bare majority of the members of the Canadian House of Commons and Senate" (Report of Dominion Provincial Conference, 1931, at p. 3).

Martland and Ritchie JJ. in their dissent stated (at p. 841):

> However, on occasions, this Court has had to consider issues for which the B.N.A. Act offered no answer. In each case, this Court has denied the assertion of any power which would offend against the basic principles of the Constitution.

They went on to discuss a number of the more important decisions rendered by this Court and conclude with the following (at pp. 844-45):

> It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in express provisions of the British North America Acts or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada's Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments. Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed, as it was by Dickson J. in the Amax (supra) case at p. 591, that "There are no Canadian constitutional law precedents addressed directly to the present issue ...".

(Emphasis added.)

In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the Patriation Reference, supra, this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law.

2) Application of the Principle of the Rule of Law

67 It is clear from the above that: (i) the law as stated in s. 23 of the Manitoba Act, 1870 and s. 52 of the Constitution Act, 1982 requires that the unilingual Acts of the Manitoba Legislature be declared to be invalid and of no force or effect, and [page753] (ii) without more, such a result would violate the rule of law. The task the Court faces is to

recognize the unconstitutionality of Manitoba's unilingual laws and the Legislature's duty to comply with the "supreme law" of this country, while avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law.

68 A number of the parties and intervenors have suggested that the Court declare the unilingual Acts of the Manitoba legislature to be invalid and of no force or effect and leave it at that, relying on the legislatures to work out a constitutional amendment. This approach because it would rely on a future and uncertain event, would be inappropriate. A declaration that the laws of Manitoba are invalid and of no legal force or effect would deprive Manitoba of its legal order and cause a transgression of the rule of law. For the Court to allow such a situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution.

69 Other solutions suggested by the parties and intervenors are equally unsatisfactory. Counsel for the Attorney General of Manitoba argues that the linguistic rights guaranteed by s. 23 of the Manitoba Act, 1870 can be protected by the Lieutenant-Governor of the province, who can either withhold Royal Assent to a unilingual bill or reserve the bill for the signification of the Governor General's pleasure: Constitution Act, 1867, ss. 55, 57, 90. See also Manitoba Act, 1870, s. 2. Though this legal power continues to exist, it has not been exercised in recent years. See, Reference re Disallowance and Reservation of Provincial Legislation, [1938] S.C.R. 71.

70 The fundamental difficulty with the Attorney General of Manitoba's suggestion is that it would make the executive branch of the federal government, rather than the courts, the guarantor of constitutionally entrenched language rights. It should be noted that a decision of a provincial Lieutenant Governor as to whether to withhold assent or reserve a bill is not reviewable by the courts: Reference re Disallowance and Reservation [page754] of Provincial Legislation, supra, at p. 95. The overall effect of implementing the suggestion of the Attorney General of Manitoba would be to insulate the Legislature's failure to comply with s. 23 of the Manitoba Act, 1870 from judicial review. Such a result would be entirely inconsistent with the judiciary's duty to uphold the Constitution.

71 Similar considerations would apply to the six Manitoba citizen interveners' contention that the federal power of disallowance in the Constitution Act, 1867 could be used as an alternative to judicial invalidation. This is not an appropriate alternative solution because it asks the Court to abdicate its responsibility to enforce the dictates of the Constitution.

72 The only appropriate resolution to this Reference is for the Court to fulfil its duty under s. 52 of the Constitution Act, 1982 and declare all the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect and then to take such steps as will ensure the rule of law in the Province of Manitoba.

73 There is no question that it would be impossible for all the Acts of the Manitoba Legislature to be translated, re-enacted, printed and published overnight. There will necessarily be a period of time during which it would not be possible for the Manitoba Legislature to comply with its constitutional duty under s. 23 of the Manitoba Act, 1870.

74 The vexing question, however, is what will be the legal situation in the Province of Manitoba for the duration of this period. The difficulties faced by the Province of Manitoba are two-fold: first, all of the rights, obligations and other effects which have arisen under the repealed, spent and current Acts of the Manitoba Legislature will be open to challenge, since the laws under which they purportedly arise are invalid and of no force or effect; and, second, the Province of Manitoba has an invalid and therefore ineffectual legal system until [page755] the Legislature is able to translate, re-enact, print and publish its current Acts.

75 With respect to the first of these problems, it was argued by a number of the parties and intervenors that the de facto doctrine might be used to uphold the rights, obligations and other effects which have purportedly arisen under the unilingual Acts of the Manitoba Legislature since 1890.

76 The de facto doctrine is defined by Judge Albert Constantineau in The De Facto Doctrine (1910), at pp. 3-4 as follows:

> The de facto doctrine is a rule or principle of law which, in the first place, justifies the recognition of the authority of governments established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government; secondly, which recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies; and, thirdly, which imparts validity to the official acts of persons who, under color of right or authority, hold office under the aforementioned governments or bodies, or exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage.

That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):

> Again, the doctrine is necessary to maintain the supremacy of the law and to preserve Peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the [page756] worst kind would be encouraged, which might at any time culminate in anarchy.

77 The de facto doctrine is of ancient and venerable origin. The first reported English case was the Abbé de Fontaine's Case (1431) Y.B. 9 H. VI., fol. 32. The doctrine's utility was even recognized by the Romans. See A.M. Honore, "Reflections on Revolutions", [1967] 2 Irish Jurist 26 at p. 269. See also, Scadding v. Lorant (1851), 3 H.L.C. 418, 10 E.R. 164 (H.L.); R. v. Slythe (1827), 6 B. & C. 240, 108 E.R. 441, at p. 444; Margate Pier Co. v. Hannam (1819), 3 B. & Ald. 266, 106 E.R. 661, at p. 663.

78 The de facto doctrine has long been accepted in Canada. In O'Neil v. Attorney General of Canada (1896), 26 S.C.R. 122, at p. 130, Chief Justice Strong said: "The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, ... legal and binding". See also Turtle v. Township of Euphemia (1900), 31 O.R. 404; R. v. Gibson (1896), 29 N.S.R. 4; see generally cases collected in Constantineau, supra, at p. 20, note 35.

79 There is only one true condition precedent to the application of the doctrine: the de facto officer must occupy his or her office under colour of authority. This is consistent with the rationale for the doctrine, viz., that the members of the public with whom the officer dealt relied upon his ostensible status. Simply put, "[a]n officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law". R. v. Corporation of Bedford Level (1805), 6 East 356; 102 E.R. 1323 at p. 1328 (per Lord Ellenborough C.J.). See also Parker v. Kett (1702), 1 Ld. Raym. 658; 91 E.R. 1338, at p. 1340.

80 The application of the de facto doctrine is, however, limited to validating acts which are taken under invalid authority: it does not validate the authority under which the acts took place. In other words, the doctrine does not give effect to unconstitutional [page757] laws. It recognizes and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized. Thus, the de facto doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable.

81 The de facto doctrine will not by itself save all of the rights, obligations and other effects which have purportedly arisen under the repealed and current Acts of the Legislature of Manitoba from 1890 to the date of this judgment. Some of these rights, obligations and other effects did not arise as a consequence of reliance by the public on the acts of officials acting under colour of authority or on the assumed validity of public and private bodies corporate. Furthermore, the de facto authority of officials and entities acting under the invalid laws of the Manitoba Legislature will cease on the date of this judgment since all colour of authority ceases on that date. Thus, the de facto doctrine only provides a partial solution.

82 It should be noted that there are other doctrines which might provide relief from the consequences of the invalidity of Manitoba's laws. For example, res judicata would preclude the re-opening of cases decided by the courts on the basis of invalid laws. And the doctrine of mistake of law might, in some circumstances, preclude recovery of monies paid under invalid laws: see Eadie v. Township of Brantford, [1967] S.C.R. 573; Amax Potash Ltd. v. Government of Saskatchewan, supra. However, as the Attorney General of Canada has stated in his factum, these doctrines are of limited scope and may not cover all of the situations that could be questioned.

[page758]

83 The only appropriate solution for preserving the rights, obligations and other effects which have arisen under invalid Acts of the Legislature of Manitoba and which are not saved by the de facto or other doctrines is to declare that, in order to uphold the rule of law, these rights, obligations and other effects have, and will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which it would be impossible for Manitoba to comply with its constitutional duty under s. 23 of the Manitoba Act, 1870. The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy.

84 Nor will the constitutional guarantee of rule of law tolerate the Province of Manitoba being without a valid and effectual legal system for the present and future. Thus, it will be necessary to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect, for the period of time during which it would be impossible for the Manitoba Legislature to fulfil its constitutional duty. Since this temporary validation will include the legislation under which the Manitoba Legislature is presently constituted, it will be legally able to re-enact, print and publish its laws in conformity with the dictates of the Constitution once they have been translated.

85 Analogous support for the measures proposed can be found in cases which have arisen under the doctrine of state necessity. Necessity in the context of governmental action provides a justification for otherwise illegal conduct of a government during a public emergency. In order to ensure rule of law, the Courts will recognize as valid the constitutionally invalid Acts of the Legislature. According to Professor Stavsky, "The Doctrine of State Necessity in Pakistan" (1983), 16 Cornell Int. L.J. 341, [page759] at p. 344: "If narrowly and carefully applied, the doctrine constitutes an affirmation of the rule of law".

(Emphasis added.)

86 The courts have applied the doctrine of necessity in a variety of circumstances. A number of cases have involved challenges to the laws of an illegal and insurrectionary government. In the aftermath of the American Civil War, the question arose as to the validity of laws passed by the Confederate States. The courts in addressing this question were primarily concerned with ensuring that the rule of law be upheld. The principle which emerges from these cases can be summarized as follows: During a period of insurrection, when territory is under the control and dominance of an unlawful, hostile government and it is therefore impossible for the lawful authorities to legislate for the peace and good

order of the area, the laws passed by the usurping government which are necessary to the maintenance of organized society and which are not in themselves unconstitutional will be given force and effect: see Texas v. White, 74 U.S. 700 (1868); Horn v. Lockhart, 84 U.S. 570 (1873); United States v. Insurance Companies, 89 U.S. 99 (1874); Baldy v. Hunter, 171 U.S. 388 (1898).

87 The general principles and concerns which underlie these cases are best stated by Mr. Justice Field in Horn v. Lockhart, supra (at pp. 580-81):

> We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they [page760] were not hostile in their purpose or mode of enforcement to the authority of the National government, and did not impair the rights of citizens under the Constitution.

88 The doctrine of necessity was also applied with respect to an insurrectionary government in Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.) This case dealt with the efficacy of official acts of the Smith régime shortly after Southern Rhodesia's unilateral declaration of independence from Britain in 1965. Lord Reid, writing for the majority, canvassed the American authorities discussed above, but found them distinguishable on the ground that in this case, Parliament had specifically provided that it would have legislative authority for the territory of Southern Rhodesia (in the Southern Rhodesia Act and Order in Council of 1965), and it thereby followed that there was no "legal vacuum" necessitating recognition by the Courts of the laws purportedly enacted by the insurrectionary Smith government.

89 Lord Pearce dissented from the majority view. He saw no merit in the distinction drawn by the majority, noting that while the lawful government had formally asserted its authority, it was in no position, as a practical matter, to actually govern. In his view, the American cases presented "a helpful analogy" and, in reliance on them, he formulated the "state necessity doctrine" as follows, at p. 732:

> I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognized as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. This last i.e., (c), [page761] is tantamount to a test of public policy.

Again, it is clear that the reasons for applying the state necessity doctrine pertain to a concern with the rule of law. At p. 740, Lord Pearce says:

> If one disregards all illegal provision for the needs of the country, there is a vacuum and chaos.
>
> In my view, the principle of necessity or implied mandate applies to the present circumstances in Rhodesia.

(Emphasis added.)

90 It should be noted that neither the American cases on necessity, nor the comments of Lord Pearce in Madzimbamuto can be applied directly to the present case. All of these cases are concerned with insurrectionary governments, the present case is not. But even more fundamental than this distinction is the fact that all of these cases require that the laws saved by the application of the doctrine not impair the rights of the citizens guaranteed by the Constitution. In the present case, the laws in question do impair these rights. Nonetheless, the necessity cases on insurrectionary governments illustrate the more general proposition that temporary effect can be given to invalid laws where this is necessary to preserve the rule of law.

91 The doctrine of state necessity has also been used to uphold laws enacted by a lawful government in contravention of express constitutional provisions under extraordinary circumstances which render it impossible for the government to comply with the Constitution. In Attorney General of the Republic v. Mustafa Ibrahim, [1964] Cyprus Law Reports 195, the Court of Appeal of Cyprus invoked the doctrine of state necessity to hold valid a law passed in direct contravention of the express provisions of the Cypriot Constitution.

92 Cyprus is a dyarchy, power being shared between Greek and Turkish Cypriots. The 1960 Cypriot Constitution contained several entrenched [page762] provisions guaranteeing the equality of status of the two Cypriot communities. In particular, the Constitution established a High Court of Justice and a Supreme Constitutional Court, each staffed by judges from both communities and governed by a neutral (non-Cypriot) President. A Turkish Cypriot charged with an offence against a Greek Cypriot was given the right to be tried by such a "mixed" court. In addition, all laws were required to be enacted in both the Turkish and the Greek languages. These constitutional provisions, termed "basic articles", could not be amended.

93 In 1963, Turkish insurgents gained control over those parts of Cyprus inhabited by the Turkish community. This effectively prevented Turkish Cypriots from participating in the government of the country, including the Parliament of Cyprus and all courts located outside the Turkish areas. As a consequence, it became impossible to constitute "mixed" courts as required by the Constitution, to assemble the Supreme Constitutional Court, or to enact laws in Turkish, there being virtually no qualified translators available during the insurgency.

94 To deal with the emergency, the Parliament of Cyprus passed a temporary law abolishing the requirement of mixed courts for the duration of the insurrection and conferring on a new Court of Appeal, composed solely of Greek Cypriot judges, the jurisdiction then vested by the Constitution in the Supreme Constitutional Court. This temporary measure, enacted in Greek only, was challenged as unconstitutional.

95 The Court of Appeal upheld the law on grounds of necessity. Josephides J. at p. 265 set forth four prerequisites which he said must be satisfied before the doctrine of state necessity could apply to validate such an unconstitutional law:

> (a) an imperative and inevitable necessity or exceptional circumstances;
> (b) no other remedy to apply;
> (c) the measure taken must be proportionate to the necessity; and

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> (d) it must be of a temporary character limited to the duration of the exceptional circumstances.

Josephides J. added:

> A law thus enacted is subject to the control of this court to decide whether the aforesaid

> prerequisites are satisfied, i.e. whether there exists such a necessity and whether the measures taken were necessary to meet it.

All four conditions being satisfied, Josephides J. concluded (at p. 268) that the impugned law, while unconstitutional, was nevertheless effectual "for the duration of the necessity and no more".

96 The question in Ibrahim, supra, was whether a temporary unconstitutional law, enacted in order to meet the exigencies of a state of emergency, could be valid. The question in the present Reference is quite different. Here, the Court is concerned with whether unconstitutional laws can be given temporary validity in order to avoid a state of emergency. It is the Court which must take steps to avoid the deleterious consequences of the Manitoba Legislature's persistent failure to observe the Constitution. In Ibrahim the Court simply condoned the measures taken by the Parliament of Cyprus in response to a necessitous situation arising out of circumstances beyond its control. Thus, Ibrahim is not directly applicable to the circumstances of the present case.

97 The principle that can be deduced from the Ibrahim case with respect to the present context, however, is that a Court may temporarily treat as valid and effective laws which are constitutionally flawed in order to preserve the rule of law. The case stands for the proposition that under conditions of emergency, when it is impossible to comply with the Constitution, the Court may allow the government a temporary reprieve from such compliance in order to preserve society and maintain, as nearly as possible, normal conditions. The overriding concern is the protection of the rule of law.

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98 A third situation in which the doctrine of necessity has been applied is where the executive has taken emergency action to fill a legislative void created by a court ruling. In the Pakistani case of Special Reference No. 1 of 1955, P.L.R. 1956 W.P. 598, there was a challenge to emergency action taken by the Governor General of Pakistan in the face of an apparent legal vacuum. The Indian Independence Act, 1947, was the original Constitution for the newly created Dominions of India and Pakistan. As a step toward complete independence, the Act provided for a Constituent Assembly in each country, with power to amend the Act and enact new constitutional laws. Royal assent was required for the passage of all such constitutional legislation.

99 The Constituent Assembly of Pakistan set out immediately to forge its own Constitution. From 1947 to 1954 it enacted 44 constitutional amendments. The members of the Assembly, however, felt that it was important that the new Constitution have roots as independent of imperial authority as possible. They therefore deliberately failed to obtain Royal Assent to any of the amendments. Indeed, in 1948, the Assembly passed an amendment purportedly abolishing the requirement of Royal Assent. This amendment, like the other 43, was itself passed without royal assent.

100 In Federation of Pakistan v. Tamizuddin Khan, P.L.R. 1956 W.P. 306, the Federal Court of Pakistan held the constitutional amendments void. It followed that a great many statutes and regulations enacted pursuant to the invalid amendments were themselves nullities. The situation that obtained was in many respects similar to that now facing Manitoba.

101 The Governor General of Pakistan reacted to the emergency by summoning a Constituent Convention and issuing a proclamation assuming to himself, until the Convention could act, the power to validate and enforce all laws necessary to preserve the State and maintain the government of the country. This action was challenged, and in Special Reference No. 1 of 1955, supra, the Federal [page765] Court of Pakistan held that although the Governor General's action was not authorized by the Constitution, it nevertheless was valid under the doctrine of state necessity. Muhammad Munir C.J. said (at p. 671):

> The disaster that stared the Governor-General in the face, consequent on the illegal manner in which the Constituent Assembly exercised its legislative authority is apparent ... The Governor-General must, therefore, be held to have acted in order to avert an impending disaster and to prevent the State and society from dissolution. His proclamation of the 16th April, 1955, declaring that the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955, shall be retrospectively enforceable is accordingly valid during the interim period, i.e., until the validity of these laws is decided upon by the new Constituent Assembly.

102 The Special Reference No. 1 of 1955, supra, stands for the proposition that a situation of state necessity can arise as a consequence of judicial invalidation of unconstitutional laws, leaving a legal void. The difference between that case and the present is that in the present case it is the judicial branch of government that is retrospectively recognizing unconstitutional laws as temporarily valid and enforceable, while in the Special Reference No. 1 of 1955 case it was the executive branch of government which proclaimed that laws were retrospectively valid and enforceable, and the role of the judiciary was simply to condone the actions of the executive.

103 Thus, the Special Reference No. 1 of 1955, supra, case cannot be directly applied to the present set of circumstances. It is, however, illustrative of the broader principles which justify this Court's action in the present case: namely, that otherwise invalid acts may be recognized as temporarily valid in order to preserve normative order and the rule of law. The Federal Court of Pakistan allowed an unconstitutional exercise of executive power since the effects of not allowing such an exercise of power would have been anarchy and chaos and thereby a violation of the rule of law.

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104 The cases on the necessity doctrine in all three circumstances discussed above point to the same conclusion: the Courts will recognize unconstitutional enactments as valid where a failure to do so would lead to legal chaos and thus violate the constitutional requirement of the rule of law. This is well expressed by Mr. Justice Triantafyllides in Ibrahim, supra, at p. 237:

> If the position was that the administration of justice and the preservation of the rule of law and order in the State could no longer be secured in a manner which would not be inconsistent with the constitution, a constitution under which the sovereign will of the people could not be expressed so as to regulate through an amendment of the fundamental law such a situation, then the House of Representatives, elected by the people, should be empowered to take such necessary steps as are warranted, by the doctrine of necessity, in the exigencies of the situation. Otherwise the absurd corollary would have been entailed viz. that a State, and the people, should be allowed to perish for the sake of the constitution; on the contrary, a constitution should exist for the preservation of the State and the welfare of the people.

(Emphasis added.)

105 The doctrine of necessity is not used in these cases to support some law which is above the Constitution; it is, instead used to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution.

106 In every case in which the doctrine of state necessity has been applied it has been either the executive or the legislative branch of government which has responded to the necessitous circumstances, later to have its actions tested in the courts. This fact does not, however, detract from the general relevance of these cases in demonstrating that the courts will not allow the Constitution to be used to create chaos and disorder.

107 Turning back to the present case, because of the Manitoba Legislature's persistent violation of the constitutional dictates of the Manitoba Act, 1870, the Province of Manitoba is in a state of emergency: all of the Acts of the Legislature of Manitoba, purportedly repealed, spent and current (with the [page767] exception of those recent laws which have been enacted, printed and published in both languages), are and always have been invalid and of no force or effect, and the legislature is unable to immediately re-enact these unilingual laws in both languages. The Constitution will not suffer a province without laws. Thus the Constitution requires that temporary validity and force and effect be given to the current Acts of the Manitoba Legislature from the date of this judgment, and that rights, obligations and other effects which have arisen under these laws and the repealed and spent laws of the Province prior to the date of this judgment, which are not saved by the de facto or some other doctrine, are deemed temporarily to have been and continue to be effective and beyond challenge. It is only in this way that legal chaos can be avoided and the rule of law preserved.

108 To summarize, the legal situation in the Province of Manitoba is as follows. All unilingually enacted Acts of the Manitoba Legislature are, and always have been, invalid and of no force or effect.

109 All Acts of the Manitoba Legislature which would currently be valid and of force and effect, were it not for their constitutional defect, are deemed temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing. Rights, obligations and any other effects which have arisen under these current laws by virtue of reliance on acts of public officials, or on the assumed legal validity of public or private bodies corporate, are enforceable and forever beyond challenge under the de facto doctrine. The same is true of those rights, obligations and other effects which have arisen under current laws and are saved by doctrines such as res judicata and mistake of law.

110 Rights, obligations and any other effects which have arisen under purportedly repealed or spent laws by virtue of reliance on acts of public officials, [page768] or on the assumed legal validity of public or private bodies corporate are enforceable and forever beyond challenge under the de facto doctrine. The same is true of those rights, obligations and other effects which have arisen under purportedly repealed or spent laws and are saved by doctrines such as res judicata and mistake of law.

111 All rights, obligations and any other effects which have arisen under Acts of the Manitoba Legislature which are purportedly repealed, spent, or would currently be in force were it not for their constitutional defect, and which are not saved by the de facto doctrine, or doctrines such as res judicata and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing of these laws. At the termination of the minimum period these rights, obligations and other effects will cease to have force and effect unless the Acts under which they arose have been translated, re-enacted, printed and published in both languages. As a consequence, to ensure the continuing validity and enforceability of rights, obligations and any other effects not saved by the de facto or other doctrines, the repealed or spent Acts of the Legislature, under which these rights, obligations and other effects have purportedly arisen, may need to be enacted, printed and published, and then repealed, in both official languages.

112 As concerns the future, the Constitution requires that, from the date of this judgment, all new Acts of the Manitoba Legislature be enacted, printed and published in both French and English. Any Acts of the Legislature that do not meet this requirement will be invalid and of no force or effect.

VI

The Duration of the Temporary Period

113 The difficult question, then, is what is the duration of the minimum period necessary for translation, [page769] re-enactment, printing and publishing of the unilingual Acts of the Manitoba Legislature?

114 It was argued by the Attorney General of Canada and by the Fédération des francophones hors Québec that this Court fix some arbitrary period such as a year or two years during which the Manitoba Legislature could re-enact its unilingual legislation in both languages.

115 This solution would not be satisfactory. We do not know how many of the Acts of the Legislature have already been translated. We know nothing as to the availability of translators or their daily output. We thus have no factual basis for determining a period during which compliance with s. 23 of the Manitoba Act, 1870 would not be possible.

116 As presently equipped the Court is incapable of determining the period of time during which it would not be possible for the Manitoba Legislature to comply with its constitutional duty. The Court will, however, at the request of either the Attorney General of Canada, or the Attorney General of Manitoba, made within one hundred and twenty days of the date of this judgment, make such a determination. The Attorney General of Canada was granted carriage of this Reference and the Attorney General of Manitoba represents the province whose laws are in issue in this case. Following such a request, a special hearing will be set and submissions will be accepted from the Attorney General of Canada and the Attorney General of Manitoba and the other intervenors.

117 The period of temporary validity will not apply to any unilingual Acts of the Legislature enacted after the date of judgment. From the date of judgment, laws which are not enacted, printed, and published in both languages will be invalid and of no force and effect ab initio.

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VII

Question 4

The Status of the 1980 Act

118 Question No. 4 of this Reference asks whether any of the provisions of An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, 1980 (Man.), c. 3 (the 1980 Act), are inconsistent with s. 23 of the Manitoba Act, 1870 and, if so, whether the inconsistent provisions are invalid and of no force or effect.

The Act in its entirety reads:

> Definition of "official language".
>
> 1 In this Act "official language" means the English language or the French language.
>
> Interpretation where conflict.
>
> 2 Where the meaning of a provision of an Act in one official language conflicts with, is repugnant to or is inconsistent with the meaning of the corresponding provision of the Act in the other official language
>
> (a) the provision in the official language in which the Bill for the Act was printed when copies thereof were first distributed to the members of the assembly in the

2(a) and 5 violate s. 23's requirement that both language versions be equally authoritative. The remaining sections of the Act are inseverable from the constitutionally infirm provisions and fall with them.

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VIII

Conclusions

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i) Section 133 of the Constitution Act, 1867 and s. 23 of the Manitoba Act, 1870 are mandatory;

ii) All Acts of the Manitoba Legislature that were not printed and published in both the English and French languages are, and always have been, invalid and of no force and effect;

iii) The Acts of the Manitoba Legislature which would currently be in force were it not for their constitutional defect (i.e. current Acts) are deemed to have temporary validity and force and effect from the date of this judgment to the expiry of the minimum period required for translation, re-enactment, printing and publishing;

iv) Rights, obligations and any other effects which have arisen under current Acts, and purportedly repealed or spent Acts, of the Legislature of Manitoba, which are not saved by the de facto doctrine or doctrines such as res judicata and mistake of law, are deemed temporarily to have been, and to continue to be, valid, and of force and effect until the expiry of the minimum period required for translation, re-enactment, printing and publishing;

v) The Court will, at the request of either the Attorney General of Canada or the Attorney General of Manitoba, made within one hundred and twenty days of the date of this judgment, establish the minimum period necessary for translation, re-enactment, printing and publishing of (1) unilingual Acts of the Legislature of Manitoba which would be currently in force were it not for their constitutional defect, and (2) the unilingual repealed and spent Acts of the Legislature of Manitoba. Following such a request, a special hearing will be set and submissions will be accepted from the Attorney General of Canada and the Attorney General of Manitoba and the other intervenors.

vi) An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, [page781] 1980 (Man.), ch. 3, is invalid and of no force and effect in its entirety if it was not enacted, printed, and published in both official languages. In any event, s. 1 to 5 are invalid and of no force and effect.

IX

Answer to the Questions

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Question #1

"Are the requirements of section 133 of the Constitution Act, 1867 and of section 23 of the Manitoba Act, 1870 respecting the use of both the English and French languages in

(a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and
(b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba mandatory?"

Answer:

Yes.

Question #2

"Are those statutes and regulations of the Province of Manitoba that were not printed and published in both the English and French languages invalid by reason of section 23 of the Manitoba Act, 1870?"

Answer:

Yes, but, for the reasons given by the Court, the invalid current Acts of the Legislature will be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question #3

"If the answer to question 2 is affirmative, do those enactments that were not printed and published in English and French have any legal force and effect, and if so, to what extent and under what conditions?"

[page782]

Answer:

The Acts of the Legislature that were not enacted, printed and published in English and French have no legal force and effect because they are invalid, but, for the reasons given by the Court, the current Acts of the Legislature will be deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question #4

"Are any of the provisions of An Act Respecting the Operation of section 23 of the Manitoba Act in Regard to Statutes, enacted by S.M. 1980, ch. 3, inconsistent with the provisions of section 23 of the Manitoba Act, 1870, and if so are such provisions, to the extent of such inconsistency, invalid and of no legal force and effect?"

Answer:

If an Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, enacted by S.M. 1980, ch. 3, was not enacted, printed and published in both official languages, then it is invalid and of no force and effect in its entirety.

If it was enacted, printed and published in both official languages, then ss. 1 to 5 are invalid and of no force and effect.

The questions referred to were answered as follows:

Question 1: - Yes.

Question 2: - Yes, but, for the reasons given by the Court, the invalid current Acts of the Legislature will be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question 3: - The Acts of the Legislature that were not enacted, printed and published in English and French have no legal force and effect because [page783] they are invalid, but, for the reasons given by the Court, the current Acts of the Legislature will be deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication.

Question 4: - If An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, enacted by S.M. 1980, Ch. 3, was not enacted, printed and published in both official languages, then it is invalid and of no force and effect in its entirety.

If it was enacted, printed and published in both official languages, then ss. 1 to 5 are invalid and of no force and effect.

qp/qlcvd/qlhbb

Rosen and Sav-On Drugs Ltd. v. Attorney General of Ontario

Indexed as: Rosen v. Ontario (Attorney General)

Ontario Court (General Division), December 9, 1994.
Borins J. (No. RE 4712/94)

Remedies – Interim injunction – Stay of challenged statutory scheme – Pharmacists challenging constitutionality of ban on sale of tobacco products in pharmacies in Tobacco Control Act and seeking order staying enforcement of legislation until constitutional issue decided – Order refused – Act constituting public interest legislation and applicants failing to show that suspension of legislation would provide public benefit – Tobacco Control Act, 1994, S.O. 1994, c. 10 – Canadian Charter of Rights and Freedoms.

The applicants had commenced an application for a declaration that s. 4(2), paras. 8 and 9 of the Ontario *Tobacco Control Act, 1994,* prohibiting the sale of tobacco products in health care facilities, including pharmacies, were unconstitutional. They sought an order staying the enforcement of the legislation until the constitutional issue was decided.

Held: motion dismissed.

For the purposes of this motion, it was assumed without deciding that the applicants had established that there was a serious constitutional issue to be decided and that compliance with s. 4(2) paras. 8 and 9 would cause them irreparable harm. The issue to be decided was whether the balance of convenience favoured retaining the status quo until the constitutionality of the impugned provisions was decided. The Act constituted legislation which furthered the public good. As the legislation was introduced to protect the public interest, the court was required to assume that irreparable harm to the public interest would result from any order that the enforcement of the legislation be stayed. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicants had to demonstrate that the suspension of the legislation would itself provide a public benefit. The applicants failed to do so. The public interest in the convenience to the users of tobacco products in being able to purchase those products in a pharmacy was far outweighed by the public interest achieved by the purpose of the Act.

Cases considered

Apld

R.J.R.-MacDonald Inc. v. Canada (Attorney General) (1994), 20 C.R.R. (2d) D-7 (digest), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 164 N.R. 1

Statutes considered

Canadian Charter of Rights and Freedoms, s. 2(*b*)
Tobacco Control Act, 1994, S.O. 1994, c. 10, s. 4(2) paras 8, 9

MOTION for an order staying enforcement of the *Tobacco Control Act, 1994*, S.O. 1994, c. 10, until the issue of the constitutionality of the legislation is decided.

Alan J. Lenczner, Q.C., and *Anne E. Posno*, for applicants.
Robert E. Charney, for respondent.

BORINS J.: — Mr. Rosen and Sav-On Drugs Ltd. have commenced an application for a declaration that s. 4(2) paras. 8 and 9 of the *Tobacco Control Act, 1994*, S.O. 1994, c. 10, are unconstitutional and of no force and effect because the legislation is in contravention of freedoms guaranteed to them by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. Because the application will not be heard until after s. 4(2) paras. 8 and 9 come into force on December 31, 1994, the applicants have moved for an order to stay the enforcement of the legislation until the constitutional issue is decided. Counsel have indicated that they expect to be prepared to argue this issue around February 15, 1995, assuming the court can hear it at that time.

In my view, the issue to be decided on this motion comes squarely within the guidelines provided by the Supreme Court of Canada in *R.J.R.-MacDonald Inc. v. Canada (Attorney General)* (1994), 20 C.R.R. (2d) D-7 (digest), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. The Supreme Court held that relief such as that requested in this motion is available only if the applicants are able to satisfy these requirements.

In the view which I hold of this motion, I have assumed without deciding, that the applicants have established that there is a serious constitutional issue to be decided and that compliance with s. 4(2) paras. 8 and 9 after December 31, 1994, would cause the applicants irreparable harm. The applicants' success on this motion depends on whether they have been able to satisfy the third requirement — that the balance of convenience, taking into account the public interest, favours retaining the status quo until the court has decided the constitutionality of s. 4(2) paras. 8 and 9.

Because interlocutory relief from the effect of legislation has been sought in a constitutional case, the motions court is required to follow the guidelines in the *R.J.R.-MacDonald* case, when considering the balance of convenience. It is appropriate to consider

both the purpose of the Act and the sections of the Act which have been impugned. The Act, in my view, was passed for the purpose of protecting public health by banning the sale and use of tobacco products in certain places. As such, it is legislation which furthers the public good. All of the places stipulated in s. 4(2) have the common description of being places which are health care facilities. In regard to pharmacies, it is significant that the applicable legislation provides that they can be operated only by licensed pharmacists, who are health care professionals. The purpose of s. 4(2) paras. 8 and 9, is to ensure that pharmacists provide proper health care to their patients by preventing the sale of tobacco products in pharmacies. In short, pharmacies are part of the health care system in this province.

In considering the balance of convenience in constitutional cases, the consideration of the public interest plays an important role, due to the wider impact of the constitutional challenge. As the legislation was introduced to protect the public interest, the court is required to assume in most cases that irreparable harm to the public interest would result from an order that the enforcement of the legislation be stayed. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest, must demonstrate that the suspension of the legislation would itself provide a public benefit. In this regard, I agree with Mr. Charney that this is a suspension and not an exemption case on the basis of the large number of pharmacies which the applicants purport to represent.

There is little difference between the balance of convenience argument in this case and the *R.J.R.-MacDonald* case, and I have not been persuaded that a different result should follow in this case. The applicants, although they have demonstrated that they will incur financial losses, have failed to establish a more compelling public interest in the suspension of s. 4(2) paras. 8 and 9, than the respondent's public interest which I am required to assume would be harmed as the result of the order which the applicants seek in this motion. In my view, the public interest in the convenience to the users of tobacco products in being able to purchase these products in a pharmacy when purchasing pharmaceutical products is far outweighed by the public interest achieved by the purpose of the Act.

Therefore, the motion is dismissed. Costs reserved to the judge hearing the application.

Motion dismissed.

GOVERNMENT LIABILITY

LAW AND PRACTICE

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has been found to apply to the constitutional question regarding the division of powers between Parliament and the provinces,[222] and that deference will usually be given when a tribunal is interpreting its own statute or statutes closely related to its function.[223] A question of law that is of central importance to the legal system, and outside the specialized area of the decision maker, will always attract a correctness standard. On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the other two factors so indicate.[224] Further, decisions concerning the determination of jurisdiction are to be dealt with on the standard of correctness.[225]

If the court determines on the *certiorari* motion that the administrative decision-maker made a reviewable error, the court may quash or vary the decision or order.[231]

12.30.20 Injunctions, Specific Performance and Declarations

At common law, no injunction or any order for specific performance could issue against the Crown.[232] This rule arose from the common law immunity of the Crown whereby the courts refused to allow any court order to be made against the Crown. The reason for this immunity was the belief that it was not appropriate for the courts to issue an order against the monarch, and the impossibility of punishing the monarch for contempt of court.[233]

This common law rule has been incorporated into Crown proceeding statutes in every Canadian jurisdiction which expressly prohibit relief by way of injunction or specific performance against the Crown. These statutes provide that, rather than issuing an injunction or specific performance, the court may "make an order declaratory of the rights of the parties".[234]

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222 *Supra*, footnote 214, at para. 58, citing *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, 156 D.L.R. (4th) 456.

223 *Supra*, footnote 214, at para. 54, citing *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, 121 D.L.R. (4th) 385.

224 *Supra*, footnote 214, at para. 55.

225 *Supra*, footnote 214, at para. 59.

226 Footnotes 226 to 230 removed.

231 *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12.

232 I.C.S. Spry, *The Principal of Equitable Remedies*, 6th ed. (Pymont, Australia: LBC Information Services, 2001), at p. 346; *Grand Council of the Crees of Quebec v. Canada*, [1982] 1 F.C. 599, 124 D.L.R. (3d) 574 (C.A.).

233 *R. v. Powell* (1841), 1 Q.B. 352.

234 *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 22; *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 11; *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25, s. 17; *Proceedings Against the Crown Act*, R.S.S. 1978, c. P-27, s. 17; *Proceedings Against the Crown Act*, C.C.S.M., c. P140, s. 14; *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 14; *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18, s. 14; *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, s. 16; *Crown Proceedings Act*, R.S.P.E.I. 1988, c. C-32, s. 13; *Proceedings Against the Crown Act*, R.S.N.L. 1990, c. P-26, s. 15; and *Code of Civil Procedure*, R.S.Q., c. C-25, s. 94.2, which provides that "no extraordinary recourse or provisional remedy lies against the government".

The statutory prohibition against issuing injunctions against the Crown cannot be circumvented by the issuing of an injunction against an officer of the Crown if the effect of that order would be the equivalent of granting such relief against the Crown. However, injunctions are available against Crown officers where they exceed their authorization or they act in a manner which would attract personal liability if committed by a private person.[235]

The declaration which operates in lieu of an injunction or specific performance allows the court to make an order declaratory of the rights of the parties.[236] This declaratory relief makes it unnecessary to issue a final injunction against the Crown as it will provide effectively the same remedy.[237] Hence, declarations can provide remedies in contractual circumstances similar to specific performance where the plaintiff can obtain a declaration that it is entitled to the fulfillment of a contract by a government together with the right to damages,[238] or to a permanent injunction when a court issues a declaration that a government tax or fee is *ultra vires* and therefore unenforceable.[239]

When considering legislation, the court should show some deference to the government decision-maker.[240] However, the court should not merely defer to the government's position. "Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or executive branch."[241] The courts must rise above political debate and allow legislatures to develop social policy. In circumstances where such social policy infringes upon rights that are protected by the Charter, the courts should not shy away from considering that legislation and, in appropriate circumstances, issue a declaration that the legislation either violates the Charter or is unconstitutional.[242]

A declaration can be an effective substitute for a final order of specific performance or a permanent injunction,[243] however, it cannot replace an interim or interlocutory injunction. Interim or interlocutory injunctions are

235 *Smith v. Nova Scotia (Attorney General)* (2004), 244 D.L.R. (4th) 649, 226 N.S.R. (2d) 344 (C.A.), leave to appeal to S.C.C. refused [2005] 1 S.C.R. vi, 249 D.L.R. (4th) vii.

236 *Gloucester Properties Ltd. v. British Columbia* (1980), 110 D.L.R. (3d) 247, [1980] 6 W.W.R. 30 (B.C.S.C.).

237 *Snuneymuxw First Nation v. British Columbia* (2004), 26 B.C.L.R. (4th) 360, 48 C.P.C. (5th) 289 (S.C.).

238 *Founders Square Ltd. v. Nova Scotia (Attorney General)* (2001), 192 N.S.R. (2d) 127, 13 B.L.R. (3d) 44 (C.A.), leave to appeal to S.C.C. refused 198 N.S.R. (2d) 402*n*, 275 N.R. 395*n*.

239 *Christie v. British Columbia (Attorney General)* (2005), 262 D.L.R. (4th) 51, [2006] 2 W.W.R. 610 (B.C.C.A.), supp. reasons 263 D.L.R. (4th) 582, 48 B.C.L.R. (4th) 322 (C.A.), revd 280 D.L.R. (4th) 528, [2007] 8 W.W.R. 64 (S.C.C.).

240 *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 254 D.L.R. (4th) 577, at para. 93.

241 *Supra*, at para. 87.

242 *Supra*, at para. 89.

243 For example, see *Dominion Building Corp. v. The King*, [1933] 3 D.L.R. 577, [1933] A.C. 553 (P.C.), where the Privy Counsel used declaratory relief to achieve a result comparable to specific performance in circumstances where the Crown was a party to a contract and specific performance would otherwise be appropriate.

used to maintain the status quo of the parties pending the final determination of their rights. A declaration of rights, is, by its very nature, a final order.[244] Thus, declaratory relief should not be granted on an interim application

(*The next page is* 12-45)

244 *Shaw v. British Columbia* (1982), 140 D.L.R. (3d) 178, [1982] 6 W.W.R. 718 (B.C.S.C.); *Te'Mexw Treaty Assn. v. W.L.C. Developments Ltd.* (1998), 163 D.L.R. (4th) 180, [1999] 1 C.N.L.R. 249 (B.C.S.C.).

because, as a final order, it should not be made until there has been a full hearing and a determination on the merits.[245]

The bar against injunctions binding the Crown only arises where the Crown is acting within its sphere of legislative authority. The statutory protection in the *Crown Proceedings Act* has no effect where the Crown lacks the legislative jurisdiction over a subject matter. The legislature cannot inappropriately shield itself from remedies by enacting legislation purporting to prevent such remedy being granted against it.[246]

This inability for the Crown to shield itself when acting *ultra vires* applies whenever the Crown is acting beyond its constitutional limitations, including Charter violations and constitutional divisions of powers considerations. The *Crown Proceedings Act* cannot expand the common law immunity of the Crown in cases where the Crown is alleged to be acting beyond its legislative competence.[247]

The jurisdiction for issuing an injunction against the Crown is limited to constitutional cases and is used sparingly.[248] Only in clear cases will interlocutory injunctions be granted against the enforcement of legislation on the grounds of alleged unconstitutionality.[249]

When considering whether to grant an interim injunction, the court should consider the public interest, including the public interest to the legitimacy of the public institutions. The court must be cautious to enjoin impugned government action which may or may not ultimately be found to be unconstitutional.[250]

When considering interlocutory relief on a constitutional challenge, certain specific principles are relevant to unique circumstance of such cases:

1. It is assumed that all legislation enacted by a democratically elected government is for the common good;
2. Only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed;
3. Interim relief in constitutional cases will rarely, if ever, be available when it amounts to a final determination of the applicant's rights;

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245 *Millership v. Kamloops (City)* (2001), 110 A.C.W.S. (3d) 189 (B.C.S.C.).

246 *Amax Potash Ltd. v. Saskatchewan Government*, [1977] 2 S.C.R. 576, 71 D.L.R. (3d) 1.

247 *Snuneymuxw*, *supra*, footnote 237.

248 *Snuneymuxw First Nation v. British Columbia* (2004), 26 B.C.L.R. (4th) 360, 48 C.P.C. (5th) 289 (S.C.), at para. 69.

249 *Canada (Attorney General) v. Harper*, [2000] 2 S.C.R. 764, 193 D.L.R. (4th) 38, at para. 9.

250 *Snuneymuxw*, *supra*, footnote 248, at para. 71; see also *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)* (2005), 12 C.E.L.R. (3d) 216, [2005] 2 C.N.L.R. 138 (B.C.S.C.).

4. There is an important distinction between relief that suspends legislation and that which merely exempts one or more persons from the application of legislation; and
5. Interim relief that preserves the status quo is less disruptive to the administration of justice than relief that alters the status quo.[251]

An applicant for interlocutory relief in a constitutional challenge must first demonstrate the serious question to be tried; second, that irreparable harm will result if the relief is not granted; and third, an assessment of the balance of convenience between the parties.[252] As a general rule, the same principles apply when a government authority is the applicant for a motion for such interlocutory relief. The courts must be sensitive of making a ruling which deprives legislation enacted by elected officials of its effect.[253] However, the courts are charged with a responsibility of safeguarding fundamental rights pursuant to the Charter and "For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional, might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute."[254]

In order to satisfy the requirement that there be a serious issue to be tried, the judge must make a preliminary assessment on the merits of the case. The threshold is a low one.[255] Once satisfied that the application is neither vexatious nor frivolous, the motion judge should proceed to consider the second and third parts of the test, even if the judge is of the opinion that the plaintiff is unlikely to succeed at trial.[256]

There are two exceptions to this general rule. The first is where the result of the interlocutory motion will, in effect, amount to a final determination of the action.[257] The second exception is when the consideration of the constitutionality presents itself as a simple question of law alone. In those cases, it is appropriate to make a more significant investigation of the merits of the case.[258]

Irreparable harm is a question of whether a refusal to grant relief would so adversely effect the applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the

251 *Law Society of British Columbia v. Canada (Attorney General)* (2001), 207 D.L.R. (4th) 705, [2002] 3 W.W.R. 455 (B.C.S.C.), affd 207 D.L.R. (4th) 736, [2002] 3 W.W.R. 483 (B.C.C.A.), leave to appeal to S.C.C. granted [2002] 2 S.C.R. v, 210 D.L.R. (4th) vi.

252 *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

253 *Supra*, at para. 38.

254 *Supra*, at para. 39.

255 *Supra*, at para. 49.

256 *Supra*, para. 50.

257 *Harper*, *supra*, footnote 249.

258 *RJR-MacDonald*, *supra*, footnote 252, at para. 55.

result of the interlocutory application. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from another.[259] Hence, irreparable harm arises in circumstances where one party would be put out of business,[260] or where one party will suffer permanent market loss or irreparable damage to its business reputation,[261] or where the permanent loss of a natural resource will result should a challenged activity not be enjoined.[262]

The balance of convenience is a determination of which of the two parties will suffer the greater harm from the granting or refusal of interlocutory injunction pending a decision on the merits.[263] The factors which must be considered in assessing the balance of convenience are numerous and will vary with each individual case.[264] One of the factors that will weigh heavily in the determination of the balance of convenience is whether the granting of an injunction against the enforcement of a law would effectively give the plaintiff the relief that he was seeking.[265] Conversely, where the ultimate effect of the legislation will be that any declaration as to its unconstitutionality will be worthless, absent interim injunctive relief, that will be a significant factor for the court to take into consideration on the balancing of convenience.[266]

In constitutional cases, the public interest is a special factor which must be considered in assessing where the balance of convenience lies. It is appropriate that both parties in an interlocutory constitutional proceeding rely upon the considerations of the pubic interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. Each party must demonstrate to the court a compelling public interest in refusing or granting the relief sought. The public interest includes both the concerns of society generally and the particular interest of identifiable groups.[267] The interest of the public, which the government authority is to protect, must be taken into account in weighing the balance of convenience along with the interests of the private litigants.[268] This issue was considered

259 *Supra*, at para. 59.

260 *R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228, 67 Sask. R. 123 (Q.B.).

261 *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.).

262 *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577, 61 B.C.L.R. 145 (C.A.), leave to appeal to S.C.C. refused 61 N.R. 240*n sub nom. British Columbia v. Martin.*

263 *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321, at p. 129.

264 *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, at para. 63.

265 *Canada (Attorney General) v. Harper*, [2000] 2 S.C.R. 764, 193 D.L.R. (4th) 38, at para. 7.

266 *Wittal v. Saskatchewan Government Insurance* (1983), 145 D.L.R. (3d) 729, [1983] 4 W.W.R. 300 (Sask. Q.B.), affd 51 D.L.R. (4th) 641, [1988] 5 W.W.R. 616 (Sask. C.A.); *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta* (1995), 169 A.R. 195, 30 Alta. L.R. (3d) 225 (C.A.).

267 *RJR-MacDonald, supra*, footnote 264, at para. 66.

by McLachlin C.J. in *Harper v. Canada (Attorney General)*,[269] in a matter where the respondent applied for an interim injunction restraining the enforcement of third party spending limits during a federal election pending a decision as to the constitutionality of that provision of the *Canada Elections Act*.[270] McLachlin C.J. stated:

> Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stands the rights that the laws allege to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough . . .[271]

When a private litigant alleges that public interest is at risk, the private litigant has the onus to demonstrate the harm that will ensue. Private litigants are normally presumed to be pursuing their own interest rather than that of the public at large. The applicant must convince the court of the public interest benefits that will flow from the granting of the relief sought.[272]

A much lighter onus lies upon a public authority arguing irreparable harm to the public interest. It is presumed that the law is for the public good.[273] The public authority will usually satisfy the test simply upon proof that the authority is charged with a duty of promotion or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to the responsibility. Once these minimal requirements have been met, the court should not, in most cases, assume that irreparable harm to the public interest would result in the restraint of the action.[274] The court must always be mindful that the Charter and other constitutional challenges do not provide a licence to evaluate the effectiveness of government action. The courts only should act when it is necessary to restrain government action because it encroaches upon fundamental rights.[275]

12.30.30 Damages

The Crown Proceeding Acts in all Canadian jurisdictions place the Crown in a position, as near as possible, to a person in civil litigation. Hence, any

268 *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 106 D.L.R. (4th) 507, 14 O.R. (3d) 280 (Gen. Div.), at pp. 303-304, affd 121 D.L.R. (4th) 79, 21 O.R. (3d) 104 (C.A.), cited with approval in, *RJR-MacDonald*, *supra*, footnote 264.

269 *Harper*, *supra*, footnote 265.

270 S.C. 2000, c. 9.

271 *Harper*, *supra*, footnote 265, at para. 5.

272 *RJR-MacDonald*, *supra*, footnote 264, at para. 68.

273 *Harper*, *supra*, footnote 265, at para. 9.

274 *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, at para. 71.

275 *Supra*, at para. 72.